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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 06-2438 (D)

TOWN OF TOPSFIELD

Plaintiff,

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION
Defendant.

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MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S AND
DEFENDANT'S MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiff, the Town of Topsfield ("Town"), seeks judicial review, pursuant to G. L. c. 30A, § 14, of a decision by the defendant, the Department of Environmental Protection ("DEP"), to impose certain conditions on the Town's water withdrawal permit. Both parties move for judgment on the pleadings. For the following reasons, the DEP's decision is AFFIRMED.

BACKGROUND

Under the Water Management Act, G. L. c. 21G ("Chapter 21G"), water withdrawals above the threshold volume of 100,000 gallons per day require a permit from the DEP. G. L. c. 21G, §§ 4 and 7. While the DEP may raise or lower the threshold volume as it deems necessary, it may not require approval for withdrawals below the threshold volume. G. L. c. 21G, § 4. In issuing a permit, the DEP may attach "whatever conditions it deems necessary to further the purposes of [Chapter 21G] or to assure compliance with its regulations." G. L. c. 21G, § 11.

The Town draws its water supply from the Ipswich River Basin in an amount above the threshold volume. As such, it is required to obtain a permit from the DEP. Studies conducted by

the United States Geological Survey between 1999 and 2002 revealed that water withdrawals from the Ipswich River Basin had resulted in a low flow of the river, harming nearby aquatic life and wildlife and reducing the public water supply. As a result, when the Town's permit came up for review in May 2003, the DEP modified the permit to include twelve new special conditions with the goal of reducing stress on the Ipswich River. The Town objected to four of the conditions, and requested an adjudicatory hearing on the matter. The hearing took place in June 2004, and on January 19, 2006, the Administrative Magistrate issued a Recommended Final Decision upholding the special conditions, with modifications to Special Condition 1. On March 31, 2006, the Commissioner of the DEP issued a Final Decision adopting the Recommended Final Decision in its entirety. Special Condition 1 and Special Condition 7 are the subjects of the present appeal.

DISCUSSION

I. Special Condition 1

Under Special Condition 1, if in any calendar year the Town exceeds its authorized volume of water withdrawals on an average annual daily basis, it must implement a water bank by March 1 of the following year, conserving at least two gallons of water for every additional gallon of water demand added to the system. In his Recommended Final Decision, the magistrate added to Special Condition 1 the requirement that if in any year, the number of new connections to the Town's water supply exceeds two percent of existing connections, the Town must implement a water bank by March 1 of the following year, conserving at least two gallons of water for every gallon of water demand added to the system as a result of the new connections.

The Town contends that Special Condition 1 is invalid because it constitutes an unlawful tax on new users of the public water supply, arguing that it would be akin to the monetary exactions invalidated in *Emerson College v. City of Boston*, 391 Mass. 415 (1984) and *Berry v. Town of Danvers*, 34 Mass. App. Ct. 507 (1993). Special Condition 1, however, does not necessitate any sort of monetary payment, never mind one that burdens only new users of the public water supply. Rather, it allows the Town discretion in determining the means by which the water bank will be accomplished, and the options available—such as implementing town-wide conservation measures—do not violate the prohibitions of *Emerson College* and *Berry*. The Town's assertion that the DEP is forcing it to implement an illegal tax is speculative.

The Town also argues that Special Condition 1 is unsupported by substantial evidence with respect to how the water bank would work or whether the water bank is necessary, and that the DEP failed to consider the Town's interests in growth and economic development. The record demonstrates otherwise, however; and the Magistrate specifically addressed the stressed nature of the Ipswich River, as well as evidence of the Town's anticipated growth, in his Recommended Final Decision. Thus, it cannot be said that his decision to uphold Special Condition 1 with modifications was unsupported by substantial evidence.

Finally, the Town argues that the Magistrate lacked the authority to modify Special Condition 1, citing *Town of Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796 (2004). In *Town of Falmouth*, the town suspended a police officer for ten days for conduct unbecoming an officer. *Id.* at 796. The officer appealed the suspension to the Civil Service Commission, which also found conduct unbecoming an officer, but reduced the suspension to five days. *Id.* at 796-797. On appeal, the court noted that the Commission had the authority to modify a term of suspension only if it found that the penalty was based on biased or inequitable treatment of

similarly-situated employees, *id.* at 800-801, and that it was otherwise beyond the Commission's authority to determine the appropriate length of the suspension. *Id.* at 797.

The present case is not comparable. While in *Falmouth*, the Civil Service Commission had the power to modify the town's decision only if it found biased or inequitable treatment, here, the Magistrate's decision was not so limited. Pursuant to 310 C.M.R. § 1.10 (n)(14)(a), the Magistrate's recommended decision "should include findings of fact, conclusions of law and recommendations on issues necessary to the decision." Nowhere does the regulation limit the scope of the Magistrate's review to a mere acceptance or rejection of the subject matter in dispute. In addition, when the DEP issues a Final Decision, it "may adopt, modify, or reject a recommended decision, with a statement of reasons." 310 C.M.R. § 1.10 (n)(14)(b). In other words, it was free to accept or reject the Magistrate's recommendations. See e.g., *Waisbren v. Bd. of Registration in Medicine*, 418 Mass. 756, 757-759 (1994). Here, the Magistrate made recommendations, and the DEP adopted them, as permitted by the regulations. There was no error.

II. Special Condition 7

The disputed portion of Special Condition 7, "Performance Standard for Restricting the Use of Unregulated Irrigation Wells," provides:

The Department has been informed that within the Ipswich River Basin there has been an increase in the number of wells that are not subject to regulation under the Water Management Act and are used in whole or in part for irrigation purposes (hereinafter "unregulated irrigation wells"). To avoid a further increase in the number of such wells, the Department determined that because of the stressed nature of the Ipswich River, it is appropriate that the communities located in the Ipswich River Basin make the use of unregulated irrigation wells subject to the restrictions on nonessential outside water use that are triggered by streamflow thresholds, that are required by this Modified Permit, and that apply to customers of the public water system.

The Town argues that Special Condition 7 constitutes an attempt by the DEP to accomplish indirectly what it cannot do directly. The Town reasons that because the permitting and registration requirements of G. L. c. 21G, §§ 5 and 7 apply only to water withdrawals above the threshold amount, the DEP lacks the authority to regulate water withdrawals below the threshold amounts. Because the DEP lacks the power to regulate these smaller withdrawals, the Town argues, it cannot order the Town to do so in its place.

After reviewing the language of Chapter 21G and the case law regarding the authority of administrative agencies, the court concludes that Special Condition 7 is valid. The withdrawal volume threshold of G. L. c. 21G, § 4 applies only to registration and permit requirements. The language of this section does not, as the Town contends, exempt water withdrawals below the threshold amount from DEP regulation. Indeed, Chapter 21G provides the broad directive that the DEP:

shall cooperate in the planning, establishment and management of programs to assess the uses of water in the commonwealth and to plan for future water needs. . . . [and] adopt such regulations as it deems necessary to carry out the purpose of this chapter, establishing a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses.

G. L. c. 21G, § 3. Additionally, G. L. c. 21G, § 11 specifically allows the DEP to “attach to any permit whatever conditions it deems necessary to further the purposes of [Chapter 21G] or to assure compliance with its regulations.”

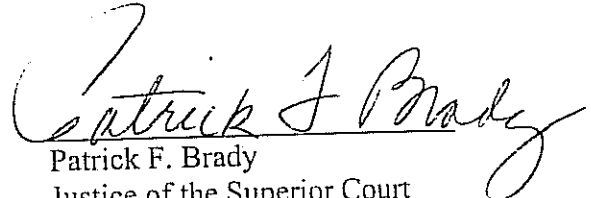
Thus, the DEP had the authority to impose Special Condition 7 not only under the language of G. L. c. 21G, § 11, but also because it furthers the goals of Chapter 21G, namely, that of managing the Commonwealth’s water. “Where a grant of power is expressly conferred

by statute upon an administrative officer or board . . . they in the absence of some statutory limitation have authority to employ all ordinary means reasonably necessary for the full exercise of the power and for the faithful performance of the duty.” *Bureau of Old Age Assistance of Natick v. Commissioner of Pub. Welfare*, 326 Mass. 121, 124 (1950). The fact that the statute contains specific language regarding permit requirements for some water withdrawals does not invalidate the DEP’s authority to regulate other water sources and withdrawals. See *Grocery Mfrs. of America, Inc. v. Dept. of Public Health*, 379 Mass. 70, 76 (1979) (“The fact that various sections of [the statute] grant the department authority to prescribe regulations in great detail on particular subjects does not limit the department’s authority to deal with other matters under more general statutory guidelines. Specific statutory authority to act in a particular respect does not bar consistent action under general statutory authority.”).

The decision to implement Special Condition 7 was supported by substantial evidence. The language of the condition contains an explanation as to why it was necessary, specifically, because of the increase in the number of private irrigation wells in the Town, coupled with “the stressed nature of the Ipswich River.” The administrative record supports this conclusion. As the DEP explained in a letter to the Town, “The cumulative impact of [the unregulated irrigation wells] not only adversely affects the ability of the Ipswich River to function both as a viable habitat for aquatic life and a reliable source of safe drinking water, but also undermines the effort to reduce the nonessential outside water use in the Ipswich River Basin in the summer, when flows are low.” It was reasonable for the DEP to conclude, based on its experience, technical competence, specialized knowledge, and discretionary authority, G. L. c. 30A, § 14, that regulating nonessential uses of irrigation wells furthered the goals of Chapter 21G.

ORDER

For the foregoing reasons, the decision of the Department of Environmental Protection is AFFIRMED. The Town of Topsfield's Motion for Judgment on the Pleadings is DENIED, and the Department of Environmental Protection's Motion for Judgment on the Pleadings is ALLOWED.


Patrick F. Brady
Justice of the Superior Court

Dated: June 15, 2007