

18
Commonwealth of Massachusetts
County of Plymouth
The Superior Court

CIVIL DOCKET# PLCV2009-00967B

V.S. Haseotes & Sons,
Plaintiff,

vs.

Department of Enviromental Protection,
and Laurie Burt, Commissioner,
Defendants.

JUDGMENT

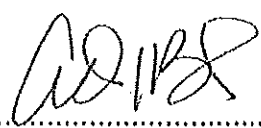
This action came on before the Court, Thomas F. McGuire, Jr., Justice, presiding, upon motion of the plaintiff, V.S. Haseotes & Sons for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) and Superior Court Standing Order 1-96, and the Court after hearing and upon consideration thereof, issued a Memorandum of Decision and Order, therefore,

It is ORDERED and ADJUDGED:

That the complaint of the plaintiff, V.S. Haseotes & Sons, be and hereby is DISMISSED and that the Decision of the defendants be and hereby is AFFIRMED.

Dated at Plymouth, Massachusetts this 17th day of October, 2011.

Robert S. Creedon, Jr.,
Clerk of the Courts

By:  Assistant Clerk

Copies mailed 10/17/2011

17

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

PLYMOUTH, ss.

Civil Action #PLCV2009-00967

V.S. HASEOTES & SONS,
Plaintiff

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION and
Commissioner LAURIE BURT,
Defendants

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, V.S. Haseotes & Sons, is the owner of 320 acres of land abutting the Taunton River in Bridgewater. It seeks judicial review, pursuant to G.L. c. 30A, § 14, of a decision of the Department of Environmental Protection ("DEP") classifying a portion of this land as bordering vegetated wetlands under the Wetlands Protection Act, G.L. c. 131, § 40.

The plaintiff has filed a motion for judgment on the pleadings under Rule 12(c) of the Massachusetts Rules of Civil Procedure and Superior Court Standing Order 1-96. The defendants have filed an Opposition to that motion.

FACTS

In reviewing a decision of an administrative agency, the court's review of the issues "shall be confined to the record..." G.L. c.30A, § 14(5). The following facts are therefore taken from the record of administrative proceedings before the DEP:

In April 2007, the plaintiff filed an "Abbreviated Notice of Resource Area Delineation" ("ANRAD") with the Bridgewater conservation commission, pursuant to 310 CMR 10.05. By

this filing, the plaintiff sought a delineation of wetlands on its property that are subject to the Wetlands Protection Act, G.L. c. 131, § 40.

In April 2008, the Bridgewater conservation commission issued an "Order of Resource Area Delineation" ("ORAD"). The commission concluded that the wetlands boundaries delineated on the ANRAD "were found to be inaccurate and cannot be confirmed...." The plaintiff sought review of the ORAD by the DEP.

In December 2008, the DEP issued a "Superseding Order of Resource Area Delineation" ("SORAD") that upheld the determination of the Bridgewater conservation commission.

DEP held an adjudicatory hearing on the plaintiff's appeal. At the hearing, the plaintiff's wetlands expert, John Carr, gave an opinion as to the location of wetlands boundaries based on a scientific methodology relying on dissolved oxygen in groundwater gathered from test wells on the land. The DEP's wetlands expert, Gary Makuch, provided an opinion that included as wetlands areas classified as uplands by the plaintiff's expert. Makuch's opinion was based on a more traditional method of wetlands classification that relied on the presence of wetland indicator plants, poorly drained soils and the presence of groundwater within twelve inches of the ground surface.

On July 8, 2009, the Commissioner of DEP issued a final decision upholding the SORAD.

ANALYSIS

Under G.L. c. 30A, a party challenging an administrative agency's decision bears the burden of proving that its "substantial rights" have been prejudiced based on one of the grounds enumerated in G.L. c. 30A, § 14(7). *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 6 (1992) (burden of proof is on appealing party.)

"Under G.L. c. 30A, § 14, [the court] review[s] the findings below only to determine whether the agency's decision was unsupported by substantial evidence, arbitrary and capricious, or otherwise based on an error of law. ... 'It is a standard of review "highly deferential to the agency," which requires . . . according "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." ... [The court] give[s] deference to the decision of an agency interpreting its own regulations. ... [The court does] 'not intrude lightly within the agency's area of expertise,' ... as long as the regulations are interpreted with reference to their purpose and to the purpose and design of the controlling statute." *Friends and Fishers of the Edgartown Great Pond, Inc. v. Department of Environmental Protection*, 446 Mass. 830, 836-837 (2006) (citations omitted).

The plaintiff contends that the DEP erred by rejecting the dissolved oxygen methodology for determining the presence of wetlands and instead relying on more traditional indicia such as the presence of wetlands indicator plants. The plaintiff contends that the dissolved oxygen approach is better suited to an evaluation of this site because the hydrology of the area has changed over time by use of the land for agricultural purposes.

The DEP hearing officer first noted that DEP regulations define wetlands boundaries for areas disturbed by cultivation based on the presence of wetland indicator plants:

Where an area has been disturbed (e.g. by cutting, filling, or cultivation), the boundary is the line within which there are indicators of saturated or inundated conditions sufficient to support a predominance of wetland indicator plants, a predominance of wetland indicator plants, or credible evidence from a competent source that the area supported or would support under undisturbed conditions a predominance of wetland indicator plants prior to the disturbance.

310 CMR 10.55(2)(c)(3).

The hearing officer noted that the plaintiff's expert did not rely on the presence of wetland indicator plants in evaluating the site. The hearing officer found that the expert's reliance on the presence of uplands plants was improper because those plants were not predominant and the presence of the uplands plants was undocumented.

The hearing officer rejected the alternate methodology based on the presence or absence of dissolved oxygen in groundwater. The hearing officer noted that no evidence was introduced indicating that this methodology has been accepted in the relevant scientific community or is otherwise reliable. The hearing officer also concluded that there were too few groundwater samples tested for dissolved oxygen to reliably support the expert's conclusion.

DEP's wetlands expert relied on the presence of hydric soils as indicative of wetlands, in addition to the presence of wetland indicator plants. The plaintiff's expert concluded that the hydric soils were relics and not indicative of present wetlands. The hearing officer rejected that conclusion because it was based on suspicion and speculation rather than established facts.

Based on these considerations, the hearing officer concluded:

[T]he Petitioner did not introduce sufficiently credible evidence to meet his burden of going forward or sufficient evidence to meet his burden of proof by a preponderance of the evidence that the BVW boundary line as delineated on the ANRAD plan is accurate and meets the criteria of wetland delineation at 310 CMR 10.54(2)(c)3. The conclusions of the Petitioner's expert witness regarding the wetland's boundary delineation was based on a methodology and site specific factual assumptions that lacked sufficient indicia of reliability to be considered credible evidence. The Petitioner also failed to introduce sufficiently credible evidence to rebut the Department's testimony which supported the conclusion that areas of the property the ANRAD plans depicted as upland contained significant indicators of wetlands vegetation and hydrology that clearly supported those areas be delineated as BVW in accordance with the criteria at 310 CMR 10.54(2)(c)3.¹

Adm. Rec. 620.

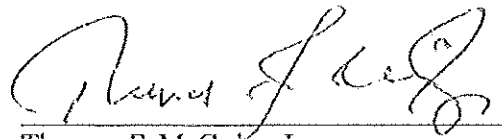
¹ This citation appears to be an error. The correct citation, set out earlier in the decision is 310 CMR 10.55(2)(c)3.

The hearing officer's decision, which was adopted as the final DEP decision, represents a reasoned analysis based on substantial evidence. The plaintiff's argument is essentially that the hearing officer should have adopted the dissolved oxygen methodology rather than relying on more traditional methods for determining the presence of wetlands, such as the presence of wetland indicator plants and types of soil. While the hearing officer could have properly accepted the dissolved oxygen methodology, the decision not to do so was within his authority as the fact finder. "The responsibility for determining the credibility and weight of conflicting evidence rests solely with the agency." *Starks v. Director of Division of Employment Security*, 391 Mass. 640, 643 (1984).

ORDER

The plaintiff's motion for judgment on the pleadings is **DENIED**. Judgment shall enter **AFFIRMING** the decision of the defendants.

October 10, 2011



Thomas F. McGuire, Jr.
Justice of the Superior Court

Entered: 10/17/11