

COMMONWEALTH OF MASSACHUSETTS

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One Pemberton Square, Suite 1200  
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(617) 725-8106

January 25, 2011

Paul T. Muniz, Esquire  
Burns & Levinson LLP  
125 Summer Street  
Boston, MA 02110-3342

RE: No. 2009-P-2105  
Lower Ct. No.: SUCV2007-00675

ARBORWAY COMMITTEE & OTHERS

vs.

MASS EXEC. OFFICE TRANSPORTATION & OTHERS

NOTICE OF DECISION

Please take note that on January 25, 2011, the court issued the following decision in the above-referenced case:


Decision: Rule 1:28 (MC SK FE, JJ.). Judgment affirmed. \*Notice. (See image on file.)

A copy of the court's opinion in the case will be available on <http://www.massreports.com> after 11:00 a.m. today. If the opinion is identified above as a Full or Rescript opinion, go to the Slip Opinions section of the website, and then choose Appeals Court, Opinions. If the opinion is identified as a Rule 1:28 decision, go to the Unpublished Decisions section of the website, and then search for the opinion by specifying its Docket Number, using the format 09-P-1234. The clerk's office will not be mailing a copy of the decision to you. Only incarcerated self-represented litigants will receive a paper copy by mail.

Effective May 1, 2010, all further filings in this appeal are required to be accompanied by a PDF copy of the document. See Appeals Court Standing Order Regarding the Filing of Certain Motions and Letters, available at [http://www.mass.gov/courts/appealscourt/docs/SO\\_filing\\_motions\\_papers.pdf](http://www.mass.gov/courts/appealscourt/docs/SO_filing_motions_papers.pdf)

Very truly yours,  
Joseph Stanton, Clerk

To: Paul T. Muniz, Esquire  
Pierce O. Cray, A.A.G.  
Eloise Lawrence, Esquire  
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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

## COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

←**ARBORWAY**→ COMMITTEE & others [FN1] vs. EXECUTIVE OFFICE OF TRANSPORTATION & CONSTRUCTION [FN2] & others. [FN3]

09-P-2105

## MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, the Arborway Committee and twelve individual members (collectively, Arborway), appeal from a partial summary judgment under Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974), dismissing claims against the State defendants, the Executive Office of Transportation and Construction (EOTC) and the Department of Public Works (DPW). Arborway, a community-based public interest group, basically contends that the defendants breached a contract, which was embodied in a written memorandum of understanding (MOU), obligating the defendants to restore light rail service to the former Forest Hills terminus of the Massachusetts Bay Transportation Authority's Arborway Green Line. The judge dismissed the claims against the defendants on limitations grounds. We affirm.

The Conservation Law Foundation (CLF) and EOTC entered into the MOU in 1990 as part of the Central Artery/Third Harbor Tunnel ('big dig') project. [FN4] Under the MOU, operational light rail service was to have been restored by no later than the end of 1997 [FN5]; light rail service has never been restored as promised. The parties agree that the limitations period applicable here is three years on all claims. [FN6] See G. L. c. 260, § 3A.

Arborway filed this action in 2007, seven years after the three-year statute of limitations period ran. Arborway generally argues that because of various actions and statements of EOTC, its breach claims did not accrue until December 13, 2006, the date by which EOTC unequivocally withdrew its support for the project and twelve days after the Department of Environmental Protection (DEP) amended its regulations to eliminate the rail restoration project as one of its obligations. [FN7] Thus, according to Arborway, its 2007 filing was well within the limitations period.

To determine whether a limitations period has run requires determination of the date when a claimed breach has occurred or a cause of action has accrued, [FN8] and that depends upon the language of the agreement. The interpretation of the contract itself generally presents a question of law for the court. *Suffolk Constr. Co. v. Lanco Scaffolding Co.*, 47 Mass. App. Ct. 726, 729 (1999). *Berkowitz v. President & Fellows of Harvard College*, 58 Mass. App. Ct. 262, 270 (2003). The interpretation of an unambiguous agreement is an issue of law for the court. *Lumber Mut. Ins. Co. v. Zoltek Corp.*, 419 Mass. 704, 707 (1995). A contract provision is ambiguous 'only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.' *Citation Ins. Co. v. Gomez*, 426 Mass. 379, 381 (1998). The mere fact that parties disagree on the proper construction of contractual language, however, does not necessarily establish ambiguity. *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.*, 419 Mass.

462, 466 (1995).

Generally, the plaintiffs claim that the contract and any breach was extended by virtue of EOTC's delays in seeking to substitute another project, thus extending the date by which their cause of action accrued, first to the end of 2000, then by EOTC's successive requests to the DEP to approve its claims of infeasibility. We disagree.

First, it bears noting that the MOU does not expressly allow for the possibility of extending the dates by which construction on the line needed to be completed (end of 1996) and the line operational (end of 1997). Implicitly, there is one exception, which is to allow a project to be substituted in one specific instance: after the public environmental review process, to which the parties to the MOU agreed most of the projects would be subject, and, '[i]f any planned improvement is found in the course of such a review process to have environmental impacts which render the project infeasible, EOTC shall develop and implement a substitute transit facility or service that will serve at least the same number of passengers in the same transportation corridor as the transit improvement contemplated by this agreement.'

The record does not show that EOTC sought Massachusetts Environmental Policy Act (MEPA) review, nor did EOTC request the DEP to allow substitution of projects prior to the end of the MOU period. While EOTC did request the DEP to permit a delay near the end of 1997, the record is clear that the request did not meet any of the conditions set by the MOU for such a request, as the request was not based upon environmental infeasibility. EOTC had not requested MEPA review and its request did not then seek to substitute a particular project. [FN9] Moreover, EOTC's request was expressly made under the provisions of the 1991 'Transit Regulation' and not the MOU, citing accessibility, design and parking issues, with specific reference to the Americans with Disabilities Act. [FN10]

We agree with the defendants that the express terms of the MOU contemplated that it would be incorporated or codified into a regulation but that it did not contemplate incorporation of after-issued regulations into the MOU: 'The parties agree that all appropriate terms of this agreement . . . should be incorporated in any compliance plan [i.e., preconstruction certification] that may be submitted for the Artery/Tunnel Project (see proposed 310 [Code Mass. Regs. §] 7.38(5) (November 1990)). All commitments in this agreement shall be implemented and enforceable whether or not the measures to be undertaken pursuant to those commitments are also required

under the DEP regulation.' On this record, a breach of the MOU, if there was one, was clearly manifest by the end of 1997, when the Arborway Green Line extension was supposed to be, but was not, operational.

Considering the plaintiffs' estoppel claims, read in a light most favorable to the plaintiffs, EOTC made no statements, through the end of 2000, that could reasonably have lulled the plaintiffs in such a way that an estoppel would excuse their delay in filing suit. Compare *Gamache v. Mayor of N. Adams*, 17 Mass. App. Ct. 291, 294 (1983) ('Fatal in this case to any claim of estoppel is the absence in the record of any showing that the plaintiff did anything different from what he otherwise would have done and was thereby harmed in reliance on any conduct of the defendants'). Moreover, it is an exception, not the rule, that an estoppel could be applied to EOTC, a governmental entity, to preclude it from asserting limitations if proper circumstances existed, an exception under which the plaintiffs here do not qualify. Given the possible conflicting concerns represented by the DEP's decision-making and the policy considerations that enter into appropriations legislation, the plaintiffs have not shown, on this record, their right to proceed on estoppel grounds. See *Phipps Prods. Corp. v. Massachusetts Bay Transp. Authy.*, 387 Mass. 687, 693 (1982); *LaBarge v. Chief Admn. Justice of Trial Ct.*, 402 Mass. 462, 468-469 (1988) ('Generally, the doctrine of estoppel is not applied against the government in the exercise of its public duties, or against the enforcement of a statute.' . . . Estoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest'), quoting from *Gamache, supra*. [FN11]

*Judgment affirmed.*

By the Court (McHugh, Sikora & Fecteau, JJ.),

Entered: January 25, 2011.

FN1. Twelve named citizens who are Arborway Committee members and residents or business proprietors in the Jamaica Plain or Mission Hill districts of Boston.

FN2. Also known as the Executive Office of Transportation.

FN3. The Department of Public Works, also known as the Department of Highways, and the Conservation Law Foundation (CLF). The plaintiffs' claims against the CLF have been stayed pending the outcome on appeal here. We note that the Attorney General's brief suggests that the Massachusetts Department of Transportation is the successor to the State agency defendants, see St. 2009, c. 25, but there has been no substitution of party below.

FN4. For present purposes only, the State defendants have: (i) conceded Arborway's standing (Arborway claims that it is an intended third-party beneficiary under the MOU); and (ii) admitted their breach of the MOU. Although not specifically conceded, the defendants also appear to accept for purposes here that the MOU constitutes an enforceable contract. In addition, the motion judge assumed that the plaintiffs have standing. While we do not necessarily agree with the points conceded or assumed below, our decision proceeds on the same concessions and assumptions.

FN5. Under the MOU, EOTC was required to do the following, inter alia: 'A. All of the improvements listed in Appendix A to this agreement shall be completed. EOTC shall make every effort to complete each improvement by the last day of the calendar year

stated as the year of completion in Appendix A. EOTC shall begin the operation of each new facility or service by the last day of

the calendar year following the stated year of completion.'

FN6. The complaint asserts claims for breach of contract, estoppel (equitable and promissory), and declaratory relief.

FN7. Specifically, the December 13, 2006, date corresponds with DEP's request to the United States Environmental Protection Agency for the incorporation of the newly amended regulation into the State implementation plan for Massachusetts under the Federal Clean Air Act.

FN8. The plaintiff's have alleged in their complaint that EOTC breached the MOU by, 'among other things, failing and refusing to restore [light-rail] service on the Arborway Line within the time period contemplated by the Agreement.'

FN9. We decline to accept Arborway's invitation to read the MOU as incorporating, or in light of and consistently with, various regulations and directives that were not specifically incorporated into or otherwise referred to in the MOU. We observe that the regulations on which Arborway relies did not exist when the MOU was executed. See *Chicopee Concrete Serv., Inc. v. Hart Engr. Co.*, 398 Mass. 476, 477-478 (1986). Moreover, we find it significant to our decision that the environmental review of the project intended by the MOU, and its meaning of

'infeasibility,' are substantially narrower and different from the use of those terms by the DEP in its later-issued regulations. For example, the 'Transit Regulation' (the only regulation of the two issued in 1991 that referenced the Arborway project) allowed substitution if the original project '[wa]s infeasible due to associated engineering, environmental or economic impacts.' 310 Code Mass. Regs. § 7.36(4) (1991). (In 2006, the DEP amended the 1991 Transit Regulation by removing the Arborway Green Line project from its

content.)

FN10. Furthermore, it was not until 1998 that EOTC requested the DEP to declare the work at issue here 'infeasible' under the regulation, and not until 1999 that it suggested substitution by articulated buses. The DEP refused to issue the declaration of infeasibility and later rejected EOTC's suggestion for an alternative project; while it did impose various requirements on EOTC to be completed by year end 1999, EOTC did not satisfy these obligations. This, in turn, prompted some of the present Arborway members, in August, 2000, to file a notice of intent to sue (with the notice apparently timed to permit them to then file suit by year end 2000, within the original limitations period).

FN11. Given our decision, the plaintiffs' claim for declaratory relief has no merit.

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