

# Judge can't disturb decision by agency

## State court lacks MEPA authority

Environmental lawyers say a recent ruling ends more than a decade of debate over whether Superior Court judges can second-guess decisions on subject-matter jurisdiction by the secretary of the Executive Office of Energy and Environmental Affairs.

In a closely watched case that started in 2000, Superior Court Judge Bruce R. Henry held in an issue of first impression that he could not disturb the EOEEA secretary's advisory opinion that a developer was not required to file an Environmental Impact Report — or EIR — under the Massachusetts Environmental Policy Act.

The plaintiffs, who claimed the controversial project would result in increased traffic and other problems, argued that the secretary was obligated under MEPA to order the defendant developer to apply for state permits.

"If the decision had gone the other way, it would have allowed the courts to delve into the business of micro-managing the secretary's decisions about the scope of his jurisdiction under MEPA," said the developer's lawyer, Greg D. Peterson of Boston. "The plaintiffs were basically saying to the judge that he shouldn't trust the secretary to make decisions about whether or not he knows how to read his own statute and regulations."

Peterson, who practices at Tarlow, Breed, Hart and Rodgers, P.C., said the complex statute mandates anyone who



PETERSON



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### Counsel for developer

proposes a project that requires a permit or public financial assistance to file an Environmental Notification Form with the secretary to commence a review of the project's potential environmental impacts

"After all these years, lawyers can look at this case and have a much higher degree of confidence that if the secretary concludes that a project is not in MEPA jurisdiction, then that should be the end of the story," Peterson said.

Briefs in *Ten Persons of the Commonwealth, et al. v. Fellsway Development, LLC, et al.* can be found at [www.masslawyersweekly.com](http://www.masslawyersweekly.com).

### 'Dangerous circumstance'

Peterson, who handled the case with his colleague Kerry T. Ryan, said the judge's ruling reinforces the notion that MEPA was intended to create a bright-line test for developers and their counsel.

While the issue had never been decided by a Massachusetts court, Peterson said, the plaintiffs in *Fellsway* were precluded from seeking judicial review of EOEEA Secretary Ian A.

Bowles' advisory opinion based in part on the Supreme Judicial Court's 1988 *Cummings v. Secretary of the EOEEA* decision.

In *Cummings*, the SJC held in a nearly identical suit that the secretary's decision not to require an EIR was not judicially reviewable, Peterson said.

Because judges rarely involve themselves in disputes involving the statute, cases like the one decided by Henry take on added significance, said R. Jeffrey Lyman, a former MEPA director who re-wrote the agency's regulations in 1998.

"MEPA is a complex statute, and it would be a dangerous circumstance if judges believed they could substitute their judgment for that of an expert agency that takes in literally hundreds of pieces of input on many projects," he said. "So the fact that a judge has said that he is going to entrust the secretary and allow him to proceed unimpeded by second-guessing is a good thing."

Lyman, who practices at Goodwin Procter in Boston, said Henry's decision is "fully within the orbit" of long-standing caselaw under MEPA, including *Cummings*.

But plaintiffs' counsel Barry P. Fogel of Keegan Werlin in Boston, who plans to appeal, said the case is factually distinguishable from *Cummings*.

"What we are dealing with here is a challenge to a substantive legal decision by the secretary involving MEPA jurisdiction," he said. "This was not a routine discretionary decision that a project did not need to prepare an EIR, which is what was involved in

*Cummings*. So to the extent that the judge applied the holding in *Cummings* to our facts, we believe it was the wrong decision.”

Because Henry did not issue a written decision, Fogel said, it is hard to determine how the judge applied the cases and the standard of review to his clients’ complaint. He added that, while MEPA does not have a provision specifically addressing the question, several recent SJC opinions support his argument that the Superior Court has jurisdiction.

“If the Appeals Court or the SJC were to issue a decision with the same outcome [as Henry’s] on these same facts, I would expect that the court would need to establish a new legal basis that isn’t found in any of the existing cases, including *Cummings*,” Fogel said.

#### **New ruling**

In 2000, defendant Fellsway Development announced a proposal to construct the Longwood Commons project on the site of the old Boston Regional Medical Center in Stoneham.

Over time, the developer eventually planned to build a mixed-use project consisting of 405 housing units and more than 200,000 square feet of office parks in the center of the Middlesex Fells Reservation, which was owned

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— R. Jeffrey Lyman

and operated by the Department of Conservation and Recreation.

The proposal was contested by the plaintiff mayors of Melrose and Medford along with a group of 10 taxpayer citizens, who said the project would lead to increased traffic and other environmental concerns in the parkways.

For a variety of reasons, the project did not move forward for nearly eight years.

When Bowles ruled in 2008 that a complete environmental review was needed under MEPA, the developer filed a complaint in Land Court. While that suit was pending, the developer

agreed to pay \$1.8 million to the Department of Conservation and Recreation in order to carry out certain traffic improvements under the project.

The developer then withdrew the suit and sought a new legal ruling from the secretary to declare that MEPA jurisdiction no longer applied.

In June, Bowles concluded that the project was no longer subject to the jurisdiction of MEPA. He wrote in an advisory opinion that, where the project no longer required the state to pay for certain traffic improvements, his agency could not order an environmental review.

The plaintiffs responded with their Superior Court suit.

In an April 2 order, Henry dismissed their complaint with prejudice.

“The essence of the claims in this matter is that the Secretary has failed to require an EIR for the project in question and that the Commissioner and these developer defendants are complicit in that failure,” he wrote. “I am dismissing that claim for lack of subject matter jurisdiction and failure to state a claim.”

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