COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

May 21, 2018

In the Matter of
104 Stony Brook, LLC

OADR Docket No. WET-2017-021
Weston, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

The Petitioner, 104 Stony Brook, LLC ("Petitioner" or "Stony Brook"), challenges the Superseding Order of Resource Area Delineation ("SORAD") issued by the Massachusetts Department of Environmental Protection's Northeast Regional Office ("DEP") concerning Stony Brook's real property at 104 Boston Post Road, Weston, Massachusetts ("the Property"). The SORAD was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The protected Resource Areas at the Property include Riverfront Area and Bordering Vegetated Wetlands ("BVW"). See G.L. c. 131 § 40; 310 CMR 10.02; 310 CMR 10.55 and 10.58.

Stony Brook lodged this appeal after its request to exempt the Property from the Riverfront Area regulations was denied by both the Weston Conservation Commission ("Commission") and DEP in the Order of Resource Area Delineation ("ORAD") and SORAD, respectively. Shortly after filing this appeal here, with the Office of Appeals and Dispute Resolution ("OADR"), Stony Brook filed a motion for summary decision arguing that the Property is exempt from regulation as Riverfront Area pursuant to Section 18 of the Rivers

Protection Act (or "Rivers Act"). Stony Brook argues that the Property is exempt because of its asserted association with an historic mill complex. That association, Stony Brook contends, provides an exemption under the Rivers Protection Act from regulation as a Riverfront Area.

The other parties—DEP, Intervener City of Cambridge, and the Commission—all opposed the motion for summary decision, and filed cross motions for summary decision. Those parties assert that the purported exemption under the Rivers Protection Act is inapplicable. Instead, they contend that DEP promulgated regulations that implement the historic mill complex exemption in the Rivers Act and the Property is not encompassed within the scope of that regulatory exemption.

There are no genuine issues of material fact, and thus the appeal is ripe for summary decision. After reviewing the parties' pleadings, the applicable law, and the administrative record I conclude that the Rivers Act does not exempt the Property from being regulated as Riverfront Area. When the Massachusetts Legislature enacted the Rivers Act it charged DEP with promulgating regulations to implement that act. DEP did that when it promulgated 310 CMR 10.58 (Riverfront Area regulations) and the definition of Historic Mill Complex in 310 CMR 10.04. As a consequence, those regulations are the controlling regulatory authority for historical mill complex exemptions in the Riverfront Area, not the Rivers Act.

Contrary to Stony Brook's argument, DEP's regulatory exemption for Historic Mill Complexes properly and validly implements the Rivers Act's historic mill exemption. As a consequence, the regulatory exemption is the only historic mill complex exemption, and there are not two exemptions, one under the Rivers Act and the other under the regulations, as Stony Brook argues. The Property fails to satisfy the criteria for exemption under the regulations, and

as a consequence the Property is not exempt. Summary decision should therefore be entered in favor of DEP, Cambridge, and the Commission to affirm the SORAD, and against Stony Brook.

EVIDENCE

The evidence in the administrative record is derived from pre-filed written testimony and exhibits submitted by the parties. The testimony is sworn to under the penalties of perjury, and thus materially equivalent to an affidavit. Pre-filed testimony was filed on behalf of the witnesses identified below.

For Stony Brook, testimony from the following witnesses is in the administrative record:

1. Timothy J. Williams. Williams is a Massachusetts licensed professional engineer, employed with Allen & Major Associates. Williams is a civil engineer who has knowledge of wetlands laws and has been involved in the permitting phase of the project. No educational background information was provided for him.
2. David Calhoun. Calhoun is a principal of Stony Brook. He provided historical information concerning the Property. No educational background information was provided for him.

For the Weston Conservation Commission testimony from the following witness is in the administrative record:

1. Michele Grzenda. Grzenda is employed as the Weston Conservation Commission Administrator. Grzenda has 10 years of experience as a conservation administrator and 7 years of experience as an environmental consultant. She has 21 years of experience in wetlands and water resources management. No educational background information was provided for her.

For DEP testimony from the following witness is in the administrative record:

1. Heidi Davis. Davis has been employed with DEP in its Division of Wetlands and Waterways Program since 1989. She has substantial experience in wetlands permitting and enforcement matters. She served as the primary point person for DEP's Northeast Regional Office in connection with the implementation of the Rivers Protection Act. She is a certified wetlands scientist and has a BA in environmental science.

BACKGROUND

On December 22, 2016, Stony Brook filed an Abbreviated Notice of Resource Area Delineation ("ANRAD") to obtain an Order of Resource Area Delineation ("ORAD") confirming the delineation of BVW and Riverfront Area.[1] The ANRAD is an appropriate procedural mechanism to determine regulatory jurisdiction under the Wetlands Protection Act and the Wetlands Regulations.

Indeed, the Wetlands Regulations at 310 CMR 10.05 (3)(a)1 provide that any person who wishes to know whether the Wetlands Act applies to land or to work that may affect a resource area may file a request for a determination of applicability with the local conservation commission. Matter of Bosworth, Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), adopted by Final Decision (March 14, 2016). The request is sometimes referred to as an ANRAD, the acronym for "abbreviated notice of resource area delineation." The process provides a procedure for a party to confirm the delineation of wetland Resource Areas that are identified on the plans filed with the conservation commission. 310 CMR 10.05(4)(b)2. In response, the conservation commission issues an ORAD, generally affirming or rejecting the ANRAD. An ORAD is binding as to the location of resource areas identified by

[1] Stony Brook has filed a Comprehensive Permit with the Town of Weston Zoning Board of Appeals seeking to construct 150 rental units in an 8 story building on the Property outside the Riverfront Area.

the proponent. 310 CMR 10.05(6)(a)3. It is not binding with respect to resource areas at the property that were not identified by the proponent. Bosworth, supra.; Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012).

ORADs are generally entitled to preclusive effect for a period of three years, or longer if they are extended. See Matter of Tompkins-Desjardins Trust, Docket No. WET-2010-035, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 7, 2011). The purpose of allowing a period for reliance upon the ORAD is to facilitate reasonable reliance and predictability for those affected by the ORAD property. Id.

Here, after holding hearings, the Commission issued an ORAD denying Stony Brook's request to exempt the Property under the Rivers Protection Act. Stony Brook appealed to DEP, requesting a SORAD. DEP issued a SORAD confirming the BVW delineation and confirming that the Property is not entitled to an exemption under the Rivers Act. The matter is now on appeal here, before OADR.

The Property consists of 2.09 acres, or 91,040.4 square feet. According to the SORAD, the Property contains upland area, Riverfront Area for Stony Brook, and Buffer Zone to BVW. Approximately 17,000 square feet of the Property is located within the Riverfront Area. Most of the Property is wooded. Davis PFT[2], ¶ 23. Only one building, known as the historic Nathaniel Sibley House, is presently located on the Property. It sits far from Stony Brook, outside of the Riverfront Area on the upland portion of the Property.

Under the Wetlands Regulations and Wetlands Act, the Riverfront Area is the land between the mean annual high-water line of a perennial stream and a parallel line 200 feet away. G.L. c. 131 § 40; 310 CMR 10.58(2)(a); Matter of Skeffington, Docket No. WET 2009-049,

[2] "PFT" is the acronym for pre-filed testimony.

Recommended Final Decision (March 30, 2010), adopted by Final Decision (April 9, 2010). Riverfront Area is likely to be "significant to protect the private or public water supply; to protect groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries." 310 CMR 10.58(1). Land adjacent to rivers and streams can protect the natural integrity of these water bodies. The presence of natural vegetation within riverfront areas is critical to sustaining rivers as ecosystems and providing these public values. 310 CMR 10.58(1) and (3) (absent evidence to the contrary a Riverfront Area is presumed to be significant to the protection of these interests).

I discuss below the undisputed material facts in the light most favorable to Stony Brook. Beginning in about 1679, the area surrounding the Property was substantially developed by mills and related industrial purposes, particularly along Stony Brook. The estimated total surrounding mill area ranges from 73-150 acres. The Property was purchased in 1832 by Nathaniel Sibley, Henry Coolidge, and Joseph Treat. A mill existed on the bank of Stony Brook near but not on the Property until around the 1880s. By 1831, other buildings in the area but not on the Property included a saw mill, grist mill, cider mill, two barns, ice house, cattle shed, and piggery.

In about 1885, much of the Property was taken by laws enacted by the Massachusetts Legislature for the City of Cambridge water supply. Any mill related operations ceased at that time. Cambridge was consequently vested with certain water rights, resulting in the creation of the 75 acre Stony Brook Reservoir. It is undisputed that another mill-related building was not constructed on the Property from 1885 to the present. Williams PFT, ¶¶ 9-11; Exhibits 6, 7, 14, 15; Calhoun PFT, Exhibit 2.

The Site Plan in this appeal depicts evidence of 4 buildings on the Property—the existing Sibley House and remnants of 3 structures that were razed in or before the 1960s. The Sibley house remains on the upland portion of the Property, approximately 500 feet from the river. It is now used as an office building. All that is left of the 3 remaining structures are small remnants of stone foundations. There is uncontroverted evidence showing that by around 1940 to 1945 the Property was the homestead of Nathaniel L. Sibley, not a mill complex. Grzenda PFT, Exhibit 8. Of the three razed structures, the one closest to the river was what has been referred to as the Bigelow House, named after the apparent owner, Abraham Bigelow. It and the Sibley House may have been used for a period of time until the 1880s as boarding houses for mill employees. The evidence indicates that a corner of the Bigelow House may have touched or slightly extended into the 200 foot Riverfront Area. Williams PFT, Exhibit 21; Davis PFT, ¶ 36.

Aside from the Sibley house, the remainder of the Property consists primarily of woods, in addition to paved parking and access driveways. Stony Brook is a perennial stream located southeast of the Property on land owned by Cambridge. It discharges into the Stony Brook Reservoir, which is located south of the site and is owned by Cambridge.

STANDARD OF REVIEW

The Adjudicatory Rules, 310 CMR 1.01(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits (or pre-filed written testimony) show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for

summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home Centers, Inc., supra. (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)).

DISCUSSION

I. Section 18 of the Rivers Protection Act is not Applicable as an Exemption

The Rivers Act. This appeal is grounded in the Rivers Protection Act and whether DEP properly implemented the historic mill complex exemption in the Rivers Act. In 1996, the Wetlands Act, G.L. c. 131 § 40, was amended by the Rivers Protection Act, Chapter 258 of the Acts of 1996. The Rivers Protection Act created the Riverfront Area as a new protected resource area under the Wetlands Act. See 310 CMR 10.02(1). When it enacted the Rivers Protection Act the legislature stated that its purposes are "to protect the private or public water supply; to protect the groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect fisheries." Rivers Act, § 1. The Rivers Act is not intended to diminish the protections and exemptions provided in G.L. c. 131 § 40. Rivers Act, § 1.

When the legislature drafted the Rivers Protection Act it included Section 18, which relates to when "historic mill complexes" are exempt from the Riverfront Area. Section 18 specifically provides the following:

> 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. (emphasis added)

At the same time it enacted the Rivers Act, the legislature also delegated to DEP the obligation to "adopt such regulations as are deemed necessary to carry out the purposes of this act." Rivers Act, § 4 (emphasis added). The legislature also required that the regulations adopted by DEP "shall be filed with the joint committee on natural resources and agriculture sixty days prior to their effective date . . . ." Rivers Act, § 4. The Rivers Act further required DEP to create a "riverfront advisory committee for the purpose of participating in the review of the rules and regulations promulgated pursuant to the provisions of §4 of the th[e] act." The act prescribed the committee's membership. Rivers Act, § 11.

DEP's Regulatory Promulgation Process. DEP followed the legislative directive and amended the Wetlands Regulations with: 310 CMR 10.58, which regulates the Riverfront Area created by the Rivers Act, and the definition of Historic Mill Complex in 310 CMR 10.04. See Preface: 1997 Regulatory Revisions for the Rivers Protection Act Amendments to the Wetlands Protection Act (summarizing the regulations and the regulatory development process). DEP's rulemaking process included the "Riverfront Advisory Committee," which, as required by the Rivers Act, was comprised of: "four representatives of environmental organizations, a developer, and a representative for real estate, agriculture and aquaculture interests. Three committee members owned land within the riverfront area. The committee met biweekly from January through April, 1997." 1997 Preface, § II.

"The Department also had the benefit of comments from other knowledgeable individuals from the development, environmental, and legal communities. The Department held seven public hearings in May 1997 and received over 1,200 pages of comments from citizens, environmental organizations and development interests." 1997 Preface, § II.

DEP engaged in a robust drafting and rulemaking process, as exemplified above and by the "Riverfront Advisory Committee Meeting Summary" from the January 31, 1997 meeting. DEP Motion, Exhibit 5. Topics for discussion included, among other things, the historic mill complex exemption and the need to define "historic mill complexes," such as: how to "better define the limits of the parcel," "limits to the area covered by the exemption," and how to encourage redevelopment. Id. At that particular meeting, 22 people were present. Id.

In the Preface to the Riverfront Area regulations, DEP stated that while it was drafting and promulgating the regulations it "received comments expressing many conflicting views of the legislative intent behind the Rivers Protection Act. [DEP stated that] [t]he regulations are designed to implement the statute by providing clear procedures and substantive criteria to guide applicants, conservation commissions, and Department staff from project design through the decision making process. The new provisions governing riverfront areas are located at 310 CMR 10.58; the variance provisions formerly at 310 CMR 10.58 and 10.36 have been moved to 310 CMR 10.05 (10)." 1997 Preface, § III (emphasis added).

The regulations were promulgated July 25, 1997, and became effective October 6, 1997, after the 60 mandatory legislative review period "with the joint committee on natural resources and agriculture" expired. Rivers Act, § 4.

The regulations contain an extensive discussion of the importance of the Riverfront Area, providing that it is:

> likely to be significant to protect the private or public water supply; to protect groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries. Land adjacent to rivers and streams can protect the natural integrity of these water bodies. The presence of natural vegetation within riverfront areas is critical to sustaining rivers as ecosystems and providing these public values. The riverfront area can prevent

> degradation of water quality by filtering sediments, toxic substances (such as heavy metals), and nutrients (such as phosphorus and nitrogen) from stormwater, nonpoint pollution sources, and the river itself. Sediments are trapped by vegetation before reaching the river. Nutrients and toxic substances may be detained in plant root systems or broken down by soil bacteria. Riverfront areas can trap and remove disease-causing bacteria that otherwise would reach rivers and coastal estuaries where they can contaminate shellfish beds and prohibit safe human consumption. Natural vegetation within the riverfront area also maintains water quality for fish and wildlife.

310 CMR 10.58(1).

"Although Massachusetts has almost 9000 miles of rivers, the riverfront area is less than one percent of the state's total acreage. The purpose of the Rivers Protection Act is to preserve the natural integrity of rivers and adjacent land for the important values these areas provide to all citizens of the Commonwealth." 1997 Preface, § I.

Pursuant to the Rivers Act's charge for DEP to draft regulations it "deemed necessary to carry out the purposes of th[e] act"[3] DEP promulgated regulations pertaining to the "historic mill complex" exemption that originated in Section 18 of the Act. Thus, DEP promulgated provisions "[e]xempt[ing]" or "[g]randfather[ing]" certain activities or areas, including "[a]ctivities within an Historic Mill Complex." 310 CMR 10.58(6)(k). The phrase "Historic Mill Complex was undefined in the Rivers Act, and so DEP defined it in the regulations as follows:

> Historic Mill Complex means the mill complexes 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. An historic mill complex also means any historic mill included on the Massachusetts Register of Historic Places. An historic mill complex includes only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking

[3] Rivers Act, § 4 (emphasis added).

> 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.

310 CMR 10.04 (Historic Mill Complex definition).

Application of the Regulatory Exemption. At first blush, the resolution of this appeal would seem to be straightforward: DEP followed the legislative directive and process to promulgate regulations to implement the "purposes" of the Rivers Protection Act. Ordinarily, and absent an ambiguity, the plain meaning of those regulations is controlling. Matter of Sullivan, Docket No. WET 2011-013, Recommended Final Decision (May 31, 2011), adopted by Final Decision (June 22, 2011); Matter of Milton, Docket No. WET 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012).

Stony Brook, however, contends that to follow that path in this appeal would be a mistake. It argues that DEP's regulations exempting historic mill complexes is inconsistent with and distinctly different from the historic mill complex exemption in the Rivers Protection Act. It believes that the statutory exemption in Section 18 of the Rivers Act is much broader than DEP's regulatory exemption. As a consequence, it contends that the apparent conflict should be dealt with by harmonizing the regulation and the statute to create *two different* exemptions, a regulatory exemption and a statutory exemption. In brief, it argues that the statutory exemption applies to "land now or formerly associated with historic mill complexes." In contrast, the regulatory exemption applies to "[a]ctivities within an Historic Mill Complex." 310 CMR 10.58(6)(k). Stony Brook argues that I should apply only the statutory exemption to the Property, as no "activities" have yet been proposed for the Riverfront Area and the statutory

exemption is broader. Stony Brook argues that the entire 2.1 acres is exempt because it includes "land now or formerly associated with historic mill complexes."[4]

There are a number of reasons why Stony Brook's position is without merit. The first is that there is no indication that DEP intended its historic mill regulatory exemption to be a distinctly different exemption from the statutory exemption. Instead, what is abundantly clear is that DEP intended to follow through on its legislative charge to promulgate regulations to implement the purposes of the Rivers Act as an amendment to the Wetlands Act, and not create an exemption that is in addition to the exemption in the statute. In fact, the Wetlands Regulations state: "As of October 6, 1997, the revised 310 CMR 10.00 must be used to implement the Rivers Protection Act." 1997 Preface, § II. Under these circumstances, the regulatory implementation of a legislative directive is typically controlling.

Moreover, Stony Brook's argument itself is internally inconsistent. There is no rational reason to create two exemptions, one applying simply to land and one applying to activities within the footprint of historic mill complexes. A broader statutory "land" exemption would subsume the narrower regulatory activities exemption, i.e., the land exemption would swallow the activities exemption, rendering it superfluous. Also important is that with the Rivers Act the legislature was acting to expand wetlands protection (to Riverfront Areas) and carve out an exemption in those newly created Riverfront Areas for historic mill complexes. The intention was not, as Stony Brook advocates, to carve out a blanket protection for land associated with historic mill complexes regardless whether the mill complex is in the Riverfront Area or

[4] Stony Brook's assertion that the Wetlands Regulations for historic mill complexes are not consistent with the Rivers Protection Act may properly be considered in this forum. See Matter of SEMASSNext Hit Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), adopted by Final Decision (June 24, 2013).

regardless of when the mill complex purportedly existed.[5] Indeed, that would exceed DEP's own jurisdiction and the bounds of jurisdiction under the Wetlands Act and Wetlands Regulations. It would also be contrary to the purpose of the River Act and violate the axiom that exemptions are to be narrowly construed. Woods v. Executive Office of Communities and Development, 411 Mass. 599, 604-605 (1992) (statutory exception is to be narrowly construed).

Further, Stony Brook's argument for a statutory land exemption *and* a regulatory activities exemption sets up a false dichotomy under the Wetlands Act and the Wetlands Regulations, which the legislature explicitly intended as the regulatory foundation. The reference to "activities" is a jurisdictional trigger that applies throughout the Wetlands Regulations *and* the Wetlands Act to the other wetlands resource areas identified in the Wetlands Act and the Wetlands Regulations. Before the Rivers Act, the wetlands resource areas included: bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding. G.L. c. 131 § 40, ¶ 1; 310 CMR 10.02(1). These wetlands regulatory schemes did not protect the land or areas per se. Instead, and in *general*, they regulated certain activities in those areas. Broadly speaking, there is no jurisdiction under the Wetlands Regulations or the Wetlands Act until there is an alteration, work, or activity occurring or to be proposed in jurisdictional wetland resource areas. The Wetlands Act itself states in pertinent part: "No person shall remove, fill, dredge or alter [a Wetlands Resource Area]. . . without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of

[5] Stony Brook argues that its entire 2.1 acre land should be "exempt." Stony Brook Motion, pp. 1, 4 (statutory exemption includes entire 2.1 acre area).

conditions and provided all appeal periods have elapsed. Said notice shall be filed . . . in which the proposed activity is to be located. . . ." G.L. c. 131 § 40, ¶ 1 (emphasis added). The Regulations are similarly replete with references to "activity" as a jurisdictional trigger. See e.g. 310 CMR 10.01(2); 310 CMR 10.02(2); 310 CMR 10.03(7)(c); 310 CMR 10.04 (Agriculture(b)); 310 CMR 10.04 (General Performance Standards); 310 CMR 10.04 (Project Site); 10.58.

The regulations at 310 CMR 10.02(2) articulate in detail the "Activities Subject to Regulation under M.G.L. c. 131 § 40." So when the legislature enacted the Rivers Act to amend the Wetlands Act to include Riverfront Area as a resource area it set forth the general purpose for the historic mill exemption but explicitly left implementation of that exemption to DEP, which correctly confined jurisdiction to *activities* within the Riverfront Area. Like other resource areas, it's not the land itself within the Riverfront Area that is regulated, instead it is certain activities in those areas. As a consequence, Stony Brook's distinction between the regulation of land versus the regulation of activities sets up a false choice. The legislature explicitly charged DEP with implementing the Legislature's Riverfront Area amendment to the Wetlands Act through the Wetlands Regulations, both of which only regulate activities that "remove, fill, dredge or alter" the protected resource areas.

This conclusion is consistent with two prior DEP Final Decisions. In one, the Final Decision specifically rejected similar reasoning that was articulated by an administrative law judge before the parties reached a settlement agreement, which mooted the appeal itself. Nevertheless, in the Final Decision approving the settlement agreement the Commissioner specifically rejected and disavowed the administrative law judge's decision. See Matter of James Knott, Sr., Docket No. 2001-48, Final Decision (November 22, 2002) (incorporating

settlement agreement and specifically rejecting in a footnote the Recommended Final Decision and its reasoning that advanced arguments similar to those proffered by Stony Brook.); see also Northpoint Realty Development Corp., Docket No. 2001-064, Ruling On Motions for Summary Decision (March 4, 2003) (recognizing, without detailed analysis, that the regulatory exemption "codifies the statutory" exemption, which is to be "narrowly construed").

The Regulation is Consistent with the Statutory Charge. Stony Brook advances other arguments why it believes DEP's regulatory exemption of Historic Mill Complexes is inconsistent with and exceeds the authority of the historic mill exemption of Section 18 of the Rivers Act. Given Stony Brook's articulated inconsistency between the statute and the regulation and its challenge to the validity of the regulation, I turn to principles of interpretation established by the courts. Although Stony Brook has not argued the regulations are wholly invalid, its argument asserts that the regulation is inconsistent with the statute and the statutory purpose, and is not applicable to the Property. As a consequence, the regulatory validity test is applicable. I therefore apply the two-part framework used to determine whether regulations promulgated by an agency are valid.

The first part of the framework is to employ the "conventional rules of statutory interpretation" to determine "whether the Legislature has spoken with certainty on the topic in question." Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633, 830 N.E.2d 207 (2005); see Mass. Teachers' Ret. Sys. V. Contributory Ret. Appeal Bd., 466 Mass. 292, 994 N.E.2d 355, 362 (2013). When the court determines that a statute is unambiguous the court gives effect to the legislature's intent. Navy Yard Four Associates, LLC v. Department of Environmental Protection, 88 Mass. App. Ct. 213, 37 N.E.3d 46 (2015).

Second, if "the Legislature has not directly addressed 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". Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 187, 908 N.E.2d 740 (2009) (quotation and citation omitted); Goldberg, 908 N.E.2d at 213. The "second stage of [the] analysis requires 'substantial deference' to the expertise and statutory 'interpretation of [the] agency charged with primary responsibility' for administering a statute." Goldberg, 908 N.E.2d at 213. "At the second stage, regulations 'are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" Goldberg, 908 N.E.2d at 213 (quoting Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595, 583 N.E.2d 856 (1992)).

Statutory Ambiguity and Deference. During the rulemaking process DEP properly recognized that the Rivers Act's exemption for historic mill complexes is ambiguous and DEP sought to clarify that while remaining consistent with the purpose of the Rivers Act. That DEP recognized this ambiguity during the drafting process and sought to clarify it is exemplified by the DEP "Riverfront Advisory Committee Meeting Summary" from the January 31, 1997 meeting. DEP Motion, Exhibit 5. Topics for discussion included, among other things, the historic mill complex exemption and the need to define "historic mill complexes," such as: how to "better define the limits of the parcel," "limits to the area covered by the exemption," and how to encourage redevelopment. Id. At that particular meeting, 22 people were present. Id.

Section 18 of the Rivers Act is ambiguous. It references "land now or formerly associated with historic mill complex . . . ." This ambiguous phrase raises a number of questions, the first being what is an "historic mill complex?" Second, what does it mean for land

to be now or formerly associated with an historic mill complex? Does it mean land that at anytime in history, even as far back as the 1600s, that had some association with an historic mill complex is exempt? Does that include an association that is as tenuous as an area were millworkers lived, socialized, or shopped, regardless whether there was a physical association between that land and the actual mill complex? Does it include land that was used for storage of materials for the mill complex but never actually occupied by a mill complex? Does it include land that was associated with an historic mill complex for only a very small period of time? Does it include land that served only as a dumping ground for the mill complex or a source of timber for building? Thus, the statutory ambiguity is readily apparent.

And what is meant by the statute's reference to "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 . . . ?" Does it mean, as Stony Brook argues, based upon the prior antecedent rule, that the temporal limitation of 1946 applies only to the mill complexes in those specifically identified cities, and otherwise there is no 1946 temporal limitation in the statute?

Given this ambiguity, the second stage of the test requires me to determine "whether the agency's interpretation may be reconciled with the governing legislation". Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 187, 908 N.E.2d 740 (2009) (quotation and citation omitted); Goldberg, 908 N.E.2d at 213. There must be "substantial deference" to DEP's interpretation and the regulations 'are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.'" Goldberg, 908 N.E.2d at 213 (quoting Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595, 583

N.E.2d 856 (1992)). The ultimate question is whether the policy embodied by the agency's interpretation is "reasonable." Biogen, 454 Mass. at 187.

There are several guideposts—*all* applicable here—to consider in determining whether DEP's regulation is reasonable. "In examining the regulatory response to statutory silence or ambiguity, it is unimportant whether [a court] would have come to the same interpretation of the statute as the agency." Goldberg, 908 N.E.2d at 213 (emphasis added). "Statutory silence, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators." Goldberg, 908 N.E.2d at 214. "Administrative agencies are more suited to the task of clarifying the Legislature's plan through specific rules, and more able to provide for 'consistency and coherence,' than are courts. . . . [Judicial] deference is especially appropriate where, as here, the statutes in question involve an explicit, broad grant of rule-making authority." Goldberg, 908 N.E.2d at 214.

Although an agency may only exercise "the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission . . . a plaintiff challenging the validity of an agency's regulations has a formidable burden." Biogen, 454 Mass. at 187 (internal citation omitted).

"Statutory silence, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators." Goldberg, 444 Mass. at 634 (emphasis added); see Middleborough v. Housing Appeals Comm., 449 Mass. 514, 523, 870 N.E.2d 67 (2007).

Additional deference to regulations as being within the legislative intent is accorded when the legislature retains, as here, the opportunity to review the regulations but does not exercise its authority to challenge and alter those regulations. Navy Yard Four, 37 N.E.3d at 55; MRI Assocs., Inc. v. Department of Pub. Health, 70 Mass. App. Ct. 337, 342 n.8, 874 N.E.2d 419 (2007). "Deference to an agency's interpretation of statutory silence, or ambiguity, is particularly appropriate where, as here, the regulation in question was promulgated immediately after the enactment of the governing legislation." Mass. Teachers' Ret. Sys. v. Contributory Ret. Appeal Bd., 466 Mass. 292, 994 N.E.2d 355, 362 (2013). Additional deference is provided when "the record indicates that [the regulation] was the product of 'thoughtful, reasoned deliberation,' and not 'rash, uninformed rule making . . . .'" Mass. Teachers' Ret. Sys. V. Contributory Ret. Appeal Bd., 994 N.E.2d at 362.

All of the preceding guideposts militate in favor of upholding DEP's regulations for historic mill complexes: The legislature specifically required DEP to draft implementing regulations; DEP promptly drafted those regulations; DEP utilized a rigorous public deliberative process; the legislature reserved an opportunity to review the regulations prior to becoming effective; and the legislature left the regulations unchanged, indicating its assent. This properly promulgated regulation is "not to be declared void unless [its] provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 613 (1997); Consolidated Cigar Corp. v. Department of Public Health, 372 Mass. 844, 850 (1977) (agency has considerable leeway in interpreting a statute is charged with enforcing).

DEP's historical mill complex regulation is reasonable and consistent with Section 18 of the Rivers Act. First, it addresses the *temporal* requirements for an historic mill complex. It

references the historic mill complexes in Holyoke, Taunton, Fitchburg, Haverhill, Methuen, and Medford as examples, without limitation, of exempt historic mill complexes if they were in existence as of 1946; this is a reasonable construction of the statute. The regulation also reasonably establishes that the historic mill complex, i.e., the interrelated buildings making up the complex, must have been in existence on the effective date of the Rivers Act, August 7, 1996, as specifically required by the statute ("existing on the effective date of this act").

Last, the regulation defines "mill complex" including the surface area of land, as the statute frames it, "now or formerly associated" with the mill complex. The regulation defined that to be "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 and including associated structures to provide water for processing to generate water power, or for water transportation." (emphasis added) This recognizes the statute's inclusion of land that was "formerly associated" with the complex by stating that such land may be included in the regulatory exemption if it "was" occupied by interrelated areas and "used" for the specified purposes, assuming the other criteria are met. It also recognizes that "complex" generally means interrelated or interconnected.[6]

This is an entirely reasonable interpretation of an otherwise ambiguous provision that implements the legislature's desire to exempt certain areas from the Riverfront Area in order to encourage development of historic complexes. It accomplishes that objective while also serving the broader, overarching purpose of the Rivers Act—the protection of rivers and the Riverfront

[6] complex. Dictionary.com. Dictionary.com Unabridged. Random House, Inc. http://www.dictionary.com/browse/complex (accessed: May 21, 2018).

Area that acts to naturally enhance and preserve rivers. Indeed, exempting areas outside the DEP definition would possibly, in many cases, not serve the purpose of encouraging development of historic complexes nor the protection of the river. Instead, it could serve to arbitrarily exempt areas that had little connection to a mill complex and are not in need of incentives for development.

Stony Brook makes a number of arguments that are without merit. Stony Brook contends that the 1946 date found in the statute "applies to a specific universe of listed cities cited with mills in the statute rather than to all historic mills based upon accepted rules of statutory interpretation of antecedent phrases and the precise use of commas." Stony Brook motion, p. 13 (citing Knott). It argues that the modifying clause in the statute—"in existence prior to nineteen hundred and forty-six"—applies only to the immediately precedent mills in the referenced cities and towns and not to all historic mills. Stony Brook motion, p. 13. It adds that if the legislature had inserted a comma after "Medford" the phrase "in existence prior to nineteen hundred and forty six" would have referred not only to mill complexes located in the listed cities but, as well, to any of the historic mill complexes of which those in the listed cities are a subset, regardless of their location. Stony Brook concludes that because no comma follows the list of cities, the phrase following the list of cities modifies the list of cities that precedes it. This is sometimes referred to as the last antecedent rule.

Stony Brook argues that the list of cities is the "last antecedent." If the legislature intended the exemption to apply only to those mills in existence in 1946 and 1996, it would not need to reference the cities and towns. Stony Brook motion, p. 13. Moreover, Stony Brook adds, the legislature would not have used the terms "now" or "formerly" if it had intended to exempt mill complexes in existence in 1946 and 1996. All statutory terms must be given effect.

Stony Brook motion, p. 14 (citing Recinos v. Escobar, 473 Mass. 734 (2016), and similar decisions).

Thus, Stony Brook concludes that the term "associated with" means "joined, connected, or related." Stony Brook motion, p. 14 (citing Knott). As a consequence, here, the exempt property includes the entire 2.09 acres "which was used by the community for mill work, boarding, growing and harvesting crops and day to day activities." Stony Brook motion, p. 14.

Stony Brook introduced evidence from which one could conclude that by 1845 the area surrounding the Property, perhaps as much as 73 to 150 acres, was an active mill site complex. Some buildings were in operation until 1884 when property was taken to create the Stony Brook Reservoir for Cambridge. "[A]t least one building was operational prior to and after 1946 until its destruction in the 1960s." Stony Brook motion, p. 9; Williams PFT, ¶¶ 8-20. Stony Brook asserts that "there is overwhelming evidence to find that the mill complex uses took place on the entire Property . . . and that it is exempt from the definition of 'Riverfront Area' . . . ." Stony Brook motion, p. 9; Williams PFT.

Stony Brook's argument, however, would have the absurd result of confining the 1946 qualification to a small number of cities, while leaving no temporal restriction for the remainder of the Commonwealth, a result that seems quite arbitrary. There is no apparent rational basis to impose the temporal limitation solely upon those cities, and meanwhile exempt other Riverfront Areas with no temporal limitation, which would be contrary to the main objective of protecting Riverfront Areas. Indeed, "it is a well-established canon of statutory construction that a strictly literal reading of a statute should not be adopted if the result will be to thwart or hamper the accomplishment of the statute's obvious purpose, and if another construction which would avoid this undesirable result is possible." Watros v. Greater Lynn Mental Health and Retardation

Ass'n, Inc., 421 Mass. 106, 113 (1995). In contrast, it would have been rational for the legislature to have a temporal limitation that is equally applicable throughout the Commonwealth. It seems equally rational that the historic mill complexes would have had to at least been in existence at the time the statute was enacted, which is the implicit temporal limitation that DEP made explicit in the regulations—August 7, 1996.

With respect to the last antecedent rule, it is important to remember that "when the intent of the Legislature is not evident based solely on the words of a statute, extrinsic aids may be helpful but they do not supply hard and fast rules. The last antecedent rule is not always a certain guide." New England Survey Systems, Inc. v. Department of Industrial Accidents, 89 Mass. App. Ct. 631, 638-39, 53 N.E.3d 675, 681-82 (2016) (citing Selectmen of Topsfield v. State Racing Commn., 324 Mass. 309, 312, 86 N.E.2d 65 (1949); Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432, 446 N.E.2d 1051 (1983). "In particular, we do not apply the last antecedent rule when "there is something in the subject matter or dominant purpose [of the statute] which requires a different interpretation." New England Survey Systems, supra. (citing Hopkins v. Hopkins, 287 Mass. 542, 547, 192 N.E. 145 (1934)). The last antecedent rule "is not an absolute and can assuredly be overcome by other indicia of meaning." ENGIE Gas & LNG LLC v. Department of Public Utilities, 475 Mass. 191, 199, 56 N.E.3d 740, 747-48 (2016) (quoting Barnhart v. Thomas, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003)). Applying the last antecedent rule here would lead to the absurd result discussed above and would seriously undermine the overarching purpose of the Rivers Act.

For all the above reasons, Section 18 of the Rivers Act does not apply as an exemption for an historic mill complex.

II. No Part of the Riverfront Area is Exempt Pursuant to the Historic Mill Complex Exemption in 310 CMR 10.58(6)(k) and 310 CMR 10.04

The undisputed material facts demonstrate that no part of the Riverfront Area is exempt pursuant to the Historic Mill Complex exemption in 310 CMR 10.58(6)(k) and 310 CMR 10.04. The evidence, viewed in the light most favorable to Stony Brook, failed to evidence an historic mill complex that was in existence before 1946 and until at least August 7, 1996. Instead, the evidence demonstrates that any mill complex that was arguably associated with the Property failed to exist after the property taking in the 1880s for the City of Cambridge water supply. After that, the Property was put to use for other purposes, including a homestead. In addition, the undisputed material facts fail to demonstrate that any part of the Riverfront Area includes the footprint of the area that is or was occupied by interrelated mill buildings (manufacturing buildings, housing, utilities, parking area, and driveways) in existence by 1946 and until at least August 7, 1996.

In fact, the only evidence of a mill-related use in the Riverfront Area was a partial foundation of a corner of the Bigelow house in the Riverfront Area which may have been used for housing mill employees. But it is undisputed that it was not in existence as of August 7, 1996. After the destruction of the Bigelow House in the early 1960s no structures existed at the Property except the Sibley House, which is located outside of the Riverfront Area. Grzenda PFT, ¶ 13.

For the above reasons, there is no genuine issue of material fact that any part of the Riverfront Area is exempt under 310 CMR 10.58(6)(k) and 10.04. In addition, as discussed in section I, the Rivers Act, Section 18, does not apply as an exemption. Therefore, the DEP Commissioner should issue a Final Decision affirming the SORAD.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his 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 M.G.L. 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 shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: 5/21/18

Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of: 104 Stony Brook, LLC

Docket No. WET-2017-021 File No. 337-1283
Weston

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