

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

May 22, 2019

In the Matter of
Craig & Hope Beckman

OADR Docket No. WET-2018-013
Concord, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

James Balfour and Robert A. Schulman, Trustees of Robert A. Schulman Trust of 2014 (“Petitioners”), filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”) concerning the real property at Keuka Road (Lots 2A, 2B, 3B, 4A, 5A, and 80B), Concord, Massachusetts (“the Property”). The Petitioners challenge the Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued to the Applicants, Craig and Hope Beckman pursuant to the Wetlands Protection Act, G.L. c. 131 § 40 (the “Act”), and the Wetlands Regulations, 310 CMR 10.00 et seq. The SOC approved the Applicants’ proposed project to build a 4-lot residential development, including related infrastructure (roadway, stormwater management system) on the Property (“the Project”). The Petitioners object to the SOC because they believe that it omits a Wetlands Resource Area, specifically a Bordering Vegetated Wetland (“BVW”) that is allegedly located where some of the construction will occur. 310 CMR 10.55 (BVW definition and performance standards).

After considering the entire administrative record and the applicable law, I recommend that MassDEP's Commissioner issue a Final Decision affirming the SOC and allowing the Applicants' and MassDEP's motions to dismiss the appeal because: (1) the Petitioners' alleged claim challenging the SOC fatally omits an important element, namely that the allegedly unidentified BVW must "border" on a specified waterbody; and (2) the Petitioners failed to demonstrate standing.

DISCUSSION

MassDEP issued the SOC approving the Project after the Petitioners appealed to MassDEP the Town of Concord's Natural Resources Commission's Order of Conditions approving the same project. No Project work will occur within Wetlands Resource Areas. See 310 CMR 10.01 and 10.02 (defining wetlands jurisdiction and resource areas). Two of the proposed homes and a stormwater basin would be within the Buffer Zone to BVW.¹ 310 CMR 10.02; 310 CMR 10.53; 310 CMR 10.55. No structures will be within 50 feet of the BVW. The Property is a former agricultural site that is now overgrown with invasive species. To address the invasive species the Applicants' proposed project includes an Invasive Species Management Plan as mitigation.

Shortly after the Petitioners filed this appeal challenging the SOC, the Applicants filed a motion to dismiss the appeal for lack of standing and failure to state a claim upon which relief can be granted. After holding a Pre-Hearing Conference at which all the parties were in

¹ The Inland Wetlands Regulations group together the types of freshwater wetlands as "Bordering Vegetated Wetlands, " or BVW, as follows: "Bordering vegetated wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering vegetated wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40." 310 CMR 10.55(2)(a).

attendance I concurred with the Applicants' position that there were significant deficiencies with the Petitioners' Notice of Claim. I therefore issued the Ruling and Order Requiring Response to Motion to Dismiss, Order to Show Cause, and Order for More Definite Statement ("Ruling and Order"). In the Ruling and Order, I stated that:

[w]ith respect to the issues in the Petitioners' Notices of Claim and Pre-Hearing Statement, the Petitioners have thus far attempted to ambiguously state claims in noncompliance with 310 CMR 1.01(6) and 310 CMR 10.05(7)(j).² Moreover, the purported claims appear based upon speculation and conjecture with respect to technical issues under the Wetlands Protection Act and the Regulations. Further, the asserted wetland (swamp/BVW) must border on one of the identified water bodies in 310 CMR 10.02(1). Given that requirement, it is not clear how the asserted wetland (swamp) could possibly be delineated without being connected to the BVW that has already been delineated in the binding ORADs/FORAD (File Nos. 137-1202 and 137-1371). Any connection to such BVW would be an impermissible collateral attack on the binding delineations in the binding ORADs/FORAD, absent some rationale or legal basis of which I am not presently aware.

Ruling and Order, pp. 2-3.

Therefore, I required the Petitioners to: (1) file a written, signed statement, pursuant to 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j), that specifically, clearly and concisely set forth the facts and claims (including each element of the claims) which are grounds for the appeal, and the relief sought, and (2) file with OADR written credible evidence from a "competent source" in support of their claims, pursuant to 310 CMR 1.01(11)(b). That provision required the Petitioner to "file sufficient evidence to meet the burden of going forward by producing at least some

² Among other deficiencies, the Notice of Claim did not comply with 310 CMR 1.01(11)(b) because it was "so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought . . ." 310 CMR 1.01(11)(b). see Matter of Gormally, Docket No. 2003-037, Recommended Final Decision (November 4, 2003), adopted by Final Decision (November 19, 2003); Matter of Symes, Docket No. 2002-054, Decision and Order on Restated Claims, 9 DEPR 155 (June 4, 2002); Matter of Cormier Construction Co., Decision and Order on Motion to Dismiss, Docket No. 93-071 (November 23, 1993); Simmons v. Abruzzo, 49 F.3d 83, 86 (2nd Cir. 1995)(complaint should be dismissed where it is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised"); Green v. Massachusetts, 108 F.R.D. 217, 218 (D. Mass. 1985) (similar statement of the law).

credible evidence from a competent source in support of the position taken.” The evidence was to be signed and authenticated under the penalties of perjury and indicate the witness’ qualifications and background.

The Petitioners responded to the Ruling and Order, asserting that they had adequately alleged a claim and they had standing. The Applicants and MassDEP also responded, both requesting that I dismiss the appeal. After reviewing the parties’ pleadings, the administrative record, and the applicable law I conclude that the Applicants’ and MassDEP’s requests to dismiss the appeal should be allowed.

The Alleged BVW Does Not Border On A Waterbody. There are two reasons why the appeal should be dismissed. The first derives from an Order of Resource Area Delineation (“ORAD”) and a Final Order of Resource Area Delineation (“FORAD”) that were issued for the Property pursuant to 310 CMR 10.05 (3)(a)1. That regulation provides that any person who wishes to know whether the Wetlands Act and Wetlands Regulations apply to land or to work that may affect a resource area may file a request for a determination of applicability with the local conservation commission. Matter of Bosworth, Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), adopted by Final Decision (March 14, 2016). The request is sometimes referred to as an ANRAD, the acronym for “abbreviated notice of resource area delineation.” The process provides a procedure for a party to confirm the delineation of wetland Resource Areas that are identified on the plans filed with the conservation commission. 310 CMR 10.05(4)(b)2. In response, the conservation commission issues an ORAD, generally affirming or rejecting the ANRAD. An ORAD is binding as to the location of resource areas identified by the proponent. 310 CMR 10.05(6)(a)3. It is not binding with respect to resource areas at the property that were not identified by the proponent. Bosworth, supra;

Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012).

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

Here, there are two binding and preclusive orders of resource area delineation that identify BVW at the northern edge of the Property (“confirmed BVW”). The first order is the January 6, 2017, ORAD (DEP File #137-1371) that confirmed BVW at the northern end of Lots 5A, 6A, and 80B (Parcels 3850, 3851, and 3852). The second order is a Final Order of Resource Area Delineation issued on May 29, 2015, which remains valid until May 29, 2021; it also confirmed the location of the BVW at the northern end of the Property.

The Petitioners’ claim that there is an additional BVW on the Property located south of the confirmed BVW suffers from a fatal flaw that flows indirectly from the FORAD and the ORAD. In order for a wetlands resource area, like the BVW confirmed in the FORAD and ORAD, to be a jurisdictional protected resource area under the Wetlands Act and Regulations it must “border” on an ocean, estuary, creek, river, stream, pond, or lake. 310 CMR 10.02(1); 310 CMR 10.55(2). “Bordering” means “touching.” 310 CMR 10.04 (Bordering). An area borders on another area if “some portion of the area is touching the waterbody or if some portion of the area is touching another area listed in 310 CMR 10.02(1)(a) some portion of which is in turn touching the waterbody.” 310 CMR 10.04 (Bordering); see Matter of Pyramid Mall of Hadley Newco, LLC, Docket No. 2006-49, Final Decision (September 24, 2010).

Here, the confirmed BVW in the ORAD and FORAD borders on an intermittent stream to the north of the BVW. The ORAD and FORAD also confirm the southernmost, upland boundary of the confirmed BVW.

In contrast, the Petitioners' claim that there is another unidentified BVW that lies to the south of the confirmed BVW is fatally flawed because the Petitioners have not alleged that it borders on any of the identified waterbodies in 310 CMR 10.02. In fact, the Petitioners claim that the unidentified BVW lies upland and further south from the confirmed BVW in the ORAD and FORAD. They believe it extends across the proposed access road, Keuka Road, and onto the rear of Balfour's property at 696 Main Street. Notice of Claim, p. 3; Petitioners' Response to the Respondents' Motion to Dismiss and More Definite Statement of Their Claim and Motion for an Order Allowing Entry Onto Land for an Extension of Time to Partially Comply With OADR's November 7, 2018 Order ("Petitioners' Response to Order"), pp. 3-4.

The Petitioners have not alleged the existence of any waterbody at the site or in proximity to the allegedly unidentified BVW that the BVW may border, or touch. Thus, the only waterbody on which the allegedly unidentified BVW could border would be the intermittent stream to the north of the confirmed BVW. In order for that to occur, however, the unidentified BVW would have to be connected to the confirmed BVW. That would necessarily mean that the southernmost boundary for the confirmed BVW would have to be extended to include the allegedly unidentified BVW. The Petitioners, however, are barred from alleging that because the FORAD and the ORAD established the southernmost boundary of the BVW, and the FORAD and ORAD are entitled to preclusive effect. In sum, because the allegedly unidentified BVW is not alleged to border on any waterbody and because the unidentified BVW cannot be connected to the confirmed BVW in order to border on the intermittent stream to the north, the Petitioners

have failed to state a claim on which relief may be granted. See 310 CMR 1.01(11)(d).³ In fact, the Petitioners' pleadings suggest that the allegedly unidentified BVW is separate and distinct from the confirmed BVW and does not border on any waterbody: the Petitioners stated that the allegedly unidentified BVW is "*clearly distinct* from the wetland delineated at the rear of Lots 5A, 6A, and 80B Keuka Road," i.e., the one confirmed in the ORAD and FORAD.⁴ Response to Order, p. 4 (emphasis added).

The Petitioners Failed To Demonstrate Standing. The second basis for dismissal is the Petitioners' failure to demonstrate that they have standing. To have standing under 310 CMR 10.05(7)(j)2.b.iii, the Petitioners were required to include in their Notice of Claim "sufficient written facts to demonstrate status as a person aggrieved." See also 310 CMR 1.01(6)(b) (setting forth requirements for filing notice of claim). "Person Aggrieved means 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. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved." 310 CMR 10.04

In particular, the Petitioners must demonstrate that the Applicants' project (1) might possibly impact the interests of the Act for BVW; and (2) those adverse impacts would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of the Petitioners. Matter of Digital Realty Trust, Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013);

³ In accord with the standard of review set forth in 310 CMR 1.01(11)(d)2 I have "assume[d] all the facts alleged in the notice of claim to be true."

⁴ Given the outcome of this appeal, I have denied the Petitioners' Motion for Order Allowing Entry Onto Land for Extension of Time to Partially Comply with November 7, 2018, Order.

Matter of Town of Southbridge Department of Public Works, Docket No. WET-2009-022, Recommended Final Decision, (September 18, 2009), adopted by Final Decision (October 14, 2009). The impact to the asserted right or interest must be one that the Wetlands Protection Act is designed to protect. Id.; Matter of Lepore, Recommended Final Decision (September 2, 2004), adopted by Final Decision (December 3, 2004); Matter of Whouley, Docket No. 99-087, Final Decision (May 16, 2000). "[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998). "Rather, [when standing is challenged] the plaintiff must put forth credible evidence to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996).

The Petitioners failed to meet the standing threshold. They have only alleged that the road construction will destroy the alleged BVW and will "cause injury to the Petitioners and their properties 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 the Wetlands Act. Petitioners' Response to Order, p. 3. This assertion of standing is too abstract and conjectural. The Petitioners have not identified how the alleged adverse impacts to the unidentified BVW would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of theirs. Matter of Digital Realty Trust, Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013). Although the Petitioners allege that they own some of the land on which BVW allegedly exists and the roadway will be constructed, that claim is being litigated in the Massachusetts Land Court. Notice of Claim, p. 2. There is no showing of injury to any private property interest or

private legal interest that the Petitioners presently own. As such, the Petitioners have not shown that they own land that will be impaired by the proposed work in the allegedly affected and unidentified BVW; thus, their allegations are insufficient. The Petitioners' standing is also undermined because it is dependent upon alleged adverse impacts to the allegedly unidentified BVW, for which they have failed to state a claim.

CONCLUSION

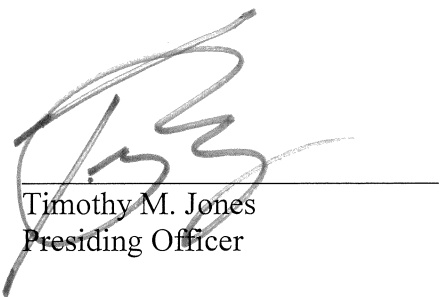
For all the above reasons, I find that the motions to dismiss have merit and should be allowed. As a consequence, I recommend that MassDEP's Commissioner issue a Final Decision affirming the SOC.

NOTICE- RECOMMENDED FINAL DECISION

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

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: 5/22/19



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Craig & Hope Beckman

Docket No. WET-2018-013

File No. 137-1419
Concord

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Date: May 22, 2019