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

April 21, 2017

In the Matter of
Brice Estates, Inc.

Docket No. WET-2016-024
MassDEP File No. 277-0434

RECOMMENDED FINAL DECISION

INTRODUCTION

On September 16, 2016, Marcia R. Warrington, purportedly on behalf of ten residents of Rutland, Massachusetts ("the Petitioner"), filed this appeal challenging a Superseding Order of Conditions ("SOC") that the Central Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to Brice Estates, Inc. ("the Applicant") on August 30, 2016, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 et seq. ("the Wetlands Regulations"). The SOC authorized the Applicant's development of a 109-lot residential subdivision on 121.6 acres of real property located Off Main Street in Rutland ("the proposed Project"). SOC Transmittal Letter, at p. 1. The proposed Project, which includes the construction of roadways, utilities, and stormwater management facilities, was previously approved by the Town of Rutland Conservation Commission ("RCC").

The Petitioner's original Appeal Notice challenging the SOC had several pleading

deficiencies that needed to be corrected by the Petitioner in order for her appeal to proceed. First, the Petitioner's original Appeal Notice did not comport with the requirements of 310 CMR 10.05(7)(j)2.a and 2.b.iv by failing to set forth any facts establishing that the Petitioner was representing ten Rutland residents in the case, at least one of which previously participated in the permit proceeding pursuant to 310 CMR 10.05(7)(j)2.a.[1] The Petitioner's original Appeal Notice also did not comport with the requirements of 310 CMR 10.05(7)(j)2.b.v by failing to set forth "a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the [public] interests identified in the [MWPA][2] . . . ." The Petitioner simply alleged in her original Appeal Notice that "the SOC was issued prematurely" because "[t]he [proposed] project . . . is located within the boundaries of the General Rufus Putnam House Historic Site, a National Historic Landmark[,]" and that "[o]ver the last 15 years, [the] Mass. Historical Commission (MHC) has been involved with reviewing this project either as the lead agency or as a consulting party to the Army Corps under Section 106 of the National Historic Preservation Act" and "[t]o date, this project is still under review with [the] MHC and other State and National Historic agencies (in accordance with Section 106 of the Historic Preservation Act) and as such has not been permitted by the Army Corps."

On September 26, 2016, I issued an Order ("September 2016 Order") directing the

[1] The provisions of 310 CMR 10.05(7)(j)2.a are discussed below, at pp. 10-15.

[2] The eight public interests of the MWPA are set forth below, at pp. 4-5.

Petitioner to file by Monday, October 10, 2016,[3] an Amended Appeal Notice/More Definite Statement pursuant to 310 CMR 1.01(6)(e) and 11(b)[4] that corrected the pleading deficiencies of her original Appeal Notice as described above. My September 2016 Order directed that the Petitioner's Amended Appeal Notice/More Definite Statement was to:

(1) set forth the name and address of each of the ten Rutland residents that the Petitioner purportedly represents in the appeal;

(2) set forth specific facts demonstrating that at least one of ten Rutland residents previously participated in the permit proceedings in accordance with 310 CMR 10.05(7)(j)2.a;

(3) contain a "a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA]" in accordance with 310 CMR 10.05(7)(j)2.b.v; and

(4) "includ[e] reference[s] to the statutory or regulatory provisions [that the Petitioner contends were] violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] . . ." in accordance with 310 CMR 10.05(7)(j)2.b.v.

On October 11, 2016, the Petitioner filed a timely Amended Appeal Notice/More

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[3] This date should have been Tuesday, October 11, 2016, because October 10th was the Columbus Day Holiday. On October 4, 2016, the parties were informed of the correct date of October 11, 2016.

[4] 310 CMR 1.01(6)(e) provides that:

> Upon a Presiding Officer's own initiative or by motion of any party, the Presiding Officer may order any party to file any pleading, reply to any pleading, or permit any party to amend or withdraw its notice of claim or other pleading upon conditions just to all parties.

310 CMR 1.01(11)(b), in turn, provides that:

> Where a notice of claim for adjudicatory appeal is so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought, any party may move for, or the Presiding Officer may order, a more definite statement. The motion or order shall set forth the defects complained of and the details desired. A motion or order for a more definite statement also may seek or require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken. The more definite statement shall be filed within ten days of the Presiding Officer's order being sent or within another time as may be ordered. If the more definite statement is not filed within the prescribed deadline, the Presiding Officer may either dismiss the adjudicatory appeal, grant the relief sought, or make another order as may be appropriate.

Definite Statement, which, as discussed in detail below, at pp. 10-22, failed to correct the pleading deficiencies of her original Appeal Notice. In response, the Applicant has moved pursuant to 310 CMR 1.01(11)(d)(1) and 310 CMR 1.01(11)(d)(2) to dismiss the Petitioner's appeal for lack of standing and failure to state a claim upon which relief can be granted. The Department also seeks dismissal of the Petitioner's appeal by way of a Motion for Summary Decision pursuant to 310 CMR 1.01(11)(f), contending that the Petitioner's standing to maintain the appeal is uncertain, and, if she has standing, her substantive claim against the SOC contending that it was issued "prematurely" by the Department fails as a matter of law.

After reviewing the Applicant's and the Department's respective motions, and for the reasons discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision granting the motions and affirming the SOC because: (1) the Petitioner lacks standing to pursue the appeal either as the representative of a ten resident's group or an individual "aggrieved person" pursuant to 310 CMR 10.05(7)(j)2.a; and (2) if she has standing, the Petitioner's substantive claim against the SOC contending that it was issued "prematurely" by the Department fails as a matter of law.

STATUTORY AND REGULATORY FRAMEWORK

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 ("Webster Ventures I"), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015).

The MWPA and the Wetlands Regulations provide that "[n]o person shall remove, fill, dredge[,] or alter[5] any [wetlands] area subject to protection under [the MWPA and Wetlands

[5] The Wetlands Regulations at 310 CMR 10.04 define "alter" as "chang[ing] the condition" of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

> (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
>
> (b) the lowering of the water level or water table;
>
> (c) the destruction of vegetation;
>
> (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. "Dredge" is defined as "deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently" a protected wetlands area, and "[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently." Id.

Regulations] without the required authorization, or cause, suffer or allow such activity . . . ." G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, supra, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, supra, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, supra, 22 DEPR at 204. "Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent ("NOI")" with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for "[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]" described as "the Buffer Zone" by the Regulations, "which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands]." 310 CMR 10.02(2)(b).

The "[permit] issuing authority" is either the local Conservation Commission when initially reviewing the applicant's proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed construction activities in protected wetlands areas and "are allowed to 'impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]'" and to require that "'all work shall be done in accordance' with the conditions they might impose. . . ." Id. Orders of Condition, including any findings and wetland delineations forming the basis of the Orders, are valid for three years from the date of the Order's issuance. 310 CMR 10.05(6)(d). However, any "order [by the Department] shall supersede the prior order of the conservation commission . . . and all work shall be done in

accordance with the [Department's] order." Healer, supra.

DISCUSSION

I. THE DISMISSAL STANDARD OF 310 CMR 1.01(11)(d)(1) AND 11(d)(2)

Under 310 CMR 1.01(11)(d)(1), a party may move to dismiss an administrative appeal for lack of jurisdiction, and under 310 CMR 1.01(11)(d)(2) a party may seek dismissal of an appeal for failure to state a claim upon which relief can be granted. In the Matter of SEMASS Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 MA ENV LEXIS 34, at 8-9, adopted as Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37; In the Matter of Chris Stasinos, OADR Docket No. 2011-035, Recommended Final Decision (December 5, 2011), 2011 MA ENV LEXIS 137, at 4, adopted as Final Decision (December 28, 2011), 2011 MA ENV LEXIS 136. "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. Id. 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) ("Rule 12(b)(1)") or based upon a failure to state a claim upon which relief can be granted under Mass. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"). SEMASS, supra, 2013 MA ENV LEXIS 34, at 9; Stasinos, supra, 2011 MA ENV LEXIS 137, at 4; See Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (defendant may challenge subject matter jurisdiction "by bringing a motion to dismiss under [Rule 12(b)(1) or 12(b)(6)], [and] we accept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true"); Schaer v. Brandeis University, 432 Mass. 474, 477-78 (2000) ("In

evaluating a rule 12 (b)(6) motion, we . . . accept [the plaintiff's] factual allegations as true[,] [but] we do not accept legal conclusions cast in the form of factual allegations").

As discussed below, at pp. 9-10, a party's standing to pursue a claim is jurisdictional in nature. As such, a motion seeking to dismiss an administrative appeal due to the appellant's lack of standing is appropriately brought pursuant to 310 CMR 1.01(11)(d)(1) and/or 310 CMR 1.01(11)(d)(2). For these reasons, the Applicant has properly brought its motion to dismiss the Petitioner's appeal for lack of standing and failure to state a claim pursuant to 310 CMR 1.01(11)(d)(1) and 310 CMR 1.01(11)(d)(2).

II. THE SUMMARY DECISION STANDARD OF 310 CMR 1.01(11)(f)

"[The] summary decision [rule in 310 CMR 1.01(11)(f)] is . . . designed to avoid needless [evidentiary] adjudicatory hearings" in administrative appeals. SEMASS, supra, 2013 MA ENV LEXIS 34, at 12; In the Matter of Lowe's Home Centers, Inc., OADR Docket No. WET-2009-013, Recommended Final Decision (June 19, 2009), 16 DEPR 115, 116 (2009), adopted as Final Decision (June 30, 2009); Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980) ("administrative summary judgment procedures" are appropriate to resolve administrative appeals without an adjudicatory hearing "when the papers or pleadings filed [in the case] . . . conclusively show . . . that [a] hearing can serve no useful purpose . . ."). The rule provides in relevant part that:

> [a]ny party [to an administrative appeal] may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the . . . appeal. . . . The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. . . .

"'This standard mirrors the standard set forth in Rule 56' . . . governing [summary judgment

motions in] civil suits in Massachusetts trial courts." SEMASS, supra, 2013 MA ENV LEXIS 34, at 14; Lowe's, supra, 16 DEPR 116; In the Matter of Roland Couillard, OADR Docket No. WET-2008-035, Recommended Final Decision, at 4 (July 11, 2008), adopted as Final Decision (August 8, 2008).

In sum, "[a] party seeking a summary decision [pursuant to 310 CMR 1.01(11)(f)] must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." SEMASS, supra, 2013 MA ENV LEXIS 34, at 14-15. "If the moving party meets this burden, the opposing party 'may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.'" Id.; 310 CMR 1.01(11)(f); Lowe's, supra, 16 DEPR 116; In the Matter of William and Helen Drohan, OADR Docket No. 1995-083, Final Decision, 1996 MA ENV LEXIS 67, at 4 (March 1, 1996); cf.Mass. R. Civ. P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007) (same). As discussed below, the Department has made the required demonstration for summary decision in its favor.

III. THE PETITIONER'S APPEAL SHOULD BE DISMISSED FOR LACK OF STANDING

A. The Jurisdictional Nature of Standing

Standing "is not simply a procedural technicality." 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, 115 S.Ct.2431, 2435 (1995) ("[s]tanding is perhaps the most important of the jurisdictional doctrines").

B. The Petitioner's Amended Appeal Notice/More Definite Statement Fails To Demonstrate The Petitioner's Standing To Pursue The Appeal As The Representative Of A Ten Residents Group Pursuant To 310 CMR 10.05(7)(j)2(a).

Under 310 CMR 10.05(7)(j)2(a), certain individuals or entities may, within 10 business days after an SOC's issuance, file an appeal with OADR challenging the SOC, including "any ten residents of the city or town where the land [subject to the SOC] 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 SOC], or [3] providing written information to the Department prior to issuance of [an SOC]." In her Amended Appeal Notice/More Definite Statement, the Petitioner alleged the following in support of her claim that she brought this appeal on behalf of ten residents of Rutland pursuant to 310 CMR 10.05(7)(j)2(a).

The Petitioner alleged that "[o]n December 3, 2014 [the] Order of Conditions issued by the Rutland Conservation Commission [approving the proposed Project] was appealed by a group of more than 10 residents of the town of Rutland to MassDEP requesting [an SOC] from the Department [overturning the Commission's Order of Conditions approving the proposed Project]." Petitioner's Amended Appeal Notice/More Definite Statement, at p. 1. The Petitioner "[e]nclosed [with her Amended Appeal Notice/More Definite Statement] a list of the names and

addresses of the Rutland citizens group that signed the [SOC request to the Department]." Id. The list was entitled "The Following Citizens of Rutland, Massachusetts Appeal the Conservation Commission Order Dated 11/18/2014" and listed the names and signatures of 30 Rutland residents, including the Petitioner and her husband, Chris Warrington. Id. The Petitioner also alleged that "[i]n addition to being listed as one of the more than 10 residents that signed the [SOC request], [she was] also the representative/contact of the group who prepared and submitted the [SOC request] package to [the Department] which included: The appeal form, the 'Citizens of Rutland' signature list and a letter dated November 25, 2014 outlining [the residents'] concerns." Id.

Undisputedly, the Petitioner's Amended Appeal Notice/More Definite Statement demonstrates that 30 Rutland residents, including the Petitioner, requested the SOC from the Department in December 2014 seeking to overturn the RCC's approval of the proposed Project. The SOC request was governed by 310 CMR 10.05(7)(a)5 through 7(i), which authorize "any ten residents of the city or town where the land is located" to request an SOC from the Department seeking to overturn an OOC from a local conservation commission authorizing work in a protected wetlands area. However, the Petitioner's Amended Appeal Notice/More Definite Statement fails to demonstrate that the same 30 Rutland residents, or at least ten of them, filed this administrative appeal with OADR challenging the SOC.[6] At best, the Petitioner's Amended Appeal Notice/More Definite Statement demonstrates that one member of that group of Rutland residents: the Petitioner filed this administrative appeal challenging the SOC. For all these reasons, the Petitioner has failed to demonstrate that she has standing to pursue this

[6] Administrative appeals of SOCs to OADR are governed by the separate procedures set forth in 310 CMR 10.05(7)(j).

administrative appeal of the SOC as the representative of a Ten Residents Group comprised of at least 10 Rutland residents pursuant to 310 CMR 10.05(7)(j)2(a).

C. The Petitioner's Amended Appeal Notice/More Definite Statement Fails To Demonstrate The Petitioner's Standing To Pursue The Appeal As A "Person Aggrieved" By The SOC Pursuant To 310 CMR 10.04 and 310 CMR 10.05(7)(j)2(a).

Under 310 CMR 10.05(7)(j)2(a), "[an] aggrieved person [who] previously [participated] in the permit proceedings" may also appeal an SOC to OADR within 10 business days after the SOC's issuance. As noted above, at best the Petitioner's Amended Appeal Notice/More Definite Statement demonstrates that she alone filed the appeal of the SOC. Undisputedly, the Petitioner previously participated in permit proceedings by making the SOC request to the Department on behalf of herself and her fellow Rutland residents as discussed above. The only issue regarding the Petitioner's standing to pursue the appeal as an individual is whether she has alleged sufficient facts in her Amended Appeal Notice/More Definite Statement demonstrating that she is a "person aggrieved" by the SOC within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a).

The Wetlands Regulations at 310 CMR 10.04 define "person aggrieved" 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 [MWPA]. . . .

"A 'person aggrieved' as that term is used in the MWPA must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.'" Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision, 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, OADR Docket No.

WET-2012-029, 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision, 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of "person aggrieved" under G.L. c. 40B).

"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." Webster Ventures I, supra, 2015 MA ENV LEXIS 14, at 16; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

> [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."

63 Mass. App. Ct. at 441; Webster Ventures I, supra, 2015 MA ENV LEXIS 14, at 16-17; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken

as true demonstrate the possibility that injury alleged would result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29; compare Standerwick, 447 Mass. at 37 (plaintiffs' case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury").

To sum up, to demonstrate that she is a "person[s] aggrieved" by the SOC, the Petitioner was required to set forth "sufficient written facts" in her Amended Appeal Notice/More Definite Statement showing that the proposed Project will or might cause her 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. 310 CMR 10.04; 310 CMR 10.05(7)(j)2.b.iii; Webster Ventures I, supra, 2015 MA ENV LEXIS 14, at 17-18; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. The Petitioner did not do this because her Amended Appeal Notice/More Definite Statement is devoid of any facts, if taken as true, demonstrating that the proposed Project will or might cause her 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. Moreover, her allegation "that [her] husband . . . and [she] are abutters to the [proposed] [P]roject" does not confer automatic standing to her as a "person aggrieved" by the SOC within the meaning of 310 CMR 10.04 and 10.05(7)(j)2(a); In the Matter of Ryan Development, LLC, OADR Docket No. WET-2016-028, Recommended Final Decision (January 6, 2017), 2017 MA ENV LEXIS 9, at 8 (abutter did not have automatic standing to appeal the Department's Superseding Order of Resource Area

Delineation to OADR), adopted as Final Decision (January 17, 2017), 2017 MA ENV LEXIS 8.

While it is true that 310 CMR 10.05(7)(a)(4) authorizes "any owner of land abutting the land on which the work is to be done" to request an SOC from the Department seeking to overturn an OOC of a local conservation commission regardless of whether the abutter is aggrieved, that is not the same rule if an abutter appeals an SOC to OADR. Appeals of SOCs to OADR are governed by 310 CMR 10.05(7)(j), which does not provide abutters an automatic right to appeal an SOC. Ryan Development, supra, 2017 MA ENV LEXIS 9, at 8. To appeal an SOC, an abutter must demonstrate that he or she is an aggrieved person who previously participated in the permit proceedings within the meaning the 310 CMR 10.04 and 310 CMR 10.05(7)(j)2.a. Here, the Petitioner satisfied one of these elements: prior participation in the permit proceedings, but not the other: aggrievement. Accordingly, the Petitioner lacks standing to challenge the SOC as a person aggrieved by the SOC pursuant to 310 CMR 10.04 and 310 CMR 10.05(7)(j)2.a.

IV. THE PETITIONER'S SUBSTANTIVE CLAIMS AGAINST THE SOC FAIL AS A MATTER OF LAW.

Even if she has standing to pursue the appeal of the SOC as the representative of a Ten Residents Group and/or as an individual "aggrieved person" pursuant to 310 CMR 10.05(7)(j)2.a, the Petitioner's substantive claim against the SOC that it was issued "prematurely" by the Department fails as a matter of law.

First, contrary to my September 2016 Order as discussed above and the requirements of 310 CMR 10.05(7)(j)2.b.v, the Petitioner's Amended Appeal Notice/More Definite Statement fails to contain a "a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA]." The Petitioner's

Amended Appeal Notice/More Definite Statement also fails to cite any provision of the MWPA and the Wetlands Regulations that the SOC purportedly violates. Instead, the Petitioner's sole claim is that the Department issued the SOC prematurely in violation of G.L. c. 9, §§ 26-27C and 950 CMR 71.00, which govern historical and archeological landmarks. The MWPA and the Wetlands Regulations are not a vehicle for enforcement of G.L. c. 9, §§ 26-27C and 950 CMR 71.00.

The purpose of G.L. c. 9, §§ 26 through 27C "is to eliminate, minimize, or mitigate adverse effects to properties listed in the State Register of Historic Places." 950 CMR 71.02(1). Enforcement of G.L. c. 9, §§26-27C and 950 CMR 71.00 are under the purview of the Massachusetts Historical Commission ("MHC"), an agency within the Massachusetts Secretary of State's Office. G.L. c. 9, § 26.

G.L. c. 9, § 27C provides in relevant part that:

> . . . prior to a state body's . . . licensing, in whole or in part, a private project, the state body undertaking . . . licensing such project shall notify the [MHC] of such project and the [MHC] shall, within [30] days of receipt of such notice, determine whether such project will have any adverse effect, direct or indirect, on any property listed in the state register of historic places. If the [MHC] does not make a determination within [30] days, the state body or the proponent may proceed with the project. . . .

If, however, "[the MHC makes a] determination of adverse effect":

> the [MHC], the state agency and, in the case of a private project, the project proponent shall immediately consult to discuss ways to eliminate, minimize or mitigate the adverse effects; provided, however, that such property was included in the inventory of the historic assets of the commonwealth prior to the [30th] day following the submission of . . . the application for the required state permits for the project. The state body undertaking the project or the private entity proposing the project shall adopt all prudent and feasible means to eliminate, minimize, or mitigate the adverse effects. . . .

G.L. c. 9, § 27C. By its terms, G.L. c. 9, § 27C does not authorize the MHC to preclude a state agency's permitting of a proposed development project if the MHC determines that the project

will have an adverse effect on any property listed in the Commonwealth's register of historic places. Instead, the statute directs the state agency and the project proponent to "consult [with the MHC] to discuss ways to eliminate, minimize or mitigate the adverse effects" and "adopt all prudent and feasible means to eliminate, minimize, or mitigate the adverse effects." G.L. c. 9, § 27C.

Under 950 CMR 71.04(1), "[a] private project proponent may provide notification to the MHC of a proposed project involving property listed on Commonwealth's register of historic places. In such a situation, "a state body [responsible for permitting the proposed project] need not provide notice to the MHC of the project." 950 CMR 71.04(1). Notification of the project to the MHC can be made by "complet[ion] [of] an Environmental Notification Form as required under MEPA . . . ." Id.

"MEPA" is the acronym for the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H. MEPA and the MEPA Regulations at 301 CMR 11.00 "establish a process to ensure that State permitting agencies [such as the Department] have adequate information on which to base their permitting decisions, and that environmental impacts of the project [(Damage to the Environment)][7] are avoided or minimized." City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 201, n.12 (2014) ("Brockton I"); In the Matter of Brockton Power Co., LLC, OADR Docket Nos. 2011-025 & 026, Recommended Final Decision (July 29, 2016), 2016 MA ENV LEXIS 66, at 143, n. 44, adopted as Interlocutory Decision [of MassDEP Commissioner] (March 13, 2017), 2017 MA ENV LEXIS 21. "Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the [Massachusetts] Secretary [of Energy and Environmental Affairs ("EEA"),] . . . who determines

[7] "Damage to the Environment" is defined by the MEPA Regulations at 301 CMR 11.02 as "[a]ny destruction or impairment (not including insignificant damage or impairment), actual or probable, to any of the natural resources of the Commonwealth including, but not limited to . . . historic districts or sites."

whether the project meets the review threshold requiring an . . . [Environmental Impact Report ("EIR") under MEPA]." Id. "If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the [EEA] Secretary certifies whether the FEIR has complied with MEPA . . . ." Id. A Certification by the EEA Secretary that the FEIR complies with MEPA "does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies." Id. The Certification "[also] does not mean that a proposed project meets applicable permitting standards." In the Matter of Stephen D. Peabody, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. "Instead, it only means that the project's proponent has adequately described the environmental impacts and addressed mitigation" as required by MEPA. Id. The permitting agency "retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review . . . ." 301 CMR 11.01(1)(b).

In this case, the proposed Project was subject to MEPA review because it involves: (1) creation of more than 10 acres of impervious surfaces (301 CMR 11.03(1)(a)2); and (2) alteration of more than 25 acres of land (301 CMR 11.03(1)(b)1). Certificate of the Secretary of Energy and Environmental Affairs on the Supplemental Environmental Impact Report [for Brice-Lemon Estates, Rutland, Massachusetts], January 29, 2016 ("EEA Secretary's MEPA Certificate for the proposed Project"), at p. 4.[8] The MEPA review began in April 2003, when the Applicant submitted an ENF for a smaller project proposing the development of an 80 unit Open Space Cluster residential subdivision on a 96 acre site located off of Route 122A (Main Street) in Rutland. EEA Secretary's MEPA Certificate for the proposed Project, at p. 2. MEPA review continued for next 13 years (until January 2016) with the original project being revised to the

[8] In support of its Motion for Summary Decision, the Department submitted a copy of the EEA Secretary's MEPA Certificate for the proposed Project.

present proposed Project. EEA Secretary's MEPA Certificate for the proposed Project, at pp. 2-12. The history of the MEPA review is as follows.

In November 2007, the EEA Secretary issued a MEPA Certificate on the Applicant's FEIR for the original project, which "directed the [Applicant] to file a Supplemental Final Environmental Impact Report ("SFEIR") . . . provid[ing] a robust and detailed analysis of [several items, including] . . . of the project's potential impacts to and proposed mitigation for . . . historic resources." Id., at p. 3. The EEA Secretary's MEPA Certificate on the Applicant's FEIR "specifically required the [Applicant] . . . to demonstrate the project's consistency with . . . applicable Federal and State regulations governing properties listed in the Federal and State Registers of Historic Places." Id.

"In March 2009, the [Applicant] submitted a SFEIR for the project that provided a description of a number of proposed project changes. The project changes included . . . reduced alterations to . . . portions of [the] designated National Historic Landmark site. . . . However, comments on the SFEIR from [the Massachusetts Department of Conservation and Recreation] and MassDEP indicated that the [Applicant] still had not resolved several of the outstanding issues that had been highlighted during review of the FEIR." Id. As a result, in April 2009 the EEA Secretary issued a MEPA Certificate on the SFEIR, which "directed the [Applicant] to file a Second Supplemental Final Environmental Impact Report ("SSFEIR") . . . provid[ing] a robust and detailed analysis of [several items, including] . . . of the project's potential impacts to and proposed mitigation for . . . historic resources." Id.

"In June 2009, [the Applicant] filed a SSFEIR for the project that outlined a number of project changes and proposed mitigation measures. The project changes pertained to the [project's] stormwater management detention basins and discharge locations. The SSFEIR also

identified a second viable wastewater alternative using on-site septic systems although the [Applicant] continued to include sewers in its Preferred Alternative despite the fact that the sewer alternative could not be permitted. The SSFEIR presented additional mitigation to minimize stormwater impacts." EEA Secretary's MEPA Certificate for the proposed Project, at p. 3.

The EEA Secretary's subsequent MEPA Certificate on the SSFEIR identified several aspects of the project that were not permittable and noted that the project would require changes. Id., at pp. 3-4. In December 2014, the Applicant submitted a Notice of Project Change ("NPC") to reflect that the Applicant had revised the project to the present proposed Project. Id., at p. 4. In February 2015, the EEA Secretary issued a MEPA Certificate on the NPC requiring the Applicant's "preparation of a Supplemental EIR [("SEIR")] to establish that the project [was] designed consistent with State regulations and associated performance standards and that it [was] designed to avoid, minimize and mitigate Damage to the Environment to the maximum extent feasible." Id.

In August 2015, the Army Corps of Engineers ("ACOE") issued a preliminary finding that the proposed Project "[would] 'not adversely effect' the General Rufus Putnam House Historic Site."[9] Id., at p. 10. In September 2015, the MHC informed the ACOE that it needed additional information in order to determine whether it agreed with the ACOE's preliminary finding. Department's Motion for Summary Decision, at p. 10. However, the MHC did not make a finding pursuant to G.L. c. 9, § 27C that the proposed Project "will have [an] adverse

[9] The ACOE has jurisdiction over the proposed Project because the Project "requires a 404 Programmatic General Permit from the . . . ACOE." EEA Secretary's MEPA Certificate for the proposed Project, at pp. 3, 10. These permits are issued pursuant to Section 404 of the federal Clean Water Act. https://www.epa.gov/cwa-404/section-404-permit-program.

effect, direct or indirect, on any property listed in the state register of historic places." Id.

In December 2015, the Applicant submitted a SEIR for the proposed Project to the EEA Secretary. [EEA] Environmental Monitor, December 23, 2015.[10] On December 18, 2015, the MHC received a copy of the SEIR. MHC Comment Letter to SEIR (January 21, 2016) attached to EEA Secretary's MEPA Certificate for the proposed Project. On December 23, 2015, EEA's Environmental Monitor published the Applicant's SEIR and informed the public that comments on the SEIR were due by January 22, 2016. [EEA] Environmental Monitor, December 23, 2015.

On January 21, 2016, the MHC submitted comments to the EEA Secretary on the Applicant's SEIR for the proposed Project. MHC Comment Letter to SEIR (January 21, 2016) attached to EEA Secretary's MEPA Certificate for the proposed Project. The MHC's comments confirmed that the proposed Project "is located within the boundaries of the General Rufus Putnam House Historic Site, a National Historic Landmark that includes not only the c. 1760 house, but also 135 acres of historically associated land." Id. The MHC also confirmed that "[t]his National Historic Landmark is listed in the State and National Registers of Historic Places." Id. The MHC's remaining comments included that "[t]he SEIR indicate[d] that the proposed [P]roject's . . . design [would] result in slightly reduced impervious surface area, a slight decrease in site alteration, and the removal of two lots, among other changes." Id. None of the MHC's remaining comments, however, included a finding pursuant to G.L. c. 9, § 27C that the proposed Project "will have [an] adverse effect, direct or indirect, on any property listed in the state register of historic places." Id.

On January 29, 2016, the EEA Secretary issued a Certificate on the Applicant's SEIR for the proposed Project finding "that the [SEIR] ***adequately and properly*** complie[d] with MEPA

[10] EEA's Environmental Monitor "provides information on projects under review by [EEA's MEPA Office], recent MEPA decisions of the [EEA] Secretary[,] . . . and public notices from environmental agencies." http://170.63.40.34/EEA/emepa/

and its implementing regulations." EEA Secretary's MEPA Certificate for the proposed Project, at p. 1 (emphasis in original). The EEA Secretary stated that "[t]he [SEIR] . . . described the project, its environmental impacts, and proposed mitigation sufficient to meet the requirement of adequacy," and that the Applicant "[had] revised the design of the [proposed Project] to further avoid and reduce environmental impacts." Id. As a result, the EEA Secretary:

> allow[ed] the [proposed] [P]roject to proceed to State permitting in accordance with [the MEPA Regulations, at] 301 CMR 11.08(8)(c)(1), because the primary aspects and issues of the [P]roject ha[d] been clearly described and their nature and general elements were analyzed in the [SEIR] and previous submissions . . . [and] that certain aspects of the project . . . requir[ing] additional analysis of technical details . . . .[could] be fully analyzed during State Agency permitting and that further MEPA review would not materially advance the agency review of the project.

Id.

In conclusion, the Summary Decision record undisputedly demonstrates that the MHC was made aware of the proposed Project during the MEPA review process and that the MHC did not make a finding "within [30] days of receipt of such notice [that] . . . [the] [P]roject will have any adverse effect, direct or indirect, on any property listed in the state register of historic places." G.L. c. 9, § 27C. Thus, under G.L. c. 9, § 27C, the Department "[could] proceed with [its SOC review of] the project." Accordingly, based on the undisputed material facts and as a matter of law, the Department did not issue its SOC approving the proposed Project "prematurely" as the Petitioner contends in this appeal. For these reasons, the Applicant and the Department are entitled to Summary Decision and the SOC should be affirmed.

CONCLUSION

For the reasons discussed in detail above, I recommend that the Department's Commissioner issue a Final Decision granting the Applicant's and the Department's respective motions to dismiss the appeal and for summary decision and affirming the SOC because: (1) the

Petitioner lacks standing to pursue the appeal either as the representative of a ten resident's group or an individual "aggrieved person" pursuant to 310 CMR 10.05(7)(j)2.a; and (2) if she has standing, the Petitioner's substantive claim against the SOC contending that it was issued "prematurely" by the Department fails as a matter of law.

Date: 4/21/14

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief 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/or 14(e), and may not be appealed to Superior Court pursuant to 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 and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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