

Matthew Watsky, Esq.

*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**, admitted to the Massachusetts bar in November 2018, has now joined the practice and was a contributor to this commentary.*

I. Introduction

Several decisions, including *In the Matter of Jean T. Ricupero and Karen and Thomas Doyle*, *In the Matter of Jimary Realty Trust*, and *In the Matter of Robert J. Cote*, discuss the importance of expert witnesses providing facts to establish their credibility. Expert witnesses must support their conclusions with evidence and base their opinions on the facts of the case, because OADR Presiding Officers will note misconceptions and outright inaccuracies in their testimony, particularly if the witness did not personally inspect and analyze the site, and will discount the weight of the expert's testimony as a result. *In the Matter of 104 Stony Brook, LLC*, *In the Matter of Jimary Realty Trust*, and *In the Matter of FTO Realty Trust* discuss doctrines of statutory and regulatory interpretation, including the Multiple Filings Policy, public trust doctrine, and estoppel. Additionally, OADR held in *In the Matter of Three Bays Preservation, Inc.*, and *Mass Audubon Society* that a petitioner is responsible for looking for notification of the Chapter 91 public comment period required for nonapplicant intervenors, and cannot rely on DEP staff to remind or inform the petitioner of the running of the public comment period.

II. Credibility of Expert Witnesses

A practice tip in cases depending upon expert testimony: Counsel should ensure that the expert views the site at issue and is personally familiar with the specific facts of the case. Attorneys should review expert reports and testimony for consistency with the facts of the case and the accurate application of the rules and regulations prior to submitting the testimony to the agency. The potential financial benefits of an expert basing their opinion on reports or photos alone, or to have only a young assistant conduct inspections but to have the senior expert testify based on the associate's observations, is not worth the risk of a Presiding Officer noting that an expert has not viewed the property and discounting their testimony severely or entirely. You can be sure this will be a question asked on cross examination in upcoming hearings.

In the Matter of Jean T. Ricupero and Karen and Thomas Doyle, Docket No. WET-2017-015, 016, DEP File No. SE 66-1744, 1745, Sandwich, 25 DEPR 103

June 26, 2018. Jane A. Rothchild, Presiding Officer, issued the Recommended Final Decision, adopted as the Final Decision by Martin Suuberg, Commissioner, on July 13, 2018. The Decision

involved consolidated appeals to two Superseding Orders of Conditions issued by DEP-SERO, one to Jean Ricupero and one to Thomas and Karen Doyle, each for a separate project at the property now owned by the Doyles. Abutters Chris and Marcia Warrington brought the appeal, asserting that they were aggrieved by the two SOC's. The first project, filed on behalf of Ricupero, was to abandon and remove an existing below grade septic system and construct a new below grade septic system in coastal dune, barrier beach, and Riverfront Area. The second project, filed on behalf of the Doyles as prospective buyers of the property, proposed to raze the existing at-grade single family home and to replace it with a house elevated on timber piles, and the associated deck, stairs, shed, and fence, in coastal dune, barrier beach, coastal beach, and Riverfront Area. The Doyles' NOI would result in an overall reduction of the displacement of the coastal dune resource by the house from 818 square feet down to 21 square feet. The NOI would also reconstruct the coastal dune displaced by the existing house and foundation by placing 215 cubic yards of clean, compatible dune sand under the proposed elevated house and would reconnect the abutting dunes on either side of the house by matching their contours as closely as possible. Sandwich issued Orders approving each project, and the Warringtons appealed. On appeal, DEP issued SOC's affirming the two projects.

The Presiding Officer issued a Recommended Final Decision dismissing the appeals on two grounds: 1) the Petitioners lacked standing, and 2) the Petitioners failed to prove that the DEP erred in issuing the SOC's. Additionally, the Presiding Officer found that each project complied with the applicable regulations and would protect and enhance the interests of the WPA. The Petitioners based their argument of aggrievement on their expert's testimony, which stated that the project would create a new pathway for coastal waters through the Doyles', formerly Ricupero's, lot, subjecting the Petitioners' property to the negative effects of erosion and undermining vegetation. Petitioners wanted the proposed house to be moved landwards towards the road. The Petitioners ignored the fact that moving the house away from the dune towards the road (and Riverfront Area) was an alternative considered during the MEPA process, and the fact that the MEPA process concluded that the alternative would result in increased impacts within the Riverfront Area as compared to the preferred alternative.

The Petitioners' expert familiarized himself with the site by reviewing 1) the NOIs for both projects, 2) the SOCs for both projects, 3) the proposed project site plan for the site, 4) the FEMA map from 2014, 5) site photos taken by others, 6) aerial photos from Google Earth, and 6) the map of record for property. The crux of the Petitioners' expert's testimony was that elevating the house on timbers, losing mature established dune vegetation around the existing foundation, and reconstructing the dune would create a new pathway for ocean waters. The Petitioners' expert argued that the project would not meet standards of protecting the coastal beach, coastal dune, land subject to coastal storm flowage, barrier beach, and riverfront area.

The Presiding Officer held that although the Petitioners were abutters who previously participated in the permitting process, their only stated basis for aggrievement was that a new pathway for ocean waters would be created, and there was no credible evidence to support their assertion. The Presiding Officer held that the Petitioner's expert's testimony suffered from an incomplete understanding, misunderstanding, or intentional disregard of the project's conditions and a fatal error of fact. The expert did not review the Post-Construction Development Plan for the project, nor the MEPA certificate issued. He based his testimony of the creation of a new pathway on the statement that the crest of the new dune would be at elevation 15, when it would in fact be at elevation 18. The expert had the opportunity to review updated plans, appeared to have failed to do so, and when corrected on the dune elevation during the hearing he refused to revise his testimony. Based on this, the Presiding Officer determined that the Petitioner's expert lacked familiarity with the subject matter of his testimony, making his arguments and testimony mere speculation unsupported by credible evidence.

As the Petitioners' basis of aggrievement was based entirely on the noncredible expert's testimony, the Presiding Officer found that the Petitioners had failed to demonstrate their standing. This case is an example of the importance of an expert being familiar with the site and with the subject matter, as the Presiding Officer gave no weight to the testimony and thus no weight to the claim of aggrievement.

In the Matter of Jimary Realty Trust, OADR Docket No. 2016-015, DEP File No. Waterways No. W14-4276, Gloucester, 25 DEPR 156

August 3, 2018. Salvatore M. Giorlandino, Chief Presiding Officer, issued the Recommended Final Decision, adopted as the Final Decision by Martin Suuberg, Commissioner, on August 14, 2018. OADR held that DEP erred in approving a c.91 license for a Gloucester boatyard improvement project with respect to the Applicant's proposed L-shaped float structure, which would significantly interfere with public rights of navigation by impairing line of sight and requiring the alteration of the established course of vessels, and would generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present. Expert testimony from a seasoned local mariner demonstrated that the proposed float would significantly interfere with public rights of navigation, and the testimony from the Waterways Section Chief was found unpersuasive, because the Chief failed to visit the project site before filing expert testimony, and relied

on the testimony of one of the Applicant's experts who was found not credible.

The Petitioners challenge a portion of the c.91 license issued on the basis that the proposed L-shaped float would interfere with public rights of navigation and failed to comply with the 25-foot setback requirement of 310 CMR 9.36(2). The Decision did not describe the factual basis for a claim under this rule—so this decision does not shed light on whether the area was naturally intertidal, but dredged, or Commonwealth Tidelands. The Petitioners' expert witness was a retiree from the maritime industry, and was very familiar with the waters of Gloucester Harbor after nearly 50 years' experience as a sailor and 40 years of experience as a commander/operator of medium to large sized sea vessels. The Applicant's expert witness was an experienced sailor and operator of medium to large sized vessels, and he had charter boat management experience and spent time all about Gloucester Harbor. His testimony was based on a review of the Pre-Filed Testimony, his personal observations, his familiarity with the fairway at issue, and his experience as a licensed Captain. The Applicant's expert was found unpersuasive because his observation of the fairway at issue was in fact limited solely to his observations as he navigated a different channel, and he admitted that he had never operated a boat in the specific fairway at issue. Additionally, the Applicant's expert admitted on cross-examination that there was nothing unfair about the Petitioners' expert witness's demonstration/simulation of the use of large vessels in the fairway at issue, and he further admitted that he, like the Petitioner's expert claimed, would not take larger vehicles into the fairway without advance arrangements either.

After the Applicant's expert witness was found unpersuasive, the testimony of the DEP's Waterways Section Chief in support of the project was also found not persuasive. The Chief had not visited the site in 20 years and did not view the site prior to filing Pre-Filed Testimony that depended heavily on the testimony of the Applicant's expert witness.

When OADR finds a witness's testimony unpersuasive, it can be fatal to a case when one party's expert is found credible and the other's is not. In this case, the Presiding Officer discounted the testimony of both the Applicant's expert, primarily because he had not made himself personally familiar with the specific fairway at issue. The DEP's expert, having relied on the Applicant's expert testimony, was also found lacking. It is crucial to have an expert visit the specific site at issue and be familiar with the details and facts of the project in order for the OADR to find the expert credible or to give more weight to the expert's testimony.

In the Matter of Robert J. Cote, OADR Docket No. WET-2017-014, DEP File No. 197-0604, Leicester, 25 DEPR 165

August 9, 2018. Salvatore M. Giorlandino, Chief Presiding Officer, issued the Recommended Final Decision, adopted as the Final Decision by Martin Suuberg, Commissioner, on August 28, 2018. OADR affirmed the SOC authorizing the removal and relocation of a 30-foot section of an existing stone wall on a bank of a Leicester pond in connection with creating access for a proposed boat ramp. OADR found that there was sufficient information from the Applicant's expert to approve the work and condition the

project to protect the bank and associated buffer zone. OADR added two new conditions to the Final Order that required the relocation of the proposed retaining wall, with new footing similar to the footing under the existing wall, and obligated the Applicant to stabilize the exposed area after construction with compacted materials to prevent erosion into resource areas. The OADR found that although the 30 feet of bank impacted by the proposed project was significant to flood control, the project could still be approved under the Wetland Protection Act and wetlands regulations because the proposed removal and relocation of the wall satisfied the performance standards of 310 CMR 10.54(4), and the resource area would be enhanced and protected by the two conditions proposed by DEP at the hearing and accepted by OADR in the Final Order. Additionally, the proposed work would satisfy the requirements of 310 CMR 10.53(1), and the additional conditions proposed by DEP and included by OADR would enhance and protect the erosion and sedimentation controls proposed for project.

The Petitioner raised the issue during the appeal that the Applicant submitted only a hand-drawn plan, not one created with engineering software. Site plans under 310 CMR 10.04 require that the plan be deemed necessary by the issuing authority to describe the site and/or the work, to determine the applicability of the MWPA or to determine the impact of the proposed work on interests identified in the MWPA. The regulation makes it clear that the permit issuing authority has discretion to determine what is necessary on a plan. In this case, Applicant may have supplied only a hand drawn plan, but did so after responding to a request for more detailed plan, and the Conservation Commission was satisfied with the revision. The regulations do not require an engineered plan for every wetlands project, because that cost could make even small projects prohibitively expensive.

Additionally, the Petitioner failed to present evidence on the issue of whether the Applicant failed to overcome the presumption that the proposed project impacts on the bank were significant to the interests of the Act and wetlands regulations. The Petitioner cannot just rely on the assertion that the NOI application was insufficient to cover the claim that the Applicant failed to overcome the presumption of significance. The Applicant addressed the issue anyway on the grounds that the work proposed would increase the flood storage volume of the pond and demonstrated that the project activities would comply with the general performance standards of 310 CMR 10.54(4) and would protect resource areas sufficiently. The Petitioner's expert failed to present specific evidence supporting their argument that the project did not comply with those general performance standards, when the Applicant's expert addressed all five applicable general performance standards pertaining to bank and testified as to how the proposed project would comply.

The weighing of credibility of the experts is often dependent on the detail with which the witness addresses the regulatory issues, and applied the factual observations to those standards. An attorney should ensure that an expert has viewed a site in person, reviewed all materials relating the project, and that the expert can speak to the specifics of the regulations.

In the Matter of Miltiades and Phyllis Tzitzenikos, OADR Docket No. WET-2010-033, Newbury, 25 DEPR 183

August 3, 2011. Timothy M. Jones, Presiding Officer, issued the Recommended Decision, adopted as the Final Decision by Kenneth Kimmell, Commissioner (in 2011), on October 12, 2011. This decision was not available in 2011, but has been made available in this publication of the OADR decisions. The Applicants in this case challenged the SOC issued by DEP that denied the proposed project of a single-family house, driveway, and walkway. The denial was based on the grounds that the project did not meet performance standards for coastal dune and barrier beach.

At issue in this case was again the credibility of expert witnesses. The Presiding Officer found the Applicant's expert not credible in this case, although the expert is widely recognized as an expert in the science of coastal dunes and barrier beaches. The Applicant's expert's knowledge of Plum Island specifically, where the project was proposed, was considered outdated as the expert based his testimony on his experience on the Island as a student in the 1970s. The situation on Plum Island, including erosion issues, had drastically changed since the 1970s. Additionally, the Applicant's expert's testimony was found conclusory, without foundation, and internally inconsistent.

The DEP's expert witness, however, was found highly credible. She was very familiar with Plum Island, and Newbury in particular, after providing technical assistance to Newbury. She was extensively involved in the delineation of dunes since 1993, and had visited Plum Island multiple times. The DEP's witness based her testimony on fieldwork specific to the site, on GIS technology that used Light Detection and Ranging ("LiDAR") data from when she delineated Plum Island's Primary Frontal Dune in her work for CZM and FEMA, and on a cross-sectional analysis of the site.

Although an older case, *In the Matter of Tzitzenikos* is still applicable as an example of how crucial it is to ensure that your expert is prepared and knowledgeable about the specifics of the site.

III. Doctrines of Statutory and Regulatory Interpretation

In the Matter of 104 Stony Brook, LLC, OADR Docket No. WET-2017-021, Weston, 25 DEPR 120

May 21, 2018. Timothy M. Jones, Presiding Officer, issued the Recommended Final Decision, adopted as the Final Decision by Stephanie Cooper, Deputy Commissioner, on July 17, 2018. The Petitioner 104 Stony Brook LLC appealed the SORAD issued by DEP concerning their property at 104 Boston Post Road, Weston, MA. The Petitioner claimed its property exempt from Riverfront Area regulations based on the Historic Mill Complex exemption, and their request was denied by both the Weston Conservation Commission with the issuance of an Order of Resource Area Delineation and DEP with the issuance of the SORAD affirming the ORAD. The Petitioner's argument of the site's association with a Historic Mill Complex was opposed by the DEP, the City of Cambridge, and the Weston Conservation Commission, who all contended that the Riverfront Area exemption was not applicable, because the property was not associated with a Historic Mill Complex.

On December 22, 2016, the Petitioner filed an ANRAD to confirm Bordering Vegetated Wetland (“BVW”) and Riverfront Area (“RA”) on the property. The Petitioner later filed a comprehensive permit application with Weston’s ZBA seeking to construct 150 rental units in an 8-story building outside RA on the site. The Conservation Commission issued an ORAD denying Petitioner’s request to exempt the property under the Rivers Protection Act as a Historic Mill Complex. On appeal, DEP confirmed the BVW delineation and affirmed the denial of the Historic Mill Complex exemption. The property, 2.09 acres, had approximately 17,000 square feet of RA (assuming the applicability of a 200-foot Riverfront Area), and an existing building, the historic Nathaniel Sibley house, located far outside the RA. The property was surrounded by mill areas starting in around 1679, and a mill existed near but not on the property until the 1880s. By 1831, other buildings in the area but not on the property at issue included a saw mill, a grist mill, a cider mill, two barns, an ice house, a cattle shed, and a piggery. The building now referred to as the Sibley House and another building may have been used for a period of time until the 1880s as boarding houses for mill employees. In 1885, a law enacted by the Legislature took much of the property for the City of Cambridge’s water supply, which ended all mill operations. From 1940 to 1945, the property was the homestead of Nathaniel L Sibley, not part of a mill complex.

Section 18 of the Rivers Protection Act states that “The riverfront area shall not include land now or formerly associated with historic mill complexes including, but not limited to, the mill complexes in the Cities of Holyoke, Taunton, Fitchburg, Haverhill, Methuen and Medford in existence prior to nineteen hundred and forty-six and situated landward of the waterside face of a retaining wall, building, sluiceway, or other structure existing on the effective date of this act.” The DEP responded to the Act’s enactment by promulgating the regulations 310 CMR 10.58, regarding riverfront area. DEP defined Historic Mill Complex as any mill complex in, but not limited to, Holyoke, Taunton, Fitchburg, Haverhill, Methuen, and Medford in existence prior to 1946 and situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure existing on August 7, 1996. A Historic Mill Complex also means any historic mill included on the Massachusetts Register of Historic Places. A Historic Mill Complex includes only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking areas, and driveways) constructed before and existing after 1946, used for any type of manufacturing or mechanical processing and including associated structures to provide water for processing, to generate water power, or for water transportation.

The Petitioner argued the entire 2.09-acre property qualified as exempt HMC because it included land now or formerly associated with Historic Mill Complexes - focusing on the prefatory language in the statute and asserting it serves as a separate standard, rather than reading the statute and regulation congruently. The Presiding Officer held that this argument was without merit.

First, there is no indication that DEP wanted the exemption in the regulations to be different from the statute’s exemption. Second, it would not make sense to create two exemptions, one applying to the land alone and one applying to activities within the footprint of Historic Mill Complexes. Third, the Legislature wanted to expand the wetland resource area protection, not to carve out a blanket protection for land associated with Historic Mill Complexes regardless of whether the mill complex purportedly existed. Additionally, DEP cannot regulate land outside of its jurisdiction, which is confined solely to activities within the riverfront area, buffer zone to resource areas, and to resource areas.

The Decision goes on to analyze the regulations under the doctrines of administrative law. The Presiding Officer applies the two-part regulatory validity test to determine whether regulations promulgated by an agency are valid. The first part is to employ conventional rules of statutory interpretation to determine whether the Legislature has spoken with certainty on the topic in question.¹ This involves determining if the statute is unambiguous, and if so, the court gives effect to the legislature’s intent. Second, if the Legislature does not directly address the issue and the statute is capable of more than one rational interpretation, the tribunal must proceed to determine whether the agency’s interpretation may be reconciled with the governing legislation.² The Presiding Officer held that DEP recognized that the River’s Act exemption for historic mill complexes was ambiguous and sought to clarify the Act while remaining consistent with the Act during the creation of the regulations. The Presiding Officer held that the DEP’s regulation was reasonable, and in so doing, gave deference to DEP’s interpretation, especially since the Legislature did not exercise its authority to challenge and alter that interpretation when it had the opportunity to do so.

The Presiding Officer found no part of the riverfront area on the property exempt pursuant to the historic mill complex exemption. The evidence did not show that there was a historic mill complex in existence before 1946 and until at least August 7, 1996, indeed, any mill complex ostensibly associated with the site ceased to exist after the property taking in the 1880s for the Cambridge water supply. Additionally, the facts failed to demonstrate that any part of the riverfront area included the footprint of the area that is or was occupied by interrelated mill buildings in existence by 1946 and until at least August 7, 1996. Therefore, the Presiding Officer advised that the DEP Commissioner should issue a Final Decision affirming the SORAD.

Concepts of judicial interpretation of statutory and regulatory law are applied in an administrative tribunal like the OADR. Counsel should be prepared, if necessary, to incorporate such concepts into their arguments.

In the Matter of Three Bays Preservation, Inc. and Mass Audubon Society, OADR Docket No. 2017-020, Osterville, 25 DEPR 128

July 24, 2018. Timothy M. Jones, Presiding Officer, issued the Recommended Final Decision, adopted as the Final Decision by Martin Suuberg, Commissioner, on July 31, 2018. The holding in

1. *In the Matter of 104 Stony Brook, LLC*, 25 DEPR 125 (citing *Goldberg v. Bd. of Health of Granby*, 444 Mass. 627 (2005)).

2. *In the Matter of 104 Stony Brook, LLC*, 25 DEPR 125 (citing *Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 187 (2009)).

this case was that a failure to file public comments during the public comment period under the Waterways Regulations was fatal to the Petitioners' standing to appeal the waterways license and WQC permits given for a barrier island dredging project intended to improve bird habitat and navigation. Although the Petitioners survived a motion to dismiss and a motion for summary decision with respect to standing, their failure to comply with the regulatory requirement (310 CMR 9.17(1)(b), 314 CMR 9.10(1)) to submit public comments during the public comment period proved to be fatal to standing. Additionally, the Presiding Officer held that Petitioners may not assert estoppel against DEP to excuse their failure to file comments, even if the Petitioners claim that their failure to do so was due to reliance on DEP's representations. The decision also discusses public trust doctrine and the rule against applying estoppel to the government.³

The Petitioners contacted DEP prior to the combined permit filing by the Applicant, asking for guidance. On December 14, 2014, a Petitioner emailed a DEP staff member inquiring about the project status after the Commission's review had terminated. The DEP staff member responded, explaining that the next step in the process was DEP issuing permits for c.91 and the 401 Water Quality Certification, and provided contact information for the specific DEP staff members handling the permits. In January 2015, the Petitioners contacted the appropriate staff members and asked to be notified when the applications were submitted, and the staff members agreed to do so. The Petitioners contacted DEP again in late spring and early summer, asking if the applications had been filed. The Petitioners contacted DEP again in November 2015 and were informed that the combined permit application was filed in July 2015. The Petitioners then filed their comments with the DEP staff members. In fact, the public notice of the combined permit application was published on August 7, 2015, stating that DEP was receiving public comments until August 22, 2015 and August 28, 2015 for each of the permit applications. No public comments were received during those comment periods. Two years later, DEP issued a combined permit for c.91 and 401 Water Quality Certification. It was alleged and not disputed that the combined permit application was in fact filed in March, 2015, and if the DEP staff members had replied accurately to the Petitioners' inquiries in April 2015 or June 2015, the Petitioners would have monitored the weekly newspaper and seen the public notice.

The Motion to Dismiss was denied because the Petitioners' allegations must be assumed to be true, and if so then the Petitioners were aggrieved. However, an allegation of aggrievement alone is not enough, the Petitioners must demonstrate that they are aggrieved and also that they submitted written comments during the public comment period. Although the Petitioners demonstrated an injury different from the general public both in kind and in magnitude, to establish standing in a hearing, the possibility of injury must be more than an allegation of abstract, conjectural, or hypo-

thetical injury, the Petitioners must put forth credible evidence to support their allegations.

Case law for c.91 appeals that include public trust doctrine states that a party appealing the waterways license must have more than a vague and transient interest in the matter, their aggrievement must be high enough to assure that the appealing party will be a responsible representative of the public trust beneficiaries and a diligent advocate of the significant public rights and interests it asserts. For example, a Petitioner in this case demonstrated possible injury in fact that is distinguishable from any injury to the general public in both kind and magnitude. The Petitioner had lived in the surrounding area for over 70 years, swims, boats, and bird watches in the area, and has two moorings for unique boats that are protected by the island. The project's proposed widening of the inlet would increase wave action in Cotuit harbor, which could impact Petitioner's ability to use his boats safely. The Petitioner's wife and son-in-law, also avid sailors in the area, corroborated his testimony. The Petitioner sufficiently proved aggrievement, including evidence of a possible injury to protected legal interests that fall within c.91 public trust rights (navigation), and demonstrated significant legal interests at stake with the moorings and boats. The Petitioner's interests were sufficiently different in kind and magnitude from general public. The Petitioner, however, failed to file timely public comments and that was fatal to his standing to appeal. None of the other petitioners filed timely public comments, and DEP did not extend the public comment periods.

This case is unique from many in that the Petitioners defend their failure to file public comments based on their reliance on DEP staff having agreed to provide notification of the combined permit filing, and DEP having failed to notify the Petitioners. Apparently, DEP inaccurately responded to Petitioners that the combined permit had not been filed yet, even though it had, and that the public comment period had not yet begun to run, even though it had. It is irrelevant that the Petitioners filed comments after learning that the comment period expired. The Petitioners argued that the OADR should apply estoppel under the narrow exception to the general rule that estoppel may not be asserted against the government. The elements of estoppel are 1) an actor makes a representation intended to induce reliance on the part of a person to whom the representation is made, 2) the person makes an act or omission in reasonable reliance on the actor's representation, and 3) the person suffers detriment as a consequence of the act or omission.⁴ Estoppel is narrowly applied to the government in cases where a government official acts or makes representations contrary to a statute or regulation designed to prevent favoritism, secure honest bidding, or ensure some other legislative purpose.⁵ The Presiding Officer held that in this case, DEP never indicated to the Petitioners in any way that its statements should be relied upon. The DEP made statements of fact in its emails to the Petitioners, but those statements were not intended to misrepresent the law or to circumvent the law. There was no evidence that DEP made

3. Public Trust Doctrine means that the Commonwealth holds tidelands in trust for public use. The Legislature delegated authority to DEP under Chapter 91 to 'preserve and protect' the public's rights in tidelands by allowing only water-dependent uses or another proper public purpose. (Citing *Moot v. Dep't of Environmental Protection*, 448 Mass. 340, 342 (2007)).

4. *In the Matter of Three Bays Preservation, Inc. and Mass Audubon Society*, 25 DEPR 141 (citing *Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 27-28 (2006)).

5. *In the Matter of Three Bays Preservation, Inc.*, 25 DEPR 142 (citing *McAndrew v. School Comm. Of Cambridge*, 20 Mass. App. Ct. 356, 361 (1985)).

the representations to the Petitioners intending to induce them to rely on those representations and to encourage them not to look for the public notice, or that the Petitioners' reliance was reasonable. There was nothing stopping the Petitioners from looking for public notice of the comment period in the newspaper. There was also no evidence that the Petitioners contacted the DEP more frequently with a clear intent to rely on DEP's responses to determine when to look for the public notice. There was no evidence explaining why the Petitioners could not have looked for the public notice themselves.

A takeaway from this case is that potential petitioners of projects should not rely on the representations of agencies or localities regarding the public comment period or the timelines. Potential petitioners should confirm the timelines for themselves, and should keep an eye out for public notices in newspapers. The statutory deadlines for public comment are not negotiable, and reliance on a governmental agency will not automatically mean that the narrow exception to the general prohibition of estoppel on governments will be applicable.

In the Matter of FTO Realty Trust, OADR Docket No. WET-2015-024RM, Tewksbury, 25 DEPR 195

October 19, 2018. Timothy M. Jones, Presiding Officer, issued the Recommended Final Decision after Remand, adopted as the Final Decision after Remand by Martin Suuberg, Commissioner, on October 29, 2018. On remand from Superior Court, the OADR found that DEP filed a timely appeal from a flawed Tewksbury Order approving the NOI application for a single-family house that failed to comply with the performance standards for Bordering Land Subject to Flooding ("BLSF"). The flawed design had multiple hydraulic restrictions in the compensatory flood area. DEP suggested an alternative ground for affirming its SOC denying the project, the doctrine of judicial estoppel, which would bar the Applicant from maintaining inconsistent positions to manipulate and play fast and loose with judicial system.

The Petitioner challenged the SOC denying the proposed project of a single-family house with 6 feet of fill underneath, with a 5-foot-high retaining wall encircling the house for protection from flooding, with all construction within BLSF and riverfront area. The final plans proposed filling 21,504 cubic feet of BLSF for the house, with 21,599 cubic feet proposed as compensatory flood area. The existing property had a small cottage on pilings approximately 10 feet from the river. The project proposed to demolish the cottage and restore the disturbed riverfront area. The property was largely within resource areas or buffer zones to resource areas. The Tewksbury Conservation Commission issued an Order in March 2015 approving the project, but did not timely send the Order to DEP. DEP had requested additional information and abutters opposed the project. DEP was notified of work on the site by an abutter, and learned that an Order had been issued. After contacting the Commission's agent, DEP received the Order in May 2015. DEP then appealed the Order and issued an SOC denying the project on the grounds that it would impede

flood waters, would restrict the hydraulic connection to river, and would result in flooding to the nearby avenue. FTO appealed the SOC to OADR. During the appeal, the Petitioner filed a new NOI with the Conservation Commission to address the issues raised by DEP in its SOC. The Petitioner filed for a stay on the appeal so that they could work on the second NOI application, claiming that the second NOI would address DEP's concerns. DEP opposed the stay on the grounds that the second NOI was filed with the Commission on April 19, 2016, but not filed with the DEP until May 3, 2016, soon before the DEP's Pre-Filed Testimony in the appeal was due. OADR allowed the stay on the grounds of the Wetlands Program Policy 88-3, the Multiple Filings Policy, and on the Petitioner's representations. The Commission approved the second NOI application with a new Order on July 11, 2016, which DEP appealed.

This case discusses Wetlands Program Policy 88-3, which requires that if the applicant files multiple NOIs concerning the same project, they must choose within 21 days of the Commission's subsequent Orders which NOI they will pursue, or have the first NOI application involuntarily dismissed. The Petitioner represented that it would be content with either NOI and subsequent Order, and would not choose which appeal to pursue. Pursuant to the Policy, OADR chose for them, ruling that the Petitioner was the one who invoked the Policy to get the stay in the first appeal, was aware of the provisions of the policy, and that the order allowing the stay in the first appeal required compliance with the Policy. The OADR decided to dismiss the first NOI and the appeal associated with it because the Petitioner failed to make the decision. The Petitioner then appealed that decision to Superior Court, which issued a ruling in the Petitioner's favor that the Policy did not apply under the circumstances of the case, vacating the decision and remanding it to OADR to decide if the DEP's appeal of the first Order was valid, and then if the policy applied. During the appeal to Superior Court, the DEP issued an SOC affirming the second Order approving the project.

The Decision also ruled that the DEP timely appealed the first Order. The OADR affirmed the SOC on its merits, and held that the preponderance of the evidence, even from the Commission, showed that DEP filed a timely appeal of the first Order. The Commission's agent failed to mail the first Order to the DEP, despite having a statutory obligation to do so. Evidence showed that the DEP did not receive 17 of the 52 Orders the Commission issued during the three-year period around when the first Order was issued, with no coherent explanation from the Commission. The Commission's agent could not explain its mailing procedures without multiple inconsistencies and uncertainties, in contrast to DEP, which had a well-established, consistent, formal procedure for the receipt and distribution of mail within the agency. Due to that failure and the statutory obligation, the 10-business day period tolled until DEP knew or should have known of the Order. Once the DEP learned of the issuance of the Order, it appealed within 10 business days.⁶

6. We assume, although not stated in the Order, that DEP appealed within 10 business days of the postmark on the envelope in which the Order was actually sent to the DEP.

Additionally, the Presiding Officer held that the project did not comply with the applicable wetland performance standards. DEP learned that the floodplain elevation on the site was higher than that shown on the site plan, and photos from the abutter showed most of the site underwater during a flood of record. DEP appealed the project on the grounds that the BLSF boundary was not accurate, and that additional fill of BLSF would occur even though the Order did not quantify it, and that insufficient compensatory flood storage was proposed. The compensatory flood storage proposed would also restrict the hydraulic connection to the river and result in flooding to the road.

The Presiding Officer held that the Petitioner was bound by judicial estoppel, and could not use inconsistent positions to manipulate the judicial system.⁷ The Doctrine barred the Petitioner from continuing their appeal because the administrative record demonstrated that they held inconsistent positions. The Petitioner had claimed throughout the process of the first appeal and the second NOI filing that it would pursue whichever filing became final. The Petitioner did in fact receive the second SOC approving the project, which was not appealed and became final. The Petitioner began work on the site in accordance with that SOC, but after the OADR attempted to dismiss the first NOI and Order, the Petitioner appealed to Superior Court and later attempted to have the Presiding Officer recused for considering having the first SOC appeal mooted based on the finality of the second SOC. The Petitioner then argued that it intended to pursue the first Order,

rather than the second, despite significant costs that would ensue from such an attempt to change the site work of the second SOC to that of the first Order. The Presiding Officer held that the Petitioner should be judicially estopped from continuing to pursue the appeal, contrary to its representation that if the second SOC was approved, then the appeal of the first would no longer be necessary.

IV. Conclusion

The decisions from OADR often discuss important concepts and doctrines, ranging from cases of first impression to applying long-held precedent that impact the outcome of the cases. A Presiding Officer will carefully review and weigh the credibility of an expert's testimony, and will discount those that are based on clear misconceptions or lack of personal knowledge of the case, or that are not backed by the facts and specifics of the case. Failure to proffer testimony from a persuasive, credible expert witness can lead to, at times, mere discounting of that specific testimony, or, in the case where a party's standing relies on that testimony, the dismissal of the case. Some issues implicate DEP jurisdiction, such as the requirement of Commissions to comply with statutory mailing obligations and the requirement of intervening parties in Chapter 91 cases to participate in public comment within a specific period, which are non-negotiable and non-discretionary. Practitioners and participants should be aware of and responsive to deadlines, and should not depend solely on the statements of the agency regarding deadlines. ■

7. "Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously

asserted in another proceeding." *In the Matter of FTO Realty*, 25 DEPR 10 (citing *Blanchette v. School Comm. of Westwood*, 427 Mass. 176, 184 (1998)).