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LAW OF THE LAND

Supreme Judicial Court Finds MEPA Certification Arbitrary

By Deborah A. Eliason and Stephen M. Richmond

In Allen v. Boston redevelopment Authority, the Massachusetts Supreme Judicial Court recently ruled that the certification of a final Environmental Impact Report by the secretary of the Executive Office of Energy and Environmental Affairs was arbitrary and capricious.

The secretary previously certified that an EIR submitted by University Assoc. for a project that would house a Biosafety Level 4 facility in South Boston complied with the Massachusetts Environmental Policy Act.

The decision is unusual given the level of discretion typically afforded the secretary in the MEPA process. The SJC held that the secretary's certification was arbitrary and capricious for two reasons: (1) The evaluation of a worst-case pathogen release scenario was significantly incomplete because it did not analyze the likely damage to the environment that would occur;

and (2) The final EIR failed to consider alternative locations in response to a comment letter that the secretary had specifically requested that the applicant evaluate (Allen & others v. Boston Redevelopment Authority & others, 450 Mass. 242, 257-259, 2007).

In addressing the first of its rationales for overturning the secretary's decision, the court held that the scope of the EIR under Massachusetts General Laws Chapter 30, Section 62A is not limited to environmental consequences that are actual, probable or likely. Instead, the court determined that the secretary is required to ensure that where the report must evaluate a worst case scenario, the secretary has an obligation to ensure an analysis of those issues that are likely to cause damage to the environment, even if the chances of the worst-case scenario occurring are remote. The court concluded that because the nature of this type of facility is to conduct research on highly virulent and infectious pathogens, and because the facility was proposed to be located in a densely populated urban area, the likelihood that the release of a pathogen would cause environmental damage was "extraordinarily high." As the worst-case scenario evaluated by the applicant did not adequately address these environmental consequences, and this shortcoming potentially denied state agencies the opportunity for meaningful review of environmental impacts and potential mitigation measures, the court held that the EIR was significantly incomplete and that the secretary's decision to certify the EIR was therefore arbitrary and capricious and must be vacated.

With regard to the consideration of alternative geographical locations for a project, the court considered whether MEPA requires the secretary to mandate that all EIRs contain an analysis of alternative locations for a project. M.G.L. Chapter 30, Section 62B requires that an EIR contain an analysis of "reasonable alternatives" to a proposed project and their environmental consequences. In addition, the MEPA regulations provide that the EIR must ordinarily include a description and analysis of all feasible alternatives.

The court recognized that it is not clear from the statute "whether the 'reasonable alternatives' that must be considered are simply those within the proposed site … such as a different design, or whether [it] would encompass a different site location altogether." The court first held that it is within the discretion of the secretary to determine specifically what project alternatives must be included in an EIR. While not directly addressed, this presumably sanctions the discretion of the secretary to determine on a case by case basis whether an alternative location analysis will be necessary. However, in this particular case, the court determined that the secretary had instructed the applicant to include an analysis of alternative project locations in response to a comment on the draft EIR, and had then certified as complete an EIR that did not include the evaluation.

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The court therefore held that the secretary's decision to certify the EIR without the completion of the alternative location analysis was arbitrary and capricious as the EIR did not comply with the secretary's prior direction on the required content of the EIR.

Adding to the interesting nature of this case is the concurrence by Justice Cordy. He pointed out that following the remand of the matter to the secretary by the lower court for the same reasons cited by the SJC, the secretary had directed the applicant to supplement the final EIR by addressing a worst-case scenario arising from the release of a contagious pathogen, and providing an analysis of a feasible alternative location in a less-populated area. At the time the decision was issued, the supplemental final EIR was scheduled to be filed in a few months. Cordy therefore concluded that the SJC's decision was unnecessary in light of the secretary's order after remand.

Furthermore, while Cordy concurred with the majority decision, he viewed the decision as limited in scope. Cordy emphasized that the court will not substitute its discretion for that of the secretary. In his opinion, the SJC's decision does not require the secretary to direct project applicants to consider and analyze unlikely or remote contingencies and to prepare worse case scenarios as a matter of law. Nor, in his opinion, would a decision by the secretary not to require such studies be an abuse of discretion. He views the focus of the court's decision to be not on what the secretary required with regard to the consideration of alternative locations, but on the fact that the secretary approved a final EIR without those considerations being addressed.

This decision is noteworthy and raises as many questions as it answers. It will undoubtedly be up to future courts to determine the breadth of the SJC's ruling. ■