

21.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 05-2145

FRIENDS OF THE BLUE HILLS, [INC.](#) et al.,

dated
10/4/06
NORFOLK COUNTY

Plaintiffs,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION and MASSACHUSETTS
WATER RESOURCES AUTHORITY,

Defendants.

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR
JUDGMENT ON THE PLEADINGS AND DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER
JURISDICTION**

These cross-motions arise out of the November 3, 2003 issuance of a Variance from the provisions of the Wetlands Protection Act' ("WPA") regarding the Massachusetts Water Resources Authority's Blue Hills Covered Storage Project ("the Project") in Quincy, which was in turn upheld by the September 20, 2005 Final Decision of the Commissioner of the Department of Environmental Protection. The plaintiff, Friends of the Blue Hills, Inc. ("FOBH"), is a charitable organization whose purposes include preserving and protecting the resources found in the Blue Hills Reservation, including the Blue Hills Reservoir ("Reservoir.")

FOBH has brought this action against the Department of Environmental Protection ("DEP") and the Massachusetts Water Resources Authority ("MWRA"), challenging the

¹G. L. c. 131, § 40.

Commissioner's decision to grant a Variance from several of DEP's wetlands regulations to allow new reservoirs to be constructed on the site of an existing open reservoir in Quincy.

FOBH now moves for judgment on the pleadings under the first count of their Amended Complaint, which seeks "Review of the Variance and Final Decision pursuant to c. 30A, § 14." FOBH asserts that the DEP's findings pursuant to MEPA § 61 are not supported by substantial evidence in the record. Both DEP and MWRA have opposed this motion. Further, both defendants have filed a Cross-Motion to Dismiss FOBH's Amended Complaint for lack of subject matter jurisdiction.¹

For the reasons stated below, the Plaintiffs Motion for Judgment on the Pleadings is **DENIED.** Also, the defendants' Motion to Dismiss FOBH's Amended Complaint for Lack of Subject Matter Jurisdiction is **ALLOWED.**

BACKGROUND

The factual background of the events giving rise to these actions are summarized at length in the Administrative Records of the proceedings. FOBH is a not-for-profit charitable trust whose aims include preserving and protecting the resources found in the Blue Hills Reservation. FOBH challenges the DEP Commissioner's issuance of a Variance from the provisions of the WPA regarding the Project. The DEP mandates that the distribution storage of public water supplies be covered to prevent contamination. To bring the MWRA into compliance with state and federal drinking water requirements and to allow the MWRA to fix

² MWRA filed a Motion to Dismiss Plaintiffs' Amended Complaint for Lack of Subject Matter Jurisdiction. While it has not submitted a separate cross-motion to dismiss FOBH's amended complaint, DEP has asked this court for relief by affirming the Commissioner's decision or dismissing plaintiffs' complaint. As such, I will regard the DEP as having joined MWRA's Motion to Dismiss Plaintiff's Amended Complaint.

and restore deteriorating portions of its water line systems, MWRA wishes to construct and operate a covered drinking water storage facility within the Blue Hills Reservoir, located within the Massachusetts Department of Conservation and Recreation's ("MDCR") Blue Hills Reservation.

The Blue Hills Reservation, which was set aside by the Metropolitan Parks Commission for public recreation, encompasses over 7,000 acres of land from Quincy, Dedham, Milton, and Randolph. The Blue Hills Reservoir is an existing manmade, uncovered distribution Reservoir formerly used to provide water storage and maintain system pressure. Built in the early 1950's, the Reservoir provided distribution storage and maintained system pressure for the MWRA water system until 1981, when it was removed from service due to high bacteria levels from birds and animals. While the Reservation is generally open for public use, the Reservoir is not accessible to the public.

The Project includes, among other things, the construction of two reinforced concrete tanks in the eastern half of the existing Blue Hills Reservoir and a new dam. The existing reservoir will be temporarily drained while the tanks and dam are constructed. The proposed water storage tanks will be buried underground and planted with meadow grasses on top. Once construction is complete, the western half of the reservoir will be refilled with water and turned over to the MDCR for park purposes.

On November 7, 2003 the DEP Commissioner issued a Variance from the performance standards of the WPA. Throughout this process, FOBH's primary objections have been concerning the sufficiency of the MWRA's proposed wetlands mitigation for this project. After a two year plenary review process, on September 20, 2005 the DEP Commissioner issued a Final

Decision upholding upheld the Variance. More specifically, FOBH's main complaint is that the DEP decision allows the MWRA to destroy half of the Reservoir without creating anything to take the place of its wetland resources.

DISCUSSION

1. The Merits

FOBH now moves for judgment under Court I of their Amended Complaint, which seeks judicial review of the DEP's Variance and final decision pursuant to G. L. C. 30A, § 14, asserting that this court should vacate the Variance on three grounds. Each argument lacks merit.

In determining whether allegations are legally sufficient, a court, ruling on a complaint for judicial review under G.L. c. 30A, is confined to the record of the administrative hearing unless procedural irregularities are alleged. See G.L. c. 30A, § 14(5); LeMaine v. City of Boston, 27 Mass. App. Ct. 1173, 1174 (1989). Since FOBH does not allege any procedural irregularity, this court's review will be confined to the four corners of the record of the administrative agency. As the party appealing the administrative decision, FOBH bears the burden of demonstrating the decision's invalidity. See Merisme v. Board of Appeals on Motor Vehicle Liab., 27 Mass. App. Ct. 470, 474 (1989).

Pursuant to G. L. c. 30A, "[a]n agency's interpretation of its own regulation and statutory mandate will be disturbed only `if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.'" Box Pond Ass'n v. Energy Facilities Siting Bd., 435 Mass. 408, 416 (2001), citing TBI, Inc. v. Bd. of Health of North Andover, 431 Mass. 9, 17 (2000), in turn quoting Brookline v. Comm'n of the Dep't. of Env'tl Quality Eng'g, 398 Mass. 404, 410 (1986). The reviewing court may not substitute its judgment for that of the agency. Southern Worcester

County Regional Vocational Sch. v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977). In assessing the DEP Commissioner's decisions, the court is not permitted to make de novo determinations of fact, to make credibility choices or to draw inferences different from those drawn by the DEP Commissioner. See Southern Worcester County Regional Voc. School Dist., 386 Mass. at 420. To this end, a 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" by statute Id., quoting G. L. c. 30A, § 14 (7). Thus, a "court should not intrude lightly within the agency's area of expertise [An agency's] decisions are not to be overturned unless they are contrary to law or `unreasonable, arbitrary, whimsical, or capricious.'" Id., quoting Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge, 395 Mass. 535, 553 (1985) (citations omitted).

Here, FOBH have not sustained their burden of showing that the agency action was arbitrary, capricious, or an abuse of discretion as required by the judicial review standards of G.L. c. 30A, § 14(7). First, the FOBH claims that the Variance is arbitrary and capricious because it deviates from DEP's purported "standards mandating no net loss of wetlands in the Commonwealth." After thoroughly considering the WPA's regulatory Variance criteria and the DEP's Wetlands Program Policy, the Commissioner properly found that there is no evidence in the record of any existing "no net loss policy" of either the Wetlands Program or the DEP that carries the force of law so that it is germane to the permitting decisions in this dispute.

Moreover, the Final Decision was not arbitrary and capricious, as the Commissioner properly found that there is no evidence in the record that the DEP has ever produced any official, legally

binding policy or regulations reflecting a "no net loss" concept in the context of Variances.

Next, FOBH contends that substantial evidence does not support the DEP Commissioner's findings that pursuant to the Massachusetts Environmental Policy Act, G.L. c. 30, § 61, MWRA took "all feasible means and measures to avoid or minimize damage to the environment." This court need not address this argument because FOBH has waived this claim as a matter of law. It appears from the Administrative Record that FOBH did not raise this claim prior to the instant action, and thus this claim is barred by FOBH's failure to exhaust its administrative remedies. See Luchini v. Comm'n of Revenue, 436 Mass. 403, 404-405 (2002).³

Finally, FOBH argues that the Commissioner's decision is supposedly based upon an error of law because the Commissioner "mistakenly held" that the Wetlands Protection Act, G. L. c. 131, § 40, "allows a public agency to destroy wetlands, without replacement," whenever it is acting to protect a public water supply. This court is unpersuaded by FOBH's contention that the DEP Commissioner's decision is based on an error of law concerning the WPA's "interest in protecting the public water supply." There is no evidence in the record that in his Final Decision, the DEP Commissioner upheld the MWRA's 2003 issuance of the Variance based upon a misinterpretation of the WPA. Contrary to FOBH's assertion, substantial evidence exists in the record that after an exhaustive review the DEP Commissioner upheld the 2003 Variance because MWRA had satisfied all three regulatory Variance criteria pursuant to 310 CRM 10.05(10)(a)1-3.

Based upon the entire record of the DEP Commissioner's hearing and the evidence

³To the extent that FOBH is claiming in footnote 8 of its Opposition that the DEP Commissioner "(a) failed to discharge his duties under MEPA by not adhering to DEP's "No Net Loss" of wetlands standard, and (b) lacked substantial evidence for his findings under § 61 of MEPA," this court remains unpersuaded. As explained above, substantial evidence supports the DEP Commissioner's findings that no legally operative "No Net Loss" policy exists that is relevant to this dispute. Second, substantial evidence in the record supports the DEP Commissioner's findings.

submitted therein, the court determines that FOBH has failed to carry its burden of demonstrating that the DEP Commissioner's decision is unsupported by substantial evidence or is arbitrary and capricious. See Merisme, supra, 27 Mass. App. Ct. at 474 (discussing the burden placed on the moving party of a G.L. c. 30A action). Accordingly, this Court concludes that the DEP Commissioner's issuance of a Variance from the provisions of the WPA regarding the Project is properly supported by substantial evidence in the record and thus it must stand.

2. **Standing**

DEP and MWRA oppose FOBH's motion and cross-move to dismiss FOBH's Amended Complaint for lack of subject matter jurisdiction. The defendants contend that the court should dismiss Count I of the Amended Complaint because FOBH is not a 'person aggrieved' and thus it lacks standing to seek judicial review and/or injunctive relief under G.L. c. 30A, § 14, and accordingly FOBH cannot challenge DEP's decision under Counts II and III. The defendants further assert, *inter alia*, that FOBH has failed to exhaust its administrative remedies.'

The issue of whether FOBH is an "aggrieved person" under G.L. c. 30A, § 14 essentially involves the issue of standing to seek judicial review of state administrative agency action. Chapter 30A, § 14 provides that a review of adjudicatory decisions of administrative agencies may be sought only by a "person or appointing authority aggrieved by a final decision" The words "person. .. aggrieved" as used in G.L. c. 30A, § 14 "are not to be given a narrow construction." Shaker Community, Inc. v. State Racing Comm'n, 346 Mass. 213, 216 (1963).

⁴ In its opposition to defendant's motion to dismiss, FOBH contends that Plaintiffs Falmer, Olanoff, Tarnkin, Morse, Jeffries, Joslin, MacDonald, Mussey, and Lehrer Jacobs do not assert that they have standing in their individual capacities to challenge the Final Decision under c. 30a, § 14, and thus the issue of whether they have exhausted their administrative remedies is not relevant to FOBH's standing to bring Count 1.

"Not every person whose interests might conceivably be adversely affected is entitled to review."

Group Ins. Comm'n v. Labor Relations Comm'n, 381 Mass. 199, 204 (1980).

"Mere participation in the administrative process does not confer standing to raise a claim in the Superior Court." Ginter v. Commissioner of Ins., 427 Mass. 319, 324 (1998). This court may exercise *de novo* review of pure issues of law, including standing. See Buchanan v. Cont. Ret. App. Bd., 65 Mass. App. Ct. 244, 246 (2005). A party must be aggrieved in a "legal sense" and show that "substantial rights" may have been "prejudiced" to properly sustain an action for review. Duato v. Comm'r of Pub. Welfare, 359 Mass. 635, 637-638 (1971). Moreover, for the plaintiff to have standing, the injury alleged must fall "within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." Penal Insts. Comm'r for Suffolk County v. Comm'r of Correction, 382 Mass. 527, 532 (1981).

Here, FOBH has not alleged facts that place them within the area of concern of the statute. FOBH makes the general assertion that the MWRA's project impacts one of its purposes, which is to preserve and protect the resources found in the Blue Hills Reservation, including the Reservoir. This allegation is insufficient. FOBH's purpose of preserving the Reservation is shared by all citizens generally and the Reservoir is not open either to the public or to FOBH and its members. To this end, FOBH has not shown that any "substantial right" has been "prejudiced." As such, FOBH is not a party aggrieved by the decision and order of the DEP Commissioner, and therefore it lacks standing to challenge the decision and order. Accordingly, the plaintiffs complaint should be dismissed.'

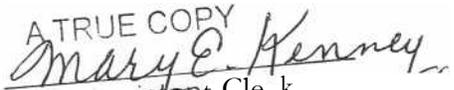
'Counts II and III must also be dismissed. The right of "ten plaintiffs of the Commonwealth" under G.L. c. 131, § 40 to seek an temporary restraining order based on a alleged violation of the WPA is contingent upon G.L. c. 214, § 7A. Since FOBH does not have standing under G.L. c. 30A, § 14, it lacks standing to assert this claim.

ORDER

Plaintiffs' Motion for Judgment on the Pleadings is DENIED. Defendants' Motion to Dismiss is ALLOWED. Judgment shall enter dismissing the amended complaint.


Patrick F. Brady
Justice of the Superior Court

DATED: October, 2006

ATRUE COPY
Attest: 
Deputy Assstant Clerk
10/0/06