

COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**July 25, 2023**

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In the Matter of  
Belmont Hill School,  
350 Prospect Street

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

**RECOMMENDED REMAND DECISION**

**I. INTRODUCTION**

A ten residents 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 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 (“BCC”) to Belmont Hill School (“the Applicant”) on September 27, 2022. MassDEP denied the Petitioner’s Request for a SDA as untimely. The SDA was issued pursuant to the Wetlands Protection Act, G.L. c. 131, §40 and the Wetlands Regulations, 310 CMR 10.00.

**Procedural Background:**

The Scheduling Order in 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 Petitioner's prior counsel indicating that a settlement had been reached and that she anticipated filing a withdrawal of this appeal in a few days. As a result, I put my ruling on the pending motions and opposition on hold. 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the Petitioners' counsel withdrew and informed OADR that eight (8) members of the "10 residents group" had also withdrawn from being part of the group and requested that the Petitioners' be provided with time to find replacement counsel and "to name those Petitioners not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."<sup>1</sup>

The original 10 residents group that brought this appeal included nineteen (19) identified members on Petitioners' Exhibit 1. My prior communication on this issue indicated that the group cannot be expanded or have additional members, and that if the number of members goes below 10 members, then the appeal is no longer a 10 residents group appeal but an appeal brought by individuals and those individuals must be aggrieved by the SDA in order to maintain their appeal. See 310 CMR 10.05(7)(j)2.b.iii. 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 "10 residents group, as re-constituted."

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<sup>1</sup> OADR also received an email from Lois Pines ("Ms. Pines"), a member of the Petitioners, 10 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 10 resident group and to find new counsel. Ms. Pines filed a second email seeking to identify additional members of the 10 residents group.

Because the Petitioners' prior counsel had responded to the pending Motions by filing an Opposition, completed my review of the filings and denied the Motions to Dismiss without prejudice concluding that the Petitioners SDA request was timely filed with the regional office. I 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,<sup>2</sup> the Applicant filed a Motion to Dismiss for Lack of Standing with which MassDEP concurred and which the Petitioners opposed. 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 filed a Joint Motion to Stay the Proceeding since the pending motions relate to standing. I stayed the Proceedings and the Parties presented oral argument on the pending motions.

## **II. Discussion**

### **1. Standing**

Standing "is not simply a procedural technicality, it is a jurisdictional prerequisite." Brice, at \*16.<sup>3</sup> Under 310 CMR 10.05(7)(j)2(a), certain individuals or entities may, within 10 business days after an SDAs issuance, file an appeal with OADR challenging the SDA. Included

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<sup>2</sup> C. Dyland Sanders, Alessandra W. Wingerter filed their Notice of Appearance on March 24, 2023.

<sup>3</sup> Citing, Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 ("Webster Ventures II"), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32. Rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther, supra, 427 Mass. at 322 ("[w]e treat standing as an issue of subject matter jurisdiction [and] ... of critical significance"); see also United States v. Hays, 515 U.S. 737, \*17, 115 S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines").

in those who may appeal is "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]."

## 2. Substitution:

The Petitioners contend that a 10 residents' group can change its membership at any time if it maintains 10 members, regardless of whether they were involved or present at the inception of the appeal. The Petitioners further contend that substitution, allowed for "justice and convenience" pursuant to 310 CMR 1.01(6)f.<sup>4</sup> is a low bar that is met by their request. The Petitioners request the substitution because several members have settled with the Applicant and must withdraw. Others simply wish to withdraw. The Petitioners assert that other residents are willing to participate in this appeal and that as such the Motion to Dismiss should be denied because substitution will allow the group to maintain the required numerosity. At oral argument the Petitioners argued that a 10 residents group should not be incentivized to "front-load" membership by identifying all interested residents and instead should be allowed to use the substitution provision whenever membership would otherwise drop below 10 members to add new members.

The Applicant contends that the members of a 10 residents group must be present at the inception, otherwise the Applicant faces a moving target as it works to resolve the appeal

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<sup>4</sup> "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."

through settlement and the group just keeps changing as some members settle or lose interest and others do not. The Applicant further contends that substitution sets a high bar that should reflect a standard similar to Mass.R.Civ.Pr.Rule 25 which authorizes substitution in serious circumstances beyond the parties' control.<sup>5</sup> The Applicant asserts that the Petitioners have not shown such circumstances and that the appeal should be dismissed because the Petitioners have failed to maintain the requisite numerosity. MassDEP concurred with the Applicant's Motion to Dismiss but declined to offer a position on substitution, asserting during oral argument that substitution is routinely allowed.<sup>6</sup>

During oral argument Petitioners' counsel represented that the group has 11 members because the three referenced in its filings as wanting to withdraw, had not yet formally done so. However, Petitioners' post-oral argument filing identifies 19 members, seven (7) of whom were included of the original list of 10 resident group members submitted at the inception of the appeal. The Petitioners' filing includes addresses to show that the members are residents of Belmont but does not provide any evidence, as discussed at the oral argument, that its proposed substitute members were "present at the inception" of these proceedings.<sup>7</sup>

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<sup>5</sup> The Applicant cites two decisions, both of which preceded the current 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, 1991 WL 48117 at \*1); and an individual petitioner could not participate due to poor health (In the Matter of Douglas Abdelnour, et al., 1991 WL 438146, at \*1-2).

<sup>6</sup> MassDEP's post-oral argument filing does not support this position. The Department's filing consisted of a list of case cites which included two decisions that applied the 2007 wetland appeal regulations, neither of which granted substitution.

<sup>7</sup> For example, the Petitioners represent that their original list of 19 members 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.

### 3. Substitution in the Context of Wetlands Appeals

In October 2007 the wetland 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.<sup>8</sup> With respect to ten residents, the wetlands appeal regulations retained the provision that allows ten residents to initiate appeals, extending the statutory right such groups have to request a superseding order of conditions.<sup>9</sup> Having been involved in the development and implementation of the 2007 wetlands appeal regulations, I know that in retaining the 10 residents 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 applicants interest in quickly obtaining a permit.<sup>10</sup> Nothing in the public comments supports the Petitioners' contention that a 10 residents group should not be required to "front-load" its membership, and should instead be able to add new members to replace members who simply choose to leave the group. To the contrary, the regulations are designed to ensure that public interest is demonstrated and that includes up-front participation with residents actually joining and participating in a 10 residents group.

Regarding numerosity, a 10 residents group must have 10 residents at the start and there must remain 10 resident members through to the end, and they must have been present from the

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<sup>8</sup> "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.

<sup>9</sup> Some comments opposed any limits on 10 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 10 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

<sup>10</sup> For example, the wetlands appeal regulations establish deadlines for completing proceedings.

appeal's inception. This formula has long been applied as the threshold for a 10 residents group's standing and was not changed by the 2007 wetlands appeal regulations.

The regulatory grant of standing to appeal as a ten residents group carries with it two implicit conditions which the group must meet; it must consist of at least ten residents when its request for an adjudicatory hearing is filed, and it must maintain a group membership of at least ten appealing residents throughout the appeal. Both of these conditions are jurisdictional, for the Department [\*3] cannot entertain a wetlands permit appeal by a ten residents group if, in fact, it does not consist of at least ten residents of the city or town where the proposed project is located. In addition to demonstrating a jurisdictional basis for the appeal, compliance with these implicit conditions furnishes the Department and other parties, particularly the applicant, with their sole assurance that a wetlands Permit appeal by a ten residents group is brought, and can be prosecuted to conclusion, in good faith. **Neither condition is particularly difficult to meet, assuming that the requisite ten appealing residents are actually present from the appeal's inception...** (emphasis supplied).

Matter of Labrie Stone Products, Inc., Docket No. 93-066, Final Decision -- Order of Dismissal (February 11, 1994)(“Labrie Stone”)

Since the implementation of the 2007 wetlands appeal regulations the question of substitution in the context of a 10 residents group appeal has been addressed in two other proceedings. The first case was dismissed where the petitioner 10 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, 2010 MA ENV LEXIS 128, Recommended Final Decision, (June 16, 2010), adopted by Final Decision, 2010 MA ENV 173 (June 22, 2010). In the second, substitution was denied where the 10 residents group lacked numerosity at the inception of hearing. 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, 2010 MA ENV LEXIS 75, \*9, Recommended Final Decision, (July 01, 2010), adopted by Final Decision, 2010 MA ENV LEXIS 158 (July 7, 2010), Recommended Final De-

cision on Reconsideration, 2010 MA ENV LEXIS 75, (July 27, 2010), adopted by Final Decision, 2010 MA ENV LEXIS 76 (July 30, 2010), at \*9. These decisions are consistent with the holding in Labrie Stone, that “10 appealing residents are actually present from the appeal’s inception.”

Generally, the Department will accept an appeal from a 10 residents group with the list of members identified in the notice of claim with an authorized representative. Noonan at \*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 at \*4. In this case, MassDEP and the Applicant challenged the Petitioners’ standing, and the 10 residents group 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.

As noted above, the substitution provision in the appeals regulations, 310 CMR 1.01(6)(f), is incorporated into the 2007 wetlands appeal regulations. Two decisions addressed substitution before the wetlands appeal regulations were promulgated in 2007. See footnote 3. One allowed substitution where a property transferred following a foreclosure and the other allowed substitution due to poor health. In these circumstances, the presiding officer determined that substitution should be allowed for “justice and convenience.” As to timing, substitution could happen “at any time in the proceedings” where needed to address a serious matter such as a property foreclosure or poor health. In sum, a presiding officer has the discretion to allow substitution when “justice and convenience” are served, meaning something other than some members of a 10 residents group settle or simply choose to no longer participate, or to cure a



lack of numerosity at inception. There is nothing in the 2007 wetlands appeal regulations to suggest that a lower bar should be set for the meaning of “justice and convenience.”

Maintaining the high bar 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 citizens 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 membership drops below ten (10), 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.<sup>11</sup> The 10 residents group provision is intended to ensure that when there is particular public interest in a project, the public can participate. If that interest lessens, 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 10 residents group can intervene if they do so within 21 days. This balance is built into the 2007 wetlands appeal regulations. There is nothing in the regulations, or in the facts presented, to support a position that the long-standing meaning of substitution was changed in 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 the parties control arise.

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<sup>11</sup> See Maters v Nixon, 15 LCR 541, \*543 (October 2017)(basic tenant of construction to give effect to all the provision so that no part will be inoperative or superfluous).

As such, if the Petitioners 10 residents group, as reconstituted, drops below the 10 members present at the inception, then the remaining members can proceed as aggrieved persons, if they meet the regulatory requirements of 310 CMR 10.05(7)(j)2.b.iii. but the 10 residents group cannot proceed.

4. Remand Recommendation

At the end of oral argument, the Applicant noted that because MassDEP dismissed the Petitioner's SDA request on timeliness grounds the regional office had not conducted a substantive review of the SDA. The Applicant offered that it would not object to a remand so that review could occur. The Petitioner and the Department also stated that they would not object to a remand.

Given that the Petitioners' request for review of the SDA was timely, I recommend that MassDEP's Commissioner issue an interlocutory Remand Decision, deferring a decision on the pending Motions and Oppositions, and remanding the matter to MassDEP's Northeast Regional Office to review the Petitioners' SDA Request and to issue a determination in accordance with the Massachusetts Wetlands Protection Act and the Wetlands Regulations.

**Date:** July 25, 2023



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Margaret R. Stolfa  
Presiding Officer

### **NOTICE- RECOMMENDED REMAND DECISION**

This decision is a Recommended Remand Decision of the Presiding Officer. It has been transmitted to the Commissioner for her consideration. 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.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Remand 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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