

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2010-2920-B

BLACKINTON COMMONS LLC

vs.

MASSACHUSETTS DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Notice sent
10/29/2010
R.D.C., JR.
B. & D.
D.V.
S.S.

(sc)

MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S CLAIM OF WAIVER OF ESCROW REQUIREMENT

Plaintiff has the burden to prove "either the presence of a substantial question for review by the court or an inability to pay" the administrative penalty into an escrow account.

This court accepts that to satisfy "the presence of a substantial question for review by the court", the plaintiff must raise a question that is more than non-frivolous. The plaintiff must raise an issue on appeal that, at the very least, is a "close" question, one that raises a substantive issue worthy of appeal.

The only question raised by the plaintiff is whether the DEP has the legal authority to invalidate Response Action Outcome (RAO) Statements that fail to comply with DEP requirements for assessing and cleaning up contaminated properties. This court agrees with DEP that this issue is "implausible", given G.L. c. 21E's language. The Massachusetts Contingency Plan (MCP), promulgated by DEP, states that "(t)he Department has final administrative authority and discretion to determine . . . whether a response action, application, Opinion or other submittal is in compliance with M.G.L. ch. 21E, [the MCP], and other applicable requirements."

310 C.M.R. § 40.0100 (1) and (1)(e). In this court's assessment, plaintiff fails to raise a substantive issue, indeed does not even raise a non-frivolous issue, in questioning the DEP's authority to unilaterally invalidate the RAO submitted.

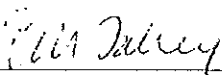
Alternatively, the plaintiff seeks to not have to post the bond or assessed fee on the grounds of inability to pay. In support of that position, plaintiff relies on the affidavit of its manager, stating that plaintiff has no income or any funds. In response, defendant seeks to take discovery but also submits an affidavit of an investigation in the Attorney General's Office. That investigator's research revealed that plaintiff paid \$780,000 in 2004 for two parcels of land in Attleboro, Massachusetts, which is the location of plaintiff's development. The research further revealed that plaintiff sold 38 condos between 2005-2008 for \$11,177,866.00. While plaintiff's manager's affidavit only reveals plaintiff's current income, nothing is revealed as to what happened to all of that money. Given these two affidavits and that it is plaintiff's burden to prove inability to pay, Commonwealth v. Godwin, 60 Mass. App. Ct. 605, 610 (2004), plaintiff has failed to meet that burden. Plaintiff fails to establish that it is unable to post in the Superior Court the civil administrative penalty assessed by DEP.

Accordingly, where plaintiff fails to raise a substantial issue and fails to satisfy its burden to prove inability to pay, plaintiff shall place \$318,276.40 in an interest-bearing escrow account in the Suffolk Clerk's Office within 20 days, i.e. by November 22, 2010.

ORDER

Plaintiff shall place \$318,276.40 in an interest-bearing escrow account in the Suffolk Clerk's Office within 20 days, i.e. by November 22, 2010.

The administrative record is to be prepared within 30 days. Plaintiff has to serve its Motion for Judgment on the Pleadings by January 4, 2011; Defendant's Opposition is due by February 4, 2011. The Motion for Judgment on the Pleadings will be heard at 2:00 p.m. on February 28, 2011.


Elizabeth M. Fahey
Justice of the Superior Court

Dated: 10/29/10