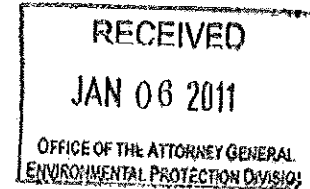


COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE  
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Boston, Massachusetts 02108-1705  
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January 5, 2011

Seth Schofield, Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place, 18th Flr.  
Boston, MA 02108



RE: No. 2010-J-0582  
Lower Ct. No.: SUCV2010-02920

**BLACKINTON COMMONS, LLC**

**vs.**

**MASS DEPT. OF ENVIRONMENTAL PROTECTION**

NOTICE OF DOCKET ENTRY

Please take note that on January 5, 2011, the following entry was made on the docket of the above-referenced case:

ORDER: Pursuant to G. L. c. 231, § 118, first paragraph, petitioner Blackinton Commons, LLC (Blackinton) requests interlocutory relief against the denial of a motion for reconsideration by a Superior Court judge. . . . I DENY Petitioner Blackinton's request for interlocutory relief from the Superior Court judge's denial of its motion for reconsideration. By the Court (Sikora, J.).  
\*Notice/Attest/Fahey, J./Image.

Very truly yours,

The Clerk's Office

Dated: January 5, 2011

To: David Viens, Esquire  
Seth Schofield, Assistant Attorney General  
Suffolk Superior Court Dept.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

10-J-582  
(Suffolk Superior  
Ct. No. SUCV2010-  
02920)

BLACKINTON COMMONS, LLC

VS.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION.

ORDER

Pursuant to G. L. c. 231, § 118, first paragraph, petitioner Blackinton Commons, LLC (Blackinton) requests interlocutory relief against the denial of a motion for reconsideration by a Superior Court judge. See Superior Court Rule 9D. Blackinton sought to have the judge reconsider the merits of her earlier denial of its request for a waiver of the requirement of a bond or payment of an administrative penalty in the full amount of \$318,276.40 assessed by the defendant Massachusetts Department of Environmental Protection. General Laws c. 21A, § 16, eighth paragraph, requires the placement of such security into an interest-bearing escrow account under the control of the court in which the assessed party seeks judicial review of a final DEP adjudication. The provision of the security is a jurisdictional prerequisite for the exercise of the reviewing court's authority. Ibid. The statute authorizes the court to grant a waiver of the security requirement upon grounds of either the presence of a substantial question for review by the court or an inability to

discovery.

Standard of review. Under G. L. c. 231, § 118, first paragraph, a single justice reviews a trial court order for clear error of law or abuse of discretion. Aspinall v. Phillip Morris Companies, Inc., 442 Mass. 381, 390 (2004) and cases cited. In addition, the statute imposes a time limit of thirty days for submission of a petition for interlocutory review. The present petition entered the docket of this court on December 23, 2010. Consequently, a single justice lacks authority to review the original decision of the motion judge to deny waiver on October 29, 2010. I can review only the denial of the motion for reconsideration on November 29, 2010.

Merits. 1. Inability to pay. Blackinton has failed to show its inability to pay the required escrow amount to the reasonable satisfaction of the judge. First, it has failed to comply with her direction to complete discovery and her implicit invitation to seek reconsideration upon the basis of the detailed financial information resulting from compliance with that discovery. Second, it has substituted for such discovery information a conclusory affidavit from its president alleging project losses of approximately \$1.1 million in response to DEP's affidavit materials identifying gross condominium project sales of \$11,177,866.00. The judge was entitled to distrust the Blackinton affidavit by reason of its general and conclusory

character. It lacked the specificity which she appeared to anticipate from the responses by Blackinton to DEP's discovery. DEP's opposition to the motion for reconsideration emphasized this point. As an example of the need for specific financial information, DEP cited the sale of one of the thirty-eight condominium units to a manager of the corporation for the nominal sum of one dollar. (Opposition, third page). The judge's distrust of the financial information was certainly not an abuse of discretion.

2. Substantial issue of law. A motion for reconsideration, by nature, must show newly discovered factual information, a change of circumstance, or a clear error of fact or law, in order to succeed. See Peterson v. Hobson, 306 Mass. 597, 600 (1940); Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 622 (1989). A judge exercises sound discretion to deny a motion for reconsideration on the ground that the moving party "raised no new issues that were not before the court at the time of the original motion." Hanrahan v. City of Boston, 53 Mass. App. Ct. 1114 (2002). Otherwise, the parties could simply recycle prior rejected arguments under the headings of motions for reconsideration and thereby abuse the resources of both the opposing parties and the courts. Upon this ground, the judge was entitled to reject preemptively Blackinton's repetitive argument that it was presenting a substantial question of statutory

interpretation of DEP's authority to invalidate its Response Action Outcome (RAO) Statement. While Blackinton may have continued to view this question as a substantial issue, the judge had clearly rejected it by discussion in her October 29 decision. Mere repetition of the earlier failed argument does not meet the definition of a proper subject for reconsideration.

Independently, if the merits of the question were entitled to review, one could not say that a rejection of the contention as an insubstantial position amounted to a clear error of law. DEP's enabling legislation appears to confer expansive enforcement authority upon it and by strong implication the authority to invalidate an RAO. The Department may "establish standards, procedures and deadlines [within remedial Contingency plans] . . . to insure that response actions are taken in compliance with" G. L. c. 21E. See G. L. c. 21E, § 3A(d). The Legislature provided that nothing in Chapter 21E "shall be construed to limit the authority of the department . . . to take actions to protect public health, safety, welfare or the environment." G. L. c. 21E, § 3A(n).

General administrative law doctrine and specific decisional law reinforce this apparent delegation of expansive environmental remedial authority to the agency. See especially DiCicco v. Department of Environmental Protection, 64 Mass. App. Ct. 423, 427-428 (2005). "We give substantial deference to the

construction placed on a statute . . . by the agency charged with its administration, . . . and deference is especially appropriate where the Legislature has seen fit to delegate broad rule making authority to the [agency]." Id. at 427 (citations and internal quotations omitted). The judge committed no clear error of law.

Conclusion. For these reasons I DENY Petitioner Blackinton's request for interlocutory relief from the Superior Court judge's denial of its motion for reconsideration.

By the Court (Sikora, J.),

  
Assistant Clerk

Entered: January 5, 2011.