

DEP REPORTER

*Massachusetts Department of Environmental Protection
Administrative Law Decisions*

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Department of Environmental Protection (DEP) Presiding Officers/Year Appointed

Bonnie Heiple, Commissioner	2023		
Salvatore M. Giorlandino, Chief	2007	Timothy M. Jones, Presiding Officer	2009
Jane A. Rothchild, Presiding Officer	2015	Margaret R. Stolf, Presiding Officer	2022
Patrick Groulx, Presiding Officer	2023		

COMMENTARY BY:

*Matthew Watsky, Esq.
Rachel Watsky, Esq.*

*CITE BY VOLUME AND PAGE OF THE
DEP REPORTER THUS:*

In the Matter of King's Grant Water Company, Inc. (Final Decision), 31 DEPR 12 (2024)



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DEP Reporter

Department of Environmental Protection—Administrative Law Decisions

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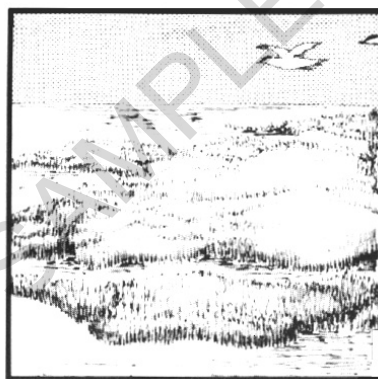
Wetlands Appeal-Solid Waste-Clean Waters Act-Fines and Penalties—Upon the recommendation of Presiding Officer Patrick M. Groulx, Chief Presiding Officer Salvatore M. Giorlandino denied a motion to reconsider a PAN in the amount of \$30,795 against a Pittsfield man found to have unlawfully dumped large pieces of debris along the banks of the Housatonic River and in so doing violated the Wetlands Act, Solid Waste Regulations, and the Massachusetts Clean Waters Act. The decision notes that the motion merely renews claims or arguments previously made and denied. Moreover, the Petitioner's assertion that he was unaware of the case, had not received emails, and was never served at the proper address were belied by the fact that he met with DEP officials, had actual knowledge of the PAN and UAO, and filed a response to the Order to Show Cause. In the Matter of Gordon (Final Decision on Reconsideration) 67

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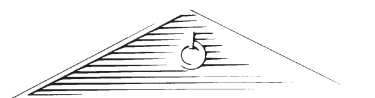


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Water Supply

Penalties and Fines

Chief Presiding Officer Salvatore M. Giorlandino issued a Final Decision on Reconsideration reaffirming a final decision issued the previous month dismissing four appeals from the Petitioner claiming an inability to pay four Penalty Assessments totaling \$18,250 for egregious violations of water supply regulations affecting public water supply. The Petitioner, a for-profit operator of an Attleboro water supplier, once again failed to provide sufficient information for OADR to review the condition of its finances. *In the Matter of King's Grant Water Company, Inc. (Final Decision on Reconsideration)*, 31 DEPR 45 (2024).

Four different Penalty Assessment Notices were affirmed by OADR in a total amount of \$18,250 against a for-profit Attleboro operator of a public drinking water system for egregious violations of multiple regulations after the Petitioner failed to submit sufficient information allowing MassDEP to assess its inability to pay the fines. *In the Matter of King's Grant Water Company, Inc. (Final Decision)*, 31 DEPR 12 (2024).

Practice and Procedure

– Motion for Reconsideration

Chief Presiding Officer Salvatore M. Giorlandino issued a Final Decision on Reconsideration reaffirming a final decision issued the previous month dismissing four appeals from the Petitioner claiming an inability to pay four Penalty Assessments totaling \$18,250 for egregious violations of water supply regulations affecting public water supply. The Petitioner, a for-profit operator of an Attleboro water supplier, once again failed to provide sufficient information for OADR to review the condition of its finances. *In the Matter of King's Grant Water Company, Inc. (Final Decision on Reconsideration)*, 31 DEPR 45 (2024).

Wetlands Appeals

Appeal

– Filing Fee

A Pittsfield man's late-filed appeal from a \$30,795 Penalty Assessment Notice and a Unilateral Enforcement Order was dismissed for lateness but also because he did not submit a separate filing fee for each appeal. *In the Matter of Gordon (Final Decision)*, 31 DEPR 60 (2024).

– Timeliness

Chief Presiding Officer Salvatore M. Giorlandino found that a Petitioner's failure to timely file a properly pled Notice of Claim required dismissal of her appeal and that principles of equitable tolling were not applicable in this case where the Petitioner received timely notice of the Department's SDA decision. *In the Matter of Baldissera (Final Decision)*, 31 DEPR 68 (2024).

An abutter appeal from a Negative SDA was dismissed where the Notice of Appeal was not filed in a timely fashion and also because it merely included objections that were vague, speculative, and without factual basis. *In the Matter of Baldissera (Final Decision)*, 31 DEPR 68 (2024).

A Pittsfield man's late-filed appeal from a \$30,795 Penalty Assessment Notice and a Unilateral Enforcement Order was dismissed. The Petitioner was fined for violations of Wetlands and Solid Waste Regulations, along with the Clean Waters Act. Not only was the appeal filed late but the Petitioner failed to submit a separate filing fee for each appeal. *In the Matter of Gordon (Final Decision)*, 31 DEPR 60 (2024).

The appeal of a *pro se* Petitioner challenging a \$54,165 Penalty Assessment Notice and a Unilateral Enforcement Order was dismissed for lack of timeliness as it was filed ten days late. The Petitioner had been fined for

placing fill in Riverfront Areas, violating the Clean Waters Act, and illegal dumping and open burning. *In the Matter of Hill (Final Decision)*, 31 DEPR 58 (2024).

An appeal from a Sherborn Ten Residents Group seeking a Superseding Order of Conditions was dismissed where the Notice of Claim failed to specify why their SOC request was timely given that postmarks and signature dates of some of the list of residents clearly indicated the request was not. Moreover, the Petitioners' Letter of Definite Statement did not meet the requirements for tolling the filing deadline. *In the Matter of Fenix Partners Farm Road, LLC (Final Decision)*, 31 DEPR 34 (2024).

OADR denied a reconsideration motion from a *pro se* appellant seeking a Superseding Order of Conditions with regard to a Wakefield project. The appeal had been dismissed for lack of timeliness where the request was submitted 479 calendar days after the original Order of Conditions was issued by the Conservation Commission. The decision finds that the Petitioner failed to provide any new basis in law justifying his filing an appeal so late. *In the Matter of CCF Quannapowitt Property Company, LLC (Final Decision)*, 31 DEPR 31 (2024).

Bordering Land Subject to Flooding

Affirming the SOC denying a project for a Lowell single-family home within Bordering Land Subject to Flooding in the flood zone of the Merrimack River, Presiding Officer Margaret R. Stolfa found that the project proponent had failed to demonstrate that the proposed system of vents, pipes, and storage vaults would allow flood waters to pass freely. As such, the design resulted in restrictions of flood water volumes and did not satisfy regulatory performance standards for construction in BLSF. *In the Matter of Martin Burke and Melmar Properties, LLC (Final Decision)*, 31 DEPR 1 (2024).

A design for compensatory storage for a single-family home in BLSF located in the Merrimack River flood plain miscalculated the lost flood storage space with flawed calculations for the house foundation and the rain garden. The correct calculation for the foundation should have included not only the foundation walls but the volume enclosed by the foundation walls. The rain garden stormwater storage capacity was a separate volume that could not be used for compensatory storage and should have been counted as storage "lost to fill." *In the Matter of Martin Burke and Melmar Properties, LLC (Final Decision)*, 31 DEPR 1 (2024).

Buffer Zone

– General

Chief Presiding Officer Salvatore M. Giorlandino adopted as final Presiding Officer Michael W. Dingle's Recommended Decision affirming a negative SDA for a residential property in Plymouth where the owner had engaged in minor activities in the buffer zone that do not require the filing of a Notice of Intent. These included maintenance of a lawn and landscaped areas, storage of firewood, and placement of a swing set and chicken coop. The appeal was brought by an abutter found not to be aggrieved. *In the Matter of Baldissera (Final Decision)*, 31 DEPR 68 (2024).

Motion for Reconsideration

OADR dismissed a Wakefield Petitioner's *pro se* motion for reconsideration of its denial of a Superseding Order of Consideration for lack of timeliness where the Petitioner failed to provide any further justification for his filing of an appeal notice over a year late. *In the Matter of CCF Quannapowitt Property Company, LLC (Final Decision on Reconsideration)*, 31 DEPR 63 (2024).

CUMULATIVE SUBJECT MATTER DIGEST–JANUARY-JUNE 2024

Notice of Intent**– Landowner Permission**

Where this North Andover Petitioner refused to sign a Notice of Intent and was one of four landowners affected by a proposal to pave a gravel private way, Presiding Officer Margaret R. Stolfi ruled that the Notice of Intent regulations only required the written permission of one landowner in these circumstances. Each landowner owned a pro rata share of the fee interest underlying the way, along with an easement that extended the length of the way. As such, only one Applicant needed to demonstrate “colorable claim” to title. *In the Matter of Kindred (Final Decision)*, 31 DEPR 54 (2024).

Penalties and Fines (See also Enforcement Order)**– General**

The appeal of a *pro se* Petitioner challenging a \$54,165 Penalty Assessment Notice and a Unilateral Enforcement Order was dismissed for lack of timeliness as it was filed ten days late. The Petitioner had been fined for placing fill in Riverfront Areas, violating the Clean Waters Act, and illegal dumping and open burning. *In the Matter of Hill (Final Decision)*, 31 DEPR 58 (2024).

Practice and Procedure**– Dismissal of Appeal**

MassDEP dismissed a Newbury Conservation Commission appeal challenging DEP’s SOC authorizing a project on undeveloped property after the parties filed a Joint Stipulation agreeing to the dismissal with each party bearing their own costs. *In the Matter of Walter Eriksen and Cricket Lane, LLC (Final Decision)*, 31 DEPR 11 (2024).

– Motion for a More Definite Statement

Commissioner Bonnie Heiple dismissed the appeal from the Wareham Conservation Commission challenging a MassDEP Superseding Order of Conditions overturning the Commission’s denial of wetlands permits for a solar energy project on a former cranberry bog where its claim for adjudicatory review failed to give adequate notice of the issues to be addressed or the relief sought. The appeal notice made insufficient reference to specific errors in the SOC and did not explain which statutes and regulations were violated. *In the Matter of BE RE, LLC (Final Decision)*, 31 DEPR 49 (2024).

An appeal from a Sherborn Ten Residents Group seeking a Superseding Order of Conditions was dismissed where the Notice of Claim failed to specify why their SOC request was timely given that postmarks and signature dates of some of the list of residents clearly indicated the request was not. Moreover, the Petitioners’ Letter of Definite Statement did not meet the requirements for tolling the filing deadline. *In the Matter of Fenix Partners Farm Road, LLC (Final Decision)*, 31 DEPR 34 (2024).

– Motion for Reconsideration

Upon the recommendation of Presiding Officer Patrick M. Groulx, Chief Presiding Officer Salvatore M. Giorlandino denied a motion to reconsider a PAN in the amount of \$30,795 against a Pittsfield man found to have unlawfully dumped large pieces of debris along the banks of the Housatonic River and in so doing violated the Wetlands Act, Solid Waste Regulations, and the Massachusetts Clean Waters Act. The decision notes that the motion merely renews claims or arguments previously made and denied. Moreover, the Petitioner’s assertion that he was unaware of the case, had not received emails, and was never served at the proper address were belied by the fact that he met with DEP officials, had actual knowledge of the PAN and UAO, and filed a response to the Order to Show Cause. *In the Matter of Gordon (Final Decision on Reconsideration)*, 31 DEPR 67 (2024).

Standing**– Abutters**

The appeal of a neighbor challenging a negative SDA arising from her Plymouth neighbor’s engagement in minor activities in the buffer zone, such as landscaping and installing a swing set, was dismissed for dismissed for failure to file a timely or complete Notice of Claim. Even had the Notice of Claim held up, the appeal would have been dismissed for lack of aggrievement where the Petitioner’s amended Notice of Claim failed to provide a clear description of the alleged errors in the SDA or a description of how these alleged errors were inconsistent with regulatory requirements. *In the Matter of Baldissera (Final Decision)*, 31 DEPR 68 (2024).

– Conservation Commission

The appeal from a Ten Residents Group, challenging a MassDEP Superseding Order of Conditions overturning the denial of wetlands permits for a solar energy project on a former cranberry bog was dismissed by Commissioner Bonnie Heiple where none of the members of the group met the regulatory criteria for previously participating in local permit proceedings and the written information the members did submit occurred prior to the hearing. *In the Matter of BE RE, LLC (Final Decision)*, 31 DEPR 49 (2024).

Commissioner Bonnie Heiple dismissed the appeal from the Wareham Conservation Commission challenging a MassDEP Superseding Order of Conditions overturning the Commission’s denial of wetlands permits for a solar energy project on a former cranberry bog where its claim for adjudicatory review failed to give adequate notice of the issues to be addressed or the relief sought. The appeal notice made insufficient reference to specific errors in the SOC and did not explain which statutes and regulations were violated. *In the Matter of BE RE, LLC (Final Decision)*, 31 DEPR 49 (2024).

– Environmental Activists

The appeal from an environmental group challenging a MassDEP Superseding Order of Conditions overturning the denial of wetlands permits for a solar energy project on a former cranberry bog was dismissed by Commissioner Bonnie Heiple for lack of standing where the group failed to submit sufficient written testimony during the local hearing. *In the Matter of BE RE, LLC (Final Decision)*, 31 DEPR 49 (2024).

– Specific Harm

Commissioner Bonnie Heiple dismissed an appeal from a Ten Residents Group challenging a Belmont Hill School expansion project where the group failed to maintain its numerosity during the course of the appeal and was reduced to seven individuals. The Commissioner also found that these individuals lacked standing in their individual capacities as their concerns were generalized and speculative and failed to raise issues that were justiciable under the Wetlands Protection Act. *In the Matter of Belmont Hill School (Final Decision)*, 31 DEPR 36 (2024).

– Ten Citizens Group

The appeal from a Ten Residents Group, challenging a MassDEP Superseding Order of Conditions overturning the denial of wetlands permits for a solar energy project on a former cranberry bog was dismissed by Commissioner Bonnie Heiple where none of the members of the group met the regulatory criteria for previously participating in local permit proceedings and the written information the members did submit occurred prior to the hearing. *In the Matter of BE RE, LLC (Final Decision)*, 31 DEPR 49 (2024).

Superseding Determination of Applicability**– Minor Activities**

Chief Presiding Officer Salvatore M. Giorlandino adopted as final Presiding Officer Michael W. Dingle’s Recommended Decision affirming a negative SDA for a residential property in Plymouth where the owner had engaged in minor activities in the buffer zone that do not require the filing

CUMULATIVE SUBJECT MATTER DIGEST–JANUARY-JUNE 2024

of a Notice of Intent. These included maintenance of a lawn and landscaped areas, storage of firewood, and placement of a swing set and chicken coop. The appeal was brought by an abutter found not to be aggrieved. *In the Matter of Baldissera (Final Decision)*, 31 DEPR 68 (2024).

Ten Citizens Group**– Substitution**

Commissioner Bonnie Heiple dismissed an appeal from a Ten Residents Group challenging a Belmont Hill School expansion project where the group failed to maintain its numerosity during the course of the appeal and

was reduced to seven individuals. The Commissioner also found that these individuals lacked standing in their individual capacities as their concerns were generalized and speculative and failed to raise issues that were justiciable under the Wetlands Protection Act. *In the Matter of Belmont Hill School (Final Decision)*, 31 DEPR 36 (2024).

Wetlands Bylaws

Presiding Officer Margaret R. Stolfi dismissed a North Andover Petitioner's claims under the local wetlands bylaw given MassDEP's lack of jurisdiction over municipal bylaws. *In the Matter of Kindred (Final Decision)*, 31 DEPR 54 (2024).

ABRIDGED SAMPLE

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Bergeron, Docket No. 01-071, Recommended Final Decision, 9 DEPR 71 (2002)

In the Matter of Kindred (Recommended Final Decision), 31 DEPR 56 (2024)

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Berkshire Housing Authority, Docket No. 10-007, Recommended Final Decision, 17 DEPR 161 (2010)

In the Matter of Baldissera (Recommended Final Decision), 31 DEPR 70 (2024)

Blackinton Common, LLC, Docket No. 07-115, Final Decision, 17 DEPR 8 (2010)

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In the Matter of King's Grant Water Company, Inc. (Recommended Final Decision), 31 DEPR 23 (2024)

Blackinton Common, LLC, Docket No. 07-115, Recommended Final Decision, 17 DEPR 10 (2010)

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Bogaty, Docket No. 01-005, Final Decision, 8 DEPR 188 (2001)

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Bottomley, Docket No. 09-015, Final Decision (May 5, 2009)

In the Matter of Baldissera (Recommended Final Decision), 31 DEPR 70 (2024)

Bottomley, Docket No. 09-015, Recommended Final Decision (April 30, 2009)

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Boyajian, Docket No. 10-030, Final Decision, 18 DEPR 72 (2011)

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In the Matter of Hill (Recommended Final Decision), 31 DEPR 59 (2024)

Boyajian, Docket No. 10-030, Recommended Final Decision, 18 DEPR 72 (2011)

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In the Matter of Hill (Recommended Final Decision), 31 DEPR 59 (2024)

Brice Estates, Inc., Docket No. WET-16-024, Final Decision, 24 DEPR 168 (2017)

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Brice Estates, Inc., Docket No. WET-16-024, Recommended Final Decision, 24 DEPR 168 (2017)

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Brockton Power Company, LLC, Docket No. 11-025, -026, Recommended Final Decision, 24 DEPR 27 (2016)

In the Matter of CCF Quannapowitt Property Co., LLC (Recommended Final Decision), 31 DEPR 33 (2024)

Brookline Department of Public Works, Docket No. 99-165, Final Decision, 7 DEPR 84 (2000)

In the Matter of Kindred (Recommended Final Decision), 31 DEPR 56 (2024)

Bryan, Docket No. 04-767, Recommended Final Decision, 12 DEPR 120 (2005)

In the Matter of King's Grant Water Company, Inc. (Recommended Final Decision), 31 DEPR 16 (2024)

Burkhard Corp., Docket No. 98-086, Final Decision, 6 DEPR 136 (1999)

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Corey, Docket No. WET-16-023, Final Decision, 25 DEPR 65 (2018)

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In the Matter of Belmont Hill School, 350 Prospect Street (Recommended Remand Decision), 31 DEPR 38 (2024)

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Daou, Docket No. WET-10-020, Final Decision on Reconsideration, 17 DEPR 331 (2010)

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In the Matter of Kindred (Recommended Final Decision), 31 DEPR 57 (2024)

Drohan, Docket No. 95-083, Final Decision, 3 DEPR 39 (1996)

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Duarte, Docket No. 22-015, Final Decision, 30 DEPR 44 (2023)

In the Matter of CCF Quannapowitt Property Co., LLC (Recommended Final Decision), 31 DEPR 32 (2024)

In the Matter of Gordon (Recommended Final Decision), 31 DEPR 61 (2024)

In the Matter of Hill (Recommended Final Decision), 31 DEPR 59 (2024)

Duarte, Docket No. 22-015, Recommended Final Decision, 30 DEPR 44 (2023)

In the Matter of CCF Quannapowitt Property Co., LLC (Recommended Final Decision), 31 DEPR 32 (2024)

In the Matter of Gordon (Recommended Final Decision), 31 DEPR 61 (2024)

In the Matter of Hill (Recommended Final Decision), 31 DEPR 59 (2024)

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In the Matter of Hill (Recommended Final Decision), 31 DEPR 59 (2024)

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In the Matter of King's Grant Water Company, Inc. (Recommended Final Decision), 31 DEPR 22 (2024)

In the Matter of KEN JAMES GORDON

OADR Docket Nos. 2024-004 and 2024-005
Enf. Doc. No. 00017309 and 00016603
Pittsfield

May 3, 2024

Salvatore M. Giorlandino, Chief Presiding Officer

Wetlands Appeal-Solid Waste-Clean Waters Act-Fines and Penalties—Upon the recommendation of Presiding Officer Patrick M. Groulx, Chief Presiding Officer Salvatore M. Giorlandino denied a motion to reconsider a PAN in the amount of \$30,795 against a Pittsfield man found to have unlawfully dumped large pieces of debris along the banks of the Housatonic River and in so doing violated the Wetlands Act, Solid Waste Regulations, and the Massachusetts Clean Waters Act. The decision notes that the motion merely renews claims or arguments previously made and denied. Moreover, the Petitioner's assertion that he was unaware of the case, had not received emails, and was never served at the proper address were belied by the fact that he met with DEP officials, had actual knowledge of the PAN and UAO, and filed a response to the Order to Show Cause.

FINAL DECISION

In accordance with her authority under the Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(b), Bonnie Heiple, Commissioner of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department"), has designated me the Final Decision-Maker in this administrative appeal.¹

I adopt the Recommended Final Decision on Reconsideration of the Presiding Officer. Any party may appeal this Final Decision to the Superior Court pursuant to MGL c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Final Decision.

June 3, 2024

Patrick M. Groulx, Presiding Officer

RECOMMENDED FINAL DECISION ON RECONSIDERATION

Ken James Gordon ("Petitioner"), has filed these consolidated appeals with the Office of Appeals and Dispute Resolution ("OADR")¹ of the Massachusetts Department of Environmental Protection ("Department") challenging the Department's issuance of a Penalty Assessment Notice ("PAN") (in Docket Number 2024-004) and Unilateral Administrative Order ("UAO") (in Docket Number 2024-005). Both the PAN and the UAO were issued for the alleged violations of the following statutes and regulations:

- The Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations at 310 CMR 10.00, *et seq.* In particular, the PAN and UAO allege that the Petitioner placed large pieces of fragmented concrete and other debris (e.g. bricks, glass, logs) along the

Bank of the West Branch of the Housatonic River, armoring the entirety of the Bank within the property, and within Land Under Water Body, Bordering Land Subject to Flooding, and Riverfront Area without first filing a Notice of Intent.

- The Massachusetts Clean Waters Act, G.L. c. 21, §§ 26 - 53, and the 401 Water Quality Regulations at 314 CMR 9.00 arising out of the same alterations.
- G.L. c. 111, §§ 150A and 150A1/2; the Solid Waste Management Regulations at 310 CMR 19.000; and the Site Assignment Regulations for Solid Waste Facilities at 310 CMR 16.00 for allegedly disposing of solid waste at a location without a site assignment and operating a facility to store solid waste without the proper permits.

The PAN was issued in the amount of \$30,795. Among other things, the UAO requires the Petitioner to hire an environmental consultant, draft plans to remediate the affected site, and implement the plans.

I issued a Recommended Final Decision on March 22, 2024, recommending that the Commissioner dismiss the matter for failure to file the consolidated appeals timely. The Commissioner designated the Chief Presiding Officer as the final decision maker in this matter, and he issued a Final Decision [31 DEPR 60] on April 5, 2024. The Petitioner filed a motion for reconsideration on April 11, 2024.

I. MOTION FOR RECONSIDERATION

The Motion for Reconsideration states as follows:

I Ken Gordon is filing this motion for reconsideration of the final decision, pursuant to 310 CMR 1.01(14)(b). I intend to appeal this decision because of the following reasons:

- I was never served with any PAN or UAO documents. They were sent to the wrong address.
- The PAN and UAO were sent to the wrong Email.
- I never know I was in violations of anything with DEP. I was never served.
- I was not served with notice for conference hearing.
- this case was done without my knowledge.

Motion for Reconsideration (April 9, 2024).

II. APPLICABLE STANDARD

Under 310 CMR 1.01(14)(d),

Where a finding of fact or ruling of law on which a final decision is based is clearly erroneous, a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion. Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. The motion shall be filed within seven days from the

1. 310 CMR 1.01(14)(b) provides in relevant part that "[e]very final decision" in an administrative appeal "shall be in writing and shall be signed by the [Department's] Commissioner or a designee of the Commissioner."

1. OADR is an independent quasi-judicial office in the Department which is responsible for advising its Commissioner in resolving all administrative appeals of Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

date the decision is mailed to the parties by the Department. The filing of a motion for reconsideration is not required to exhaust administrative remedies.

A party seeking reconsideration of a Final Decision issued by the Department's Commissioner in an administrative appeal of a Department enforcement order or permit decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); *Matter of Gary Vecchione*, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, *6, adopted as Final Decision on Reconsideration [21 DEPR 116] (November 7, 2014), 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." *Id.* "[R]econsideration [of the Final Decision is not] justified by the [party's] disagreement with the result reached in the Final Decision." *Id.* at *7.

III. ANALYSIS

The Petitioner's motion "repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied." 310 CMR 1.01(14)(d). First, "[e]ven though the Petitioner states that the PAN and UAO were sent to the wrong address, he nevertheless received them in time to meet with Mr. McHugh at the WERO office on January 26, 2024, well within the timeframe to appeal." Recommended Final Decision, p. 6. Given that the Petitioner had actual knowledge of the PAN and UAO, whether they were sent to an incorrect address is irrelevant. As to the assertion that the Petitioner did not know about this case, the Petitioner filed a response to the Order to Show Cause and those arguments were considered on their merits, and the record is clear that the Petitioner had actual notice. *See* Recommended Final Decision, pp. 6-7. The Petitioner makes no argument that the legal determination that the appeals were filed untimely is incorrect.

IV. CONCLUSION

For the foregoing reasons, I recommend that the Commissioner's designee issue a Final Decision on Reconsideration denying the motion.

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* * * * *

In the Matter of RICARDO BALDISSERA

OADR Docket No. WET-2021-026
DEP File No. SDA
Plymouth

May 7, 2024
Salvatore Giorlandino, Chief Presiding Officer

Wetlands Appeal-Superseding Negative Determination of Applicability-Minor Residential Activities-Untimely Notice of Claim-Tolling-Lack of Aggrievement-Lack of Clear Description of Alleged Errors in the SDA-Vague and Speculative Objections Without Factual Basis—The appeal of a neighbor challenging a negative SDA arising from her Plymouth neighbor's engagement in minor activities in the buffer zone, such as landscaping and installing a swing set, was dismissed for dismissed for failure to file a timely or complete Notice of Claim. Even had the Notice of Claim held up, the appeal would have been dismissed for lack of aggrievement where the Petitioner's amended Notice of Claim failed to provide a clear description of the alleged errors in the SDA or a description of how these alleged errors were inconsistent with regulatory requirements.

FINAL DECISION

In accordance with the Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(b), Bonnie Heiple, Commissioner of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department"), has designated me the Final Decision-Maker in this administrative appeal.¹ I adopt the Recommended Final Decision of the Presiding Officer. As such I affirm the Superseding Determination of Applicability ("SDA") issued on April 2, 2021 by the Southeast Regional Office of the Massachusetts Department of Environmental Protection in this case. The parties to this proceeding are notified of their right to file a motion for reconsideration of this decision, pursuant to

1. 310 CMR 1.01(14)(b) provides in relevant part that "[e]very final decision" in an administrative appeal "shall be in writing and shall be signed by the [Department's] Commissioner or a designee of the Commissioner."

310 CMR 1.01(14)(d). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this decision. A person who has the right to seek judicial review may appeal this decision to the Superior Court pursuant to MGL c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this decision.

March 7, 2024

Michael W. Dingle, Presiding Officer

RECOMMENDED FINAL DECISION

This is an appeal of a Negative Superseding Determination of Applicability (“SDA”) issued to Ricardo Baldissera (“Applicant”) by the Massachusetts Department of Environmental Protection (“MassDEP”) on April 5, 2021 concerning exempt minor activities at Baldissera’s property located at 403 Federal Furnace Road, Plymouth, Massachusetts (the “Baldissera Property”). The SDA affirmed a negative determination of applicability issued by the Plymouth Conservation Commission (PCC). MassDEP determined that the following normal residential activities in the Buffer Zone do not require the filing of a Notice of Intent because they will not alter a wetlands resource area subject to protection under the Massachusetts Wetland Protection Act, G.L. c. 131, sec. 40 (“MWPA”) and the Wetlands Regulations, 310 CMR 10.00: (1) maintenance of lawn and landscaped areas; (2) storage of firewood; (3) placement of a children’s swing set; (4) placement of a chicken coop; and (5) other exempt minor activities permissible under 310 CMR 10.02(2)(b)1.

The appeal is brought by Ethel Clair Koury (“Petitioner”), an abutter to the project site. Petitioner is the record owner of the abutting property at 393-395 Federal Furnace Road, Plymouth, Massachusetts (the “Koury Property”).¹

I. PROCEDURAL HISTORY

On April 21, 2021, MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) received from Petitioner an Adjudicatory Hearing Fee Transmittal Form and a check for the \$100 filing fee. However, OADR did not receive from Petitioner a separate Notice of Claim as required by 310 CMR 1.01(6)(b) and 310 CMR 10.05(7).

On May 17, 2021, at Presiding Officer Jane Rothchild’s request, OADR’s Case Administrator emailed Petitioner’s attorney to notify him that OADR had received the check and the fee transmittal form but not the Notice of Claim, and that if he had filed a Notice of Claim by mail to request that he email a copy to her. On May 21, 2021, Petitioner’s attorney emailed the Case Administrator stating “We will have the appeal document to you by early next

week.” On May 26, 2021, the Case Administrator again contacted Petitioner’s attorney who later that day filed a Notice of Claim. The document was not dated.

On June 9, 2021, after reviewing the Notice of Claim, the Presiding Officer issued Petitioner an Order for More Definite Statement pursuant to 310 CMR 1.01(6)(b) and 310 CMR 1.01(11)(b) because the Notice of Claim failed to allege any facts sufficient to establish that Petitioner had standing to bring the appeal as a person aggrieved. On June 17, 2021, in response to OADR’s Order for a More Definite Statement, Petitioner submitted an “Amended Notice of Claim for Adjudicatory Hearing” containing a list of objections to the SDA and supporting exhibits.

At a Prehearing Conference on September 30, 2021, the Presiding Officer noted concerns with respect to the timeliness of the Notice of Claim and established a schedule for the Applicant and MassDEP to file motions to dismiss the appeal and for Petitioner to file an opposition. The Applicant and MassDEP filed a Joint Motion to Dismiss on October 7, 2021, arguing: (i) OADR lacks jurisdiction over the appeal because Petitioner failed to timely file a proper Notice of Claim complying with the Wetlands Appeal Regulations at 310 CMR 10.05(7)(j)(2); and (ii) Petitioner’s appeal is based on speculative and conclusory claims and therefore she lacks standing and has failed to state a basis on which appellate relief can be granted. Petitioner filed an Opposition to the Joint Motion to Dismiss on October 15, 2021, arguing (i) when the contents of a Notice of Claim do not meet the requirements of 310 CMR 1.01, a Presiding Officer has discretion, pursuant to the Adjudicatory Proceeding Regulations at 310 CMR 1.01(6)(b), to dismiss the appeal or require a more definite statement; (ii) Petitioner’s appeal should be deemed timely based on principles of equitable tolling; and (iii) Petitioner has met the threshold for standing as an “aggrieved person” and her appeal must proceed.

I was appointed as a Presiding Officer in July 2023 and was assigned this appeal in January 2024. After reviewing the entire record, I find that Petitioner’s failure to timely file a properly pled Notice of Claim requires dismissal of this wetlands appeal. I also find that Petitioner has failed to state sufficient facts to demonstrate status as a person aggrieved. Accordingly, I recommend that this appeal be dismissed.

II. PETITIONER’S UNTIMELY NOTICE OF CLAIM REQUIRES THAT THIS APPEAL BE DISMISSED

Petitioner argues that pursuant to 310 CMR 1.01(6)(b), when there is a content-related defect in a notice of claim, a Presiding Officer can exercise discretion either to dismiss an appeal or require a more definite statement. Therefore, according to Petitioner, “[u]nlike the time limitation for filing an appeal, the requirement of a Notice of Claim is not jurisdictional.”

1. Koury’s daughter, Sharon Racette (“Racette”) has alleged that she filed this appeal on behalf of her mother. Racette stated during the September 30, 2021 Prehearing Conference in this matter that Koury suffers from Alzheimer’s Disease and is accordingly unable to prosecute the appeal. Racette alleged that she has been prosecuting this appeal pursuant to an authorization from Jennifer L. McClory

(“McClory”), who Racette asserted is Koury’s attorney-in-fact. However, the Durable Power of Attorney (the “POA”) and authorization letter fail to explain how the power of attorney has passed to McClory, who is the second successor attorney-in-fact under the POA.

Petitioner's argument is flawed. This is a wetlands appeal, and under 310 CMR 10.05(7)(j)9.b., the following regulations shall apply to wetland appeals: 310 CMR 1.01(1) through (5), (6) (c), (f) through (k); (8); (10); (12)(a)(c)(d); (13)(a) through (c), (e) through (h), (j), (l) through (n); (14)(b) through (g) and 1.03: *Miscellaneous Provisions Applicable to All Adjudicatory Proceedings*. 310 CMR 1.01(6)(b) specifically does **not** apply to wetland appeals, and in a conflict between the sets of rules, the wetland appeals regulations take precedence. 310 CMR 10.05(7)(j)9.a. Simply put, Petitioner's argument fails because 310 CMR 1.01(6)(b) does not apply to this case.

This matter does not involve a mere defect in the contents of a notice of claim. Rather, the defect is Petitioner's failure to timely file a notice of claim in the first place, as required by 310 CMR 10.05(7)(j). That governing regulation provides, in relevant part:

Any applicant, landowner, [or] aggrieved person if previously a participant in the permit proceedings... may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision... **Any party listed in 310 CMR 10.05(7)(j)2.a. that fails to timely file an Appeal Notice pursuant to 310 CMR 10.05, shall be deemed to have waived its right to appeal the Reviewable Decision.**

310 CMR 10.05(7)(j)2.a. (emphasis added). The next subsection of the regulation provides that:

"The Appeal Notice shall include... a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, MGLc. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision.

310 CMR 10.05(7)(j)2.b.v.

In this case, MassDEP issued the SDA at issue on April 5, 2021. Within the ten-day period to appeal the SDA, Petitioner filed only an Adjudicatory Hearing Fee Transmittal Form and a check for the \$100 filing fee. The Fee Transmittal Form includes the following notice immediately below the document's title:

"IMPORTANT! This form is intended for fee transmittal only. The contents of a request for an adjudicatory appeal (Notice of Claim) are established at 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's action."

However, despite that clear notice, Petitioner identified only the names and contact information for Petitioner, Applicant Baldissera, and the project at issue. It did not contain any statement of alleged errors in the SDA or that the SDA is inconsistent with 310 CMR 10.05. Indeed, Petitioner did not identify any objections at all until June 17, 2021, when she submitted her Amended Notice of Claim for Adjudicatory Hearing.

Because Petitioner failed to file, within the ten-day period, a Notice of Claim complying with 310 CMR 10.05(7)(j)(2), this appeal must be dismissed. The recent decision in *Matter of Emile Tayeh,*

Jr., OADR Docket No. WET-2019-016, Recommended Final Decision [27 DEPR 105] (June 8, 2020) discusses the clear ramifications of failing to timely file a notice of claim. "The Wetlands Regulations provide that a person with a right to file an appeal of a SOC must file the appeal within ten business days of the date the SOC is issued. The administrative cases have consistently construed the timely filing of an appeal as a jurisdictional requirement that has been strictly applied." *Matter of Boyajian*, OADR Docket No. WET-2010-030, Recommended Final Decision, 2011 MA ENV LEXIS 50 (February 23, 2011), adopted by Final Decision [18 DEPR 72], 2011 MA ENV LEXIS 48 (March 9, 2011); *Matter of Berkshire Housing Authority*, Docket No. 2010-007, Recommended Final Decision (March 16, 2010) (dismissing appeal as untimely by one day), adopted by Final Decision [17 DEPR 161] (March 19, 2010); *Matter of Stanley E. Bogaty and Frances Bogaty*, Docket No. 2001-005, Final Decision [8 DEPR 188] (September 19, 2001) (dismissing appeal as untimely by one day); *Matter of Joseph Demait*, Docket No. 97-063, Final Decision [5 DEPR 59] (April 9, 1998) (dismissing appeal as untimely by two days); see also *Matter of Xarras*, Docket No. 2008-059, Recommended Final Decision (June 26, 2008), adopted by Final Decision (June 27, 2008); *Matter of Bay Park Development Trust*, Docket No. 88-291, Final Decision - Order of Dismissal (March 31, 1989); *Matter of Treasure Island Condominium Association*, Docket No. 93-009, Final Decision (May 13, 1993); *Matter of Cross Point Limited Partnership*, Docket No. 95-088, Final Decision [3 DEPR 82] (April 30, 1996).

III. PRINCIPLES OF EQUITABLE TOLLING ARE NOT APPLICABLE IN THIS CASE

"The ten-day appeal period is a jurisdictional element that requires dismissal of the appeal if not fulfilled." *Matter of Town of Swansea*, OADR Docket No. WET-2014-020, Recommended Final Decision [22 DEPR 70] (March 27, 2015). Petitioner's claims that an adjudicatory appeal of a wetland matter such as the instant SDA "presents a procedural morass" or that Petitioner may not have been represented by counsel when she submitted her Fee Transmittal Form is not a basis to toll the appeal deadline. "The appeal period cannot be extended or modified." *Matter of Fred Bottomley*, Docket No. WET-2009-015, Recommended Final Decision (Apr. 30, 2009), adopted by Final Decision (May 5, 2009); *Matter of R & R Home Construction Corp.*, Docket No. 95-009, Final Decision [2 DEPR 89] (Apr. 14, 1995). Moreover, even if Petitioner was pro se, she was nevertheless required to comply with the applicable procedural rules. *Matter of Dan and Eva Barstow*, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 MA ENV LEXIS 16, at 8-9, adopted by Final Decision [27 DEPR 39] (February 19, 2020), 2020 MA ENV LEXIS 12; *Lawless v. Bd. of Registration in Pharm.*, 466 Mass. 1010, 1011 n.3 (2013).

"Tolling of the appeal period has been permitted in strictly limited circumstances. Tolling may be appropriate when: 1) a party that was entitled to receive notice of an SOC did not receive notice; and 2) the failure to receive notice caused the party to fail to file a timely appeal." See, e.g., *Matter of Jose Verissimo*, Docket No.

WET-2008-006, Recommended Final Decision (June 5, 2008), adopted by Final Decision (July 3, 2008).

Those circumstances are not present here. Petitioner clearly received timely notice of the Department's SDA decision which includes, in Section D of WPA Form 2, a list of the contents of an appeal notice required by 310 CMR 1.01(6) and 310 CMR 10.05(7)(j). The Fee Transmittal Form that Petitioner submitted states that it is intended for fee transmittal only and that the contents of a Notice of Claim appear in 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's SDA.

IV. PETITIONER LACKS STANDING AND HAS FAILED TO STATE A CLAIM

Under the governing regulation, "[a]ny applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a Reviewable Decision..." 310 CMR 10.05(7)(j)(2)(a). Petitioner has failed to establish that she is an "aggrieved person" for purposes of this appeal. The regulation defines "aggrieved person" as

any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in MGL c. 131, §40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

310 CMR 10.04. Here, to be "aggrieved," Petitioner must present evidence that: 1) Applicant's proposed usage of his property contravenes the interests of the Wetlands Act; and 2) the usage would cause Petitioner a private, particular injury. She has done neither. For example, her allegation that "compaction and saturation of soils on [Baldissera's] Property will increase the flooding impact to [Petitioner's] property" is too vague and speculative to establish standing. "An allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." *Matter of Jerry Marone*, Docket No. WET 2021-025, Recommended Final Decision (June 11, 2021), adopted by Final Decision [28 DEPR 39] (June 21, 2021) (dismissing appeal claiming that failure to install a culvert under a driveway would result in excess runoff onto petitioner's property). Similarly, Petitioner's statement that "[Baldissera's] Request does not supply sufficient information to rebut the presumptions of the WPA and Regulations" is insufficient to establish that Applicant's proposed usage would impact the interests of the Wetlands Act.

Based on these same deficiencies, Petitioner has failed to state a claim upon which appellate relief can be granted. Even if OADR had jurisdiction to address this matter, Petitioner's Amended Notice of Claim still fails to provide a clear and concise description of the alleged errors in the SDA including a description of how the alleged errors are inconsistent with 310 CMR 10.00 and do not contribute to the protection of the interests identified in the Wetlands Protection Act. *See* 310 CMR 10.05(7)(j)(2)(b)(v). As noted above, Petitioner's objections are vague, speculative,

and without factual basis. An appeal may be dismissed if alleged wetlands impacts are remote, speculative or otherwise based upon conclusion rather than fact. *Matter of Town of Falmouth Department of Public Works*, Docket No. 93-032, Decision and Order on Motion to Dismiss, 1 DEPR 217 (September 2, 1994) (dismissing appeal based on speculative claim that extension of highway would cause cars to careen off into surrounding wetlands).

CONCLUSION

Petitioner failed to file a timely Notice of Claim within the ten-day period mandated by 310 CMR 10.05(7)(j)(2). Accordingly, her appeal should be dismissed. Even if a Notice of Claim had been timely filed, Petitioner has failed to demonstrate her status as an "aggrieved person" as defined in 310 CMR 10.04. Accordingly, I recommend that the Commissioner issue a Final Decision dismissing this appeal.

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to MGL c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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ABRIDGED SAMPLE

DEPR Commentary

July-December 2023

Matthew Watsky, Esq.
Rachel Watsky, Esq.

WatskyLaw

WatskyLaw is an Environmental Permitting and Regulatory, Land Use, and Administrative Law practice based in Dedham, Massachusetts.

Matthew Watsky, a former Mass-DEP Deputy General Counsel, has represented a wide range of clients in private practice since 1990. He brings his experience and insight, primarily on behalf of for-profit corporations and property owners, to matters ranging from simple ANR approvals to complex matters with overlapping layers of federal, state, and local environmental and land use regulation. In addition to environmental law and land use, he represents clients in other areas of administrative law proceedings, such as those before OSHA, the FAA, and local Airport Commissions.

Rachel Watsky, who joined WatskyLaw in September 2018, was the principal contributor to this commentary. Prior to joining WatskyLaw, she was a judicial intern at Land Court for two judges and interned at the Massachusetts Department of Environmental Protection's Office of General Counsel. She represents clients in environmental and land use matters, as well as regulatory and administrative law matters.

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. Stolf, 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.

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;
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. Stofa. 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 memorandum 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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