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COMMONWEALTH OF MASSACHUSETTS

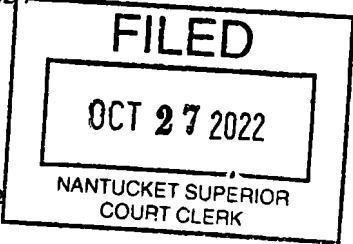
NANTUCKET, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2021-0037

THOMAS J. HUTTON & another¹

vs.

TOWN OF NANTUCKET BOARD OF HEALTH & others²



**MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

The plaintiffs, Thomas and Susan Hutton (“Plainiffs”), filed this action seeking review of a decision of the defendants, the Nantucket Board of Health (“Board”) and its members (collectively, “Defendants”), pursuant to G.L. c. 249, § 4, denying the Plaintiffs’ application for approval of an Innovative/Alternative (“I/A”) septic system on their property. The parties have filed cross-motions for judgment on the pleadings. The court held a hearing on the motions on September 22, 2022 and took the matter under advisement. For the following reasons, the Plaintiffs’ motion for judgment on the pleadings is **DENIED**, and the Defendants’ cross-motion for judgment on the pleadings is **ALLOWED**.

BACKGROUND

The Plaintiffs are the trustees of the Hutton Family Trust (the “Trust”), which owns 4 Maine Avenue in Nantucket (the “Property”). The Property is 16,000 square feet and contains a three-bedroom dwelling. The Property is located within Zone A of the Madaket Harbor Watershed Protection District (“Watershed District”), which is referenced in Nantucket Board of

¹ Susan Hutton.

² Stephen J. Visco, Malcolm W. Macnab, Meredith Lepore, James A. Cooper, and Melissa Murphy in their official capacities as members of the Nantucket Board of Health.

Health Local Regulations 49 and 51. Regulation 49 was adopted in 2015. Regulation 51 was amended to its current form in 2020.

Regulation 49 established the Madaket Tight Tank Policy. The Plaintiffs contend that Regulation 49 was never submitted to the Massachusetts Department of Environmental Protection (“MDEP”). The Defendants dispute this contention, arguing that Regulation 49 was submitted to the MDEP as part of an addendum to the Comprehensive Wastewater Management Plan (“CWMP”) prepared on behalf of the Town of Nantucket (the “Town”) by Woodard and Curran on March 27, 2015. On March 30, 2015, MDEP approved the Town’s CWMP update including the addendum that included Regulation 49. MDEP’s approval letter specifically referenced the addendum containing Regulation 49. On May 21, 2015, the Board voted to approve the same version of Regulation 49 that had been approved by the MDEP as its official Regulation 49. Thereafter, Regulation 49 was formally adopted after notice and public comment. Under Regulation 49, if a property within the Madaket Tight Tank District (“Tight Tank District”) requires an upgrade, “the property owner may be required to utilize a tight tank in lieu of a conventional Title 5 System and/or Innovative Alternative (I/A) System... ”³ Regulation 51 governs the installation of septic systems in the Watershed District.

The Property is located in the Tight Tank District, which is located in the Watershed District.⁴ An inspection of the Property’s septic system on January 18, 2013, indicated that the system was in technical failure due to insufficient separation between the system and groundwater.

³ Title 5 is a set of regulations promulgated by the MDEP which regulate septic systems in Massachusetts.

⁴ The area is sometimes referred to as being “over the bridge,” referencing Millie’s Bridge. Millie’s Bridge is located in the middle of Ames Avenue and crosses a portion of Hither Creek.

On November 4, 2020, the Nantucket Health Department sent the Plaintiffs a letter referencing Regulation 51, which requires property owners in the Watershed District whose septic systems are in technical failure to repair their system within twelve months. The letter advised that the deadline for compliance was November 15, 2021. The letter also indicated that the regulations “require installation of a [MDEP] Innovative/Alternative septic system.”⁵ The letter further stated that the system must have a nitrogen reduction of at least 19 mg/l. The letter did not reference Regulation 49 or the Tight Tank District.

The Plaintiffs’ engineer, Arthur Gasbarro, submitted an application for approval of an I/A septic system on the Property on November 10, 2020. A letter from Mr. Gasbarro accompanied the application. In the letter, Mr. Gasbarro acknowledged that the Property is located within the Tight Tank District. Mr. Gasbarro further acknowledged that the nitrogen contribution from the proposed I/A system would be 0.0475 total nitrogen per day, while a tight tank would eliminate the nitrogen contribution. The Plaintiffs also hired an expert witness from Epsilon Associates, Inc. to submit an analysis for the Board’s meeting on the proposed I/A system. The analysis showed that the proposed I/A system would result in a 20 mg/l nitrogen reduction.

Art Crowley, then a member of the Nantucket Health Department, informed Mr. Gasbarro via email on November 23, 2020, that the Property is located in the Tight Tank District and, therefore, the Property must utilize a tight tank system. Mr. Gasbarro responded via email by highlighting that Regulation 49 states only that a tight tank “may be required,” not shall be required. Mr. Crowley responded that the Board indicated it wanted every system “across the bridge” to be a tight tank and that the Plaintiffs would need the Board’s approval for the proposed I/A system.

⁵ The Nantucket Health Department sent a second letter on November 5, 2020. The second letter was nearly identical to the first, only correcting an erroneous reference to the Watershed District.

The Board described the Plaintiffs' application for an I/A system as a request for a variance from Regulation 49 on the agenda for an October 20, 2021 meeting. At the meeting, the Plaintiffs' attorneys submitted written argument and presented oral arguments. The Plaintiffs' attorneys argued that Regulation 49 could not be properly interpreted as establishing a mandatory tight tank policy in the Tight Tank District and, therefore, the Plaintiffs' proposed I/A system did not require a variance from Regulation 49. The written arguments stated that the Board had recently approved I/A systems for four other properties in the Watershed District.⁶ Also at the meeting, Mr. Gasbarro testified that the Plaintiffs objected to installing a tight tank on the Property because it requires regular monitoring and pumping, carries higher annual costs than an I/A septic system, and would prevent the Plaintiffs from expanding the dwelling located on the Property. The Board voted unanimously to deny the Plaintiffs' request for a variance from Regulation 49.

Since the adoption of Regulation 49, the Board has approved applications for tight tank systems from the owners of four properties neighboring the Plaintiffs'. In 2015, a neighbor of the Plaintiffs in the Tight Tank District installed an I/A system without seeking a variance or approval from the Board. The Board subsequently required those neighbors to remove the I/A system and install a tight tank in accordance with Regulation 49. One property in the Tight Tank District has been permitted to install an I/A system since Regulation 49's adoption. In that instance, the property owner had already begun the I/A process when Regulation 49 was adopted.

⁶ None of the properties are located in the Tight Tank District.

DISCUSSION

Review in the nature of certiorari is available of judicial or quasi-judicial proceedings where no other form of review is available and review is necessary to correct a substantial injury or injustice arising from the proceeding at issue. See *Walpole v. Secretary of the Executive Office of Env'tl. Affairs*, 405 Mass. 67, 72 (1989); *Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 117 (1984). A proceeding is quasi-judicial when it determines individual rights or interests, as opposed to political or legislative matters. See, e.g., *Warren*, 392 Mass. at 117; *Moskow v. Boston Redevelopment Auth.*, 349 Mass. 553, 570 (1965), cert. den., 382 U.S. 983 (1966); *Lucia v. Water & Sewer Comm'rs of Medford*, 332 Mass. 468, 470 (1955). Certiorari review of the Board's decision is "limited to a search for 'error of law or abuse of discretion, as measured by the arbitrary and capricious test.'" *Yerardi's Moody St. Rest. & Lounge, Inc. v. Selectmen of Randolph*, 19 Mass. App. Ct. 269, 300 (1985), quoting *Caswell v. Licensing Comm'n for Brockton*, 387 Mass. 864, 878 (1983).

As a preliminary matter, the Defendants contend that the Plaintiffs lack standing to bring the present action, contending that the Plaintiffs do not own the Property and have not shown that they may represent the Trust's interests in the Property. "A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 579 (2007), quoting *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 293 (1977). The Plaintiffs assert multiple injuries from the denial of their application to install an I/A system, including the regular monitoring and pumping a tight tank requires, the higher annual costs of a tight tank system as opposed to an I/A system, and their inability to expand the dwelling on the Property. The alleged injuries concern the installation of

a tight tank septic system on the Property. The regulatory scheme under which the Board denied the Plaintiffs' application to install an I/A system, Regulation 49, concerns the installation of tight tank systems in the area the Property is in. Therefore, the Plaintiffs have alleged injuries within the area of concern of the regulatory scheme. As such, the Plaintiffs have standing to bring this action. See *id.*

The Plaintiffs seek declaratory judgment invalidating the Board's October 20, 2021 meeting, annulling the Board's decision denying their request for a variance from Regulation 49, finding that their proposed I/A system complies with Regulation 51 and Regulation 49 cannot be validly applied, and finding that the Board violated their due process and equal protection rights with respect to Regulation 49.⁷ The Plaintiffs contend that the Board's decision was based upon errors of law, unsupported by substantial evidence, and was arbitrary and capricious.

"Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6). A decision is not based on substantial evidence if "the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary." *Doe No. 68549 v. Sex Offender Registry Bd.*, 470 Mass. 102, 109 (2014), quoting *Cobble v. Commissioner of the Dep't of Social Servs.*, 430 Mass. 385, 390-391 (1999).

The Plaintiffs first argue that Regulation 49 was not properly promulgated. Pursuant to G.L. c. 111, § 31, to properly promulgate a regulation, the Board must (1) hold and give notice of a public meeting on the regulation; (2) state at the public meeting the local conditions which exist or reasons for exceeding minimum requirements; and (3) file the regulation with the MDEP for maintenance of a central register. The Plaintiffs concede that the Defendants satisfied the

⁷ Because the court did not rely on any information exclusively contained in the affidavit of Roberto Santamaria, the Plaintiff's motion to strike the same is moot.

first two requirements. The Plaintiffs, however, contend that the Board failed to register Regulation 49 with the MDEP. To support their contention, the Plaintiffs point to an email from a MDEP employee indicating that the MDEP does not have a copy of Regulation 49 in their files. However, on March 30, 2015, the MDEP sent a letter to the Board approving the CWMP update. In the letter, the MDEP acknowledged that the CWMP update “includes an addendum describing the Madaket Tight Tank [D]istrict[,] which will allow a limited number of tight tanks in a specific area of town where no feasible options for sewage treatment and disposal exist.” The reference to the addendum and the description of the addendum establish that the MDEP received a copy of Regulation 49. The MDEP’s failure to maintain a copy of the regulation in their central register, as required by statute, does not bear on the Board’s proper promulgation of Regulation 49.

The Plaintiffs next argue that the Board violated state law and their due process rights. The Plaintiffs contend that the Board amended Regulation 49, changing its discretionary language to mandatory language, in contravention of state law and in violation of their due process rights. There is no evidence that the Board converted the language in Regulation 49 from discretionary to mandatory. In fact, in their submissions to the Board in October 2021, Plaintiffs’ counsel notes that the language of the regulation is discretionary before highlighting four occasions on which the Board permitted, in their discretion, property owners in the Watershed District to install I/A systems. Plaintiffs highlighted those four properties again in Plaintiffs’ Statement of Material Facts. As the Board has not converted the language of Regulation 49 from discretionary to mandatory, they did not do so in contravention of state law or in violation of the Plaintiffs’ due process.

Finally, the Plaintiffs contend that the Board applied Regulation 49 arbitrarily and capriciously. “A decision is not arbitrary and capricious unless there is no ground which ‘reasonable men might deem proper’ to support it.” *T.D.J. Dev. Corp. v. Conservation Comm’n of N. Andover*, 36 Mass. App. Ct. 124, 128 (1994), quoting *Cotter v. Chelsea*, 329 Mass. 314, 318 (1952). “Arbitrary and capricious action is that which is taken ‘without consideration and in disregard of facts and circumstances.’” *Hercules Chem. Co. v. Department of Env’tl. Prot.*, 76 Mass. App. Ct. 639, 643 (2010), quoting *Long v. Commissioner of Pub. Safety*, 26 Mass. App. Ct. 61, 65 (1988). “The burden is on [the Plaintiffs] to demonstrate that the Board’s decision is not reasonably related to the purpose of the authorities under which the Board acted.” *Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry*, 404 Mass. 211, 218 (1989).

The Plaintiffs’ application to install an I/A system was treated as a request for a variance from Regulation 49. The Board is permitted to adopt regulations that set forth stricter requirements than those set forth in Title 5; those stricter regulations are treated as Title 5 requirements for purposes of administration. *Tortorella v. Board of Health of Bourne*, 39 Mass. App. Ct. 277, 280, 283 (1995). “Variances from Title 5 requirements are authorized, but not required, when, ‘in [the] opinion [of the board of health] (1) the enforcement thereof would do manifest injustice; and (2) the applicant has proved that the same degree of environmental protection required under [Title 5] can be achieved without strict application of the particular provision.’” *Id.* at 281, quoting 310 Code Mass. Regs. § 15.20. The variance provision of Title 5 “gives broad discretion to the board based on the strong public interest in protecting health and the environment.” *Rosenfeld v. Board of Health*, 27 Mass. App. Ct. 621, 627 (1989).

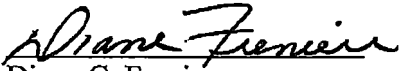
Regulation 49 provides that the owner of a property with a septic system that requires an update “may be required to utilize a tight tank in lieu of a conventional Title 5 System and/or

[I/A] System in order to reduce nutrient degradation to the Watershed, as well as provide a last resort alternative to wastewater disposal.” Under Regulation 49, “[the Board] reserves the right to require any property owner with a failed septic system, in [the Madaket Tight Tank District] to apply to the [Board] for a tight tank in lieu of a conventional or [I/A] on-site system.” The stated purpose of Regulation 49 is “to maintain and/or restrict additional effluent flows which further degrade the Watershed that is the subject of the [Massachusetts Estuaries Program] through increased nitrogen loading.” The Plaintiffs acknowledged in their submissions to the Board that a tight tank system would eliminate nitrogen contribution, while an I/A system would decrease, but not eliminate, nitrogen contribution. Eliminating the nitrogen contribution through a tight tank system best effectuates the purpose of Regulation 49. Therefore, it cannot be said that the Board’s decision denying the Plaintiffs a variance from Regulation 49 to install an I/A system was arbitrary or capricious. See *Forsyth Sch. for Dental Hygienists*, 404 Mass. at 218.

The Plaintiffs also contend that the Board acted arbitrarily because the Board acted disparately with regard to property owners on opposite sides of Hither Creek. The Plaintiffs argue that “[t]he record [] is devoid of any scientific or rational basis for this disparate treatment [of property owners on opposite sides of Hither Creek].” In fact, the CWMP Update submitted to the MDEP and as part of the Record of Proceedings in this matter indicates that “the specified area over Millie’s bridge on the far western shore of the Island,” where the Property is located, “is identified as nitrogen sensitive within the [Watershed District],” “well documented with severe physical constraints to meet Title 5,” “subjected to severe erosion on a continued basis,” and “includes parcels within the velocity zone.” These scientific findings provide a rational basis for the Board to treat property owners on opposite sides of Millie’s Bridge differently, making their doing so not arbitrary. See *Hercules Chem. Co.*, 76 Mass. App. Ct. at 643.

ORDER

For the foregoing reasons, the Plaintiffs' motion for judgment on the pleadings is **DENIED**, and the Defendants' motion for judgment on the pleadings is **ALLOWED**. The decision of the Board denying the Plaintiffs' request for a variance from Regulation 49 is **AFFIRMED**.


Diane C. Freniere
Justice of the Superior Court

Dated: October 27, 2022