

## Scott Mutch

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**From:** Stephen D. Anderson [SAnderson@AndersonKreiger.com]  
**Sent:** Monday, May 19, 2014 3:19 PM  
**To:** Mike Gowing  
**Cc:** Mark Hald; Steve Ledoux  
**Subject:** RE: Acton/GenSel - DEP regulation regarding noise  
**Attachments:** Acton/GenSel: Glass v. Town of Marblehead Bd.of Health; Acton/GenSel: D'Acci v. Cutler

Mike:

In the brief time available, I have the following preliminary answer to your question below:

### DEP's Noise Regulations

DEP's Noise Regulations are as follows:

- DEP's Air Pollution regulations define "NOISE" as "sound of sufficient intensity and/or duration as to cause or contribute to a condition of air pollution." 310 CMR 7.00 (Definitions).
- DEP's Air Pollution regulations regulate Noise as follows (310 CMR 7.10: *U Noise*):
  - (1) No person owning, leasing, or controlling a source of sound shall willfully, negligently, or through failure to provide necessary equipment, service, or maintenance or to take necessary precautions cause, suffer, allow, or permit unnecessary emissions from said source of sound that may cause noise.
  - (2) 310 CMR 7.10(1) shall pertain to, but shall not be limited to, prolonged unattended sounding of burglar alarms, construction and demolition equipment which characteristically emit sound but which may be fitted and accommodated with equipment such as enclosures to suppress sound or may be operated in a manner so as to suppress sound, suppressible and preventable industrial and commercial sources of sound, and other man-made sounds that cause noise.
  - (3) 310 CMR 7.10(1) shall not apply to sounds emitted during and associated with:
    - (a) parades, public gatherings, or sporting events, for which permits have been issued provided that said parades, public gatherings, or sporting events in one city or town do not cause noise in another city or town;
    - (b) emergency police, fire, and ambulance vehicles;
    - (c) police, fire, and civil and national defense activities;
    - (d) domestic equipment such as lawn mowers and power saws between the hours of 7:00 A.M. and 9:00 P.M.
  - (4) 310 CMR 7.10(1) is subject to the enforcement provisions specified in 310 CMR 7.52.

### Enforcement of DEP's Noise Regulations by the Board of Health

The Town's Board of Health has express authority to enforce DEP's Noise Regulations:

- DEP's regulation 310 CMR 7.52 provides that, "Any police department, fire department, or board of health official, acting within his or her jurisdictional area is hereby authorized by the Department to enforce, as provided for in M.G.L. c. 111, § 142B, any regulation in which specific reference to 310 CMR 7.52 is cited."
- General Laws c. 111, § 26, provides that cities shall establish boards of health. Among the functions of a board of health is that "[t]he board ... shall examine into all nuisances ... within its town ... which may, in its opinion, be injurious to the public health, shall destroy remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto...." G.L. c. 111, § 122.
- Since DEP's regulation 310 CMR 7.52 specifically empowers boards of health to enforce its provisions, the Superior Court has held that "the Board [of Health] was acting pursuant to lawful authority in responding to the

complaint about alleged noise from the plaintiffs' [HVAC] System." *Glass v. Town of Marblehead Bd. of Health*, 25 Mass.L.Rptr. 288, 2009 WL 903317 (Mass.Super.,2009). See attached.

- However, in the same *Marblehead* case, the Superior Court concluded that, "The Board's determination of a violation rests on the provision of 310 CMR 7.10(1) that 'No person ... shall willfully, negligently, or through failure to ... take necessary precautions cause, suffer, allow, or permit unnecessary emissions ... that may cause noise.' The minutes of the November 19th hearing contain the Board Chair's conclusion that the plaintiffs 'did not willfully create the problem.' He then added, '[B]ut it's there.' In the absence of other findings, such a conclusion does not comprise a requisite 'finding', G.L. c. 30A, § 11(8), sufficient to support the determination that the plaintiffs 'negligently, or through failure to take necessary precautions' permitted the alleged noise. Accordingly, an error of law was committed." As a result, "the Board's Order [to cease and desist from operating their residential central air conditioning system] must be annulled."

### **Enforcement of DEP's Noise Regulations by the Town**

In the alternative, the Town itself, acting through the Selectmen and the Town Manager, *may* have authority to enforce DEP's Noise Regulations:

1. Under G.L. c. 214, s. 7A, "The superior court for the county in which damage to the environment is occurring or is about to occur 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."
2. So all other things being equal, if DEP's noise regulation within DEP's Air Pollution Control Regulations, 310 CMR 7.00, is a "regulation the major purpose of which is to prevent or minimize damage to the environment," the Town would have standing to enforce the regulation under Section 7A.
3. Under Section 7A, "It shall be a defense to any action taken pursuant to this section that the defendant is subject to, and in compliance in good faith with, a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment complained of, unless the plaintiffs demonstrate that a danger to the public health and safety justifies the court in retaining jurisdiction."
4. So if DEP is actively enforcing its own regulation, the Town may be prevented from doing so.
5. DEP's Noise regulations on their face appear to constitute a "regulation the major purpose of which is to prevent or minimize damage to the environment."
6. However, a defendant to an enforcement action by the Town would assert that noise is a transitory condition; it does not damage the environment; and the regulation is meant to control the nuisance not protect the environment as such. Rather its enforcement is committed to the Board of Health.
7. By contrast, G.L. c. 111, § 142B (cited in 310 CMR 7.52's enforcement provision) provides that, "This section shall not operate to abrogate any of the powers and duties, as defined by general or special law, of any agency or political subdivision of the commonwealth."
8. On balance therefore, the Town *may* have the authority under Section 7A to enforce DEP's noise regulations.

### **Another Case Dealing With DEP's Noise Regulations**

You may also be interested in the following recent case dealing with DEP's noise regulations:

- *D'Acci v. Cutler*, 2014 WL 1047802, 6 (Mass.Land Ct.,2014) (ZBA did not exceed its authority in denying Plaintiff's appeal of the Planning Board's Site Plan Approval for applicant's proposed Asphalt Plant) (attached)

Indeed, the Noise Conditions imposed by the Planning Board are designed to ameliorate the concerns about excessive noise levels and insufficient noise mitigation raised by the Plaintiffs during the site plan review process. Consistent with the objective of site plan approval set forth in Subsection 1.4, the Noise Conditions effect a reasonable balance between Edgewood's right to construct a facility for a by-right use

in the Industrial District with the rights of abutters and neighboring landowners to live or operate businesses without undue noise disturbance generated by plant operations exceeding DEP sound limits.

Thus, where the Planning Board acted properly and within its site plan review authority by subjecting the Site Plan Approval to the Noise Conditions in order to secure the necessary future and continuing compliance with State sound regulations at the expense of the applicant, it cannot be said that the ZBA exceeded its authority by declining the Plaintiffs' petition to reverse that Site Plan Approval.

Please let me know if you have any other questions.

Steve

**From:** Mike Gowing [mailto:mikeg.acton@gmail.com]  
**Sent:** Monday, May 19, 2014 1:25 PM  
**To:** Stephen D. Anderson  
**Cc:** Mark Hald; Steve Ledoux  
**Subject:** DEP regulation regarding noise

Hi Steve, Steve L. is on vacation so I am contacting you directly. There has been some question on pollution with regard to M.G.L. Chapter 111, Sections 142A-M provide statutory authority for MassDEP's Air Pollution Control Regulations, 310 CMR 7.00.

In my discussion with other communities, it seems that there is a conflict of opinion on rights of enforcement. Some communities believe they have the right to enforce the above stated law. Acton staff believe that only the DEP can enforce air pollution (including noise) violations. Can you shed some legal light on the subject?

I would wait until Steve L.'s return but it effects an issue on tonight's BoS agenda - a special use permit request.