COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood, et al. Plaintiffs v. Kenneth L. Kimmell, as he is Commissioner of the Department of Environmental Protection, et al. Defendants	CIVIL ACTION NO. 2011-02205

CONSOLIDATED WITH

Belmont Conservation Commission Plaintiffs v. Kenneth L. Kimmell, as he is Commissioner of the Department of Environmental Protection, et al. Defendants	CIVIL ACTION NO. 2011-02206

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A STAY AND INJUNCTION

INTRODUCTION

Plaintiffs in Action No. 2010-02205 appealed under the Adrninistrative Procedure Act, G.L. c. 30A, §14; the Citizens Environmental Suit Act, G.L. c. 214, §7A; and the Declaratory Judgment Act, G.L. c. 231A, §1 from the final decision of Laurie

Burt,[1] then Commissioner of the Department of Environmental Protection, adopting the recommended decision of the Presiding Officer, Ms. Beverly Coles-Roby, issued after a four-day adjudicatory hearing. Plaintiffs challenged the decision on the grounds that it was based on (1) unlawful procedures in that in rendering her decision, Ms. Roby did not consider any of the cross-examination testimony given at the hearing which supported Plaintiffs' claims and she did not make findings of fact to support her conclusions, and also on (2) errors of law in misconstruing the Regulations issued under the Wetlands Protection Act, G.L. c.131, §40 (the "Act") and thereby denying jurisdiction over protection of significant wildlife habitat on a major wetlands resouce area of the project site.

The decision allows AP Cambridge Partners II, LLC (the "developer") to construct five four-story buildings with 299 housing units and underground parking for 500-600 cars on the Belmont Uplands, which will destroy a unique Silver Maple Forest, wetlands and vegetation that provide habitat for diverse wildlife and protection of nearby houses from flooding. Cutting down over 100 trees to clear the site for construction, removing vegetation and filling the wetlands, will destroy the storm water absorption capacity of the land causing increased flooding and sewage back-ups in the Plaintiffs' houses around Little Pond near the project site.

PRIOR PROCEEDINGS

In June, 2007, the developer commenced proceedings under the Act by filing a Notice of Intent ("NOI") with the Belmont Conservation Commission. The Commission

[1] Kenneth L. Kimmell has been substituted for Laurie Burt as the Commissioner of the Department of Environmental Protection

held a public hearing that extended over several months at which several technical experts provided testimony. On December 21, 2007, the Commission issued an Order denying the project because the developer failed (1) to provide requested information and (2) to show that the project will comply with the Wetlands Regulations for protection of wildlife habitat and for prevention of flooding. The developer appealed to the Department, which issued a Superseding Order of Conditions (SOC) approving the project. The Commission filed an appeal and requested an adjudicatory hearing in which Plaintiffs were allowed to intervene. (A.R. vol. I, 137-8) Ms. Beverly Coles-Roby, in the Department's Office of Appeals and Dispute Resolution, was appointed Presiding Officer for the hearing. Prior to the hearing, written testimony of nine witnesses was submitted who appeared at the hearing to be cross-examined.[2]

After more than ten months, Ms. Roby issued her recommended decision (A.R. vol. III, 1982), stating in her decision that she considered only the pre-filed testimony and attachments. (A.R. vol. III, 1990, 2049) She made no reference in her forty page decision to the four days of cross-examination testimony.[3] Thereafter, Commissioner Burt issued her final decision adopting Ms. Roby's recommended decision without comment. The Plaintiffs and the Commission filed separate complaints appealing the

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[2] The defendants chose not to cross-examine the Plaintiffs' expert wildlife habitat witnesses. However, the attorneys for the Coalition and the Commission cross-examined all of the defendants witnesses extensively, which testimony the Presiding Officer completely ignored in reaching her decision.

[3] Plaintiffs did not request a transcript of the hearing because there was doubt as to the completeness of the tapes made by Ms. Roby at the hearing. (See Bracken Aff't. paras. 2-6) and the fact that Ms. Roby did not base her decision on this portion of the hearing.

Commissioner's decision, which cases were consolidated. The parties then filed Motions for Judgment on the Pleadings which were heard by the Court (Haggerty, J. presiding) on March 2, 2011. The Department filed the Administrative Record.[4] On December 14, 2011 the judge issued a Memorandum of Decision and Order denying Plaintiffs' Motion and denying the Commission's Motion, except as to the count alleging that the project failed to comply with DEP's Stormwater Management Standard 3. The judge remanded the case to the Department for further proceedings regarding this issue. Plaintiffs filed a Notice of Appeal of the Court's Order denying their Motion for Judgment on the Pleadings which was entered on the docket on December 20, 2011.

ARGUMENT

The Massachusetts Courts have held that injunctive relief to prevent irrevocable harm is available when the plaintiffs show that (1) irreparable harm will be caused if an injunction or other suitable relief is not granted; (2) the irreparable harm to plaintiffs is greater than any irreparable harm to the opposing party; and (3) there is a likelihood they will prevail on the merits. See, e.g. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980), and its progeny, including more recently A.F.M. Limited v. City of Medford, 428 Mass. 1020 (1999). In cases involving governmental decisions, as here, the public interest is to be considered. See Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001); GTE Products Corp. v. Stewart, 414

[4] References to A.R. are to the Administrative Record in this matter filed with the Superior Court.

Mass. 721, 722-723 (1993). Plaintiffs submit that they have made the required showings.

Further, the Citizens Environmental Suit Act, G.L. c. 214, §7A, provides for injunctive relief to prevent damage to the environment in an action which is brought by more than ten persons domiciled in the Commonwealth and involves a violation of a statute, a major purpose of which is to prevent damage to the environment. Here, the action was brought by more than ten individuals domiciled in the Commonwealth alleging violations of the Wetlands Protection Act, a major purpose of which is to prevent "damage to the environment," which term is defined in c. 214, §7A to include destruction of wetlands, open spaces and natural areas. The SJC has held that a ten persons action may be brought under G.L. c. 214, §7A to challenge State agency decisions issued under environmental laws. See Enos v. Secretary of Environmental Affairs, 432 Mass. 132, 142 (2000); Sierra Club v. Commissioner of the Department of Environmental Management, 439 Mass. 738, 743 (2003).

1. Irreparable harm will be caused if an injunction is not issued.

The SJC stated in Packaging Industries, supra at 380, that the purpose of a preliminary injunction is "to minimize the harm that final relief can not address, by creating or preserving, insofar as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party." If the developer cuts down over 100 mature trees in the Silver Maple Forest, removes the vegetation and fills the wetlands thereby destroying wildlife habitats, and eliminating the ability of the site to absorb stormwater, irreparable damage will result to the natural resources and Plaintiffs' properties which can not be undone. See Affidavits of Plaintiffs' wetlands

experts Charles Katuska and Patrick Fairbairn; Miriam Weil, Chair of the Belmont Conservation Commission;[5] and Ellen Mass, President of Friends of Alewife Reservation.

In Sierra Club v. Durand (00-J-501, 2000), a Single Justice of the Appeals Court (Laurence, J.) issued an Order (Appendix A hereto) allowing a petition to enjoin the owner of a ski resort from cutting down numerous mature trees to build a half-pipe for snowboarders. The Order states:

> "The reasons for my allowance of the petition are:
>
> (1) the importance of maintenance of the status quo pending resolution of the litigation, which is a primary goal of equity in evaluating the propriety of preliminary relief, particularly where, as here, significant public interests (in conservation and the environment) are involved, and the status quo would be entirely disrupted essentially beyond restoration by failure to grant the requested injunction prior to a final disposition on the merits (citations omitted);
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> (2) the petitioners have clearly demonstrated the imminence of irreparable harm from implementation of the ski expansion project, at the very least in the form of the conceded destruction (which WMA intends to do before the end of summer) of valuable public resources, i.e., approximately 12.5 acres (or 2,000) trees in a mature growth forest that could not be reconstituted within our lifetimes... which will also necessarily entail the associated destruction or severe dislocation of the habitats now within the area to be clear-cut of numerous species of native plants and forest dwelling animals" (Appendix A, pp. 2-3)

In addition to the irreparable harm to the natural resources, the developer has announced its intention to begin construction of the project soon after clearing the land. The Courts have held that administrative review after construction is underway

[5] Ms. Weil's Affidavit sets forth the Commission's findings regarding the significance of the natural resources on the project site to the interests of the Wetlands Protection Act. In Jepson v. Conservation Commission of Ipswich, 450 Mass. 81, 91 fn. 13 (2008), the Court said: "No one disputes that the Conservation Commission has expertise on issues related to the protection of wetlands."

likely will be meaningless. In Sierra Club v. Marsh, 872 F. 2d 497, 500-504 (1st Cir. 1989), the Court said that "bureaucratic decision makers (when the law permits) are less likely to tear down a nearly completed project than a barely started project." In Commonwealth of Massachusetts v. Watt, 716 F. 2d 946, 952-953 (1st Cir. 1983), the Court affirmed the lower court's decision preliminarily enjoining the auction of oil drilling rights off George's Bank which was a necessary first step before oil drilling could begin. In Citizens for Responsible Area Growth (CRAG) v. Adams, 477 F. Supp. 994, 1006 (D.N.H. 1979), the Court preliminarily enjoined construction of an airport expansion project until the federal agency complied with the National Environmental Policy Act (NEPA). For other cases in which the federal courts in this Circuit have found that a preliminary injunction is the proper remedy to preserve the status quo, see, Jones v. Lynn, 477 F. 2d. 885, 892-93 (1st Cir. 1972); Silva v. Romney, 473 F 2d. 287, 291 (1st Cir. 1975); City of Boston v. Hills, 420 F. Supp. 1291, 1297 (D. Mass. 1976).

Further, the courts have held that the traditional showing of irreparable harm may not be necessary in cases seeking to enforce a statute the purpose of which is to protect the environment. In Society for the Protection of New Hampshire Forests v. Brinegar, 381 F. Supp. 282, 285 (D.N.H. 1974), the Court preliminarily enjoined construction of the extension of Route I-93 through the Franconia Notch, stating:

> "The traditional definition of irreparable harm might not fit an environmental situation'...a violation of NEPA in itself may constitute a sufficient demonstration of irreparable harm to entitle a plaintiff to blanket injunctive relief' citing Environmental Defense Fund v. Froehlke, 477 F. 2d 1033, 1037 (8th Cir. 1973)."

See also, LeClair v. Town of Norwell, 430 Mass. 328, 331-332 (1999) and Edwards v. Boston, 408 Mass. 643, 646-647 (1990); and DeGrace v. Conservation Commission of Harwich, 31 Mass. App. Ct. 132, 133 fn. 2 (1991).

2. Any harm to the developer is not irreparable and is outweighed by the harm to Plaintiffs and the public if an injunction is not granted.

A balancing of the interests in this case clearly favors granting the injunctive relief. Any delay in construction is not irreparable to the developer. However, if an injunction is not granted, loss to the public of the unique natural resources on the Belmont Uplands will be permanent and irreparable. As Justice Laurence said in Sierra Club v. Durand, supra, in balancing the claimed harm to the developer against the loss of the trees and other natural resources, "the balance of harms cuts not just overwhelmingly, but entirely, in favor of the petitioners." (Appendix A, p. 4)

3. The public interest will be served by granting an injunction.

The Wetlands Regulations state that the purpose of the Act is to protect the public's interest in wetlands in order to further certain interests, including flood control, storm damage prevention and protection of wildlife habitat (310 CMR 10.01 (2)). In Southern New England Association of Seventh Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 706 (1986), the Court said:

> "The Wetlands Protection Act, G.L. c. 131, §40, has no concern for particular land uses. That act has the broader purpose of protecting wetlands from the destructive intrusion usually associated with Twentieth Century development."[6]

[6] See also, FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone, 41 Mass. App. Ct. 681, 690 (1996); Baker v. Department of Environmental Protection 34 Mass. App. Ct. 444, 446 (1995).

The Plaintiffs and the Conservation Commission are seeking to protect the interests of the Act through their appeals of the Commissioner's decision. Likewise, the Citizens Environmental Suit Act is based on the premise that the public interest is served by granting an injunction to prevent "damage to the environment," which is defined to include destruction of "wetlands, open spaces, natural areas and parks."[7]

4. No bond should be required

While Mass. R. Civ. P. 65(c) provides that, except for good cause shown, no restraining order or preliminary injunction shall issue except upon giving security, the Reporters notes state that under former Massachusetts law, no bond was required, and the change has left the matter to the Court's discretion. However, in environmental cases, courts either have not required a bond or set a minimal amount of $1.00. In Sierra Club v. Durand, supra, although the developer filed a motion for a bond, the Court did not require one. In Citizens for Responsible Area Growth (CRAG) v. Adams, 477 F. Supp. 994, 1007 (D.N.H. 1979), the Court issued a preliminary injunction preventing airport construction until the defendants complied with NEPA, stating: "Plaintiffs will not be required to file a penal bond pursuant to Rule 65(a), Federal Rules of Civil Procedure, to cover losses should it be determined that defendants have been wrongfully enjoined or restrained," citing Boston Waterfront Residents Association, Inc. v. Romney, 343 F. Supp. 89, 91 (D. Mass. 1972). See also, Silva v. Romney, 342 F. Supp. 783, 785 (D. Mass. 1972), where the Court held that the plaintiffs are not

[7] On October 8, 2010, this Court entered an Order allowing Plaintiffs' Motion for Leave to Amend Complaint to include a paragraph 5a alleging that Plaintiffs gave proper Notice of their action as provided in G.L. c. 214, §7A.

required to file a bond to secure an injunction stopping construction of a federal project for non-compliance with NEPA.

5. Plaintiffs are likely to succeed on the merits.

Plaintiffs contend Ms. Roby's decision was based on unlawful procedures and errors of law. The unlawful procedures were that she did not consider the entire record of the adjudicatory proceedings and she failed to make findings of fact to support her conclusions, as required by the law.

As to the unlawful procedures, Ms. Roby made clear at the outset of her decision that she considered only the pre-filed testimony of the nine witnesses and attached exhibits, and that she gave no consideration to the live testimony at the hearing, including specifically Plaintiffs' cross-examination of the developer's expert witnesses.[8] This is shown by her statement at the outset of her decision:

> "Based on the discretion accorded to me by G.L. c. 30A, §11(2) and 310 CMR 1.01 (13)(h)(1), I have considered the sworn pre-filed testimony of the parties' respective witnesses and documentary evidence referenced in their testimony to make my findings and recommendations..." (A.R. vol. III, 2049)

She did not refer to the live hearing testimony anywhere in her 40-page decision. The decision in this case is in marked contrast to Ms. Roby's statement of what she considered in the Matter of Craig Campbell[9] decision which she issued the same day as her Belmont decision. In the Campbell case, she stated:

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[8] Ms. Roby purported to have tape recorded the entire hearing. There is no explanation as to why Ms. Roby did not consider the live testimony in reaching her decision except that the hearing tapes may have been unavailable or unclear. (See Bracken Aff't.)

[9] The Campbell decision was submitted to the Court soon after the hearing on March 2, 2011.

> "...I considered the sworn pre-filed and live testimony given by the parties' witnesses, and the documentary evidence to make my findings and recommendations." (Addendum to Coalition's Memorandum, p. 24) (emphasis added)

In her Campbell decision, Ms. Roby made numerous citations to both "Pre-Filed Testimony" and to the "Adjudicatory Hearing" testimony. In contrast, her decision in the Belmont case referred only to the Pre-Filed Testimony and made no references whatsoever to the Adjudicatory Hearing testimony. Therefore, Ms. Roby's failure to state that she considered the live testimony in the Belmont case was not simply an oversight as defendants contend.

The authority Ms. Roby cited for not considering the entire record does not give a hearing officer discretion to ignore all of the testimony at the hearing. The cited authority only allows the hearing officer discretion to weigh the evidence and exclude unduly repetitious evidence. It does not allow for wholesale dismissal of all the cross-examination testimony.

The Massachusetts and Federal Courts have held in a long line of cases that the State and Federal Administrative Procedure Acts require both the administrative agency and the Court to review the entire record. In Caitlin v. Board of Registry of Architects, 414 Mass. 1, 6 (1992), the SJC stated the well-established principle that "an agency's adjudicatory body must review all the evidence in the record." In Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966), the Court said that G.L. c. 30A, §14(8) "directs that the court's determinations are to be made upon consideration of the entire record," citing Universal Camera Corp. v. Labor Board, 340 U.S. 474., in which the U.S. Supreme Court held that the Administrative Procedure Act

requires the Board's findings to be supported by substantial evidence "on the record considered as a whole" and that the Court must review the "entire record." See Universal Camera at 488 and holding no. 2 in syllabus (1951). In Consolo v. Federal Maritime Commission, 383 U.S. 607, 621 (1966), the Court cited with approval the standard of review that it established in Universal Camera. U.S. Courts of Appeal have consistently applied the requirement established by the Supreme Court that the agency must consider the entire record in adjudicatory proceedings. See, Loza v. Apfel, Commissioner of Social Security, 219 F. 3d. 378, 389, 394. (5th Cir. 2000) where the Court said: "...it is clear that the ALJ must consider all the record evidence and cannot 'pick and choose' only the evidence that supports his position;" and Garfield v. Schweiker, 732 F. 2d 605, 609 (7th Cir. 1984) where the Court stated that the ALJ's "written decision should contain, and his ultimate determination must be based upon, all of the relevant evidence in the record."

These cases implement the statutory provisions in the Administrative Procedure Act, G.L. c. 30A, §11(3), (4) and (8), which make clear that a hearing officer may not pick and choose from the record evidence that supports the hearing officer's predilections, as Ms. Roby did here. These sections provide:

> "(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence."
>
> * * *
>
> "(4) All evidence...shall be...made a part of the record in the proceeding and no other factual information or evidence shall be considered..."
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> "(8) Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary

> to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so..."

The Presiding Officer indicated in her initial Order that she understood these requirements stating: "I will conduct an evidentiary or Adjudicatory Hearing...the purpose [of which] is the cross-examination of individuals ("witnesses") who have filed Pre-Filed Testimony..." (A.R. vol. I, 719) The statutory right to cross-examine witnesses assumes that the hearing officer will consider this testimony and Ms. Roby's Order clearly indicates that she intended to consider the cross-examination testim7ony in reaching a decision. If the hearing officer disregards the live testimony, this statutory right of cross-examination is rendered meaningless. Moreover, the requirement that the record on appeal contain "all evidence" and that no evidence outside the record shall be "considered" also assumes that all evidence in the record will be considered. The requirements of the Administrative Procedure Act, M.G.L. c. 30A, §11(3), (4) and (8) are to ensure that the parties are afforded due process of law at the adjudicatory hearing, with a decision based on consideration of all the evidence, including the cross-examination testimony, containing a statement of reasons and subsidiary findings of fact to support the conclusions.

Although the judge recognized the cases holding that the reviewing court must consider the "entire record" (Decision, p. 5), she overlooked the cases holding that the administrative decision-maker also must consider the entire administrative record in rendering a decision. While recognizing that Ms. Roby did not consider the entire administrative record, the judge held that since the Plaintiffs did not order a transcript of the hearing to show the testimony that supported their position, Plaintiffs waived

their claim that they were prejudiced by the Presiding Officer's failure to consider the cross-examination testimony "such that the court can determine what testimony, if any, the Presiding Officer allegedly ignored, and its significance." (Decision, p. 7) However, it is clear that the Presiding Officer ignored all of the live testimony, not just some of it. The Plaintiffs were prejudiced by the Presiding Officer's failure to consider any of the live testimony and assess the credibility of the witnesses who testified at the hearing. It was not necessary to have a written transcript to support this claim. Standing Order 1-96 requires a transcript only if the appellant claims that the decision is not supported by substantial evidence. Plaintiffs do not make such a claim. Moreover, it was uncertain whether there even was a full and clear recording of the hearing from which a legible transcript could be made. (See Bracken Aff't., paras. 4-5) Even assuming there was a complete and comprehensible recording of the hearing from which an intelligible transcript could be made, under the judge's analysis the reviewing court would have been required (1) to conduct a trial de novo with the same witnesses who submitted pre-filed testimony appearing at trial for cross-examination or (2) to decide the case based solely on the transcript without the benefit of the Presiding Officer's findings or assessment of the credibility of the witnesses, a role which the judge recognized was not appropriate, stating:

> "The court must consider 'the entire record and take into account whatever detracts from the weigh of the evidence,' but should not 'make a de novo determination of the facts or draw different inferences from the facts found by the agency.' Vaspourakan Ltd. v. Alcoholic Beverages Control Comm'n., 401 Mass. 347, 351 (1987)." (Decision, p. 5)

The Vaspourakan decision on which the judge relied is consistent with more recent SJC decisions. See, e.g., Andrews v. Civil Service Commission, 446 Mass. 611, 615-

616 (2006) and D'Amour v. Board of Registration in Dentistry, 409 Mass. 573, 581 (1991), where the Court said in reviewing an administrative decision that: "We will not substitute our views as to the facts," and She Enterprises, Inc. v. State Building Code Appeals Board, 20 Mass. App. Ct. 270, 273 (1985). In Fisch v. Board of Registration of Med., 437 Mass. 128, 138 (2002), the Court said that "it is for the agency, not the courts to weigh the credibility of witnesses" and that "a reviewing court may vacate an agency's decision as unsupported by substantial evidence if the decision provides no means of analyzing the agency's assessment of credibility." Although the Presiding Officer stated frequently in the decision that she gave more credit to defendants' experts' testimony than she did to the Plaintiffs' experts, she did not indicate how she judged credibility when she did not consider their live testimony. Moreover, she had no basis for determining the credibility of Plaintiffs' witnesses who the defendants' attorneys chose not to cross-examine at the hearing.

In their Complaint, Plaintiffs alleged the ways in which these violations of their due process rights prejudiced their claims under the Wetlands Protection Act. See paragraphs 29, 34 and 59-66 of the Coalition's Complaint, which describe the prejudice to Plaintiffs caused by the hearing officer's failure to consider the extensive cross-examination testimony of the developer's witnesses that produced evidence supporting their claims that the project will cause significant damage to wildlife habitat and increase flooding of their properties.

The Presiding Officer did not make necessary findings.

Even as to the conclusions the Presiding Officer drew from the written pre-filed testimony, she did not record necessary findings to support her conclusions. A blatant

example of her failure to make necessary findings is her conclusion that the project will have "no adverse effects on wildlife habitat" as required by 310 CMR 10.57(4)(a)(3) and 10.60(1)(a).[10] In reaching this conclusion, Ms. Roby ignored the written testimony of Plaintiffs' experts on the significant adverse impacts the project will have on the wildlife habitat on the site and the extensive live cross-examination testimony of the developer's expert witnesses who acknowledged that the project will have such adverse effects. Without any findings, Ms. Roby simply stated that she credited the pre-filed testimony of the developer's witnesses, without identifying any facts in their testimony that she credited, concluding:

> "When their [the developer's experts'] analysis is combined with the SOC's Special Conditions, the likelihood that the project complies with the regulation rises to a level meriting some weight."

Not only is this conclusion unsupported by any findings, the Presiding Officer's qualification of the conclusion by the word "likelihood" falls far short of a definitive conclusion that the project complies with the regulation. Further, Ms. Roby does not even find that the developer's pre-filed testimony should be given "great weight," but only "some weight."

The Presiding Officer's decision contains significant errors of law

The Wetlands Regulations provide to 310 CMR 10.57(4)(a)(3) as follows:

> "Work in those portions of bordering land subject to flooding found to be significant to the protection of wildlife habitat shall not impair its capacity

[10] 310 CMR 10.57(4)(a)(3) provides that projects that exceed certain thresholds, as the Belmont project does, "may be permitted if they will have no adverse effects" on wildlife habitat, as determined by the procedures in 310 CMR 10.60." These procedures are that projects exceeding the thresholds "may be permitted only if they will have no adverse effects on wildlife habitat."

> to provide important wildlife habitat functions. Except for work which would adversely affect vernal pool habitat, a project or projects on a single lot, for which Notice(s) of Intent is filed on or after November 1, 1987, that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold, or altering vernal pool habitat, may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60."[11] (emphasis added)

The Presiding Officer failed to recognize that the threshold for the "no adverse effects" requirement is two-pronged -- either the project will alter more than (1) 10% of the land in the resource area (here, BLSF) on which there is significant wildlife habitat or (2) 5,000 sf of such area, whichever is less. After finding that the project will alter only 9% of the wildlife habitat BLSF in the lower floodplain, the Presiding Officer concluded that the project impacts did not trigger the "no adverse effects" requirement. Ms. Roby ignored the 5,000 sf threshold which she herself found the project will exceed.[12] The lower court judge committed the same error in misapplying the Regulations. Indeed, the judge quoted at length from the written testimony of the developer's experts that the altered area would be less than 9%, without recognizing that the "no adverse effects" requirement applied because the altered area would be greater than 5,000 sf. The judge also believed that since the replication area was greater than the 9% area that would be altered, the project complied with the regulations, without understanding that the "no adverse effects" and wildlife replication requirements are unrelated.

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[11] The procedures in 310 CMR 10.60 are that the Department must make a determination that the project "will have no adverse effects on wildlife habitat"

[12] Ms. Roby found that the project will destroy 11,032 sf of wildlife habitat on the lower floodplain of BLSF. (A.R. vol. III, 2061)

Ms. Roby then committed a further error of law by failing to apply the "no adverse effects" requirement to the upper floodplain of BLSF. The Presiding Officer found that the project will alter 5,440 sf on the upper floodplain in addition to 11,032 sf of significant wildlife habitat in the lower floodplain. 310 CMR 10.57(4)(a)(3) provides that the project shall have "no adverse effects on wildlife habitat...found to be significant to the protection of wildlife habitat." This requirement applies both to the lower and upper floodplains. The regulations contain a presumption that the lower floodplain of BLSF is significant to wildlife habitat because habitat features typically exist there. There was no dispute that the presumption was applicable to the lower floodplain of the project site. Although the regulations do not contain a similar presumption for the upper floodplain, the Preface to the Regulations advises that the upper floodplain also is subject to protection when there is evidence of features in that area similar to those on the lower floodplain. The judge reorganized that "important habitat on the upper floodplain may also be protected on a case by case basis where evidence of its existence has been demonstrated." (Decision, p. 11) The developer's experts acknowledged that the wildlife habitat features on the lower floodplain also exist on the upper floodplain at the project site. (A.R. vol. I, 777 and vol. III, 1621) Indeed, Plaintiffs' wildlife expert pointed out to Ms. Roby on the site visit evidence of wildlife habitat features on the upper floodplain, photos of which were attached to his written testimony. (A.R. vol. V, 2916-2920)[13] The Conservation Commission considered the upper floodplain to be significant to wildlife habitat and made a written request to the developer to prepare a detailed habitat evaluation of that area. (A.R. vol. V, 3090) However, the developer refused to do so. (A.R. vol. V, 3116, para. 6) Despite the

[13] At the hearing, Ms. Roby questioned Plaintiffs' wildlife witness about these photographs and he explained that they showed significant wildlife habitat on the upper floodplain which is interconnected with habitats on the lower floodplain.

evidence given by all of the expert witnesses that significant wildlife habitat features exist on the upper floodplain, Ms. Roby misconstrued the regulation by concluding that simply because "there is no regulatory presumption" that wildlife habitat in the upper floodplain is significant, no protection was required. This was an error of law. The judge dismissed the Coalition's claim as "nothing more than an argument that the Presiding Officer should have believed the Coalition's expert testimony over DEP's expert testimony." (Decision, p. 12) Plaintiffs made no such claim. Their contention is that the Presiding Officer did not understand that, based on both the pre-filed testimony and cross-examination testimony of the developer's witnesses and the DEP's experts, that the upper floodplain of BLSF on the project site contained significant wildlife habitats and therefore, the "no adverse effects" requirement applied to the upper floodplain as well as the lower floodplain of BLSF. Ms. Roby's conclusion was contrary to the instructions in the Preface and the performance standard in the Regulations which require the project to have "no adverse effects on wildlife habitat," on both the lower and upper floodplain when, as here, the evidence shows they are significant to the protection of wildlife habitat.

The Plaintiffs were prejudiced by Ms. Roby's errors of law in misconstruing the regulations that are intended to protect wildlife habitat and prevent flooding as alleged in paragraphs 40-46, 48-49, 51-53, and 55-57 of the Complaint. The result of these unlawful procedures and errors of law is a decision that adversely impacts on the substantial interests of the individual Plaintiffs and the public which the Wetlands Protection Act seeks to protect.

M.G.L. c. 30A, §14(7) provides that:

> "The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or

> unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is–"

based on any of the grounds enumerated thereafter subparagraphs (a) through (g).

An agency that violates the procedural requirements in Section 11(3), (4) and (8) and misconstrues the applicable regulations, as Ms. Roby's decision does, provides sufficient grounds for the Court to set aside the decision under G.L. c.30A, §14(7)(c), (d) and (g). See Cobble v. Commissioner of Department of Social Services, 430 Mass. 385, 390 (1999) where the Court said: "We may set aside the decision of an administrative agency" on the grounds set forth in G.L. c. 30A, §14(7). See also, School Committee of Chicopee v. Massachusetts Commission Against Discrimination, 361 Mass. 352, 353-354 (1972) in which the Court remanded the case to the Commission for failure to make "complete subsidiary findings of fact."

CONCLUSION

For the foregoing reasons, this Court should allow Plaintiffs' Motion for a Stay and Injunction and, after notice and a hearing, grant a Preliminary Injunction prohibiting any development of the site until after the Appeals Court rules on the merits of the appeal.

Respectfully submitted,
Plaintiffs, by their counsel

Thomas B. Bracken
BBO# 052920
33 Mt. Vernon Street
Boston, MA 02108
(617) 742-4950

Dated: December 20, 2011

Appendix

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-J-501

SIERRA CLUB & others[1]

vs.

ROBERT DURAND[2]

ORDER

This is a difficult case involving complex legal issues with legitimate competing interests on both sides and with inevitable public interest ramifications. Its difficulty has been enhanced rather than reduced by the extremely able (though voluminous) written and oral presentations of counsel for the respective parties, as well as by the Superior Court judge's obviously thoughtful and conscientious effort in deciding the petitioners' request for preliminary injunctive relief. Distressingly, the questions raised by the petitioners relating to the fact-

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[1] Watchdogs for an Environmentally Safe Town ("W.E.S.T."); Donna M. Brownell; George Ross; Patty Miller; Timothy Redloon Kelly; Andre Gray Wolf Forest; Mary Marro; Beverly Camp; Sydney Patten; Therese Calvert; Anne Merriam; Muriel Ross; Mike Smith; Herbert Bingham; Joseph Reynolds; Stephen Kessler; Edward Camp; Emily Miller. They are the plaintiffs in the underlying action, Civ. No. 99-4161-A, and the petitioners here, pursuant to G. L. c. 231, § 118, para. 1.

[2] As he is Secretary of the Executive Office of Environmental Affairs; Peter C. Webber, as he is Commissioner of the Massachusetts Department of Environmental Management; and Wachusett Mountain Associates, Inc.

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intensive issues of compliance, vel non, of the challenged ski expansion project (proposed by the respondent Wachusett Mountain Associates [WMA] as approved by the respondent Commissioner of Environmental Management) with the Resource Management Protection Plan for the Wachusett Mountain State Reservation and with the requirements of the Massachusetts Environmental Policy Act (G. L. c. 30, §§ 61 et seq.) stretch the concept of single justice review virtually to the breaking point in the context of the time constraints here involved.

Nonetheless, after hearing the arguments of the parties and reviewing all materials submitted in support of and in opposition to the petition of the Sierra Club, et al., pursuant to G. L. c. 231, § 118, para. 1, seeking interlocutory relief from the judge's denial of their motion for a preliminary injunction against the proposed expansion of the ski facility in the Wachusett Mountain State Reservation, I conclude that the petitioners should be granted the preliminary relief they have sought in prayers 3 and 4 of their complaint dated August 26, 1999.

The reasons for my allowance of the petition are:

(1) the importance of maintenance of the status quo pending resolution of the litigation, which is a primary goal of equity in evaluating the propriety of preliminary relief, particularly where, as here, significant public interests (in conservation and

the environment) are involved, and the status quo would be entirely disrupted essentially beyond restoration by failure to grant the requested injunction prior to a final disposition on the merits (see Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 [1980]; Jet-Line Servs. Inc. v. Selectmen of Stoughton, 25 Mass. App. Ct. 645, 649-650 [1988]; Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 400 [1994]);

(2) the petitioners have clearly demonstrated the imminence of irreparable harm from implementation of the ski expansion project, at the very least in the form of the conceded destruction (which WMA intends to do before the end of summer) of valuable public resources, i.e., approximately 12.5 acres (or 2,000 trees) in a mature growth forest that could not be reconstituted within our lifetimes on the slope of a mountain whose "forested slopes" the respondent Durand himself has acknowledged "are an irreplaceable natural resource" (8/30/99 Certificate of the Secretary of Environmental Affairs on the Special Review Procedure, p. 1), which will also necessarily entail the associated destruction or severe dislocation of the habitats now within the area to be clear-cut of numerous species of native plants and forest dwelling animals[3];

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[3] The State defendants-respondents make no attempt to rebut the reality of this irreparable injury; while WMA argues that any such harm is outweighed by the "substantial harm to both WMA and the public" if the expansion project is enjoined, a position which the single justice deems without merit, see infra, note 4.

(3) no overbalancing equities, hardships or injuries have been adequately demonstrated by the respondents, whose only competent claims in this respect (based entirely on a remarkably unspecific affidavit of WMA's president) reflect only subjective opinion , lack supportive corroboration, and are essentially speculative,[1] with the result that there is not the slightest doubt in my mind that, on this record, the balance of harms cuts not just overwhelmingly but entirely in favor of the petitioners;

(4) I am persuaded that, despite the relative novelty and complexity of the statutory and regulatory issues here involved, the petitioners have a substantial possibility of prevailing on at least their legal position regarding the relationship between the Board of Environmental Management and the Commissioner, namely that the ski expansion project may not lawfully go forward

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[1] The alleged harms are that without the project certain ski trails will "not meet current [undocumented] standards for skier safety" (although the nature and extent of the safety problems are not described); an unspecified number of families and children will allegedly be unable to participate in skiing and educational programs because the facility is occasionally at capacity, creating undesirable waiting, abandonment of the effort, or utilization of other (unidentified) ski areas by those affected; and an implicit but wholly unsubstantiated assertion that failure to add planned snowboarding trails might undermine WMA's business. It is, of course, black letter law that WMA's estimated loss of revenues, of "between $200,000 and $300,000" (based only on the WMA president's conclusory ipse dixit) if an injunction is granted constitutes no countervailing equity and can in any event be accommodated by a security requirement, as discussed infra, page 8.

without the Board's affirmative approval,[5] which it has not yet granted, particularly in light of:

(a) the Board's being expressly invested with "control" of the Department of Environmental Management (G. L. c. 21, § 2);

(b) the clear distinction drawn in the statutes between the Board itself and an "advisory board" (G. L. c. 21, § 2C);

(c) the requirement that the Commissioner must submit management plans with respect to the Wachusett Mountain State Reservation (as well as all other state reservations, parks and forests) to the Board for its "adoption" (G. L. c. 21, § 2F);

(d) the Commissioner's status as "the executive and administrative officer" of the Department whose supervision and control of the divisions of the Department must be exercised "in accordance with such programs and policies as may be promulgated by the" Board (G. L. c. 21, § 3);

(e) the limitation of any power the Commissioner might be able to claim to "construct, maintain and operate" recreational facilities without Board approval to "public"

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[5] I find unconvincing and discount WMA's hyperbolic (and unsupported) speculation that empowering the board in this respect "could have disastrous effects on the functioning of a state agency" and "completely hamstring the agency" -- assertions not even made in the State defendants' opposition to the instant petition and immaterial to the extent controlling law dictates otherwise.

facilities, not privately-owned, commercial facilities such as WMA (G. L. c. 132A, § 2D);

(f) the fundamental condition that the Commissioner's exercise of any such power must be "consistent with the policy of the [C]ommonwealth" (ibid.) that sites such as the Wachusett Mountain State Reservation (in the midst of which the challenged project is located) "shall insofar as practicable be preserved in their natural state . . . and . . . no commercial activities except those essential to the quiet enjoyment of the facilities by the people shall be permitted" (G. L. c. 132A, § 2B);

(g) the mandate that the statutes at issue under which both the Board and the Commissioner derive their respective authority as well as their exercise of that authority must be construed in light of the authoritative interpretation by the Attorney General, to effect that any conflict between the Commissioner's dual responsibilities, to conserve and increase natural resources while at the same time being concerned with the development of public recreation involving such resources, is to be "resolved by the legislative emphasis on the conservation aspect of [the Commissioner's] duties", 1966 Op. Atty. Gen. 335, 336; and

(h) the overriding State policy canon that "[u]nless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage

to the environment" (G. L. c. 30, § 61); and finally

(5) when a party has demonstrated, as here "both that the requested relief is necessary to prevent irreparable harm . . . and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction." Packaging Indus. Group, Inc. v. Cheney, 380 Mass. at 617 n.12.[7]

In sum, I am persuaded that the petitioners have satisfactorily established a sufficient prospect of success on the merits of an outcome-determinative legal issue, that the balance of the risks of irreparable harm tilts one-sidedly in their favor, and that the combination of projected success on the merits and the degree of irreparable harm clearly justifies the preliminary relief they seek, particularly since providing such relief upholds the basic equitable principle of maintaining the status quo to prevent the irremediable loss of public rights that could not be vindicated even should the petitioners prevail after a full hearing on the merits.

Therefore, in the discretionary exercise of the plenary

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[7] The most common formulation of the requisite degree of success on the merits warranting preliminary injunctive relief in the typical situation not involving (as here) an overwhelming balance of harm in favor of the moving party is "likelihood of success". Id at 622. The substantiality of the petitioners' possibility of success here is enhanced by reason of the pro-conservation and pro-environmental policy mandates identified in subsections 4(f), (g), and (h).

authority of the single justice in such matters, I order as follows:

(1) the petitioners' "Appeal of Interlocutory Ruling Denying Motion for Preliminary Injunction" is allowed;

(2) the Superior Court's order denying the plaintiffs' motion for injunctive relief is vacated; and

(3) an order is to issue out of the Superior Court in Civ. No. 99-4161-A in the plaintiffs' favor in accordance with the terms of the injunctive relief sought in the plaintiffs' complaint and motion for a preliminary injunction, on the express condition that the plaintiffs prosecute their complaint to final judgment as diligently and expeditiously as possible and make every reasonable effort to cooperate with the defendants to that end; and also with the qualification that the Superior Court judge is directed to hold a hearing as promptly as possible addressed solely to the security requirement of Mass.R.Civ.P. 65(c), 365 Mass. 833 (1974), in order to determine whether, as the plaintiffs maintain, they are entitled to an explicit determination that good cause exists for waiving or relaxing that security requirement, or whether the plaintiffs should post bond or other security in the amount of WMA's projected losses or such other reasonable sum as the Superior Court shall deem proper.

Pending issuance of the order directed in the preceding paragraph, the single justice's Order Reviving Terms of Temporary

Restraining Order, entered August 17, 2000, shall remain in force and effect.

So ordered.

By the Court (Laurence, J.)

Assistant Clerk

Entered: August 24, 2000