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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the Superior Court correctly found that the Town of Boxford Board of Health can regulate the Massachusetts Highway Department ("MassHighway") where the regulation serves an important purpose, and either would have no effect at all, or a merely negligible effect on MassHighway's ability to fulfill its essential government function?
- II. Whether the Superior Court correctly denied the Commonwealth's Motion to Dismiss as to the Town's claim against MassHighway for a violation of G.L. c.214, §7A?
- III. Whether the Superior Court correctly denied the Commonwealth's Motion to Dismiss as to the Town's claim against the Massachusetts Department of Environmental Protection in the nature of mandamus?

STATEMENT OF THE CASE

This is an enforcement action by the Town of Boxford (the "Town"), by and through its Board of Health (the "Board"), against MassHighway arising out of MassHighway's operation of a salt storage facility ("Salt Shed") located at 100 Topsfield Road, Boxford, Massachusetts. MassHighway's operation of the Salt Shed has resulted in the release of salt into the environment and specifically into the groundwater aquifer and private drinking water wells in and around the Salt Shed. Appendix 18-19 ("A.18-19").

MassHighway's release of salt into the environment has

resulted in the contamination of at least thirty (30) private drinking water wells in the residential areas surrounding the Salt Shed. (A.18, 33-34). The contamination is in the form of dangerously elevated levels of sodium, chloride, calcium and manganese. (A.118). By MassHighway's own admission, it is at fault for the contamination of the private drinking water wells. (A.18, 33-34). This issue is especially significant because there is no public water supply in the Town. (A.19).

In light of MassHighway's release of salt into private drinking water wells in the surrounding residential areas (A.18, 33-34), the Town repeatedly requested assistance from MassHighway, as well as the Massachusetts Department of Environmental Protection ("DEP") and the Governor's office. (A.20). After years of effort on the part of the Town, no resolution was reached. Id. Instead of taking actions to eliminate the discharge of salt into the residents' drinking water supply, MassHighway engaged in a program of replacing contaminated wells as a way of settling disputes with private parties. (A.20-21). In undertaking such well-replacement, however, MassHighway refused to comply with the Board of

Health's Private Water Supply Regulations, Boxford Code §202-3, which set forth minimum standards for the installation of private drinking water wells. (A.21-22, 67-74).

Therefore, on November 1, 2008, the Board, acting pursuant to its authority in G.L. c. 111, §122, issued a Cease and Desist Order ("Order"), ordering MassHighway to cease and desist all operations at the Salt Shed within seven days of receipt of the order. (A.96). After receiving the Order, MassHighway indicated to the Town that it would not cease operations at the Salt Shed in adherence with the Order (A.101-102), and in fact, MassHighway continued to conduct operations at the Salt Shed on December 1 and 2, 2008. (A.98-99).

In response to MassHighway's blatant disregard of the Order, the Town took two courses of action on December 3, 2008. First, the Board issued a condemnation order for the Salt Shed, and arranged for the placement of jersey barriers on Topsfield Road, to prevent the MassHighway trucks from entering or exiting the Salt Shed.¹ (A.167). Also on December 3,

¹The barriers were arranged by the Town so as to allow personal vehicles, other than salt trucks, to enter and exit the Salt Shed property. (A. 165).

2009, the Town filed its Verified Complaint, Motion for a Preliminary Injunction and Motion for a Short Order of Notice. (A.3-4). In its Complaint, the Town named MassHighway and DEP as defendants and sought enforcement of the Order. (A.16-30). The Town also sought injunctive relief pursuant to G.L. c.214, §7A, and relief for violations of the Town's Private Water Supply Regulations by MassHighway. Id. Additionally, the Town brought an action against DEP seeking relief in the nature of mandamus to require DEP to institute an action against MassHighway pursuant to G.L. c.85, §7A. Id.

Thereafter, on December 4, 2008, MassHighway filed its Complaint and Motion for a Temporary Restraining Order, seeking the removal of the jersey barriers and requesting that the Court order that the Town is restrained from directly or indirectly interfering with or attempting to exert authority over MassHighway at the Salt Shed. (A.103-114). The Court granted MassHighways' Motion for Temporary Restraining Order, to the extent that the Town was ordered to remove the jersey barriers. (A.114-115).

The cases were consolidated (A.4), and a hearing was held on the parties' Motions for Preliminary

Injunction on December 9, 2008, and the matter was taken under advisement. (A.4). The Superior Court (Hopkins, J.) issued its Memorandum of Decision and Order on the Motions for Preliminary Injunction on December 24, 2008. (A.117-126). In Ruling on the Parties' Motions, the Superior Court found that the Town had the legal authority to regulate MassHighway's operations at the Salt Shed and that the Town was likely to succeed on the merits of its complaint. Id. Based on these findings, the Court issued a Preliminary Injunction prohibiting the storage of salt at the Salt Shed after June 30, 2009. Id. Because MassHighway had already committed resources to the Salt Shed for the 2008-2009 winter season, however, the Superior Court allowed MassHighway to conduct de-icing operations at the Salt Shed during the 2008-2009 winter season. Id. The Superior Court further enjoined MassHighway from causing replacement wells to be drilled/dug on private landowner's property without permits in compliance with the Town's Private Water Supply Regulations, Boxford Code §202-3. Id.

Subsequently the Commonwealth filed a Motion for Reconsideration of the Court's preliminary injunction decision (A.195), which the Town opposed (A.221), and

was denied without hearing by the Court on March 4, 2009. (A.233). The Commonwealth did not appeal pursuant to G.L. c.231, §118.

On February 2, 2009, the Commonwealth filed its Motion to Dismiss the Town's Complaint, along with the Town's Opposition. (A.127, 181). Oral argument on the Motion to Dismiss was scheduled for, and held on, June 11, 2009 and the matter was taken under advisement. (A.5). On August 27, 2009, the Court (Tuttman, J.) issued its Memorandum of Decision and Order on Defendants' Motion to Dismiss, which was docketed on September 1, 2009, denying the Motion to Dismiss. (A.7-15). In denying the Commonwealth's Motion, the Superior Court held that sovereign immunity did not present a bar to the Town's Complaint because MassHighway is not exempt from municipal regulation pursuant to the Doctrine of Essential Governmental Functions. Id. Furthermore, the Court held that the Town presented sufficient facts to state a claim upon which relief can be granted as to its claim pursuant to G.L. c.214, §7A and its request for relief in the nature of mandamus against DEP. Id.

The Commonwealth entered its Notice of Appeal on September 30, 2009. (A.6).

STATEMENT OF THE FACTS

MassHighway owns and operates a salt storage facility ("Salt Shed") located at 100 Topsfield Road, Boxford, Massachusetts. (A.9, 18). MassHighway uses the Salt Shed for the storage of sodium chloride, calcium chloride, chemically treated abrasives and/or other chemicals used for the removal of snow or ice on highways (hereinafter collectively referred-to as "salt"). Id. The Salt Shed is operated for purposes of storing salt and loading salt trucks for use in treating road surfaces along an eight-mile stretch of Interstate 95, with operations additionally taking place at a staging area in and around the Salt Shed. Id.

MassHighway's operations at the Salt Shed have resulted in the release of salt into the environment and specifically into the groundwater aquifer and private drinking water wells in and around the Salt Shed. (A.18-19). Over the past ten years, MassHighway's release of salt into the environment has resulted in contamination of at least thirty (30) private drinking water wells in the residential areas surrounding the Salt Shed. (A.18, 33-34). The contamination is in the form of dangerously elevated

levels of sodium, chloride, calcium and manganese.

(A.118). By MassHighway's own admission, it is at fault for the contamination of the private drinking water wells. Id. This issue is especially significant because there is no public water supply in the Town. (A.19).

The contamination has made the water in the wells unsafe, undrinkable and corrosive to pipes and household appliances. Id. As a result of the contamination, affected residents have had to bear unfair health and financial burdens. Id. These have included skin dryness, eye irritation and the accelerated deterioration of plumbing fixtures and appliances. (A.118). MassHighway has even had to provide its personnel working at the Salt Shed with bottled water after determining that its own drinking water well on the Salt Shed property was contaminated. (A.19, 41).

In response to complaints by residents, MassHighway has undertaken the installation of replacement wells on certain properties. (A.21, 64-65). However, MassHighway, as the entity responsible for the well replacements, has refused to comply with the minimum standards for installation of private

drinking water wells, as codified in the Boxford Code §202-3, the Private Water Supply Regulations. (A.21-22, 67-74). The out-of-compliance replacement wells have caused environmental damage, and have also become contaminated, as they draw from the very groundwater aquifer which has been impacted by the release of salt from the Salt Shed. (A.22, 67-68, 76-79).

The Town has attempted to work with MassHighway but has only received proposals for improvements, with no follow-through, and merely cursory acknowledgement of its concerns.² (A.20-21). As a result of a lack of improvements to the Salt Shed and MassHighway's operations at the site, the Town requested that MassHighway relocate the Salt Shed and the operations at the salt shed to another location. (A.20-21, 43-44). Although MassHighway owns numerous properties in the area, MassHighway has refused to relocate the Salt Shed. (A.21).

Additionally, the Town sought assistance from DEP and requested that DEP take enforcement action pursuant to G.L. c.85, §7A, which authorizes DEP to issue regulations as to place or manner of storage of

²After this litigation was initiated by the Town, MassHighway applied to the Town's Conservation Commission for an Order of Conditions to build a new Salt Shed. The application was denied and the denial is currently under appeal.

sodium chloride and other deicing chemicals, and by specific order, in a particular case regulate the place where such chemicals may be used. (A.23, 90). DEP did not issue a decision finding one way or the other as to whether to regulate where MassHighway can store road salt in connection with the Salt Shed, under G.L. c.85, §7A. (A.24, 92). Rather, DEP responded that without regulations in place to address private well road salt contamination, it could not take any action. Id.

Because it was unable to resolve this matter with MassHighway and DEP, the Board issued a Cease and Desist Order in accordance with G.L. c.111, §122, on November 21, 2008, ordering MassHighway to cease and desist all operations at the Salt Shed within seven days of the receipt of the Order. (A.24, 96). MassHighway disregarded the Order and continued conducting operations at the Salt Shed on December 1, 2008 and December 2, 2008. (A. 24, 98-99). MassHighway also expressed in writing an intent not to comply with the Order. (A. 24-25, 101-102).

ARGUMENT

I. Standard of Review for Denial of Motion to Dismiss

The Commonwealth brought its motion to dismiss under Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974), claiming a failure to state a claim upon which relief could be granted.³

This Court reviews a lower court's decision on a motion to dismiss under rule 12(b)(6) de novo. Curtis v. Herb Chambers I-95, Inc., 75 Mass.App.Ct. 662, 666 (2009) (citing Okerman v. VA Software Corp., 69 Mass.App.Ct. 771, 774 (2007)). That is, the Appeals Court applies the same standard for reviewing the sufficiency of a Complaint as applied by the Superior Court. Curtis, 75 Mass.App.Ct. at 666. In reviewing the sufficiency of a complaint, "the allegations of the complaint, as well as such inferences that may be

³The Commonwealth originally asserted in its Motion to Dismiss that it was also brought pursuant to Mass.R.Civ.P. 12(b)(1). However, in its brief, the Commonwealth failed to argue that any of the Town's claims should be dismissed pursuant to Mass.R.Civ.P. 12(b)(1). Thus, the Commonwealth has waived its argument that the Town's Complaint should be dismissed for lack of subject matter jurisdiction. Mass. R.A.P. 16(a)(4) ("The appellate court need not pass upon any questions or issues not argued in the brief."); See, for example, Grassi Design Group, Inc. v. Bank of America, N.A., 74 Mass.App.Ct. 456, 465 (2009); See also Zisk v. Quincy Hosp., 64 Mass.App.Ct. 517, 518, n.4 (2005). Indeed, the Commonwealth cannot make any such argument because the Superior Court clearly has subject matter jurisdiction over the Town's claims under the following statutes: G.L. c.111, § 187; G.L. c.214, § 1; G.L. c.214, § 7A; and G.L. c.249, § 5.

drawn therefrom in the plaintiff's favor, are to be taken as true." Iannacchino v. Ford Motor Co., 451 Mass. 623, 625, n. 7 (2008) (quoting Nader v. Citron, 372 Mass. 96, 98 (1977)); See also Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998). Assuming that all the facts in the Complaint are true, the plaintiff's factual allegations must be enough to raise a right to relief about the speculative level. Iannacchino, 451 Mass. at 636. "A motion to dismiss under rule 12(b)(6) does not necessarily lie where the complaint merely fails to plead an element of a cause of action." Schinkel v. Maxi-Holding, Inc., 30 Mass.App.Ct. 41, 51 (1991). Additionally, "the court is not to consider the unlikelihood of the plaintiff's ability to produce evidence to support otherwise legally sufficient complaint allegations, however improbable appear the facts alleged. . . ." HTA Limited Partnership v. Massachusetts Turnpike Authority, 51 Mass.App.Ct. 449, 451 (2001).

II. The Superior Court Correctly Found that MassHighway is Not Immune From Regulation by the Town

In Count I of the complaint, the Town brings a claim to enforce the Town's Cease and Desist Order pursuant to G.L. c.111, §122. In Count III, the Town

brings an action to enjoin violations of the Town's Private Water Supply Regulations. On appeal, the Commonwealth argues that the Superior Court erred in failing to dismiss these claims on the grounds that the Commonwealth is immune from such claims under the doctrine of Sovereign Immunity. MassHighway's reliance on the doctrine of sovereign immunity in defense of these claims must fail because, as set forth in greater detail below, such claims, which seek to enforce a local bylaw, regulation or order as to an activity conducted by a state agency, are not subject to the doctrine of sovereign immunity, but rather are governed by the "Doctrine of Essential Government Function." Greater Lawrence Sanitary District v. Town of North Andover, 439 Mass. 16, 22 (2003); Mass. Bay Trans. Authority v. City of Somerville, 451 Mass. 85, 86 (2008).

A. The Superior Court Correctly Applied the Doctrine of Essential Government Function to This Case

Pursuant to the Doctrine of Essential Governmental Function, municipalities may regulate entities or agencies created by the Legislature, as long as such regulation does not interfere with the entity's ability to fulfill its essential governmental

purposes and has only a negligible effect on its operations.⁴ Greater Lawrence Sanitary District, 439 Mass. at 23. "This does not mean, however, that the legislatively created entity has absolute immunity from all local regulation. It remains subject to regulations, including antinuisance regulations, that do not interfere with its ability to fulfill its essential governmental purposes and have only a negligible effect on its operations" Id. (emphasis supplied). The Supreme Judicial Court recently reaffirmed this holding. See, Mass. Bay Trans. Authority, 451 Mass. at 86.

Whether the disputed regulation interferes with a state agency's ability to fulfill its legislative mandate is a question of fact that cannot be resolved through a motion to dismiss. Greater Lawrence Sanitary District, 439 Mass. at 23 (Superior Court's decision to grant summary judgment reversed because there were questions of fact regarding the assertion of interference with essential government functions).

In this matter, as will be described in detail in Subsections C and D hereof, the Superior Court

⁴ By statute, MassHighway's essential governmental purpose is to "administer the design, construction, operation and maintenance of the roads and bridges of the Commonwealth." G.L. c.16, §1(a)(1).

correctly applied the Doctrine of Essential Government function to the facts of this case. Therefore, the Motion to Dismiss was property denied.

B. The Doctrine of Sovereign Immunity is Not Applicable to the Town's Enforcement Claims because Sovereign Immunity Pertains to Claims for Monetary Damages

The doctrine of sovereign immunity limits the Commonwealth's liability for monetary damages. See, e.g. Broadhurst v. Director of the Division of Employment Security, 373 Mass. 720, 722-23 (1977) (court cannot award costs against Commonwealth in civil action absent specific authorization). The purpose of sovereign immunity is to "protect the public treasury against money judgments." Todino v. Town of Wellfleet, 448 Mass. 234, 238 (2007) (citing New Hampshire Insurance Guaranty Association v. Markem Corporation, 424 Mass. 344, 351 (1997)).

Indeed, all of the cases cited by MassHighway involve claims for the assessment of interest. DeRoche v. Mass. Commission Against Discrimination, 447 Mass. 1 (2006) (plaintiff was awarded damages under G.L. c.151B against a municipal department and brought an action to recover interest on the award); C&M Construction Company, Inc. v. Commonwealth, 396

Mass. 390 (1985) (plaintiff brought an action to recover interest on an award of damages against the Commonwealth for a contract claim); General Electric v. Commonwealth, 329 Mass. 661 (1953) (plaintiff brought an action to recover interest on an award of damages against the Commonwealth for an eminent domain claim). The doctrine of sovereign immunity does not apply to suits by municipalities to enforce local by-laws, regulations and orders, and the Supreme Judicial Court has expressly disavowed the type of blanket immunity argued by MassHighway in this case. Greater Lawrence Sanitary District, 439 Mass. at 22. Thus, the Superior Court correctly denied MassHighway's Motion to Dismiss on this basis.

In its brief, the Commonwealth argues that the issue of sovereign immunity and the issue of allowable municipal regulation of the Commonwealth's agencies are two totally separate and distinct issues. (Appellant's Brief, p.12). The Commonwealth does not dispute that a municipality can regulate an agency of the Commonwealth, but the Commonwealth still insists the Town's claims for violations of the Town's regulations are barred by sovereign immunity. Id. Acceptance of the Commonwealth's argument would amount

to abrogating the doctrine of essential government function and would overrule Greater Lawrence Sanitary District and Mass. Bay Trans. Authority, for the authority to regulate is illusory if it does not include the authority to obtain judicial enforcement. In other words, application of sovereign immunity in this case would produce the absurd result of allowing legislatively created entities to ignore local regulations without any consequences.

Therefore, the Superior Court correctly denied the Commonwealth's Motion to Dismiss on the basis that the doctrine of sovereign immunity does not bar the Town's claims, and, as will be described more fully in the following two subsections, the Superior Court correctly found that whether the relief requested by the Town interferes with MassHighway's essential government function is a question of fact to be decided a later stage of the proceedings.

C. The Superior Court Correctly Denied MassHighway's Motion to Dismiss as to the Town's Claim Pursuant to G.L. c.111, §122 and for Enforcement of the Cease and Desist Order

The Superior Court correctly denied MassHighway's Motion to Dismiss as to the Town's claim for enforcement of the Order, pursuant to G.L. c.111,

§122. Pursuant to the provisions of G.L. c.111, §122, the Town's Board of Health is required to "examine into all nuisances, sources of filth and causes of sickness within its Town ... [and] shall destroy, remove or prevent the same ..." In accordance with this statutory mandate and based on compelling evidence that MassHighway was causing sickness and harm to the environment by contaminating private drinking water wells, the Board of Health issued an order requiring MassHighway to cease and desist the injury-causing action.

The order is valid on its face, and nothing in MassHighway's enabling legislation evidences a legislative intent to preclude enforcement of such public health and safety measures. By statute, MassHighway's essential governmental purpose is to "administer the design, construction, operation and maintenance of the roads and bridges of the Commonwealth." G.L. c.16, §1(a)(1). Nothing in that statute permits MassHighway to create a public nuisance by causing harm to the environment and contaminating drinking water wells, and nothing requires that MassHighway maintain a Salt Shed at this particular location. The Superior Court correctly

found that whether, and to what extent, enforcement of the order interferes with MassHighway's ability to fulfill its essential governmental function or has more than a negligible effect on its operations, are questions of fact that cannot be decided at this stage of the proceedings. Greater Lawrence Sanitary District, 439 Mass. At 23. Therefore, the Motion to Dismiss was properly denied.

D. The Superior Court Correctly Denied MassHighway's Motion to Dismiss as to the Town's Claim Pursuant to G.L. c.111, §31 and for Violation of the Town's Private Water Supply Regulations

The Superior Court also correctly denied MassHighway's Motion to Dismiss as to the Town's claim for enforcement of its Private Water Supply Regulations ("Regulations"), pursuant to G.L. c.111, §31. The Board enacted the Regulations pursuant to its statutory authority under G.L. c.111, §31, and brought this action to enforce those regulations. The Regulations are presumed to be valid by the court and MassHighway has not argued otherwise. The Legislature has not expressly exempted MassHighway from local regulation regarding the installation of wells on private property. Indeed, MassHighway's enabling legislation simply authorizes it to maintain roads and

bridges, it says nothing about the installation of private wells. The Superior Court correctly found that whether, and to what extent, the application of the Regulations to MassHighway's installation of new wells as replacements for those damaged by the actions of MassHighway interferes with MassHighway's ability to fulfill its essential governmental purposes, or has more than a negligible effect on its operations, are questions of fact that cannot be decided at this stage of the proceedings. Id.

III. The Superior Court Correctly Denied the Commonwealth's Motion to Dismiss as to the Town's Claim Against MassHighway for a Violation of G.L. c.214, §7A

Count II of the Town's Verified Complaint brings a claim pursuant to G.L. c.214, §7A, which allows the Court to restrain a person or governmental entity which is causing damage to the environment. The Superior Court correctly denied the Commonwealth's Motion to Dismiss as to this claim because a plain reading of the Town's Complaint establishes that the Town has alleged sufficient facts to establish its right to equitable relief under the statute.

To obtain equitable relief pursuant to G.L. c. 214, §7A, the Town must show (i) that MassHighway is

causing or is about to cause damage to the environment, and (ii) that such damage was a violation of a statute whose major purpose is to prevent or minimize damage to the environment. Boston Investments Limited v. Secretary of Environmental Affairs, 35 Mass.App.Ct. 391, 395 (1993) (citing, Wellfleet v. Glaze, 403 Mass. 79, 83 (1988)). The Town's complaint alleges sufficient facts to establish both requirements.

As to the first requirement, the Town has clearly alleged that MassHighway is causing or is about to cause damage to the environment. (A.18). MassHighway's operations at the Salt Shed have resulted in the release of salt into the environment and specifically into the groundwater aquifer in and around the Salt Shed. Id. The environmental harm is amply demonstrated by the contamination of at least thirty (30) private drinking water wells in the area. (A.19). Because MassHighway's response to this environmental harm has been inadequate, salt will continue to be released into the environment as long as MassHighway's operations continue at the Salt Shed. (A.16-30).

As to the second requirement, MassHighway violated G.L. c. 111, §122, thus, giving rise to the threat of imminent present and future harm to the environment. As previously discussed, G.L. c.111, §122 requires the Board of Health to "examine into all nuisances, sources of filth and causes of sickness within its Town ... [and] [to] destroy, remove or prevent the same ..." Pursuant to the statute, the Board of Health is authorized to issue orders requiring property owners to abate such nuisances. In this instance, based on the above-stated evidence of environmental harm, the Board of Health issued an order prohibiting MassHighway from storing salt at the Salt Shed. MassHighway refused to comply with that order. Therefore, MassHighway violated G.L. c. 111, §122.

Finally, the major purpose of the statute is to prevent the type of environmental harm alleged in the complaint. By its very terms, G.L. c. 111, §122 is intended to prevent public nuisances. "A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." Connerty v. Metropolitan District Commission, 398 Mass. 140

(1986). As found by the Superior Court, the release of salt into the environment, resulting in the contamination of at least thirty (30) drinking water wells clearly qualifies as a public nuisance. Anderson v. W.R. Grace & Co., 628 F.Supp. 1219, 1232-1233 (D.Mass. 1986) (contamination of groundwater constitutes a public nuisance because the right to be free of contamination to a water supply is a right common to the general public); Nassr v. Commonwealth, 394 Mass. 767 (1985) (property owner liable for public nuisance for pouring waste on ground which posed risk of groundwater contamination). Therefore, by violating the Board of Health's cease and desist order, MassHighway violated a statute whose major purpose is to prevent harm to the environment. Therefore, the Superior Court correctly denied MassHighway's Motion to Dismiss as to the Town's G.L. c. 214, §7A claim for injunctive relief.

In its brief, the Commonwealth argues that recovery in public nuisance cannot be allowed against a public entity. This argument, however, ignores the statutory authority conferred upon the Town to seek injunctive relief pursuant to G.L. c. 214, §7A. Indeed, the statute specifically defines the term

"person" to include any administrative agency of the Commonwealth. Moreover, although the courts have not previously allowed a common-law public nuisance claim to stand against a public entity, see, e.g., Hull v. Massachusetts Port Authority, 441 Mass. 508 (2004), it does not appear that this Court has been presented with a case like the instant case where it is alleged that the public entity's actions go beyond the entity's essential governmental function. Therefore, MassHighway's public nuisance argument is misplaced, and the Motion to Dismiss was properly denied.

IV. The Superior Court Correctly Denied the Commonwealth's Motion to Dismiss as to the Town's Claim Against DEP in the Nature of Mandamus

A. The Superior Court Correctly Found that the Town's Request for Relief in the Nature of Mandamus is Not Barred by Sovereign Immunity

The Superior Court correctly found that "relief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform." Lutheran Serv. Ass'n of New England, Inc. v. Metropolitan Dist. Comm'n, 397 Mass. 341, 344 (1986). Therefore, by the very definition of a mandamus action, the Commonwealth is subject to such an action, and a claim of sovereign immunity is entirely misplaced.

B. The Superior Court Correctly Found that the Town can Seek to Compel DEP to Exercise its Discretion

In its brief, the Commonwealth argues that the Town is using mandamus to compel a discretionary decision by DEP. However, the Superior Court correctly found that it is not the case that the Town is seeking to compel a discretionary decision, rather, the Town is asking the Court to require DEP to perform a duty it is obligated by law to perform.

It is well-settled that mandamus is an appropriate remedy "where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer." Town of Concord v. Attorney General, 336 Mass. 17, 27 (1957). Thus, where the enforcement of a state law is the direct responsibility of a particular agency, mandamus is available to compel it to perform its duties. O'Donnell v. Board of Appeals of Billerica, 349 Mass. 324, 327 (1965). Where an element of discretion is involved, mandamus can compel an agency to make a decision, but it cannot direct what decision shall be made. Liggett Drug Co. v. Board of Licensing

Com'rs of City of North Adams, 296 Mass. 41, 44
(1936).

In its Complaint, the Town is seeking a writ of mandamus to compel DEP to examine the activities at the Salt Shed and determine whether and to what extent such activities should be regulated. Under G.L. c.85, §7A, DEP is required to regulate the place where, and manner in which, sodium chloride, calcium chloride or chemically treated abrasives or other chemicals used for the removal of snow or ice on roads are stored. It is within DEP's discretion to issue such regulations; however, DEP is obligated by law to evaluate and decide whether, in each situation, to regulate the storage of such chemicals.

The facts alleged in the Complaint demonstrate that the Town requested that DEP take enforcement action with respect to the contamination from the Salt Shed and DEP refused to do so. (A.23-24, 36-37, 87-94). The Town is not asking for a particular result. It is simply asking the Court to require DEP to stop ignoring this situation, and undertake its statutory obligation. Therefore, mandamus is appropriate and the Motion to Dismiss was properly denied.

C. DEP's Claim in its Brief that it Has Already
Complied with G.L. c.85, §7A Must Fail
Because the Exhibit it Cites to is
Insufficient to Satisfy it's Burden

The Commonwealth argues in its brief that even if the Town could compel DEP to act pursuant to G.L. c.85, §7A, DEP has already investigated the Salt Shed, pursuant to G.L. c.85, §7A. (Appellant's Brief, p. 24). DEP asserts that included as part of the record is evidence of this fact, and therefore, the Board's request for relief is moot. Id. However, the evidence the Commonwealth refers to, found at Appendix 161-163, is an exhibit which was attached to the Commonwealth's Motion to Dismiss, and along with other exhibits, introduced to the Court for the very first time as an exhibit to that motion. (A. 127-180).

The Superior Court correctly declined to consider the exhibits attached to the Commonwealth's Motion to Dismiss in rendering its decision. See Memorandum of Decision and Order on Defendant's Motion to Dismiss, p. 4, FN. 10. It is well-settled that to determine whether the plaintiff has stated a claim upon which relief can be granted, the court looks exclusively at the four corners of the complaint. Epstein v. Seigal, 396 Mass. 278, 279 (1985). Generally, matters outside

the pleadings may only be considered if the Motion is treated as a motion for summary judgment and in such a case, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Mass.R.Civ.P. 12(b); Stop & Shop Companies, Inc. v. Fisher, 387 Mass. 889, 892 (1983).

In this matter, although the Town had propounded discovery upon the Commonwealth, the Commonwealth had not responded at the time of the filing of the Motion and Opposition. (A.186). Therefore, the Court correctly declined to treat this motion as one for summary judgment as discovery was ongoing, and the Court correctly declined to consider materials outside of the pleadings.

In any event, the exhibit the Commonwealth relies on is insufficient to justify dismissal of the Town's mandamus claim at this stage of the proceedings. Specifically, the Commonwealth relies on a letter from the Deputy Commissioner for Policy and Planning of DEP, to the state legislative representatives for the Town, dated September 25, 2008. (A.162-163). In this letter, it is alleged that DEP inspected the Salt Shed and the Salt Shed was observed to be in compliance

with G.L. c.85, §7A. Id. No information is provided as to who conducted the inspection, when the inspection was conducted or what the inspection entailed. Id. The insufficiencies of this letter present questions of fact as to whether DEP has complied with G.L. c.85, §7A, which would need to be addressed at later stage in these proceedings.

Furthermore, the letter contains factual inaccuracies which call into question the validity of any statements made in the letter. The letter states the materials at the Salt Shed are stored in a solid frame storage shed, on an impervious base. (A.163). That assertion is directly contradicted by the observations of the Chief Engineer of MassHighway, whose affidavit was submitted in support of MassHighway's Motion for a Preliminary Injunction, who stated that the salt is stored on an asphalt floor that is not impervious, and the Salt Shed is subject to damage due to timber frame. (A.120). Additionally, the photographs submitted by MassHighway in support of its Motion for Preliminary Injunction, and then again in support of its Motion to Dismiss (although not considered by the Court in deciding the Motion to Dismiss), show the Salt Shed sitting on

cracked asphalt, and wooden walls of the Salt Shed with salt seeping out of the shed. (A.120, 154-159). The Superior Court (Hopkins, J.) noted these contradictions when issuing the December 24, 2008 Preliminary Injunction.

The September 25, 2008 letter from DEP is further contradicted by an earlier letter to the Town from DEP in response to the Town's request that DEP act pursuant to G.L. c.85, §7A. (A.92). In that correspondence, sent by the Director of Watershed Management Bureau of Resource Protection of DEP, DEP stated that without regulations in place to address private well road salt contamination, it could not take any action. Id.

These factual contradictions clearly demonstrate that it is inappropriate to resolve this claim through a motion to dismiss. Therefore, because the Town has stated a claim upon which relief can be granted pursuant to G.L. c.249, §5 against DEP, the Motion to Dismiss was properly denied.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

DEFENDANTS-APPELLEES,



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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
ESCV NO. 08-2331

TOWN OF BOXFORD¹

vs.

MASSACHUSETTS HIGHWAY DEPARTMENT & another²

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION TO DISMISS

The Town of Boxford (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) (collectively, the defendants). Boxford alleges that MassHighway's operation of a salt storage facility (the Facility) in Boxford resulted in a release of salt into the environment and contamination of the groundwater aquifer and private drinking water wells in and around the location of the Facility. Boxford asks the court to enjoin MassHighway from operating the Facility in a manner that is injurious to the environment and the public health, and from drilling replacement wells on private land without permits from the Board. It also requests a writ of mandamus to require DEP to institute an enforcement action against MassHighway for violations of G. L. c. 85, § 7A.³ The defendants now move, pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss the complaint for lack

¹ By and through its Board of Health
² Massachusetts Department of Environmental Protection
³ Specifically, Boxford's Verified Complaint alleges that MassHighway's actions violated the following statutory provisions: G. L. c. 111, § 122 (Count I); G. L. c. 214, § 7A (Count II); G. L. c. 111, § 31; and Boxford Code §202-3 (Count III). Additionally, Boxford seeks relief in the nature of mandamus against DEP pursuant to G. L. c. 249, § 5 (Count IV).

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of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. After hearing, for the reasons set forth below, the defendants' Motion to Dismiss is **DENIED**.

BACKGROUND

The Facility, located at 100 Topsfield Road in Boxford, is owned and operated by MassHighway. It stores sodium chloride, calcium chloride, and other chemicals (collectively, salt) used for the removal of snow and ice on highways. The Facility also serves as a staging point for de-icing operations along certain portions of major interstate and state highways.

Boxford has no public water supply and its residents use private wells for drinking water. Testing of such wells in the area of the Facility revealed elevated levels of sodium, chloride, calcium, and manganese. According to Boxford, the Facility's operations resulted in the release of salt into the groundwater aquifer and the private water wells in and around the Facility. The contamination is causing health problems among Boxford's population, as well as corrosion of pipes and household appliances.⁴

When the water contamination was initially discovered, Boxford and MassHighway attempted to work together to address the problems. Although it refused to relocate the Facility, MassHighway installed an addition to the salt shed building, ensuring that operations at the Facility were conducted under cover.⁵ Additionally, MassHighway has undertaken the installation of replacement wells at the private residences affected by the water contamination. MassHighway refused, however, to obtain permits for the installation of the private water wells, in violation of Boxford's Private Water Supply Regulations.⁶ The wells drilled without permits

⁴ MassHighway has admitted that it is at fault for the contamination of the private drinking water wells.

⁵ Additionally, MassHighway has indicated it intends to replace the existing salt shed building, but has not yet implemented this plan.

⁶ Codified in §202-3 of the Boxford Code

caused further environmental damage, such as destruction of trees and vegetation and routing of high volumes of contaminated water into wetlands. Moreover, the replacement wells, which draw water from the same aquifer as the contaminated wells, are also becoming contaminated.

After unsuccessful attempts to resolve the contamination issues with both MassHighway and DEP,⁷ the Board ordered MassHighway to cease and desist all of its operations out of the Facility on November 21, 2008. MassHighway responded that the Board has no authority to regulate or to issue orders concerning the Facility, and that MassHighway intends to continue to operate the Facility in furtherance of its essential governmental function to provide safe travel of the public on state highways.

On December 3, 2008, several Board members entered the Facility and installed Jersey barriers across its entrance, preventing all ingress to, and egress from, the Facility. Subsequently, MassHighway brought an action for a preliminary injunction to compel Boxford to remove the barriers and to enjoin the Board's cease and desist order (the Order). After a hearing on December 9, 2008, the two cases were consolidated.

On December 24, 2008, after a hearing on cross-motions for preliminary injunction, another justice of this court (Hopkins, J.) enjoined Boxford from attempting to exert any authority over MassHighway as it carries out its essential governmental functions at the Facility. The court also enjoined MassHighway from the storage of salt at the Facility after June 30, 2009, and from drilling replacement wells on private property without the permits required by Boxford's regulations.

⁷ The Board submitted a notice of violation and request for enforcement pursuant to G. L. c. 85, § 7A. Citing lack of authority to regulate contamination of private wells, DEP refused to pursue the enforcement action. In subsequent correspondence, the Board clarified that it was not asking DEP to regulate private wells but was asking the agency to enforce G. L. c. 85, § 7A, which prohibits the storage and/or use of salt in a manner that contaminates a groundwater supply, and grants DEP the authority to remove or remedy the contamination.

In their Motion to Dismiss, the defendants argue that Boxford's attempt to enforce its Order pursuant to G. L. c. 111, § 122,⁸ and to enjoin violations of its Private Water Supply Regulation pursuant to the Board's authority under G. L. c. 111, § 31,⁹ are barred by principles of sovereign immunity. The defendants also claim that a cause of action for public nuisance does not exist against a public entity such as MassHighway. Further, the defendants assert that Boxford's complaint fails to cite to a violation of any statute or regulation by MassHighway as required in order to bring suit under G. L. c. 214, § 7A. Finally, the defendants contend that Boxford may not seek relief in the nature of mandamus against DEP because, in addition to the sovereign immunity bar, mandamus is not appropriate to compel performance of the agency's discretionary acts.¹⁰

DISCUSSION

I. Standard of Review

To survive a motion to dismiss, a complaint must set forth the basis of the plaintiff's entitlement to relief with "more than labels and conclusions." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). While factual allegations need not be detailed, they "must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the

⁸ General Laws c. 111, § 122, grants the Board the authority to "examine into all nuisances, sources of filth and causes of sickness within its Town . . . [and] . . . destroy, remove or prevent the same"

⁹ General Laws c. 111, § 31 grants boards of health authority to "make reasonable health regulations."

¹⁰ The defendants have attached several exhibits to the Motion to Dismiss. It is well-settled that, in evaluating a Rule 12(b)(6) motion, a court considers "the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." Shaer v. Brandeis Univ., 432 Mass. 474, 477 (2000) (internal citation omitted). Where a party submits materials outside the pleadings, a Rule 12(b)(6) motion may properly be treated as a motion for summary judgment, provided that "all parties [are] given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Stop & Shop Cos., Inc. v. Fisher, 387 Mass. 889, 892 (1983) (internal citation and quotations omitted). At this stage in the proceedings, where discovery is not complete, I decline to treat the motion as one for summary judgment, and will not consider materials outside the pleadings.

complaint are true (even if doubtful in fact)” *Id.*, quoting Bell Atl. Corp., 550 U.S. at 555. At the pleading stage, Mass. R. Civ. P. 12(b)(6) requires that the complaint set forth “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief” *Id.*, quoting Bell Atl. Corp., 550 U.S. at 557.

II. Authority of the Board to Regulate MassHighway’s Activities

Generally, the Commonwealth may not “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’n Against Dis., 447 Mass 1, 12 (2006), quoting General Elec. Co. v. Com., 329 Mass. 661, 664 (1953) (alteration in original). Municipalities, however, are permitted to regulate entities or agencies created by the Legislature “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 fulfil[] its essential government function or an action ‘reasonably related’ to its ability to fulfil[] that function.” Mass. Bay Trans. Auth. v. Somerville, 451 Mass. 80, 85-86 (2008), citing Greater Lawrence Sanitary Dist. v. North Andover, 439 Mass. 16, 22 (2003). Even “where an enabling statute creates an exemption from regulation, a statutorily created entity is not necessarily exempt from all regulation,” as long as it does not interfere with the agency’s ability to perform an essential governmental function. *Id.*

In the present case, nothing in MassHighway’s enabling statute, G. L. c. 16, § 1 (a)(1), exempts a municipality from regulating the agency.¹¹ Furthermore, the Board’s Order seeking to regulate MassHighway’s activities in storing salt and drilling private wells was issued in accordance with its statutory authority under G. L. c. 111, §§ 31 and 122. The Board has

¹¹ General Laws c. 16, § 1 (a)(1), provides that MassHighway shall “administer the design, construction, operation and maintenance of the roads and bridges of the commonwealth.”

alleged sufficient facts to suggest that its regulation of MassHighway's salt storage and private well drilling practices serves an important purpose of protecting public health and preventing damage to the environment. Whether the Board's regulations have any effect on MassHighway's ability to fulfill its essential government function cannot be decided at this stage of the proceedings. MassHighway's Motion to Dismiss Boxford's complaint on sovereign immunity grounds is, therefore, denied.

III. Failure to State a Claim Upon Which Relief Can be Granted

A. Public Nuisance Claim

"A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." Connerty v. Metro. Dist. Comm'n, 398 Mass. 140, 148 (1986). In deciding whether an action in public nuisance lies, a court may consider "whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience." Sullivan v. Chief Justice of Admin. & Mgmt. for the Trial Court, 448 Mass. 15, 34 (2006) (internal citation omitted). As a matter of law, a municipality may not impose public nuisance liability on a state government entity unless it is able to show that the entity exceeded its governmental authority or violated applicable regulations. Hull v. Mass. Port Auth., 441 Mass. 508, 517 (2004). Here, the Board has alleged sufficient facts to suggest that MassHighway violated its authority to conduct de-icing operations by releasing salt into the ground aquifer and drilling private water wells in violation of Boxford's regulations. Therefore, this claim survives the Motion to Dismiss.

B. Failure to Cite a Violation of a Statute as Required by G. L. c. 214, § 7A

General Laws c. 214, § 7A provides the following:

“[T]he superior court for the county in which damage to the environment is occurring or is about to incur may, upon . . . an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law, or regulation the major purpose of which is to prevent or minimize damage to the environment.”

The defendants’ assertion that Boxford’s complaint fails to cite to the violation of any applicable authority as required by the above statute is without merit. A plain reading of the complaint indicates that Boxford seeks to enjoin violations of G. L. c. 111, § 122, which provides the Board with authority to investigate and remedy damage to the environment. Therefore, Boxford’s claim for violation of G. L. c. 214, § 7A may stand.

C. Relief in the Nature of Mandamus Against DEP

“[R]elief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform.” See Lutheran Serv. Ass’n of New England, Inc. v. Metro. Dist. Comm’n, 397 Mass. 341, 344 (1986) (internal citation omitted). An action in mandamus does not lie, however, where a party seeks to compel a public official to perform discretionary acts. Channel Fish Co. v. Boston Fish Mkt. Corp., 359 Mass. 185, 187-188 (1971).

Here, Boxford seeks to compel DEP to institute an enforcement action against MassHighway pursuant to G. L. c. 85, § 7A.¹² Although section 7A gives DEP discretion to regulate the place and manner in which chemicals are stored, such discretion can not be


¹² General Laws c. 85, § 7A, states: “[t]he department of environmental protection . . . in consultation with the department of highways, may issue regulations as to place or manner of storage of [chemicals used for the removal of snow and ice on roads] and may, by specific order, in a particular case regulate the place where such chemicals may be used for such purpose.”

exercised without inquiring into the Facility's storage practices and determining whether they subject the water supply to the risk of contamination. Boxford has alleged sufficient facts to suggest that it is not seeking to compel a discretionary decision by DEP but rather to require it to examine MassHighway's activities at the Facility and determine whether they contribute to the groundwater contamination. Moreover, DEP is not immune from an action in the nature of mandamus, as by its definition, it is an appropriate remedy against a public official's failure to perform his or her official duties according to law. This claim, therefore, also survives the Motion to Dismiss.

CONCLUSION AND ORDER

For the foregoing reasons, the Defendants' Motion to Dismiss the Plaintiff's complaint is **DENIED.**

Dated: August 27, 2009



Kathe M. Tuttmann
Justice of the Superior Court