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I. Introduction

The OADR decisions issued in the second half of 2023 include settlement agreements and dismissals for failure to prosecute or to comply with Presiding Officers' Orders, which need not be discussed in detail. Decisions issued on the merits include *In the Matter of Melanie Amir, Trustee* as consolidated with *In the Matter of Debra Coonan* and *In the Matter of Westlook Farm Dock Association, Inc.*, as they discuss the limits of the Department of Environmental Protection's authority to address property title issues. *In the Matter of Stephen Arena, 128 Wheeler Street*, while briefly reiterating the limits of the Department's authority to address property title issues, discusses in detail a Petitioner's burden of proof pursuant to 310 CMR 1.01(8)(c) to establish why a Settlement Agreement that the Department has agreed to sign is inconsistent with the governing legal requirements. *In the Matter of Belmont Hill School, 350 Prospect Street* provides nuance to the determination of a Ten Residents Group's standing and the ability of the Group to substitute new members for members who no longer wish to participate in the adjudication.

II. The Department of Environmental Protection and Property Title Issues

As a general matter, the Department of Environmental Protection has long since held that it lacks the authority to adjudicate questions of property ownership, jurisdiction over such matters is granted to the Superior Court and to Land Court. In some permitting cases, such as under MGL c. 91, the Department requires the applicant to meet the minimal threshold of showing colorable claim of title to the relevant real property, but the Department is not entitled to rule on the issue of title beyond that minimal threshold. The following decisions adopted by the Commissioner give some clarity as to the limits of this authority.

In the Matter of Melanie Amir, Trustee, consolidated with *In the Matter of Debra Coonan*, OADR Docket Nos. WET-2023-008 and 009, DEP File Nos. SDA, Webster, 30 DEPR 64

Salvatore M. Giorlandino, Chief Presiding Officer, designated by the Commissioner Bonnie Heiple as the Final Decision maker for this appeal, issued the Final Decision on September 14, 2023, adopting the Recommended Final Decision issued on September 8, 2023 by Patrick M. Groulx. The Decision upheld the Superseding Determinations of Applicability ("SDA") issued on April 27, 2023, by the Department's Central Regional Office to Melanie Amir, as Trustee, and to Debra Coonan, for the installation of seasonal docks. The Petitioner, a Webster homeowner, owns the property in between the two properties at issue and challenged the SDAs issued to each of her abutting neighbors. The two SDAs were consolidated by the Office of Appeals and Dispute Resolution ("OADR") on June 9, 2023. The separate projects and their permitting histories are summarized below:

- Melanie Amir, as Trustee, filed a Request for Determination of Applicability ("RDA") on April 7, 2022, seeking to install a seasonal aluminum stock boat dock at the property at 24 Pleasant Point Road, in Webster, MA. The Webster Conservation Commission issued a Negative Determination of Applicability on June 25, 2022, permitting the proposed work. The Petitioner, an abutting homeowner, appealed the Negative Determination on July 1, 2022. The Department subsequently conducted a site visit, ultimately concluding that the work was within the jurisdiction of the Wetlands Protection Act ("WPA") but did not propose to remove, fill, alter, or dredge the resource areas within jurisdiction and therefore did not require the filing of a Notice of Intent. The Department additionally determined that to the extent that the Petitioner's appeal included a claim that Amir, as the Applicant, lacked the property rights to install the dock, that the Department lacked the jurisdiction to render a decision on that issue. The Department proceeded to issue a SDA issued on April 27, 2023, which the Petitioner appealed to OADR.

- Debra Coonan filed a RDA on April 22, 2022, seeking to install a seasonal aluminum stock boat dock at the property at 32, Pleasant Point Road, in Webster, MA. The Webster Conservation Commission entered a decision finding conditionally that the area where work was proposed was subject to protection under the WPA, and voted to issue a Positive Determination of Applicability due to evidence that the land to which the proposed dock would attach is historic fill. The Commission requested that Coonan provide proof of ownership of the land at issue or evidence of an easement to the benefit of her property to use the land for the proposed purpose. Coonan appealed the positive Determination on June 22, 2022. The Department subsequently conducted a site visit, and determined that while the proposed

work was within resource areas subject to protection under the WPA, the work would not remove, fill, dredge, or alter those areas, and so did not require the filing of a Notice of Intent. The Department's SDA, issued on April 27, 2023, reversed the Webster Conservation Commission's positive determination. The Petitioner timely appealed the Department's SDA to OADR.

In each SDA, the Department determined that the proposed project was within areas subject to protection under the WPA, but that the proposed work did not require the filing of a Notice of Intent as the work would not remove, fill, dredge, or alter the jurisdictional resource areas. Each of the Petitioner's appeals to OADR sought an order finding that the applicants did not have property rights to the land where the docks were proposed and requiring the applicants to prepare and file Land Court plans determining property ownership.[1]

The Presiding Officer consolidated the two appeals on June 9, 2023. Shortly thereafter, on August 7, 2023, the Department filed a motion to dismiss the appeals, arguing that the Petitioner's Notice of Appeal for each matter raised claims of property ownership over which the Department, and OADR in turn, lacks jurisdiction. The Petitioner did not file an opposition to the Department's motion to dismiss. The standards for a Motion to Dismiss are discussed in detail at 30 DEPR 66, but as a general matter under a motion to dismiss, the decisionmaker assumes that the facts alleged in the Notice of Appeal are true, but is not required to assume the same of the conclusions of law.

In addition to the challenge to property rights, the Petitioner's Notice of Appeal against Coonan raised as an additional count that Coonan had not timely filed her appeal of the Webster Conservation Commission's Positive Determination to the Department. The Presiding Officer requested parties respond to the issue of timeliness specifically. Coonan and the Department responded on August 21, 2023, filing affidavits and other documents suggesting Coonan although the Commission's DOA had a notation indicating that it was issued on June 6, 2022, that in fact June 6, 2022 was the date the Commission voted to issue the DOA and it did not issue it by hand delivery to Coonan until June 20, 2022, making her request for a SDA timely. On August 22, 2023, the Presiding Officer issued an Order giving the Petitioner under September 6, 2023 to file her response regarding the timeliness issue, under the standards of a Motion for Summary Decision under 310 CMR 1.01(11)(f). The Petitioner did not file materials responsive to this issue. The standards of a Motion for Summary Decision are discussed on 30 DEPR 66-67.

The Presiding Officer ultimately concluded that the Petitioner failed to state a claim upon which relief can be granted. This determination is a two-step process. The Petitioner must both state a claim for relief, and must seek relief that the Department has the authority to grant. In this matter, the Petitioner's main argument is that the applicants are unlawfully benefiting from unlicensed filling of the protected resource areas and are claiming to own parts of the lake that properly belong to the Commonwealth as the lake is a Great Pond. The Petitioner asserts that the Department should, as relief, require the applicants to file Land Court plans to determine which parts of the lake are owned by the applicants and which by the Commonwealth.

The Petitioner's claims are not ones that can be pursued before the OADR, nor is the OADR authorized to grant the requested relief under the WPA to determine title, or order an applicant to seek a Land Court determination to quiet title. The Department and OADR lack the authority to adjudicate questions of property ownership or to require applicants to prepare or file Land Court plans. As such, the OADR dismissed the Petitioner's consolidated appeal as the OADR lacks the authority to hear the case.[2]

In the Matter of Westlook Farm Dock Association, Inc., Docket No. 2021-031A & 031B, Draft Waterways License, DEP File No. W19-5683, Westport, 30 DEPR 96

Commissioner Bonnie Heiple issued a Final Decision ("Decision") on December 22, 2023, adopting the Recommended Final Decision issued on June 16, 2023, by Margaret R. Stolfa, which recommended affirming the Draft Waterways License with a condition preserving the Petitioners' right to access so as to avoid substantial interference with their navigation rights. The Decision also emphasized that the Department and OADR lack the authority to address property title issues between parties. Although the Applicant for a Chapter 91 license generally should demonstrate colorable title to the area where work is proposed, the Presiding Officer held that in this case, the Petitioners were barred by collateral estoppel from raising the issue of colorable title. The Decision gave collateral estoppel effect to the local conservation commission Order of Conditions, following a hearing in which one of the Petitioners in the later Waterways case asserted to the Commission that the Applicant lacked title rights, but the Commission issued the Order, no appeal was taken from that Order and it became final. We will address the issue of collateral estoppel in detail below.

The Applicant, the Westlook Farm Dock Association, Inc., filed an application for a license to construct a pile-supported pier and associated floats on an existing solid fill jetty, and to maintain and repair the existing jetty, at 33 Westlook Lane in Westport, MA. The Department's Southeast Regional Office issued a Draft Waterways License approving the proposed work in October 2021. The License was appealed by Mary Anne Sedney, as Trustee of the Mary Ann Sedney Trust-1996, and by Richard Mobley and Nancy Mobley, with the appeals consolidated before OADR.

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1. It is not clear from the Decision whether, though seasonal, the docks were designed to attach to the shore and extend out on floats, or to have feet sitting on the bottom substrate or small pilings driven in or helical piles placed in the bottom.

2. We note, that DEP clearly has authority in the Chapter 91 context to determine the limits of Historic Tidelands, including the limits of the Historic High Water Line of a Great Pond. See 310 CMR 9.02, Definition of Historic High Water Mark—"For Great Ponds, the historic high water mark is synonymous with the natural high water mark." And, 310 CMR 9.04, Geographic Areas Subject to Jurisdiction—"(1) all waterways, including all flowed tidelands and all submerged lands lying below the high water mark of : (a) Great Ponds . . .and (2) all filled tidelands, except for landlocked tidelands, and all filled land lying below the natural high water mark of Great Ponds." The Petitioner could, if she wished to actually contest the validity of use of alleged filled areas of the pond, have filed a request for determination under the Chapter 91 Regulations, at 310 CMR 9.06.

The Petitioners asserted that the License was issued in error because the Petitioner Mary Ann Sedney, was the actual owner of the real property on which the project is proposed, not the Applicant. The Petitioners additionally claimed that the License as issued was invalid because it permitted a Project which would interfere significantly with public rights of navigation.

The Applicant and the Department opposed the Petitioners' appeal, on the grounds that Applicant is the holder of an easement over the Property, providing the Applicant with a colorable claim of title to proceed with the application, and that the Project as designed would not interfere with public navigation rights.

The Applicant and the Petitioners are all a part of the Westlook Farms neighborhood, a subdivision created in 1986 through a Declaration of Trust and Protective Covenants and Easements. The Property at issue, owned by Sedney, was identified as Lot 3 in the subdivision and borders the Westport River. The Property was subject to an easement that authorized the Trust to construct a dock at a location adjacent to the easement area. Although by its terms, the Trust expired in 2016, the easement to the benefit of the neighboring property owners to use the easement area for various waterfront activities was perpetual and did not expire. In 2019, the Applicant, the Westlook Farm Dock Association, Inc., was formed with its membership limited to owners of parcels benefiting from the perpetual easement. The Applicant obtained an Order of Conditions from the Westport Conservation Commission approving the Project under the WPA and its Regulations. The Order was not appealed, and the Applicant proceeded to file the application at issue in this case.

The Applicant proposes the repair and maintenance of an existing jetty, licensed under the H & L Waterways License #3932, dated January 27, 1915, which would reduce the overall size of the repaired jetty from the structure as originally licensed. The Project includes the construction of a pier on the jetty, with associated floats designed to serve up to nine boats. The project is designed such that the proposed floats each end a minimum of 33 feet from the southern riparian property line and some 85 feet from the northern riparian property line. The nearest structure to the project is the dock owned by the Petitioners Richard and Nancy Mobley, some 230 feet north of the proposed project location, and 127 feet from the closest edge of the jetty and 140 feet from the closest edge of the proposed dock.

The issues identified for adjudication concerned the issue of colorable claim of title and whether the Project would significantly interfere with public rights of navigation. After hearing the Parties' testimony and reviewing the Parties' closing briefs, the Presiding Officer ultimately ruled that the Draft License should be affirmed. As to the issues raised regarding the regulatory criteria to determine whether a proposed structure will interfere with public rights of navigation, the Presiding Officer applied well established, predictable standards of review and determined that as designed, the Project would not significantly interfere with public rights of navigation, with a detailed analysis of the issue beginning on page 30 DEPR 104.

As to the issue of colorable claim of title, however, the Decision went where no one could have predicted. The Presiding Officer reiterated the accepted precedent that although in the case of the issuance of a Chapter 91 License the Department requires that an Applicant demonstrate a minimal threshold of colorable claim of title to the relevant real property by presentation of competent and testimonial documentary evidence, the Department and OADR do not adjudicate property disputes. In this case, the Applicant also filed a Notice of Intent under the Wetlands Protection Act in 2019, and during the public hearing Petitioner Sedney commented that she believed the Applicant had no legal authority by way of the easement held by parcel owners to file the Notice of Intent. There is nothing in the record Decision to suggest that petitioners Richard and Nancy Mobley ever attended a Conservation Commission hearing. Neither Sedney nor the Mobleys filed a request for a Superseding Order of Conditions with the Department challenging the Westport Conservation Commission's issuance of an Order approving the project, and did not therefore raise the issue of colorable title with regard to the wetlands permitting process in an appeal of the wetlands permit. Having found that the Petitioners raised the issue that the Applicant lacked colorable claim of title but did not appeal the Commission's wetlands Order of Conditions, the Presiding Officer determined that the Petitioners were now precluded from relitigating the same objection in the instant Waterways License case. Although the Petitioners could not pursue this issue on appeal before OADR, the Presiding Officer noted that there was nothing preventing the Petitioners from litigating a property dispute in court.

This is an astonishing expansion of the concept of collateral estoppel and should be a concern to practitioners and their clients. The Decision quotes from judicial precedent that sets forth the well-considered, and measured grounds on which collateral estoppel can be applicable—and then ignored nearly all of them. The Decision ruled:

A party may not relitigate an issue when: "(1) there was a final judgment on the merits in [a] prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication is identical to the issue in the current litigation; and (4) the issue decided in the prior adjudication was essential to the earlier judgment." *Green* v. *Town of Brookline*, 53 Mass. App. Ct. 120, 123 (2001). "If the conditions for preclusion are otherwise met, a final order of an administrative agency in an adjudicatory proceeding precludes "relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." Id. at 124.

The Presiding Officer's reliance on this precedent is misplaced:

> 1. A Conservation Commission's issuance of an Order of Conditions, even if it had specific findings regarding colorable title, is not a prior adjudication such that a Court would grant collateral estoppel effect;
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> 2. There is no mention in the Decision to suggest that the Mobleys, parties in this case, even attended the Conservation Commission hearing, let alone adjudicated the issue of colorable title in that hearing, and they were not parties in privity with Sedney;
>
> 3. Perhaps the issue of colorable title is identical in both permitting proceedings, although the prior adjudication was under the WPA and the adjudication here is governed by MGL c. 91;

4. Whether the issue decided in the prior adjudication was essential to the earlier judgment—there is nothing in the Decision to suggest that the Commission actually issued findings of fact and law and specifically considered and knowingly ruled on the issue of colorable title, let alone whether the Commission had the authority to rule on such an issue. Most such Orders just issue the permit with conditions. For collateral estoppel to apply, using the *Green* v. *Brookline* standard, there could be no mere assumption that the Commission had considered it—the prior adjudication must have specifically and in detail ruled on the issue and had that issue front and center, rather than as "dicta" (essentially an passing comment.)

Sedney's counsel has filed an appeal to Superior Court and has directly challenged the validity of the collateral estoppel basis for the Decision, as well as other issues.[3] We will report on this in the future—this battle is not over. The Department's unwarranted reliance on collateral estoppel in this case is another example of a tendency we have observed of recent DEP Decisions to resort to what appear to be convenient, cram-down, outcome-determinative maneuvers, rather than to follow accepted civil practice and administrative law standards. The results of pending cases litigating these recent maneuvers may lead to a course correction going forward, and we will report on the outcomes in the future.

Although the Department, and OADR in turn, may require that the Applicant for a project demonstrate at the very least that the Applicant have a colorable claim of title to the project locus the Department lacks the authority to resolve property disputes between the parties. Such disputes are to be resolved in court, either before the Superior Court or before the Land Court. Practitioners should take note of this nuance, and be prepared to evaluate the issues with clients to determine the appropriate forum to resolve such issues.

III. 310 CMR 1.01(8)(c) and Settlement

Although as a general matter, all parties to an appeal before OADR participate in and agree to settlement, the Rules of Adjudicatory Proceeding do not require that all parties join in settlement in order for the OADR to approve a Final Order of Conditions. Pursuant to 310 CMR 1.08(8)(c), if a party to an appeal will not sign a stipulation, settlement, or consent order the Department agrees to sign, the burden of going forward to establish why the agreement is inconsistent with established law may be placed upon that party by the Presiding Officer or a designee of the Commissioner.

In the Matter of Stephen Arena, 128 Wheeler Street, OADR Docket No. WET-2022-021, DEP File No. 028-2825, Gloucester, 30 DEPR 87

The Commissioner Bonnie Heiple issued the Final Decision on December 12, 2023, adopting the Recommended Final Decision issued on August 2, 2023, by Margaret R. Stolfa. The Final Decision, by adopting the Recommended Final Decision, approved and incorporated the unpublished Settlement Agreement and proposed Final Order of Conditions. The Settlement Agreement agreed to in this case was between the Applicant, the Gloucester Conservation Commission, and the Department. The Petitioners James Bordinaro and Jan Bordinaro did not join in or consent to the Settlement Agreement.

The Applicant, Stephen Arena, filed the original permit application for the property 128 Wheeler Street, for the demolition and reconstruction of a single family house with an associated driveway, patio, multiple decks, and a permanent pile-supported deck connecting to a seasonal ramp and floats on the Annisquam River. The Gloucester Conservation Commission issued a Order of Conditions approving the project and finding that the project satisfied the applicable Riverfront Area performance standards. The Petitions appealed the Order of Conditions to the Department's Northeast Regional Office, seeking a reversal of the Order. The Department, after reviewing the Petitioners' request of a Superseding Order of Conditions ("SOC"), the original Notice of Intent application, and the Commission's Order of Conditions, and conducting a site visit, issued a Superseding Order of Conditions affirming the Order of Conditions and determining that the project complied with the applicable regulations governing Coastal Bank and Riverfront Area. The Petitioners subsequently appealed the SOC to the OADR.

The parties, including the Petitioners, proceeded to enter Alternative Dispute Resolution sessions and settlement discussions, staying the proceedings. The settlement discussions were productive, ultimately resulting in the Settlement Agreement and Final Order of Conditions, which included a revised plan for the project as well as special conditions to further ensure the project would meet Riverfront Area and Coastal Bank performance standards. The Department, the Applicant, and the Gloucester Conservation Commission all agreed to sign the settlement, but the Petitioners refused to agree to the settlement.

At the subsequent status conference, the Department reported that it had circulated the settlement proposal to all parties, but the Petitioners declined to agree. The Department made clear that the Department, the Applicant, and the Town were proceeding with settlement without the Petitioners' participation. The Presiding Officer requested that parties file a joint settlement agreement and that the Petitioners file a response setting forth their grounds for opposing the agreement. The Petitioners' opposition, when filed, consisted of legal argument without any expert testimony from a wetlands expert.

The Presiding Officer issued an Order to Show Cause, directing the Petitioners to submit pre-filed direct testimony and a legal argument demonstrating the proposed settlement is inconsistent with the established law pursuant to 310 CMR 1.01(8)(c). The day before the Petitioners' pre-filed direct testimony and legal memoranda was due, the Petitioners requested an extension. When the Presiding Officer sought clarification, it became clear that the Petitioners had proceeded with filing their Notice of Appeal and engaging in mediation and settlement discussions without retaining a wetlands expert, and in fact appeared not to have retained an expert even by the date their pre-filed direct testimony was due, despite their burden of proof.

3. See Bristol Sup. Ct CA 2473CV000040, *Sedney* v. *Heiple*, Commissioner of DEP.

In response, the Presiding Officer directed the settling parties to respond by the next day regarding the Petitioners' extension request and for the Petitioners to identify their wetlands expert by the same time. The Petitioners were directed to file their expert's pre-filed direct testimony by June 8, 2023, with responses by the Applicant, the Department, and the Town to be filed by June 29, 2023. The Petitioners identified their expert witness some days after the deadline set by the Presiding Officer. The Department filed a request for recommended decision and dismissal of the appeal given the Petitioners' late-filed response to the Presiding Officer's Order and the Petitioners' failure to have an expert throughout the prior settlement proceedings.

Although the Presiding Officer agreed with the Department's argument regarding the late-filed identification of an expert witness, the Presiding Officer allowed the Petitioners a final opportunity to file testimony supporting their objections to the Settlement Agreement. The other parties were allowed to file responses. After the Petitioners' testimony and the other parties' responses were filed, the Department renewed its request for a recommended decision, and in the alternative requested a motion for directed decision, and the Applicant filed a motion for directed decision.

After reviewing the testimony and legal arguments, the Presiding Officer ruled that the Petitioners failed to meet their burden of proof as required under the Regulations that the settlement agreement is inconsistent with governing legal regulations. The Presiding Officer ruled that the wetlands expert did not demonstrate that the settlement agreement was inconsistent with the applicable law, namely the expert failed to provide testimony on the agreed Final Order of Conditions plan and how it would not comply with performance standards governing Riverfront Area and Coastal Bank. Although the Petitioners disputed that the Applicant had easement rights to use the existing driveway as proposed in the Project, the OADR and the Department, as previously discussed, do not have the authority to adjudicate issues of property rights. Such disputes are left to Superior Court or to Land Court to resolve. The Petitioners failed to present expert testimony that effectively disputed that the Applicant had the necessary colorable title to utilize the area as proposed in the Project.

The Presiding Officer recommended dismissal of the Petitioners' appeal and approval of the Settlement Agreement and Final Order of Conditions on the failure to meet their burden of proof, but additionally ruled that dismissal was appropriate because the record indicated that the Petitioners lacked a good faith basis for their appeal.

It is understood that settlement is encouraged as part of the appeal process and that public policy favors settlement over continued litigation. The purpose of the adjudicatory rules and regulations is to ensure that all parties are heard in the OADR forum and that the right to be heard is protected. Such appeals frequently further the intended purpose of the WPA and its Regulations to protect wetland resources. However, it is crucial that appeals have a good faith basis to challenge the validity of the Department's SOC. Where an appeal lacks a good faith basis, it is an improper appeal that does not serve to protect the interests of the WPA and its Regulations.

In this case, the Petitioners initiated the appeal of the Gloucester Conservation Commission's Order of Conditions as well as the Department's SOC. They proceeded to spend almost a year in settlement discussions with the other Parties, which resulted in plan changes to address the petitioners' concerns. Then the Petitioners refused to accept the settlement without ever having retained a wetlands expert to substantiate their claim that the SOC was improperly issued and that the Project, even as redesigned, would not comply with the applicable performance standards. Petitioners first retained a wetlands expert after the Presiding Officer issued Orders requiring them to under 310 CMR 1.01(8)(c) to demonstrate that the settlement agreement as agreed to by the Department was inconsistent with the governing law. When the Petitioners finally submitted pre-filed direct testimony from an expert witness, the testimony failed to address that key issue—whether the FOC and Settlement Agreement were improper.

Given this procedural history, the Presiding Officer reasonably concluded that the Petitioners brought the appeal for the sole purpose of delay, in violation of the good faith filing requirement of 310 CMR 1.01(4)(b).

IV. *In the Matter of Belmont Hill School, 350 Prospect Street*, OADR Docket No. WET-2022-025, DEP File No. SDA Denial, Belmont, 30 DEPR 69

The Commissioner Bonnie Heiple issued a Decision Adopting a Recommended Remand Decision on October 26, 2023, adopting the Recommended Remand Decision issued on July 25, 2023, by Margaret R. Stolfa. The Petitioners, a Ten Residents Group with 19 members, filed a Notice of Appeal of the Department's Northeast Regional Office's Denial of the Petitioners' request for a Superseding Determination of Applicability ("SDA") issued on November 4, 2022. The Petitioners sought the SDA to challenge the Negative Determination of Applicability issued by the Belmont Conservation Commission to the Applicant, Belmont Hill School, on September 27, 2022. The Department had denied the Petitioners' request for the SDA as untimely. This Decision sets a new standard for 10 resident groups—requiring them to maintain their numbers above the minimum 10 members, without the ability to add new members in the event that original members drop out and the membership of the group falls below 10.

In January 2023, the Department and the Applicant filed a motion to dismiss or motion for an order to show cause with OADR, which the Petitioners opposed. On February 5, 2023, OADR received an email from the Petitioners' original counsel indicating that the parties had reached settlement and that she anticipated filing a withdrawal of the appeal shortly. Accordingly, the Presiding Officer stayed issuing a ruling on the Department and the Applicant's pending motions. When no settlement agreement was filed, the Presiding Officer issued an Order to Parties to provide an update on the potential settlement or withdrawal of the appeal by February 27, 2023.

The Petitioners' counsel then filed a withdrawal of her representation with a request that the Petitioners be provided with time to find replacement counsel, and also informed the Presiding Officer that 8 of the members of the original 19 members of the Ten Residents Group had also withdrawn. Counsel requested leave for

the remaining Petitioners to name petitioners not previously specified in the Petitioners' Notice of Appeal. The Presiding Officer understood that the Group had 19 members at its inception, and so contained 11 remaining members and could appropriately be referred to as a Ten Residents Group, as reconstituted.

The Decision ruled that while a Ten Residents Group is not required to show aggrievement as a threshold standing matter, a Ten Residents Group must maintain a minimum ten individual group members, in order to be considered a Ten Residents Group rather than a group of individuals who must demonstrate aggrievement.

The Petitioners asserted that a Ten Residents Group may change its membership at any time so long as at least ten members are maintained, regardless of whether the members were all involved at the inception of the appeal. The Petitioners' argument framed the issue with the assertion that 310 CMR 1.01(6)(f) sets a low bar to allow substitution for justice and convenience. The Petitioners' motion to substitute group members was a result of several members settling with the Applicant and being required to withdraw and a result of other members simply wishing to withdraw and no longer participate. The Petitioners' motion asserted that there are other residents who wish to join the Group, and that by allowing the substitution the Group can maintain numerosity.

In contrast, the Applicant contended that the statute and regulations set a high bar, requiring that at least ten individuals of a Ten Residents Group who are named members of the group at the inception of the appeal must remain members through the conclusion. If a Ten Residents Group was permitted to continuously substitute or change its members as individual group members withdraw through settlement or losing interest, the Applicant would be forced to face a moving target as it works to resolve the appeal through settlement. The Applicant asserted that the Petitioners failed to meet the threshold for substitution by showing circumstances beyond their control authorizing substitution, and asserted that the appeal should be dismissed because the Petitioners have failed to maintain the required numerosity. The Department concurred with the Applicant's motion to dismiss for lack of standing, but declined to offer a position on the issue of substitution beyond noting at oral argument that substitution is routinely allowed.

Although during oral argument, Petitioners' counsel represented that the group had maintained 11 members as the individual members who were not required to withdraw due to settlement but otherwise wished to withdraw had not yet done so, the post-oral argument briefing identified 19 members, only 7 of whom were included in the original list provided at the inception of the appeal. The Petitioners did not include any evidence demonstrating that the proposed substitute members were present at the appeal's inception.

The Regulations, as previously discussed in *Matter of Stephen Arena*, are designed to ensure that the public is given the opportunity to participate. In the case of a Ten Residents Group, that includes requiring up-front participation with the resident group members actually joining and participating in the Ten Residents Group. In the interest of ensuring that a Ten Residents Group actually complies with the Regulations, a Ten Residents Group must demonstrate compliance that it had at least 10 members at its start, with at least 10 of those original members remaining through to the end of the proceedings. When the numerosity of the Ten Residents Group is challenged, the Department will require the authorized representative of the Group to provide evidence of a minimum of ten named group members indeed intended to participate in the appeal at the time the appeal was filed and to be represented by the authorized representative.

The only exception to that rule is the "justice and convenience" standard, based on precedent that was adopted when the regulations were amended. The Presiding Officer has the discretion to allow substitution where justice and convenience are served, at any time during the proceedings. Substitution may be allowed to address serious matters such as when a property transferred following foreclosure and when a group member has withdrawn due to poor health. The "justice and convenience" standard is in fact a high bar to pass in order to permit substitution, requiring a more serious matter than other than when some members of a Ten Residents Group settle or simply no longer wish to participate, or to cure a lack of numerosity at the appeal's inception.

Given the high bar of the "justice and convenience" standard and prior case precedent, the Presiding Officer ruled that if the Ten Residents Group, as reconstituted following the withdrawal of group members who settled with the Applicant, drops below the required ten members present at the appeal's inception, then the Group may not proceed. The remaining members are permitted to proceed as aggrieved persons if they each demonstrate they meet the standards.

The Presiding Officer recommended that the matter be remanded to the Department, on the basis of the Parties agreeing that the Department's denial of the SDA request was based on the belief that it was untimely, without having performed substantive review of the Project. All parties consented to a remand so that such substantive review could occur. The Presiding Officer agreed that remand was an appropriate action, and recommended that the matter be remanded, thus deferring a decision on the pending motions regarding substitution while the Department reviews the Petitioners' request and issues a Superseding Determination of Applicability accordingly.

V. Conclusion

In the Matter of Melanie Amir, Trustee as consolidated with *In the Matter of Debra Coonan* and *In the Matter of Westlook Farm Dock Association, Inc.* serve as helpful reminders to practitioners of the limits of the Department's and OADR's authority to adjudicate property title issues and disputes. Although the Department may, and should, confirm that an Applicant has a colorable claim of title to a project locus, that analysis does not extend into adjudicating the validity of such a claim or a claim by an opposing party as to the property rights of Parties. Practitioners should also work with clients to spot potential issues detrimental to cases, such as the risk of preclusion or estoppel if a client does nothing during a prior proceeding. *In the Matter of Stephen Arena, 128 Wheeler Street* serves as a helpful reminder to practitioners that the OADR favors settlement. Although the majority of settlements are agreed to by all parties, 310 CMR 1.01(8)(c) places a heavy burden on

the Petitioner who refuses to sign a settlement agreement to which the Department has agreed to demonstrate that the agreement is inconsistent with governing law. Practitioners should take note of the standards relating to Ten Residents Groups discussed in *In the Matter of Belmont Hill School, 350 Prospect Street*, and perhaps consider ensuring that the Ten Residents Group membership far exceed the required threshold for standing at the appeal's inception. Practitioners should be aware that separate settlements with group members that reduce the group to under 10 original members will have the effect of invalidating the group's standing to appeal. ■

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