COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

TOWN OF NORWELL *vs.* MASSACHUSETTS SCHOOL BUILDING AUTHORITY.

09-P-784

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 1999 and 2000, the town of Norwell (town) applied for and received approval from the Department of Education for funding pursuant to G. L. c. 70B to build a new middle school and a new high school. Following an audit of the finished project in 2006, the Massachusetts School Building Authority (authority), which had since replaced the Department of Education as the agency in charge of administering the school building assistance program, denied reimbursement of certain legal fees the town had incurred in connection with construction of the schools. [FN1] The town's Superior Court complaint, requesting review pursuant to G. L. c. 30A, § 14; petitioning in the nature of certiorari; seeking declaratory judgment; and claiming equitable estoppel, was dismissed on motion of the authority. The town appeals.

Background. During the building phase of the schools, the town incurred $343,419 in legal expenses related to enforcing its construction contract rights for the two projects. At the time the town applied for the grants and during the construction phase, legal costs were reimbursable under the school building assistance program, G. L. c. 70B, § 5(*a*), inserted by St. 2000, c. 159, § 140. That statute provided in relevant part as follows:

'Any eligible applicant may apply . . . for a school facilities grant to meet in part the cost of an approved school project. Such cost shall include the entire interest paid or payable by such city, town or regional school district on any bonds or notes issued to finance such project, as well as any premiums, fees or charges for credit or liquidity enhancement facilities or services issued or rendered to any such city, town or regional school district. *Such costs shall also include all costs and legal fees to enforce rights on any contracts for the construction of an approved school project.* Such application shall be in the form prescribed . . . and shall be accompanied or supplemented by drawings, plans, estimates of cost and proposals for defraying such costs or any such additional information as . . . may [be] require[d], before construction is undertaken. . . .' (Emphasis supplied.) [FN2]

In May, 2006, the authority transmitted to the town a draft audit report of the school building projects, listing as ineligible certain costs including the legal costs at issue here. The town objected; at a meeting with the authority, the authority declined to restore the legal costs. In a November 3, 2006, letter finalizing its decision, the authority noted that the legal costs 'were listed as ineligible in the draft audit report based on [Department of Education] and [authority] policies. These policies dictate that . . . legal fees are not eligible for reimbursement unless they are directly related to bond issuance costs.' The town thereafter filed its complaint and the authority filed its motion to dismiss under

Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974). The motion judge ruled that the authority's funding decisions are discretionary and not subject to judicial review under any of the theories proposed by the town, citing *School Comm. of Hatfield v. Board of Educ.,* 372 Mass. 513 (1977), and *Attleboro v. Massachusetts Sch. Bldg. Authy.,* 68 Mass. App. Ct. 1117 (2007) (issued pursuant to this court's rule 1:28).

Discussion. Under rule 12(b)(6), 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Nader v. Citron,* 372 Mass. 96, 98 (1977), quoting from *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). [FN3]

General Laws c. 30A, § 14, inserted by St. 1954, c. 681, § 1, provides to an aggrieved party judicial review of a 'final decision of any agency in an adjudicatory proceeding.' An adjudicatory proceeding is defined by G. L. c. 30A, § 1(1), inserted by St. 1954, c. 681, § 1, as 'a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.' Because the authority is not required to hold a hearing with regard to its c. 70B grant determinations, '[t]he question thus becomes whether [the town] had a property interest [in the school grants] which would invoke the protection of the due process clause of the Fourteenth Amendment to the United States Constitution, and of art. 10 of the Declaration of Rights of the Massachusetts Constitution.' *General Chem. Corp.* v. *Department of Envtl. Quality Engr.,* 19 Mass. App. Ct. 287, 290 (1985), quoting from *School Comm. of Hatfield v. Board of Educ., supra* at 514-515. 'Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state laws -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Madera v. Secretary of the Executive Office of Communities & Dev.,* 418 Mass. 452, 459 (1994), quoting from *Haverhill Manor, Inc.* v. *Commissioner of Pub. Welfare,* 368 Mass. 15, 23, cert. denied, 423 U.S. 929 (1975). As a threshold issue we decide that c. 70B, § 5, as existing during the pendency of the town's application, conferred no entitlement to school funding grants. The language of § 5 on which the town relies states that reimbursable costs 'shall . . . include all costs and legal fees to enforce rights on any contracts for the construction of an approved school project.' However, that section also provides that an application for funds is subject to approval, which requires the exercise of discretion on the part of the authority. Thus, any subsidiary decisions regarding specific reimbursements also are discretionary. Read in the context of the entire section, the language relied upon by the town is a directive that expenditures subject to potential reimbursement are to be included on an application for funds. The language does not create an entitlement to such funds and the motion judge was correct to conclude that the town's claim was therefore not reviewable under G. L. c. 30A, § 14. Cf. *School Comm. of Hatfield v. Board of Educ.,* 372 Mass. at 516 (no entitlement where determination whether proposed construction would be in town's best interests was discretionary with State board of education).

In large part for the reasons given above, we also affirm the dismissal of the claims for certiorari review, declaratory judgment, and equitable estoppel.

A requisite element for the availability of certiorari review pursuant to G. L. c. 249, § 4, is 'a judicial or quasi judicial proceeding.' *Walpole v. Secretary of the Executive Office of Envtl. Affairs,* 405 Mass. 67, 72 (1989), quoting from *Boston Edison Co.* v. *Selectmen of Concord,* 355 Mass. 79, 83 (1968). Because the authority's funding decision was a discretionary action requiring no hearing or formal procedure, it was not a judicial or quasi judicial proceeding. See *id.* at 72-73. See also *School Comm. of Hudson v. Board of Educ.,* 448

Mass. 565, 575-577 (2007). Declaratory relief pursuant to G. L. c. 231A is likewise unavailable due to the discretionary nature of the authority's decision. See *School Comm. of Hatfield v. Board of Educ., supra* at 516-517. Cf. *Attleboro v. Massachusetts Sch. Bldg. Authy.,* 68 Mass. App. Ct. 1117 (2007).

As to the town's estoppel argument, ''[g]enerally, 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 governmental acts where to do so would frustrate a policy intended to protect the public interest.' *Risk Mgmt. Foundation of Harvard Med. Insts., Inc.* v. *Commissioner of Ins.,* 407 Mass. 498, 509-510 (1990), quoting from *LaBarge v. Chief Administrative Justice of the Trial Ct.,* 402 Mass. 462, 468 (1988). Because the authority's review of c. 70B grant applications requires it to make decisions affecting the public interest, it is not a proper party to an estoppel claim.

Judgment affirmed.

By the Court (Lenk, Duffly & McHugh, JJ.),

Entered: April 16, 2010.

FN1. In July, 2004, the Legislature enacted St. 2004, c. 208, which created the authority, and transferred to it all administrative duties for the school building assistance program.

FN2. In June, 2006, the Legislature essentially rewrote § 5, and removed the language allowing for the reimbursement of legal fees related to construction contracts was removed. See St. 2006, c. 122, § § 30. Later that same year the authority also promulgated regulations deeming legal fees ineligible for reimbursement unless directly related to bond issuance costs. See 963 Code Mass. Regs. §§ §§ 2.00 et seq. Neither the rewritten statute nor the new regulations apply to the present dispute apply.

FN3. Because the authority filed its motion to dismiss before the Supreme Judicial Court, in *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 625 n.7, 635- 636 (2008), refined the standard of review enunciated in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), we apply the earlier, less strict standard. See *Flomenbaum v. Commonwealth,* 451 Mass. 740, 751 n.12 (2008), quoting from *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 544, 555 (2007). The outcome would be the same under either standard, however.

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