

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

**SUPERIOR COURT
CIVIL NO: 08-2331-D**

TOWN OF BOXFORD

vs.

MASSACHUSETTS HIGHWAY DEPARTMENT & another¹

**SUPERIOR COURT
CIVIL NO: 08-2336-D**

**COMMONWEALTH OF MASSACHUSETTS,
MASSACHUSETTS HIGHWAY DEPARTMENT**

vs.

**TOWN OF BOXFORD, by and through its
BOARD OF HEALTH**

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND
DEFENDANTS' CROSS-MOTION FOR PRELIMINARY INJUNCTION**

The Town of Boxford, by and through its board of health ("the Board"), brought this action against the Massachusetts Highway Department ("MassHighway") and the Massachusetts Department of Environmental Protection (DEP)² to enjoin MassHighway from operating a salt storage facility in the Town of Boxford, and to enjoin MassHighway from drilling/digging replacement wells on private land without permits from the Board. Shortly thereafter, MassHighway brought its own action for a

¹ Massachusetts Department of Environmental Protection

² The Board brought a mandamus action against DEP, however there was no injunctive relief sought against DEP, nor requested by DEP.

preliminary injunction to compel Boxford to remove barriers it had erected around MassHighway's salt shed facility and enjoin a cease and desist order from the Board. After a hearing on December 9, 2008, the court consolidated the two cases. The matter is now before the court on the parties' cross-motions for preliminary injunction. For the reasons stated herein, the Board's motion is **ALLOWED** in part and **DENIED** in part. MassHighway's motion is **ALLOWED** in part and **DENIED** in part.

BACKGROUND

MassHighway maintains a depot at 100 Topsfield Road, Boxford, Massachusetts, for storage of sodium chloride, calcium chloride, sand and other de-icing chemicals, materials and equipment. The facility is also a staging point for de-icing operations, primarily along an eight-mile stretch of I-95 from the interchange at Route 1 in Danvers to the interchange with Route 133 in Georgetown.

The Town of Boxford does not have a public water supply. All residents obtain their water through private wells. Since at least 1995, residents of Boxford have complained of dangerously elevated levels of sodium, chloride, calcium and manganese in their ground water aquifer. High levels of these chemicals have resulted in skin dryness, eye irritation, and the accelerated deterioration of plumbing fixtures and appliances. On several occasions in the past, MassHighway and Boxford have attempted to work together to address these problems. MassHighway took a number of measures to reduce the amount of storm water runoff during its de-icing operations, including installing an extension to its salt shed and reducing the ratio of salt to sand in its de-icing compound. Nevertheless, the residents' problems persist.

In more recent times, cooperation between the parties has broken down and their relationship has grown increasingly adversarial. On November 21, 2008, the Board ordered MassHighway to cease and desist all operations out of the Boxford facility. On December 3, 2008, members of the Board entered the facility and ordered all MassHighway employees to leave. They thereafter installed four Jersey barriers across the entrance to the facility, effectively preventing all ingress to, and egress from, the facility. On December 4, 2008, a temporary restraining order issued (McIntyre, J.), requiring the Board to remove the barriers and allow MassHighway personnel access to the facility.

DISCUSSION

Groundwater contamination

The documents filed with the court reflect that the MassHighway salt storage facility on Topsfield Road in Boxford is responsible for groundwater contamination. The pleadings reflect that this contamination occurred from stormwater runoff from the salt storage site, into vegetated areas, which subsequently filtrates into the groundwater. The storage facility is a timber shed with a pervious asphalt floor. Photographs from MassHighway reflect a deteriorated building with salt escaping beyond the timber walls, and exposed to the weather.

In 2005, as a temporary remediation measure, MassHighway built an extension to this shed with a cinder block knee wall and tent-like cover to facilitate loading and unloading of salt from trucks, without exposure to the elements. However, the salt continues to be stored and transferred in a facility that has no catch basins or storm water drainage systems. The salt continues to be stored in the same timber shed, and both the

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shed and extension are on the same pervious pavement responsible for the leaching of contaminants into the groundwater.³

MassHighway has proposed to remediate this contamination with a new facility built with poured concrete walls and a poly liner beneath asphalt pavement. MassHighway believes that this new facility will address the groundwater contamination from the salt storage site. This construction was to begin during 2006. It has not happened.

As an alternative, MassHighway has been asked to move the salt storage site, or combine its eight mile service area with adjoining facilities. MassHighway has declined, principally on assertions that service to eight miles of Route I-95 would be delayed. This assertion is made without any substantiation of how a realignment with other facilities or a relocation would differ with similar locations and circumstances in the Commonwealth.

Installation of replacement wells

Documents filed with the court also reflect that MassHighway is attempting to remediate the contamination of private water supply wells by drilling/digging replacement wells. MassHighway has contracted with third party certified well drillers pursuant to Standard Operating Procedures of the MassHighway Salt Remediation Program. These private contractors are drilling/digging replacement wells for private homeowners on private property, outside the local permit authority of the Boxford Board

³ It is notable that MassHighway relies on a letter from Lucy Edmondson, Deputy Commissioner for Policy and Planning, DEP, 9/25/08, wherein she represents that the facility is in compliance with G.L.c.85 § 7A, and states that the shed does not pose a contamination threat to a water supply or ground water supply because "all materials were stored within a solid frame storage shed with an impermeable base." This is in conflict with the observations of John Blundo, Chief Engineer, MassHighway, who acknowledges that the salt is presently stored on an asphalt floor that is not impervious and the existing shed is subject to damage due to its timber frame. MassHighway's photograph exhibits also contradict the DEP representation that the material is within a solid frame structure, in that the salt is observed to be leaking around the perimeter of the shed. Blundo represents that the shed is supported by timber buttress walls, and the photographs show that these walls are resting on the asphalt with no raised foundation.

of Health. The Board alleges that certain of these replacement wells have not been in compliance with local regulations, and that all the wells need permitting to insure the public health and safety interests of residents and landowners.⁴ Most importantly, the Board alleges that some of the replacement wells are ultimately filling with the same contaminants that the remediation is trying to eliminate from the private water wells.

Authority of the Board

The first issue this case presents is the authority of the Board to regulate the activities of MassHighway. Generally, neither the Commonwealth nor any of its instrumentalities may "be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed [by] statute." *Deroche v. Mass. Comm. Against Dis.*, 447 Mass. 1, 12 (2006) (quoting *General Elec. Co. v. Com.*, 329 Mass. 661, 664 (1953)). However, even where an agency's enabling statute "creates an exemption from regulation, a statutorily created entity is not necessarily exempt from all regulation. A regulation generally will apply to an exempt entity where that regulation serves an important purpose and either would have no effect at all or a merely negligible effect on the entity's ability to fulfill its essential government function or an action 'reasonably related' to its ability to fulfill that function." *Mass. Bay Trans. Auth. v. Town of Somerville*, 451 Mass. 80, 85-86 (2006) (see also *Greater Lawrence Sanitary Dist. v. Town of North Andover*, 439 Mass. 16, 22 (2003)).

G. L. c. 16, § 1(a)(1) provides: "There shall be a department of highways... [that] shall administer the design, construction, operation and maintenance of the roads and

⁴ The Board regulations are distinguished from zoning regulations, which would require an additional analysis.

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bridges of the commonwealth." MassHighway's enabling statute does not contain a blanket exemption from regulation by municipal boards of health or other local authorities. Given that such an exemption, if it existed, would not immunize MassHighway from all regulation, the Board is *a fortiori* entitled to regulate MassHighway's activities in Boxford, consistent with the Board's own statutorily created authority⁵, provided its regulations "have no effect at all or a merely negligible effect" on MassHighway's ability to fulfill its statutory mandate. *451 Mass. at 85-86.*

With respect to the Board, there is no dispute that its intent was to protect the public health and safety of the residents of Boxford (see footnote 5, *infra*). As for MassHighway, there is also no dispute that its de-icing operations are an essential government function. Therefore, the issue here is whether the nature and extent of the Board's interference with MassHighway's ability to fulfill its essential government function violate the principles enunciated in *Greater Lawrence Sanitary Dist. v. Town of North Andover*, and further elucidated in *Mass. Bay Trans. Auth. v. Town of Somerville*.

In *Greater Lawrence*, the Supreme Judicial Court held that the Town of Andover's board of health could require the Greater Lawrence Sanitary District ("GLSD") to obtain building permits for two biosolid processing facilities, where the permits contained conditions relating to "dust control and blasting, odor, noise, traffic and miscellaneous other aspects of the facilities' operation." *439 Mass. at 21.* However, the Court remanded to case to decide whether the specific regulations at issue in fact had

⁵ See G. L. c. 111, § 122: "The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel" (emphasis added).

too great an effect on GLSD's ability to fulfill its legislative mandate. In *Mass. Bay*, the Court held that the Town of Somerville could not regulate, through its zoning ordinances, billboards and signs for commercial advertising in and on MBTA's facilities. The court reasoned that MBTA's ability to provide low-cost public transportation was an essential government function, and its success depended in large part on its ability to raise revenue, including by selling advertising space. *451 Mass. at 86*.

In this case, MassHighway has made representations that it would build a new salt storage facility in 2006, and has undertaken several remediation measures, to include facilitating replacement water wells. MassHighway's actions, in response to the Boxford Board of Health's regulatory inquiries regarding safe and healthy well water, have been taken without any suggestion of effecting MassHighway's ability to fulfill its essential government function.

Standard for Preliminary Injunction

Where the party seeking a preliminary injunction is a governmental entity, that party must show only (1) a likelihood of success on the merits, and (2) that "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *LeClair v. Town of Norwell*, *430 Mass. 328, 331-332 (1999)* (citing *Com. v. Mass. CRINC*, *392 Mass. 79, 89 (1984)*). A showing of irreparable harm is not required. *430 Mass. at 331*.

SUMMARY

For the purpose of the preliminary injunction petitions,⁶ the court finds that the Board has a likelihood of success on the merits in asserting a public nuisance claim against MassHighway. The court believes that the history of this matter as outlined

⁶ These findings are not dispositive of the matters in dispute.

above, indicates that the Board may invoke its authority to protect the water supply for the residents of Boxford from contamination, without effecting MassHighway's ability to fulfill its statutory mandate of maintaining safe roads and bridges throughout the Commonwealth. As reflected in MassHighway documents, MassHighway planned to build a new facility in 2006 to correct the ground water infiltration of contaminants at its storage shed on Topsfield Road in Boxford. MassHighway has not done so. In the alternative, MassHighway has not substantiated their assertion that elimination and/or moving the salt storage facility would effect MassHighway's ability to maintain safe roads and bridges for eight (8) miles of Route I-95.

However, any injunction against MassHighway to prevent groundwater contamination at the storage site in Boxford must be weighed with the immediate demands of the winter season. MassHighway has a management plan with schedules, equipment, and materials apportioned throughout the state for the 2008-2009 winter months. The court finds that it would be unreasonable and not in the best interests of public safety to require MassHighway to restructure its distribution of services for the *present* winter season.

In this matter, the court is required to weigh the interests of residents and their water supply with the interests of public safety for motorists. The history of this dispute between the Town of Boxford and MassHighway leads the court to believe that Boxford residents will be inconvenienced by taking preventative measures to insure their health and safety from the use of contaminated water throughout the winter of 2008-2009, but they are not in the imminent danger that motorists are presented with, if service to eight miles of Route I-95 is suddenly interrupted during the winter months. The filing of the

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Board's petition to enjoin MassHighway from their service plan for Route I-95, in December, is not timely for purposes of overcoming the burden of *not* adversely affecting the public interest during the winter season of 2008-2009.

After the winter season of 2008-2009, an injunction to preclude salt storage at the site in Boxford *will* promote the public interest of the effected residents of Boxford. Therefore, the court will enjoin MassHighway from further salt storage at their facility in Boxford beyond the winter season of 2008-2009. Documents before the court show that MassHighway knows they are responsible for contaminating private water wells in Boxford. This injunction gives MassHighway reasonable time to remove salt from the Boxford facility and devise an alternative plan for salt storage and disbursement after the 2008-2009 winter season. This injunction is made to promote the public interest of Boxford residents by enabling them to have water from their wells that is not knowingly contaminated by MassHighway since 1995.

Additionally, the court finds that the Board has a likelihood of success on the merits on requiring that the installation of replacement wells must comply with the Town of Boxford Water Supply Regulations, as adopted by the Board of Health. The court relies on the fact that MassHighway is facilitating a private contractor to drill/dig wells on private property for private landowners. Although MassHighway hires and pays for this remediation pursuant to its own policies, it is not in the business of constructing replacement wells for private landowners under statute, and may therefore not fall within exemptions to local regulation.

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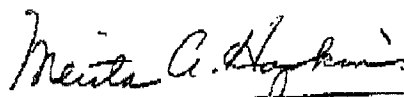
ORDER

Therefore, it is **ORDERED** that the Town of Boxford, by and through its Board of Health, is enjoined from directly or indirectly interfering with or attempting to exert any authority over MassHighway as it carries out its essential governmental functions at the Boxford facility. To the extent this Order applies to the storage of salt, it shall remain in effect throughout the 2008-2009 winter season.

It is further **ORDERED** that MassHighway is enjoined from the storage of salt at 100 Topsfield Road, Boxford, after June 30, 2009. This injunction shall remain in effect until resolution of this matter.

It is further **ORDERED** that MassHighway is enjoined from causing replacement wells to be drilled/dug by private contractors of MassHighway on private property for private landowners in Boxford without permits in compliance with Boxford Code §202-3.

By the Court,



Merita A. Hopkins
Associate Justice

Dated: December 24, 2008