COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 8, 2024

In the Matter of
Belmont Hill School,
350 Prospect Street

OADR Docket No. WET-2022-025
DEP File No. SDA Denial
MassDEP-NERO
Belmont, MA

RECOMMENDED FINAL DECISION

A Ten Resident Group from the Town of Belmont (collectively "the Petitioners") filed this appeal with the Massachusetts Department of Environmental Protection's Office of Appeals and Dispute Resolution ("OADR") of a Denial of a Superseding Determination of Applicability ("SDA") issued by the Massachusetts Department of Environmental Protection's Northeast Regional Office ("MassDEP") on November 4, 2022. The Petitioners sought the SDA to challenge the Determination of Applicability ("DOA") issued by the Belmont Conservation Commission ("Commission") to Belmont Hill School ("the Applicant") on September 27, 2022. The Petitioners challenged the Commission's determination that the area in which the Applicant proposed to perform work was not a wetlands area subject to protection under the Massachusetts Wetlands Protection Act ("MWPA"), G.L. c. 131, § 40 and the Wetlands Regulations, 310 CMR 10.00, and consequently, did not require a wetlands permit (also known as an Order of Conditions) from the Commission authorizing the proposed work. MassDEP denied the

Petitioners' SDA Request as untimely and as a result did not conduct a substantive review of the Commission's Determination of Applicability ("DOA").

As a result of this appeal and by agreement of the Parties, MassDEP subsequently conducted a substantive review of the Commission's DOA. After completing this review, MassDEP issued an SDA affirming the Commission's DOA. The Petitioners are now before me challenging the SDA's validity.

As discussed in detail below, after reviewing the Parties' filings I have determined that the Petitioners have failed to demonstrate standing as a ten resident group to challenge the SDA because the group failed to maintain the required numerosity of a minimum of 10 individuals. Specifically, the group is down to seven (7) individuals resulting in the appeal being brought by the remaining individuals in their individual capacities challenging the SDA. These remaining individuals have failed to demonstrate standing as persons aggrieved by the SDA. For these reasons, I recommend that the Department's Commissioner issue a Final Decision that (1) dismisses the appeal of the Ten Resident Group, as Reconstituted; (2) dismisses the appeal of the individual Petitioners; and (3) affirms the SDA.

Background

Proposed Project:

The Project is proposed by the Belmont Hill School in implementation of its master plan development on the School's east campus on properties having addresses of 12 Park Avenue, 283 and 301 Prospect Street in Belmont, Massachusetts. RDA cover letter, June 27, 2022. ("Proposed Project).[1] The Proposed Project includes the construction of a new 7,000 square foot

[1] To clarify the record regarding the location of the Proposed Project, the SDA, the document on appeal, and the Applicant's RDA identify the property location as 283-301 Prospect Street and 12 Park Avenue in Belmont. The SDA cover letter mistakenly states that the project property is located in Milton, Massachusetts and the challenged

facilities building, 138 parking spaces, and modifications to the configuration of screening, egress, utilities, drainage, and lighting. SDA cover letter, page 1. In filing the RDA, the Applicant requested review by the Commission of the wetlands resource areas delineated on an April 2021 wetlands delineation plan prepared by EcoTec, Inc. ("RDA Plan"). These wetlands delineation areas included the boundary of Bordering Vegetated Wetlands ("BVW") located in the eastern portion of 283 Prospect Street identified by flags A1-A5 and B1-B3, and the boundary of BVW located in the eastern portion of 283 Prospect Street identified by flags C1-C10. RDA cover letter, page 3; SDA cover letter, page 1. No work is proposed within the Buffer Zone to BVW or within the BVW. SDA cover letter, page 1; see SDA Plan, Rev. December 1, 2023.

Procedural Background:

The Scheduling Order that I issued at the outset of this appeal directed the Parties to confer to discuss the possibility of settlement which discussions the Petitioners initiated. Thereafter, the Applicant and MassDEP filed Motions to Dismiss/Show Cause in January 2023, which the Petitioners opposed. On February 5, 2023, OADR received an email from Petitioners' prior counsel indicating that a settlement had been reached and that she anticipated filing a withdrawal of this appeal in a few days. However, no settlement agreement was forthcoming, and I directed the Parties to provide an update regarding any settlement or withdrawal by February 27, 2023.

Thereafter, the Petitioners' counsel withdrew and informed OADR that eight (8) members of the "ten resident group" had also withdrawn from being part of the group and

Determination of Applicability was issued by the Milton Conservation Commission. The DOA references the Proposed Project location as 350 Prospect Street, Belmont, Massachusetts, which is the Applicant's address.

requested that the Petitioners be provided with time to find replacement counsel and "to name those Petitioners not previously specified in the 'Partial List', Exhibit 1 attached to the Petitioners' Request for Adjudicatory Proceeding." ("Notice of Appeal Ex. 1").[2]

The original ten resident group that brought this appeal included nineteen (19) identified members on Notice of Appeal Ex. 1. My prior communication to the Parties on this issue indicated that the group could not be expanded or have additional members, and that if the number of members went below ten (10) members, then the appeal would no longer be a ten resident group appeal but an appeal brought by individuals and those individuals had to be aggrieved by the SDA in order to have standing in the appeal to challenge the SDA. See 310 CMR 10.05(7)(j)2.b.iii. Based on the record before me at that time, I concluded that there appeared to be eleven (11) members remaining in the group, above the minimum of 10 members required to maintain the group. 310 CMR 10.05(7)(j)2.b.iv. Accordingly, I referred to the group as the "Ten Resident Group, as Reconstituted."

Because the Petitioners' prior counsel had responded to the pending Motions by filing an Opposition, I completed my review of the filings and denied the Motions to Dismiss without prejudice. In appealing the denial of their SDA request, the Petitioners made a reasonable argument that the Commission could not be deemed to have "issued" a DOA which was not properly signed and, therefore, their request to MassDEP for an SDA should not have been denied for being late.[3] I determined therefore that dismissal of the appeal at that early stage of

[2] OADR also received an email from Lois Pines ("Ms. Pines"), a member of the Petitioners, Ten Resident Group. The email from Ms. Pines indicated that some members of the group had removed themselves pursuant to a Memorandum of Understanding signed with the Applicant Belmont Hill School and stated an intent to add members to the Ten Resident Group and to find new counsel. Ms. Pines filed a second email seeking to identify additional members of the ten resident group.

[3] The regulations require a majority of a conservation commission to sign an order. 310 CMR 10.05(2). When a commission has failed to act, a request for MassDEP regional review is timely as long as it made up to 70 days after the expiration of the period within which the commission was required to act. 310 CMR 10.05(7)(c).

the proceedings was not warranted. See Order Denying Motion to Dismiss/Show Cause and Amended Scheduling Order, March 21, 2023. I also issued an Amended Scheduling Order including time for the Petitioners to identify new counsel and an amended schedule for the Pre-Hearing Conference and for the Parties to file their respective Pre-Hearing Statements.

However, following that Order the Parties made multiple other filings. In addition to the Petitioners' new counsel's Notice of Appearance,[4] the Applicant filed a Motion to Dismiss for Lack of Standing with which MassDEP concurred and which the Petitioners opposed. To obtain the required minimum 10 members to constitute a ten resident group, the Petitioners also filed a Motion to Substitute individual group members, which the Applicant opposed. The Department neither opposed nor joined the Petitioners' Motion to Substitute. The Parties then filed a Joint Motion to Stay the Proceedings since the pending motions related to standing, which I granted. The Parties presented oral argument on the pending motions on May 2, 2023, via the Zoom internet platform ("Zoom") which was recorded.

At the end of oral argument, the Applicant noted that because MassDEP had denied the Petitioners' SDA request on timeliness grounds, MassDEP's Northeast Regional Office had not conducted a substantive review of the Commission's DOA. The Applicant offered that it would not object to a remand so that review could occur. The Petitioners and MassDEP also stated that they would not object to the matter being remanded to MassDEP's Northeast Regional Office so that it could conduct a substantive review of the Commission's DOA and issue an SDA. Zoom Recording of Oral Orgument at 58:05-58:15. Following oral argument, I gave the Petitioners an additional opportunity to provide proof that the members of the Ten Resident Group, as Reconstituted were present at the inception of this appeal by submitting their addresses and proof

[4] C. Dyland Sanders and Alessandra W. Wingerter filed their Notice of Appearance on March 24, 2023.

of participation at the start of this appeal. This information was necessary to determine whether the Ten Resident Group, as Reconstituted could proceed as a ten resident's group.

I issued a Recommended Remand Order, which MassDEP's Commissioner adopted, which deferred the Commissioner's Final Decision in the appeal and remanded the matter to MassDEP's Northeast Regional Office to conduct a substantive review the Commission's DOA and to issue an SDA in accordance with the MWPA and the Wetlands Regulations. On January 16, 2024, I issued an Order for MassDEP to file a Status Report on its SDA review on or before February 16, 2024. The Department complied with the Order by filing a Status Report on January 31, 2024, that included the SDA issued on January 25, 2024.

The SDA cover letter indicates that the Department reviewed the records and on November 27, 2023, conducted a site inspection that was attended by the Applicant's representatives and wetland consultants, the Ten Resident Group's representatives, and members of the Commission. SDA Cover letter, page 2.[5] The SDA indicates that wetland flag locations were reviewed, and that MassDEP recommended that one flag, flag C5, be moved landward approximately 3 feet. Id. The SDA cover letter indicates that the Applicant submitted a revised plan showing this change on December 6, 2023 ("SDA Plan").[6] With this change, the SDA affirmed that the delineation of BVW present on the project site was accurate and that the Applicant's proposed work on the Property was not within the jurisdiction of the MWPA and the Wetlands Regulations. SDA cover latter, page 2.

[5] The Petitioners contend that they were excluded from attending but acknowledge that they were represented by counsel at the site inspection. Petitioners' Response to the Presiding Officer's Order of February 2, 2024, Ex. A.

[6] MassDEP filed the revised plan with OADR on February 5, 2024.

On February 2, 2024, I issued a Ruling and Order (1) affirming my determination in the Remand Decision that the Petitioners had not satisfied the requirements to substitute members of the Ten Resident Group, as Reconstituted; (2) analyzing the membership lists provided by the Petitioners and determining that the Ten Resident Group, as Reconstituted had failed to maintain the requisite numerosity to continue this appeal as a Ten Resident Group with standing; and (3) directing the remaining individual Petitioners to confirm whether they objected to the SDA as issued by MassDEP on January 25, 2024, and if they objected to concisely state the reasons therefore, the relief they sought and to provide support for any objection to the SDA with sufficient information to demonstrate that their standing to challenge the SDA, i.e., that they are aggrieved persons who previously participated in the permit proceedings within the meaning of 310 CMR 10.04 and 310 CMR 10.05(7)(j)2.a.[7]

The individual Petitioners together filed "Petitioners' Response to the Presiding Officer's Order of February 2, 2024" in which they reargued their position on substitution contending that there has been no ruling on their Motion to Substitute and also arguing that seven (7) individuals are persons aggrieved by the SDA and thus have standing to challenge the SDA in this appeal. The Applicant and MassDEP each filed timely responses to the Petitioners' filing contending that the appeal should be dismissed due to the Petitioners' lack of standing.

Discussion

A. The Jurisdictional Nature of Standing

"Standing 'is not simply a procedural technicality.' . . . Rather, it 'is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.'" In the Matter of Brian

[7] The Petitioners correctly identified seven (7) members of the Ten Resident Group who remained members of the Ten Resident Group, as Reconstituted: Orietta Geha, Raif Geta, Lois G. Pines, Carolyn Gillette, Melissa Liska, Joyce Barsam, Paul Barsam and Matthew Schwartz.

Corey, OADR Docket No. WET-2017-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, *27, adopted by Final Decision (March 15, 2018), 2018 MA ENV LEXIS 9 (Buzzards Bay Coalition had standing to challenge the SOC as an aggrieved person who previously participated in the permit proceedings), citing Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975).

The provisions of 310 CMR 10.05(7)(j)2.a state:

> "Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision. Previously participating in the permit proceeding means the submission of written information to the conservation commission prior to close of the public hearing, requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision."

"To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true." Brian Corey, *31.

As the Massachusetts Appeals Court explained in Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005):

> [t]he "findings of fact" a judge is required to make when standing is at issue . . . differ from the "findings of fact" the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. "Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge."

"Under 310 CMR 1.01(11)(d)(1), a party may move to dismiss an administrative appeal for lack of jurisdiction . . . . 'In deciding [either] motion, the Presiding Officer shall assume all

the facts alleged in the [appellant's Appeal Notice] to be true,' but '[the] assumption shall not apply to any conclusions of law' alleged in the Appeal Notice. . . . This standard mirrors the standard applied by Massachusetts courts in civil cases when reviewing challenges to court pleadings based upon the court's lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1) . . . ." In the Matter of Brice Estates, Inc., OADR Docket No. WET-2016-024, Recommended Final Decision (April 21, 2017), 2017 MA ENV LEXIS 46, *11-12, adopted by Final Decision (June 16, 2017), 2017 MA ENV LEXIS 45 ("Brice Estates") (Ten Resident Group with one member does not have standing, and that member was not a person aggrieved). "'To show standing, a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.' . . . 'Rather, the plaintiff must put forth credible evidence to substantiate his allegations.'" In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, *16-17, adopted by Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10.

1. Standing of the Ten Resident Group

Under 310 CMR 10.05(7)(j)2.a, certain individuals or entities may file an appeal with OADR challenging an SDA. Included in those who may appeal are "any ten residents of the city or town where the land [subject to the SDA] is located" provided "at least one [of the] resident[s] was previously a participant in the permit proceeding . . . ." The regulation defines "[p]reviously participating in the permit proceeding [as] [1] the submission of written information to the conservation commission prior to [the] close of the public hearing, [2] requesting an action by the Department that would result in [an SDA], or [3] providing written information to the Department prior to issuance of [an SDA]."

a. Ten Resident Group Numerosity

A ten resident group must have at least ten (10) residents at the start and there must remain ten (10) resident members through to the end, and they must have been present from the appeal's inception. Since the implementation of the 2007 wetlands appeal regulations, the question of substitution in the context of a ten (10) resident group appeal has been addressed in two other administrative appeals adjudicated by OADR. The first case was dismissed where the petitioner ten resident group did not provide affidavits that members were on board at the inception of the appeal. See In the Matter of Michael Noonan, OADR Docket No. WET-2010-017, Recommended Final Decision (June 16, 2010), 2010 MA ENV LEXIS 128, adopted by Final Decision (June 22, 2010), 2010 MA ENV 173 ("Noonan") (Ten Resident Group appeal dismissed for failure to file affidavits documenting individual's intent to join group at time the appeal was filed). In the second case, the Presiding Officer concluded that a lack of numerosity at inception cannot be cured by later substitution. See In the Matter of Joseph Daou, Trustee, Joseph Daou, OADR Docket No. WET-2010-020, Recommended Final Decision (July 1, 2010), 2010 MA ENV LEXIS 75, *9, adopted by Final Decision (July 7, 2010), 2010 MA ENV LEXIS 158, Recommended Final Decision on Reconsideration (July 27, 2010), 2010 MA ENV LEXIS 75, adopted by Final Decision (July 30, 2010), 2010 MA ENV LEXIS 76.

b. Substitution in the Context of Wetlands Appeals

In October 2007, the wetlands appeal regulations at 310 CMR 10.05(j) were implemented as part of the effort to eliminate delays in wetland permit appeals without reducing the level of environmental protection.[8] With respect to ten (10) residents, the wetlands appeal regulations

[8] "On March 1, 2007 Governor Patrick directed MassDEP to reform the wetlands appeals process to allow for more timely action on these appeals, without reducing the level of environmental protection. The revisions to the appeal process explained below keep those parts that work well; prescreening, pre-filed testimony and prior participation." Wetlands Appeal Streamlining Regulations Response to Comments (October 3, 2007), page 1.

retained the provision that allows ten (10) residents to initiate appeals, extending the statutory right such groups have to request a superseding order of conditions.[9] Having been involved in the development and implementation of the 2007 wetlands appeal regulations, I know that in retaining the ten (10) resident group appeal right, the Department recognized the value of residents' involvement in wetlands permitting and sought to balance the public's interest in participation and the applicant's interest in quickly obtaining a permit decision.[10] As a consequence, the Wetlands Regulations are designed to ensure that public interest is demonstrated and that includes up-front participation with residents actually joining and participating in a ten resident group.

Maintaining the high bar for participation in a ten resident group is consistent with giving meaning to the intervention provision in the 2007 wetlands appeal regulations. That provision provides a 21-day period under 310 CMR 10.05(7)(j)5.a for a group of ten residents to file a motion to intervene in the appeal and under 310 CMR 10.05(7)(j)5.b for any individual claiming to be substantially and specifically affected by the SDA to file a Motion to Intervene in the appeal. If group membership drops below ten, then the appeal would proceed as an appeal brought by individuals aggrieved by the SDA. See 310 CMR 10.05(7)(j)2.b.iv.

[9] Some comments opposed any limits on Ten Resident Group appeals asserting that residents have a significant non-financial stake in projects, including the right to enjoy and protect the environment and that Ten Resident Group appeals are a necessary check on the Department's implementation of the performance standards. Others argued only those parties with legal standing (constitutional or statutory rights) should be permitted to initiate an appeal, noting that Ten Citizens or a person substantially affected can also intervene through the conservation commission's ability to appeal and by showing of actual damages under G.L. c. 214, § 7A. See Wetlands Appeal Streamlining Regulations Response to Comments (October 3, 2007), page 2.

[10] For example, the wetlands appeal regulations establish deadlines for completing proceedings.

2. Standing of Person Aggrieved

The petitioner seeking to show aggrievement must set forth "sufficient written facts" showing that the proposed Project "will or might cause them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any that the general public might suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations." Brice Estates, *24-25, citing 310 CMR 10.04, 310 CMR 10.05(7)(j)2.b.iii. See also Brian Corey, *29; In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 MA ENV LEXIS 67, *33, adopted by Final Decision (September 18, 2019), 2019 MA ENV LEXIS 93 (petitioners demonstrated, albeit barely, a minimum quantum of specific factual evidence to show aggrievement); In the Matter of Diamond Development Realty Trust, OADR Docket No. WET-2018-016, Recommended Final Decision (April 2, 2019), 2019 MA ENV LEXIS 18, *13, adopted by Final Decision (April 8, 2019), 2019 MA ENV LEXIS 20.

The provisions at 310 CMR 10.05(7)(j)2 specify who may have standing to appeal and do not include abutters, although like any other person, they may have standing if they can demonstrate aggrievement. The regulations define an aggrieved person as "any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40." 310 CMR 10.04: Person Aggrieved.

B. Ten Resident Group, as Reconstituted failed to maintain numerosity and presented no grounds for substitution of members.

The Petitioners contend that where members of the Ten Resident Group, as Reconstituted withdrew, substitution of new members should be allowed for "justice and convenience"

pursuant to 310 CMR 1.01(6)(f),[11] which, Petitioners contend, sets a low bar that is met by their request. The Petitioners further contend that a ten resident group can change its membership at any time to maintain 10 members, regardless of whether they were involved or present at the inception of the appeal. Here, the Petitioners requested substitution because several members settled with the Applicant and withdrew from the appeal. Others simply wished to withdraw from the appeal. The Petitioners asserted that other residents were willing to participate in this appeal and that as such the Motion to Dismiss should be denied because substitution would allow the group to maintain the required numerosity. At oral argument, the Petitioners argued that a ten resident group should not be incentivized to "front-load" membership by identifying all interested residents and instead should be allowed to use the substitution provision any time membership would otherwise drop below ten members to add new members.

To support their argument, the Petitioners cite six (6) prior OADR decisions that reviewed ten resident group standing. Of these decisions, two (2) were issued in the context of the 2007 wetlands appeal regulation. Both denied substitution where the ten resident group lacked numerosity at the inception of the appeal.[12] As such, they do not address the present issue. [13]

[11] "310 CMR 1.01(6)(f) Substitution of Parties: The Presiding Officer may permit the substitution of parties as justice or convenience may require at any time in the course of an adjudicatory appeal."

[12] In the Matter of Beechwood Knoll School, OADR Docket No. WET-2008-050, Recommended Final Decision (September 17, 2008), adopted by Final Decision (September 18, 2008), affirmed by Recommended Final Decision on Reconsideration (October 15, 2008), adopted by Final Decision (October 17, 2008) (no standing where group representative filed statement of intent to appeal by 10 different people than those on notice of appeal); Matter of Joseph Daou, Trustee of JCJ Realty Trust, DEP Docket No. 3-0815, Recommended Final Decision (July 1, 2010), adopted as final Decision (July 30, 2010)("Daou").

[13] Petitioners also cited, In the Matter of Massachusetts Water Resources Authority (Blue Hills Covered Storage Project), Docket No. 2003-166, Decision and Order on Motions to Dismiss and to Amend (July 8, 2004), 2004 MA ENV LEXIS 94, *23-24 (ten resident group had only eight residents of Quincy; lack of ten residents at inception cannot be cured by later addition of members).

Of the remaining three (3) decisions issued before the 2007 wetland appeal regulations, one allowed substitution due to death and health issues,[14] applying a high bar for substitution. Two allowed substitutions for any reason, applying a low bar for substitution.[15] The Petitioner contends, therefore, that substitution should be allowed for any reason.

The Applicant argues that the members of a ten resident group must be present at the inception and must remain the same absent serious circumstances beyond their control. Otherwise, an applicant seeking to resolve an appeal through settlement faces a moving target as some members settle or lose interest and are replaced. The Applicant argues that the regulations establish a high bar for substitution and that "justice and convenience" should reflect a standard similar to Rule 25 of the Massachusetts Rules of Civil Procedure ("MRCP Rule 25") governing civil litigation in Massachusetts courts, which authorizes substitution in serious circumstances beyond the parties' control.[16] The Applicant asserts that the Ten Resident Group, as Reconstituted did not show such circumstances and that the appeal should be dismissed because they failed to maintain the requisite numerosity.

[14] In the Matter of Douglas Abdelnour, et al., Docket No. 88-138, Memorandum Decision and Order on Motion to Substitute Petitioners (November 20, 1991), 1991 WL 438146 (ten resident group member substitution allowed for death and personal health issues applying "justice & convenience" consistent with MRCP Rule 25 which is referenced)("Abedelnour").

[15] In the Matter of Labrie Stone Products, Inc., Docket No. 93-066, Final Decision – Order of Dismissal (February 11, 1994) (ten resident group did not file motion to substitute, which it could have done for any reason, and therefore lacked standing; but citing Abdelnour, supra); In the Matter of Jason and Naomi Rosenberg and Amram and Rosa Rasiel, Trustees, DELM Realty Trust, Docket No. 2001-053, Ruling on Motion to Dismiss (August 24, 2001), 2001 MA ENV LEXIS 185, *6 (ten resident group need not be made up of the same ten people throughout an appeal)("Rosenberg").

[16] The Applicant cites two decisions, both of which preceded the 2007 wetlands appeal regulations, which granted substitution under the substitution provision where property transferred due to foreclosure (In the Matter of Peter Poulos, Trustee, Buttermilk Land Trust, Docket No. 88-190, Memorandum Decision and Order on Motion for Summary Decision as to Standing (May 17, 1991), 1991 WL 48117, *1("Buttermilk"); and an individual petitioner could not participate due to poor health (Abdelnour, supra).

MassDEP concurred with the Applicant's Motion to Dismiss but initially declined to offer an opinion on substitution, asserting during oral argument that substitution was routinely allowed. MassDEP's post-oral argument filing did not support this position, however. The Department's filing consisted of a list of eight (8) case cites which included two (2) decisions that applied the 2007 wetlands appeal regulations, neither of which addressed substitution.[17] Of the remaining six (6) cases, three (3) addressed substitution, as discussed above.[18]

The decisions cited by Petitioners, and those produced by the Department, do not persuade me that "justice and convenience" should reflect a low bar, or that ten resident groups should not be required to "front-load" their membership. To the contrary, maintaining a high bar for substitution is consistent with the 2007 wetlands appeal regulations which retained the regulatory right for 10 residents to appeal balanced with giving the other parties confidence that the appeal could proceed to conclusion. To allow otherwise would leave the applicant and the Department in the dark regarding their adversary and would discourage settlement.[19]

Maintaining the high bar is also consistent with giving meaning to the intervention provision in the 2007 wetlands appeal regulations. That provision provides a 21-day period under 310 CMR 10.05(7)(j)5.a for a group of ten residents to file a motion to intervene in the appeal and under 310 CMR 10.05(7)(j)5.b for any individual claiming to be substantially and

[17] Daou, supra; Noonan, supra.

[18] Buttermilk, supra; Abdelnour, supra; Rosenberg, supra.

[19] Public policy favors resolution of controversy through settlement. See LePage v. Bumila, 407 Mass. 163, 166 (1990), quoting Anonik v. Ominsky, 261 Mass. 65, 66-68 (1927). See also In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034, Recommended Final Decision (August 28, 2020), 2020 MA ENV LEXIS 79, *56, adopted by Final Decision (September 23, 2020), 2020 MA ENV LEXIS 82 ("[t]he settlement of these administrative appeals has been consistent with the general rule that settlements are favored over litigation"); In the Matter of National Amusements, Inc., Docket No. 98-043, Ruling on Motion to Dismiss and Order to Show Cause (December 11, 1998) (noting that the MassDEP policy at issue sought "to provide clarity in order to encourage litigants to settle their differences through revising project plans" and interpreting it so as "to serve the interest of encouraging settlements and diminishing litigation").

specifically affected by the SDA to file a Motion to Intervene in the appeal. If the Presiding Officer determines that the group does not consist of at least ten consenting residents, the group can be disqualified. 310 CMR 10.05(7)(j)5.a. If membership drops below ten, then the appeal would proceed as an appeal brought by individuals aggrieved by the SDA. See 310 CMR 10.05(7)(j)2.b.iv.

If substitution is allowed at the low bar proposed by Petitioners and could be done at any time for any reason, then the intervention provision would have no meaning.[20] The ten resident group provision is intended to ensure that when there is particular public interest in a project, the public can participate. If that interest wanes, those members of the public who remain interested can continue with an appeal if they are aggrieved; or if interest develops after an appeal is filed by another, a ten resident group can intervene if they do so within 21 days. This balance is built into the 2007 wetlands appeal regulations. In sum, it is appropriate for a Presiding Officer to exercise discretion to allow substitution when "justice and convenience" would be served to preserve a group's standing when serious circumstances beyond their control arise. As to timing, substitution could happen "at any time in the proceedings" where needed to address a serious matter such as a property foreclosure, poor health, or death.

In the Remand Decision, I ruled that a ten resident group seeking to appeal to OADR a MassDEP wetlands determination must have at least ten members at the appeal's inception and must maintain that minimum of ten members who were present at the appeal's inception. I also ruled that the Petitioners had not presented facts that would support substitution for the original members of the Ten Resident Group who withdrew from the group.[21] The Remand Decision

[20] See Maters v. Nixon, 15 LCR 541, 543 (2017) (basic tenet of construction to give effect to all provisions so that no part will be inoperative or superfluous).

[21] For discussion, see Recommended Remand Decision, July 25, 2023.

deferred the Commissioner's decision on standing[22] to allow MassDEP's Northeast Regional Office to conduct a substantive review of the Commission's DOA and issue the SDA. Following MassDEP's filing of the January 25, 2024 SDA decision, I issued a Ruling and Order on February 2, 2024, confirming the ruling in the Remand Decision. To the extent that the Ten Resident Group, as Reconstituted contends that its Motion to Substitute is still pending, it is denied.

C. The Ten Resident Group, as Reconstituted failed to maintain numerosity.

Regarding proof of ten resident group membership, generally, the Department will accept an appeal from a ten resident group with the list of members identified in the notice of claim with an authorized representative. Noonan, *3. When standing is challenged, however, the Department asks the authorized representative to verify that the group members indeed intended to participate in the appeal, at the time the appeal was filed, and to be represented by the authorized representative. Noonan, *4. In this case, MassDEP and the Applicant challenged the Petitioners' standing, and the Ten Resident Group, as Reconstituted was therefore directed to verify that its members indeed intended to participate in the appeal at the time the appeal was filed, and to be represented by the authorized representative.

During oral argument, Petitioners' counsel represented that the Ten Resident Group, as Reconstituted had eleven (11) members because the three (3) individuals referenced in its filings as wanting to withdraw had not yet formally done so. However, Petitioners' post-oral argument filing identified nineteen (19) group members, seven (7) of whom were included in the original list of Ten Resident Group members submitted at the inception of the appeal and remained

[22] Of the Ten Resident Group, as Reconstituted, and on requiring the individuals remaining to demonstrate aggrievement.

members of the Ten Resident Group, as Reconstituted. The Petitioners' filing included addresses to show residency in Belmont but did not provide any evidence, as discussed at the oral argument, that its proposed substitute members were "present at the inception" of these proceedings.[23]

In their post-oral argument submittal, the Petitioners provided a different list of 19 individuals purporting to be members of the Ten Resident Group, as Reconstituted ("Petitioners' Ex. A"). The list includes member addresses in Belmont but did not provide any evidence that at least ten (10) of those nineteen (19) individuals were "present at the inception" of these proceedings as members of the original Ten Resident Group as listed on the Notice of Appeal Ex. 1.

Absent other proof of participation at the time of inception of the appeal, I reviewed the two lists of members filed by the Petitioners. In comparing Petitioners' Ex. A to the Notice of Appeal Ex. 1, I determined that only seven (7) of the nineteen (19) individuals listed on Petitioners' Ex. A were the original members of the Ten Resident Group, as Reconstituted and listed on Notice of Appeal Ex. 1. As a result, the Ten Resident Group, as Reconstituted no longer has the necessary numerosity to be recognized as a Ten Resident Group. In sum, the Ten Resident Group, as Reconstituted does not have standing to proceed, and I recommend that MassDEP's Commissioner issue a Final Decision dismissing the Ten Resident Group from this appeal for lack of standing.

D. <u>The individual Petitioners each failed to demonstrate aggrievement within the meaning of 310 CMR 10.04 and 310 CMR 10.05(7)(j)2.a.</u>

[23] For example, the Petitioners represent that the original list of nineteen (19) members included in their Notice of Appeal ("Notice of Appeal Ex. 1") was a "Partial List" of residents and that there were other residents interested in participating, who were not on the list. They do not explain why they would not have included those members at the time of the appeal, nor do they represent that any of their newly listed members were included on a "Complete List" of residents identified at the time the appeal was filed.

To demonstrate they were persons aggrieved, each individual Petitioner was directed to confirm whether they objected to the SDA as issued by MassDEP on January 25, 2024, and if they did, to concisely state the reasons why they objected to the SDA and the relief they sought. They were directed to support any objection to the SDA with sufficient information demonstrating that they had standing to challenge the SDA, i.e., that each individual is an aggrieved person who previously participated in the permit proceedings within the meaning of 310 CMR 10.04 and 310 CMR 10.05(7)(j)2.a.

1. **The Individual Petitioners participated in the permit proceedings.**

MassDEP contends that the individual Petitioners have failed to demonstrate that they participated in the permit proceedings because they did not provide evidence that they submitted written comments to the Commission. DEP Reply, pages 6-7. However, each individual Petitioner is identified on the Request for Superseding Determination of Applicability filed in the Department's Northeast Regional Office on October 25, 2022, Exhibit 1. As such, although the Petitioners' Letter is silent regarding the individual Petitioners' prior participation, the record shows that each individual Petitioner satisfied the requirement that they previously participated in the permit proceedings in accordance with 310 CMR 1.05(7)(j)2.a.

2. **The Individual Petitioners failed to set forth sufficient written facts to demonstrate aggrievement.**

To demonstrate that they are "persons aggrieved" the Petitioners were required to set forth "sufficient written facts" in their response to the February 2, 2024 Ruling and Order showing that the Proposed Project will or might cause them to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the

Wetlands Regulations. Each individual Petitioner did not submit a separate filing. Instead, each of the seven (7) individual Petitioners is among those listed as having signed the February 13, 2024 letter ("Petitioners' Letter") attached to Petitioners' Response to the Presiding Officer's Order of February 2, 2024, filed by the "Ten Residents of Belmont."

The Applicant and the Department contend that each individual Petitioner has failed to provide sufficient written facts to demonstrate aggrievement. They contend that the Petitioners' general complaints regarding views and impact to property values are not within the scope of the interests protected by the MWPA. They also contend that the one photograph submitted from one property and the copy of one of the project plans with a red circle added labeled "area of concern" is insufficient to demonstrate sufficient written facts showing unique and individual harm to any individual Petitioner. As discussed below, I agree that the Petitioners' Letter contains speculative and generalized statements and fails to provide sufficient written facts to demonstrate aggrievement, as required by the wetlands appeal regulations.

a. <u>As a threshold matter, abutting property owners, without more, are not persons aggrieved.</u>

The Petitioners contend that because some of the individual Petitioners are abutters, they "enjoy a rebuttable presumption they are persons aggrieved," citing <u>Marashlian v. Zoning Bd. of Appeals of Newburyport</u>, 421 Mass. 719, 721, 660 N.E.2d 369 (1996) (abutters challenging a zoning board decision are rebuttably presumed to have standing as persons aggrieved) ("<u>Marashlian</u>"). The Applicant and MassDEP correctly argue that <u>Marashlian</u> is not applicable because it applies to challenges of zoning board decisions.

In <u>Marashlian</u>, the Supreme Judicial Court held that "[a]butters <u>entitled to notice of zoning board of appeals hearings</u> enjoy a rebuttable presumption they are 'persons aggrieved.'"

Marashlian, supra, 721 (emphasis supplied). Petitioners cite to no support for their position that proceedings under the MWPA have this same presumption.

Although abutters are expressly permitted by the Wetlands Regulations to request a Superseding Determination of Applicability or Superseding Order of Conditions without showing aggrievement under 310 CMR 10.05(7)(a)4, this regulatory privilege does not extend to requests for review of Reviewable Decisions[24] which lists parties who may request review as "[a]ny applicant, landowner, aggrieved person . . . conservation commission, or any ten residents of the city or town where the land is located." See 310 CMR 10.05(7)(j)2.a. That a party owns property abutting the project "does not confer automatic standing" as a person aggrieved by the SDA within this regulatory meaning. Brice Estates, *26. To appeal the SDA an abutter must demonstrate that he or she is an aggrieved person who previously participated in the permit proceedings. Id.

b. Petitioners' Letter raised general and speculative issues without sufficient facts to show aggrievement to any individual Petitioner.

The Petitioners' Letter contends that the SDA should be reconsidered because it reviews only the wetlands boundary on the Applicant's property. The Petitioners contend that "the boundary of the entire wetland should be taken into account" but provide no written facts to show that the boundary on the SDA Plan is incorrect.

The individual Petitioners contend that there are wetlands on 269 Prospect Street that are within 100 feet of the proposed construction. They include in their letter a copy of one of the plans filed by the Applicant and they add a red circle to the Plan labeled "area of concern." The

[24] Reviewable Decision means a MassDEP decision that can be appealed to OADR and includes a superseding order of conditions or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance. See 310 CMR 10.04.

"area of concern" includes a portion of the wetland definition on the Applicant's property. However, Petitioners' Letter does not provide any wetlands delineation to support a contention that the delineation on the SDA Plan is incorrect and that the BVW extends to the property located at 269 Prospect Street. See BHS Reply Memorandum, page 3.

They also contend that there are wetlands on 257 Prospect and 210 Clifton that are also in danger. Petitioners' Letter, page 2. However, neither property is shown on the SDA Plan, nor did the individual Petitioners provide a wetlands delineation to support their objection.

MassDEP contends that the Wetlands Regulations limit the Department's review to that requested under the Determination of Applicability.[25] The regulations provide in relevant part, "Any person(s) permitted to request the Department to act under 310 CMR 10.05(7)(a) may request the Department to issue a Superseding Determination of Applicability or to issue a Superseding Order, whichever is appropriate, whenever a conservation commission has . . . issued a Determination of Applicability." 310 CMR 10.05(7)(b). "[T]he Department may conduct an informal meeting and may conduct an inspection of the site. In the event an inspection is conducted, all parties shall be invited in order to present any information necessary or useful to a proper and complete review of the proposed activity and its effects upon the interests identified in M.G.L. c. 131, § 40." 310 CMR 10.05(7)(i).

The regulations indicate that parties shall be invited to "present any information necessary or useful." The individual Petitioners contend that they submitted a letter to MassDEP before the site inspection that addressed their concerns with the Proposed Project. The Petitioners' Letter includes an excerpt from that letter, which is a list of complaints, but does not

[25] MassDEP references 310 CMR 10.05(3), which addresses how one may request a Determination of Applicability from a conservation commission to confirm a delineated boundary of BVW or other resource areas and to establish the extent of buffer zone.

provide any specific facts to satisfy the requirement of "sufficient written facts" to show aggrievement to any individual Petitioner.[26] The assertions in the Petitioners' Letter are speculative and conclusory and fail to show any injury in fact different in either kind or magnitude from any injury that the general public could suffer. Finally, while the Petitioners' Letter alleges impacts to scenic view, property value, and air pollution, none of these alleged impacts are within the scope of interests protected by the MWPA.[27]

1. Melissa Liska, (208 Rutledge Road) is not a person aggrieved.

The SDA Plan shows that 208 Rutledge Road does not abut the delineated wetlands but instead abuts a portion of the project property that is upland outside the 100 foot Buffer Zone. See SDA Plan. The Petitioners' Letter includes a photograph purportedly taken on February 4, 2024, of the view from the property located at 208 Rutledge Road. The Petitioners' Letter states that, "[t]his view used to be entirely woodlands. Now it is construction vehicles and soon it will be cars and headlights." The Petitioners' Letter refers to the woodlands as a "rare urban refuge" for many animals that live in the wetlands and argue that they will be deprived of the opportunity to see wildlife from their property. Petitioners' Letter, pages 1-2.

The discussion following the photograph of 208 Rutledge appears to relate to the four individuals that the Petitioners' Letter identifies as abutters and states that "[a]fter seeing this

[26] In most instances, the scope of a determination is limited by the question first post to the Commission. In the Matter of Christina Pesce, Docket No. 99-044, Final Decision (April 14, 2000), 2000 MA ENV LEXIS 48, *11; In the Matter of Elizabeth Haddad, Docket No. 98-028, Determination of Applicability Final Decision (August 11, 1999), 1999 MA ENV LEXIS 722, *15. The Department has discretion, however, to decline to examine issues not raised in the initial request for determination, or likewise to expand its review if facts are presented that warrant review. Christina Pesce, *11. In the present case, the individual Petitioners' lack of sufficient facts provided no grounds for the Department to expand its review.

[27] Although "prevention of pollution" is one of the interests identified in 310 CMR 10.01(2) as within the scope of the MWPA, this does not include air pollution. See In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), adopted by Final Decision (April 21, 2017) ("the MWPA and the Wetlands Regulations do not regulate air pollution").

deforestation and appreciating the effect that the destruction of the adjacent wetland would have, there can be no question that this project substantially affects our homes and our quality of life." Petitioners' Letter, page 5. The Petitioners' Letter goes on to contend that they will face an increase in cars due to the Proposed Project, increased air pollution on their properties, and decreased property values. However, these alleged impacts to scenic view, property value, and air pollution are not within the scope of interests protected by the MWPA. As such, Melissa Liska has not provided sufficient written facts to show that she is a person aggrieved for whom the Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

2. Matthew Schwartz (200 Rutledge Road) is not a person aggrieved.

The Petitioner Matthew Schwartz's ("Mr. Schwartz") property, located at 200 Rutledge Road, is shown on the SDA Plan next door to 208 Rutledge Road and is outside the 100 Buffer Zone to the BVW. The Petitioners' Letter does not make any claims within the scope of the MWPA and Wetlands Regulations that demonstrate sufficient written facts to show that Mr. Schwartz is a person aggrieved for whom the Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

3. Joyce Barsam (170 Rutledge Road) is not a person aggrieved.

The Petitioner Joyce Barsam's ("Ms. Barsam") property, located at 170 Rutledge Road, is not shown on the SDA Plan, nor does the Petitioners' Letter include any demonstration of where the property is located in relation to the wetlands delineated in the SDA. The Petitioners'

Letter does not make any claims within the scope of the MWPA and Wetlands Regulations that demonstrate sufficient written facts to show that Ms. Barsam is a person aggrieved for whom the Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

4. Paul Barsam (170 Rutledge Road) is not a person aggrieved.

The Petitioner Paul Barsam's ("Mr. Barsam") property, located at 170 Rutledge Road, is not shown on the SDA Plan, nor does the Petitioners' Letter include any demonstration of where the property is located in relation to the wetlands delineated in the SDA. The Petitioners' Letter does not make any claims within the scope of the MWPA and Wetlands Regulations that demonstrate sufficient written facts to show that Mr. Barsam is a person aggrieved for whom the Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

5. Orietta Geha has failed to demonstrate that they are a person aggrieved.

The Petitioners' Letter does not make any claims within the scope of the MWPA and Wetlands Regulations to show that the Petitioner Orietta Geha is a person aggrieved for whom the Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

6. Raif Geha has failed to demonstrate that they are a person aggrieved.

The Petitioners' Letter does not make any claims within the scope of the MWPA and Wetlands Regulations to show that the Petitioner Raif Geha is a person aggrieved for whom the

Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

7. Lois Pines has failed to demonstrate that they are a person aggrieved.

The Petitioners' Letter does not make any claims within the scope of the MWPA and Wetlands Regulations to show that the Petitioner Lois Pines is a person aggrieved for whom the Proposed Project will or might cause them to suffer an injury in fact which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and Wetlands Regulations.

E. Additional issues raised in Petitioners' Letter

The Petitioners contend that there is relevant correspondence between the Petitioners, Applicants and MassDEP that is not in the record. Specifically, they reference a November 23, 2023 letter to MassDEP. They include an excerpt from that letter that is a list of complaints they allege about the Proposed Project planned for the area outside of wetlands jurisdiction. The list of allegations regarding the Proposed Project planned for the area outside of wetlands jurisdiction without more does not equate to "sufficient written facts" to demonstrate that these allegations will result in specific harm to the individual Petitioners, greater or different in kind than to the general public, nor did they provide the allegedly missing correspondence or provide any written factual support for their position.

Finally, the Petitioners contend that this matter should be designated major and complex. As the Applicant correctly points out, that designation is available for Reviewable Decisions approving work within a resource area. 310 CMR 10.04. As such, even if any one of the

individual Petitioners made a showing of aggrievement, that provision would be inapplicable to review of the SDA in this case.

CONCLUSION

In sum, after reviewing the Parties' filings, I have determined that the Petitioners have failed to demonstrate standing as a ten resident group to challenge the SDA because the group failed to maintain the required numerosity of a minimum of ten individuals. The group is down to seven (7) individuals resulting in the appeal being brought by these remaining individuals in their individual capacities challenging the SDA. These seven remaining individuals have failed to demonstrate standing to challenge the SDA as persons aggrieved by the SDA. Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision that (1) dismisses the appeal of the Ten Resident Group, as Reconstituted; (2) dismisses the appeal of the individual Petitioners; and (3) affirms the SDA.

Date: March 8, 2024

Margaret R. Stolfa
Presiding Officer

NOTICE - RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to 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 her sole discretion, directs otherwise.

SERVICE LIST

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