

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108

**OFFICE OF APPEALS AND DISPUTE RESOLUTION**

April 7, 2017

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In the Matter of  
Robert A. Cohen

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OADR Docket No. 2016-037  
Becket, MA

**RECOMMENDED FINAL DECISION**

The Petitioner, Martha E. Kelly, challenges the Draft Waterways License issued to Robert A. Cohen by the Massachusetts Department of Environmental Protection's Western Regional Office ("DEP") pursuant to the Waterways statute, G.L. c. 91, and regulations, 310 CMR 9.00. The license allows Cohen to install a small dock off South Cove Road and Ronald Drive at Lot 28, Center Pond, Becket, Massachusetts.

Kelly's Notice of Claim ambiguously raises a number of objections to the Draft License; she alleges that the license would conflict with provisions in the "original deed" and that "[a]ccurate study is required before EPA can license docks in South Cove property."

Shortly after the appeal was filed, Cohen filed a motion to dismiss, asserting Kelly: (1) lacks standing under 310 CMR 9.02 and 310 CMR 9.17(1)(b) and (2) failed to state a claim on which relief can be granted pursuant to 310 CMR 1.01(11)(d)2. DEP concurred with the motion to dismiss.

As a consequence of the arguments in the motion to dismiss, I gave Kelly two weeks to respond to the motion and show cause why the appeal should not be dismissed. Kelly responded by filing photocopies of undated maps and a site plan and an illegible “sketch of land” (dated “2-15-2017”) concerning the project locus. Kelly did not respond to the arguments that she lacked standing and failed to state a claim on which relief could be granted. For the reasons asserted in the motion to dismiss, the appeal should be dismissed and the license should be affirmed.

The Waterways Regulations at 310 CMR 9.17 establish a number of different means for a petitioner to show standing. In this appeal, for Kelly to have standing she must show that she is a “person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period.” 310 CMR 9.17(1)(b). It is undisputed that Kelly did not submit written comments within the public comment period, and she therefore lacks standing for that reason alone.

In addition, Kelly also lacks standing because she failed to show that she is aggrieved. An aggrieved person is one “who, because of a decision by the Department to grant a license or permit, 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 public interests protected by M.G.L. c. 91 and c. 21A.” 310 CMR 9.02 (aggrieved). Kelly failed to present any facts that could show that she was possibly aggrieved under the terms of this definition. For this additional reason, Kelly lacks standing.<sup>1</sup>

Last, Kelly’s appeal should be dismissed because she failed to state a claim upon which relief can be granted. In particular, she failed to meet the requirement in the Notice of Appeal

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<sup>1</sup> The Notice of Appeal Rights that accompanied issuance of the draft license specified both of these requirements for standing, i.e., prior participation and aggrieved status.

Rights, the Adjudicatory Proceeding Rules, and the Waterways Regulations that she state clearly and concisely the facts that are the grounds for the request and the relief sought and why the draft license is not consistent with the applicable laws and regulations. 310 CMR 1.01(6)(b); 310 CMR 9.17(3). Kelly has asserted only ambiguous claims that the license somehow violates the original deed's requirements concerning property use, which is a private property dispute that cannot be adjudicated in this forum. See Tindley v. DEQE, 12 Mass. App. 358, 411 N.E.2d 187, 189 (1981). There is no claim alleged that Cohen does not have a colorable claim of title to receive a small dock license accessory to residential use. See Matter of Legowski, Docket No. 2011-039, Recommended Final Decision (October 25, 2012), adopted by Final Decision (November 5, 2012); Matter of Point Pines Yacht Club, Inc., Docket No. 91-116, Final Decision (November 20, 1997).<sup>2</sup>

For the above reasons, the appeal should be dismissed and the license should be affirmed.

#### NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

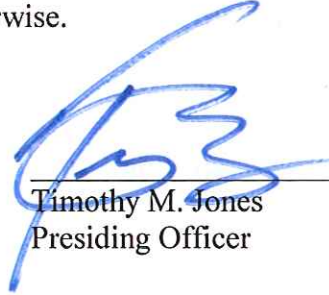
Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party

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<sup>2</sup> Jane E. Link sent an email to the Office of Appeals and Dispute Resolution in opposition to the license, but she is not a petitioner in the appeal.



shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

 4/7/17  
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Timothy M. Jones  
Presiding Officer

In The Matter Of:

Docket No. 2016-037

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Date: April 7, 2017

**SERVICE LIST**

Robert A. Cohen

File No. W16-4726  
Becket

**Party**

APPLICANT  
Robert A. Cohen

PETITIONER

DEPARTMENT

ANALYST

