COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 22, 2020

In the Matter of
Dan and Eva Barstow

Docket No. 2019-026
DEP File No.: Waterways Application No. W19-5558, Draft Waterways License
Stow, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In August 2019, Gary and Christina Nixon ("the Petitioners") filed this appeal with the Office of Appeals and Dispute Resolution ("OADR") challenging a Draft Waterways License ("the Draft c. 91 License") that the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to Dan and Eva Barstow ("the Applicants") on July 16, 2019, pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations at 310 CMR 9.00.[1] The Draft

[1] OADR is a quasi-judicial office within the Department, which is responsible for advising the Department's Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 ("TGP"), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department's Commissioner and is separate and independent of the Department's program offices, Regional Offices, and Office of General Counsel ("OGC"). TGP, 2017 MA ENV LEXIS 34, at 9. OADR staff who advise the Department's Commissioner in resolving administrative appeals are Presiding Officers such as

c. 91 License authorized the Applicants' proposed construction of a dock at the Applicants' real property at 99 Pine Point Road in Stow, Massachusetts ("the Property"). Draft c. 91 License, at p. 1. The Property fronts Lake Boon, a Great Pond of the Commonwealth subject to the Department's regulatory jurisdiction under c. 91 and the Waterways Regulations.[2]

The Petitioners contend in this appeal that the Department erred in issuing the Draft c. 91 License to the Applicants because the proposed dock authorized by the License will purportedly be "dangerously close . . . [to] the [Petitioners'] . . . rental house dock" at 96 Pine Point Road in Stowe, in violation of the 25 foot setback requirement of 310 CMR 9.36(2). Petitioners' Appeal Notice (August 4, 2019), at p. 1; Petitioners' Letter to Chief Presiding Officer (December 6, 2019). The Petitioners assert that "[t]he proposed dock would be on top of the [Petitioners'] 96 Pine Point [Road] house dock, with no space for boat access." Id. However, as discussed in detail below at pp. 5-25, the Petitioners, the parties with the burden of proving in this appeal that the Department erred in issuing the Draft c. 91 License to the Applicants, have repeatedly failed to substantiate their claims in the appeal by failing to comply with clear directives I have issued as Presiding Officer to facilitate the appeal's adjudication. This has included the Petitioners'

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myself. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department's Commissioner to serve as neutral hearing officers in administrative appeals. Id. Presiding Officers are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and issuing Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner's Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).

[2] "A Great Pond of the Commonwealth "is a pond having a water surface area of 10 acres or more in its natural (historic) state." https://www.mass.gov/guides/waterways-permitting-frequently-asked-questions; https://www.mass.gov/doc/massachusetts-great-ponds-list/download. The Department's authority under c. 91 and the Waterways Regulations to regulate activities in Great Ponds is discussed below, at pp. 3-5.

failure to file a Pre-Hearing Statement with OADR containing material information for maintenance of their appeal, including the names of the witnesses (expert witnesses as well) who would provide sworn testimonial and documentary evidence at an evidentiary Adjudicatory Hearing ("Hearing") supporting their claim that the proposed dock approved by the Draft c. 91 License violates the 25 foot setback requirement of 310 CMR 9.36(2). To date, the Petitioners have been ordered three times to file their Pre-Hearing Statement by certain deadlines and they have failed to comply. Their failure to comply has been without good cause. Accordingly, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioner's appeal and affirming the Draft c. 91 License.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PERMITTING REQUIREMENTS OF c. 91 AND THE WATERWAYS REGULATIONS GOVERNING THE DRAFT c. 91 LICENSE

Chapter 91 and the Waterways Regulations at 310 CMR 9.00 govern the development of structures in tidelands and Great Ponds of the Commonwealth. In the Matter of David Fuhrmann, OADR Docket No. 2013-037 ("Fuhrmann"), Recommended Final Decision (February 19, 2015), 2015 MA ENV LEXIS 17, at 14-15, adopted as Final Decision (April 8, 2015), 2015 MA ENV LEXIS 16; 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 14-15, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32. As noted above, Lake Boon is a Great Pond of the Commonwealth. "Chapter 91 authorization is required for all activities in, on, over, or under the entire area of any Great Pond . . . ." https://www.mass.gov/guides/waterways-permitting-frequently-asked-questions.

The Department's c. 91 jurisdiction arises under "the public trust doctrine and related

laws." Fuhrmann, 2015 MA ENV LEXIS, at 12; Webster Ventures, 2016 MA ENV LEXIS 27, at 16-17. "The public trust doctrine is an age-old concept with ancient roots," and "[i]n Massachusetts, it is expressed as the government's obligation to protect the public's interest in, among other things, navigation of the Commonwealth's waterways [,]" which includes Great Ponds. Fuhrmann, 2015 MA ENV LEXIS, at 12, citing, Trio Algarvio, Inc. v. Commissioner of the Department of Environmental Protection, 440 Mass. 94, 97 (2003). "It has long been established that the property rights of those who own property on a Great Pond extend only to the natural low water mark." Fuhrmann, 2015 MA ENV LEXIS, at 12, citing, In the Matter of Rick Brooks, Docket No. 2005-009, Ruling on Legal Issues (DALA) (May 16, 2007), adopted by Final Decision (June 11, 2010) (citing numerous Massachusetts decisions from the Supreme Judicial Court). "Under the public trust doctrine, the Commonwealth holds tidelands [and Great Ponds] in trust for the use of the public for, traditionally, fishing, fowling, and navigation." Fuhrmann, 2015 MA ENV LEXIS, at 12-13, citing, Moot v. Department of Environmental Protection, 448 Mass. 340, 342-343 (2007), S.C., 456 Mass. 309 (2010).

"Applying the public trust doctrine, MassDEP's Waterways Regulations state that the 'title to land below that natural low water mark is held by the Commonwealth in trust for the public.'" Fuhrmann, 2015 MA ENV LEXIS, at 13-14, citing, 310 CMR 9.02 (Great Pond definition); Webster Ventures II, 2016 MA ENV LEXIS 27, at 18. "The Waterways Regulations 'protect and promote the public's interest in . . . Great Ponds . . . in accordance with the public trust doctrine . . . [and] protect the public health, safety, and general welfare as it may be affected by any project in . . . great ponds . . . .'" Fuhrmann, 2015 MA ENV LEXIS, at 14, citing, 310 CMR 9.01(2)(a) and 9.01(2)(d); Webster Ventures II, 2016 MA ENV LEXIS 27, at 18-19.

Under the Waterways Regulations, "no 'structure shall be built or extended, or . . . other

obstruction or encroachment made, in, over or upon the waters of any great pond below the natural high water mark' unless licensed by the Department." Fuhrmann, 2015 MA ENV LEXIS, at 14, citing, G.L. c. 91 §§ 13 and 19; In the Matter of Rinaldi, Docket No. 2009-060, Recommended Final Decision (September 16, 2010), adopted by Final Decision (October 13, 2010); 310 CMR 9.04. Additionally, "where feasible" all proposed structures in Great Ponds must comply with the 25 foot setback requirement of 310 CMR 9.36(2), which provides as follows:

> [a] project shall not significantly interfere with littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from said property, as provided in M.G.L. c. 91, § 17. In evaluating whether such interference is caused by a proposed structure, the Department may consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures. ***In the case of a proposed structure which extends perpendicular to the shore, the Department shall require its placement at least 25 feet away from such abutting property lines, where feasible***.

(emphasis supplied). The purpose of this 25 setback requirement "[is] to provide a distance between structures that [will] provide safe navigation and berthing, and provide adequate clearance for property owners to approach their property from a waterway and approach the waterway from [their] property." Webster Ventures II, 2016 MA ENV LEXIS 27, at 90. "Often a 25 foot setback is not feasible, due to lot sizes and other restrictions," and "[i]n those instances, [proposed] projects may still be approved because there is enough room for vessels to pass each other safely." Id.

II. THE PETITIONERS' BURDEN OF PROOF IN THEIR APPEAL OF THE DEPARTMENT'S ISSUANCE OF THE DRAFT c. 91 LICENSE

A party who has standing to challenge the Department's issuance of a proposed c. 91 License may file an administrative appeal with OADR seeking to vacate the License. Webster Ventures II, 2016 MA ENV LEXIS 27, at 19-67. In such an appeal, the appellant has the burden

of proving by a preponderance of the credible evidence presented at the Hearing conducted by the Presiding Officer to adjudicate the appeal that the Department erred in issuing the proposed c. 91 License. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131; Webster Ventures II, 2016 MA ENV LEXIS 27, at 67-69; In the Matter of Jimary Realty Trust, OADR Docket No. 2016-015, Recommended Final Decision (August 3, 2018), 2018 MA ENV LEXIS 51, at 11-12, adopted as Final Decision (August 14, 2018), 2018 MA ENV LEXIS 50. Specifically, the party must prove by a preponderance of the credible evidence through the sworn testimonial and documentary evidence of competent witnesses, including expert witnesses, that the Department erred in issuing the proposed c. 91 License. Id.

It is well settled that "[a] competent source' [of evidence includes] a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted as Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted as Final Decision (October 25, 2006); In the Matter of Indian Summer Trust,

Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted as Final Decision (May 9, 2003); Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 36-39 (petitioner's failure to submit expert testimony in appeal challenging Department's Commissioner's issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner's claims in appeal because Variance was "detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance," including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design").

Here, as noted above, the Petitioners claim in this appeal that the proposed dock at the Property authorized by the Draft c. 91 License fails to comply with the 25 foot setback requirement of 310 CMR 9.36(2). Accordingly, at a Hearing in this appeal, the Petitioners would have the burden of proving through the sworn credible testimonial and documentary evidence of competent witnesses, including expert witnesses, that the proposed dock at issue violates the 25 foot setback requirement of 310 CMR 9.36(2) because it will significantly interfere with the Petitioners' littoral or riparian right to approach their property at 96 Pine Point Road in Stowe from Lake Boon. The Petitioners' witnesses, including expert witnesses, would have to provide sworn credible testimonial and documentary evidence demonstrating either: (1) it is feasible for the proposed dock to be located at least 25 feet away from the Petitioners' abutting real property or (2) if imposition of the 25 foot setback requirement is not feasible, the

proposed dock cannot be approved because there is not enough distance between the abutting real properties for vessels to pass each other safely if the proposed dock is constructed at the Property. 310 CMR 9.36(2); Webster Ventures II, 2016 MA ENV LEXIS 27, at 90. As discussed in detail in the next sections below, notwithstanding their burden of proof and my directives requiring them to identify their witnesses, including expert witnesses, for the Hearing, the Petitioners have failed to date to identify any witnesses who would testify at the Hearing in support of their claim that the proposed dock violates the 25 foot setback requirement of 310 CMR 9.36(2). As a result, the Petitioners' appeal should be dismissed and the Draft c. 91 License should be affirmed.

DISCUSSION

I. THE PRESIDING OFFICER'S AUTHORITY TO FACILITATE THE ADJUDICATION OF ADMINISTRATIVE APPEALS OF DEPARTMENT PERMIT DECISIONS AND REQUIRING THE PARTIES TO THE APPEAL TO SUBSTANTIATE THEIR CLAIMS IN THE APPEAL

Adjudication of the Petitioners' appeal of the Draft c. 91 License is not only governed by the substantive requirements of c. 91 and Waterways Regulations as discussed above, but also governed by the Adjudicatory Proceeding Rules at 310 CMR 1.01. The Adjudicatory Proceeding Rules contain a number of provisions designed to facilitate the Presiding Officer's adjudication of the appeal and requiring the parties to the appeal to provide material information substantiating their claims in the appeal prior to a Hearing taking place to adjudicate those claims. These provisions or litigation rules, include 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(9), as discussed below. The Petitioners are required to comply with these litigation rules notwithstanding their pro se status (not represented by legal counsel) in the appeal. Although their pro se status in the appeal accords them some leniency from these litigation rules, the

Petitioners are not excused from complying with them because "[litigation] rules bind a pro se litigant as they bind other litigants." In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same).

Under 310 CMR 1.01(5)(a)15, the Presiding Officer is authorized to conduct prescreening conferences with the parties to the appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

The provisions of 310 CMR 1.01(9) authorize the Presiding Officer to order the parties to an appeal to appear for a pre-hearing conference prior to a Hearing in the appeal to:

a. discuss settlement;

b. define contested issues on which evidence will be offered, if not otherwise determined under 310 CMR 1.01(6)(k);[3]

c. consider the possibility of obtaining stipulations, admissions and agreements that will avoid unnecessary evidence;

[3] 310 CMR 1.01(6)(k) provides that:

> [t]he Presiding Officer shall, absent good cause shown, limit the issues for adjudication to the issues identified in the notice of claim [("Appeal Notice")], more definite statement, and any motions to participate or intervene, or as identified at the prescreening conference.

d. establish limits on presentations of the parties;

e. establish a schedule for continuing the appeal, including a date for the adjudicatory hearing; and

f. consider any other matters that may aid in the disposition of the adjudicatory appeal.

310 CMR 1.01(9)(a)1. The parties "[must] appear at the prehearing conference with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference." 310 CMR 1.01(9)(a)2. "The parties [must also] be prepared to advise the Presiding Officer as to the prospects of settlement," Id., and "[t]he Presiding Officer may order the parties to meet or confer prior to the date of the conference to discuss settlement or other matters." 310 CMR 1.01(9)(a)3.

Prior to the pre-hearing conference, "[t]he Presiding Officer may order the parties to file a prehearing memorandum" containing:

a. a concise summary of the evidence that will be offered by the parties;

b. the facts agreed upon by the parties;

c. contested issues of fact and law, consistent with 310 CMR 1.01(6)(k);

d. the amount of time necessary for a party to conduct its case, consistent with 310 CMR 1.01(13)(d) relating to time limits;[4]

[4] 310 CMR 1.01(13)(d) provides that:

> 1. Absent agreement of the parties to time limits for the hearing acceptable to the Presiding Officer, the Presiding Officer may establish a limit on the amount of time allotted to each party to present its case and examine witnesses. This time shall be allocated equally among opposing parties, unless the Presiding Officer orders otherwise for good cause. In establishing time limits consistent with administrative efficiency, fairness to all parties and adequacy for developing the evidence, the Presiding Officer may consider the number, complexity, and novelty of issues presented; the number of witnesses and substance of their testimony; the length of time allocated for appeals of similar scope and complexity; any applicable directive or standing order; and other factors consistent with a just and speedy determination of the appeal. The Presiding Officer is authorized to monitor and enforce time limits.

e. a list of witnesses to be called, including the designation of those who will be offered as expert witnesses, and a brief summary of the testimony of each witness;

f. statements of Department policy or guidance that a party intends to cite or introduce into evidence;

g. a statement of need to substitute parties or consolidate proceedings, where the need was not previously identified; and

h. any additional matters likely to facilitate the disposition of the adjudicatory appeal.

310 CMR 1.01(9)(b)1. "At the time of or following the conference the Presiding Officer may issue an order in writing including":

a. a statement of the issues to be tried;

b. a list of witnesses who will offer testimony;

c. limitations in accordance with 310 CMR 1.01(13)(d), (e), and (f);

d. whether any disputed issues will be referred to a factfinder, consistent with 310 CMR 1.01(13)(i);

e. rulings on motions;

f. a schedule for filing motions, prefiled testimony and exhibits, setting the date of the hearing, and deciding motions;

g. attendance at an alternative dispute resolution information session when the Presiding Officer determines it could aid in the just and speedy resolution of the appeal without a hearing; and

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2. The Presiding Officer may establish time limits at the prehearing conference and may later modify them, as described in 310 CMR 1.01(13)(d)3.

3. The Presiding Officer may grant a request for modification of time limits only for good cause. In determining whether to grant a request to modify time limits, the Presiding Officer may consider: whether or not the requesting party has used the time since the commencement of the hearing in a reasonable and proper way and has complied with all orders regulating the hearing; the requesting party's explanation as to how the requested added time would be used and why it is necessary to ensure a fair hearing; and any other relevant and material facts the requesting or opposing party may wish to present in support of or opposition to the request.

h. incorporation of any matters agreed to by the parties.

310 CMR 1.01(9)(c)1.

To ensure compliance with the Presiding Officer's directives, 310 CMR 1.01(9)(c)2 provides that "[f]ailure of parties to comply with any rule or order issued by the Presiding Officer under 310 CMR 1.01(9) may result in the imposition of sanctions in accordance with 310 CMR 1.01(10)." The provisions of 310 CMR 1.01(10) authorize the Presiding Officer to impose appropriate sanctions on a party "[who] fails to file documents as required, respond to notices, correspondence or motions, [and] comply with orders issued and schedules established in orders" issued by the Presiding Officer. The Presiding Officer is also authorized to impose appropriate sanctions where the appellant fails to prosecute its appeal, engages in conduct evidencing an intent not to proceed with the appeal or to delay the appeal's resolution, or "fails to comply with any of the requirements set forth in 310 CMR 1.01." 310 CMR 1.01(10). Possible sanctions under 310 CMR 1.01(10) include, without limitation, the Presiding Officer issuing orders:

(a) taking designated facts or issues as established against the party being sanctioned;

(b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;

(c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);

(d) striking the party's pleadings in whole or in part;

(e) dismissing the appeal as to some or all of the disputed issues;

(f) dismissing the party being sanctioned from the appeal; and

(g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under

310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 discussed above which authorizes the Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

II. THE PETITIONERS' FAILURE TO COMPLY WITH THE ADJUDICATORY PROCEEDING RULES AND THE PRESIDING OFFICER'S DIRECTIVES TO FACILITATE THE APPEAL'S ADJUDICATION AND REQUIRING THE PETITIONERS TO SUBSTANTIATE THEIR CLAIMS IN THE APPEAL

A. The Petitioners' Failure to Comply with the Requirements of the Presiding Officer's October 15, 2019 Scheduling Order and November 5, 2019 Order

In accordance with my authority as Presiding Officer under 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(9), as discussed above, on October 15, 2019, I issued a Scheduling Order ("the October 15th Scheduling Order") to the Petitioners, the Applicants, and the Department (collectively "the parties") that scheduled the appeal for a Pre-Screening/Pre-Hearing Conference ("Pre-Hearing Conference") on November 13, 2019 and a Hearing on February 12, 2020 to adjudicate the appeal. The purpose of the Pre-Hearing Conference was to determine the potential amenability of the Petitioners's appeal of the Draft c. 91 License to settlement through alternative dispute resolution or other means, and to identify the Issues for Resolution in the Appeal in the event the appeal was not settled by agreement of the parties and the Hearing was

required to adjudicate the appeal. October 15th Scheduling Order, ¶ 3.

The October 15th Scheduling Order explained OADR's role in the appeal and set forth in detail the litigation rules of 310 CMR 1.01(5)(a)15, 310 CMR 1.01(9), 310 CMR 1.01(10), and 310 CMR 1.01(11)(a)2.f, as discussed above. October 15th Scheduling Order, Addendum No. 1 (p. 11); Addendum No. 2 (pp. 12-14); Addendum No. 3 (p. 15). The October 15th Scheduling Order also required the parties to perform certain actions prior to the Pre-Hearing Conference, including conducting settlement discussions to attempt settlement of the appeal by agreement of the parties and filing Pre-Hearing Statements with OADR setting forth their respective positions in the appeal and the names of the witnesses, including, expert witnesses, who would be testifying at the Hearing in support of their claims if the appeal was not settled by agreement of the parties. October 15th Scheduling Order, ¶¶ 5-8. The October 15th Scheduling Order made it clear that if any of the parties, including the Petitioners, "fail[ed] . . . to comply with any requirements of [the October 15th Scheduling] Order," they could be sanctioned pursuant to 310 CMR 1.01(5)(a)15, (10), and/or (11)(a)2.f as discussed above. October 15th Scheduling Order, ¶ 4 and Addendum No. 3 (p. 15). The range of sanctions that could be imposed was set forth in the October 15th Scheduling Order, including dismissal of the Petitioners' appeal of the Draft c. 91 License if they failed to comply with the October 15th Scheduling Order. Id.

1. The Petitioners' Failure to Initiate Settlement Discussions and to File a Settlement Statement

To assist me in ascertaining at the Pre-Hearing Conference whether there was a reasonable possibility of the appeal being settled by agreement of the parties or whether the Hearing was necessary to adjudicate the appeal, the October 15th Scheduling Order required the parties to confer with each other well in advance of the Pre-Hearing Conference "to discuss the

possibility of settlement of th[e] appeal and its amenability to mediation or other forms of alternative dispute resolution." October 15th Scheduling Order, ¶ 5. The October 15th Scheduling Order imposed "the responsibility [on] the Petitioner[s] to initiate [these] settlement discussions at least ten (10) calendar days prior to the Conference." Id.

The original deadline for the Petitioners to initiate the required settlement discussions with the Applicants and the Department was Monday, November 4, 2019.[5] This deadline was extended to Friday, November 15, 2019, after I issued an Order on November 5, 2019 ("the November 5th Order") granting the parties' request to re-schedule the Pre-Hearing Conference from 10:00 a.m., Wednesday, November 13, 2019 to 2:00 p.m., Monday, November 25, 2019. The November 5th Order reminded the Petitioners of their obligations under ¶¶ 5 and 7 of the October 15th Scheduling Order to file with OADR, "[n]o later than three (3) full days prior to the scheduled Pre-Hearing Conference, . . . a written [Settlement] [S]tatement . . . confirming that the Petitioners [had] initiated and conducted settlement discussions with the [Applicants and the Department] in accordance with [the October 15th Scheduling Order]." The November 5th Order informed the Petitioners of the deadline to file their Settlement Statement: 2:00 p.m., Wednesday, November 20, 2019.

In violation of the October 15th Scheduling Order and the November 5th Order, the Petitioners failed to initiate any settlement discussions with the Applicants and the Department and to file a Settlement Statement with OADR by the November 20, 2019 deadline. Prior to the deadline's expiration, the Petitioners did not inform OADR of any difficulties understanding the requirements of the October 15th Scheduling Order and the November 5th Order. They also neither informed OADR that they were having difficulties initiating or conducting settlement

[5] The 10th calendar day prior to the scheduled Pre-Hearing Conference of November 13, 2019 was actually Sunday, November 3, 2019, but carried over to the next business day, Monday, November 4, 2019.

discussions with the Applicants and Department nor requested additional time to conduct those discussions and/or file their Settlement Statement with OADR.

2. The Petitioners' Failure to File a Pre-Hearing Statement

To assist me in establishing the Issues for Resolution in the Appeal in the event it was not settled by agreement of the parties and required adjudication at the Hearing scheduled for February 12, 2020, ¶¶ 7 and 8 of the October 15th Scheduling Order and the November 5th Order also required the Petitioners, the Applicants, and the Department to file Pre-Hearing Statements with OADR prior to the Pre-Hearing Conference setting forth their respective positions in the case and the names of their witnesses for the Hearing, including expert witnesses, who would provide sworn testimony in support of their respective claims at the Hearing. As the parties with the burden of proof in the appeal, the Petitioners were required to file their Pre-Hearing Statement first with OADR: at least three full business days prior to the Pre-Hearing Conference (by 2:00 p.m., Wednesday, November 20, 2019)[6] and their Pre-Hearing Statement was to contain the following information:

(1) a brief summary of the Draft c. 91 License being appealed in the appeal;

(2) a brief summary of the final relief that the Petitioners were seeking in the appeal;

(3) a list of disputed relevant facts for resolution in the appeal and the Petitioners' position on each issue (what the Petitioners expected to prove at the Hearing on the appeal);

(4) a list of legal issues for resolution in the appeal, and the Petitioners' position on the issue; and

[6] The Applicants and the Department were required to file their respective Pre-Hearing Statements at least one full business day prior to the Pre-Hearing Conference: by 2:00 p.m., Friday, November 22, 2019.

(5) the names and addresses of the Petitioners' witnesses, including expert witnesses, who would be filing Pre-filed Testimony supporting the Petitioners' positions at the Hearing.

October 15th Scheduling Order, ¶ 10.

The November 5th Order informed the Petitioners that the filing deadline for their Pre-Hearing Statement was 2:00 p.m., November 20, 2019, the same deadline for the filing of their Settlement Statement. In violation of the October 15th Scheduling Order and the November 5th Order, the Petitioners failed to file a Pre-Hearing Statement with OADR by the November 20, 2019 deadline. Prior to the deadline's expiration, the Petitioners neither informed OADR that they were having difficulties preparing their Pre-Hearing Statement nor requested additional time to file it with OADR.

B. The Petitioners' Failure to Comply with the Presiding Officer's November 20, 2019 Order

As a result of the Petitioners' failure to file their Settlement and Pre-Hearing Statements with OADR by the November 20th deadline and to request a filing extension prior to the deadline's expiration,[7] I would have been well within my authority as Presiding Officer to immediately cancel the scheduled Pre-Hearing Conference of November 25, 2019 and issue a Recommended Final Decision recommending that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the Draft c. 91 License. Instead, as discussed below, on my own initiative, I accorded the Petitioners leniency by granting them

[7] The Adjudicatory Proceeding Rules at 310 CMR 1.01(3)(d) provide that:

> the Presiding Officer shall have the discretion, for good cause shown [by a party requesting an extension of time to file required papers in an appeal,] . . . to extend any time limit [for filing the papers]. ***All requests for extensions of time shall be made by motion before the expiration of the original or previously extended time period.*** The filing of the motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion . . . ."

(emphasis supplied).

another opportunity to file their Settlement and Pre-Hearing Statements, which they failed to avail themselves of.

At 4:50 p.m. on November 20, 2019, nearly three hours after expiration of the 2:00 p.m. deadline for the Petitioners to file their Settlement and Pre-Hearing Statements, I issued an Order to the Petitioners by electronic mail ("the November 20th Order"): (1) noting their failure to file their Settlement and Pre-Hearing Statements in violation of the October 15th Order and the November 5th Order; and (2) directing them to file their Settlement and Pre-Hearing Statements by no later than 2:00 p.m., the next day, November 21, 2019 ("the November 21st Deadline"). The November 20th Order made clear to the Petitioners that their failure to file their Settlement and Pre-Hearing Statements by the November 21st Deadline could result in my issuance of a Recommended Final Decision recommending that the Department's Commissioner issue a Final Decision dismissing their appeal and affirming the Draft c. 91 License.

In violation of the November 20th Order, the Petitioners failed to file their Settlement and Pre-Hearing Statements by the November 21st Deadline. Prior to the Deadline's expiration, the Petitioners did not inform OADR of any difficulties understanding the requirements of the November 20th Order and/or the previous October 15th Scheduling Order and November 5th Order. The Petitioners also neither informed OADR that they were having difficulties initiating or conducting settlement discussions with the Applicants and Department and/or preparing their Settlement Statement or Pre-Hearing Statement. They also did not request any additional time to conduct settlement discussions with the Applicants and the Department and to file their

Settlement and Pre-Hearing Statements with OADR.

C. The Presiding Officer's November 21, 2019 Order and the Petitioners' Motion for Reconsideration of the Order

At 4:26 p.m. on November 21, 2019, nearly two and one-half hours after expiration of the November 21st Deadline for the Petitioners to file their Settlement and Pre-Hearing Statements with OADR, I issued an Order to the Petitioners by electronic mail ("the November 21st Order"): (1) noting the Petitioners' failure to file their Settlement and Pre-Hearing Statements in violation of the October 15th Scheduling Order, the November 5th Order, and the November 20th Order (collectively "the Three Orders"); (2) cancelling the scheduled Pre-Hearing Conference of November 25, 2019 due to the Petitioners' failure to file their Settlement and Pre-Hearing Statements in violation of the Three Orders; and (3) stating my intent to issue a Recommended Final Decision within the next 30 days recommending that the Department's Commissioner issue a Final Decision dismissing the Petitioner's appeal and affirming the Draft c. 91 License.

Several hours after I issued the November 21st Order, at 6:34 p.m., the Petitioners responded to the Order by forwarding an electronic mail message to OADR's Case Administrator stating that "[they understood that] the filing deadline [for their] Settlement and Pre-Hearing Statements ha[d] passed for the November 25th [Pre-]hearing [Conference]" and "[they] . . . request[ed] another [Pre-]hearing [Conference] date." The Petitioners contended that "[they] ha[d] been unable to hire an attorney to help [them] with the procedures [in the appeal]" and "still believe[d] that the positioning of the [proposed] dock in question would be dangerous . . . ." This was the first time since my issuance of the October 15th Scheduling Order more than one month earlier that the Petitioners had communicated to OADR their purported

difficulties in complying with that Order and the subsequent November 5th and 20th Orders. However, the Petitioners failed to explain why they had waited until after issuance of the November 21st Order to bring to my attention their purported difficulties in complying with the Three Orders. The Petitioners also neither requested additional time to file their Settlement and Pre-Hearing Statements nor stated when they anticipated filing them.

At 10:56 a.m., on the following morning of November 22, 2019, I issued an Order to the parties by electronic mail ("the November 22nd Order"): (1) acknowledging OADR's receipt of the Petitioners' electronic mail message of the previous evening; (2) informing the parties that I was treating the Petitioners' electronic mail message as their Motion for Reconsideration of the November 21st Order setting forth my intention to issue a Recommended Final Decision recommending that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the Draft c. 91 License; and (3) directing the Applicants and the Department to file responses to the Petitioners' Motion for Reconsideration by December 3, 2019 and December 6, 2019, respectively.

On December 2, 2019, the Applicants filed a timely response opposing the Petitioners' Motion for Reconsideration contending that the Petitioners "[had] knowingly abus[ed] the licensing and appeal process by failing to follow clear legal requirements and multiple orders from the Chief Presiding Officer in this matter" and that "they should not be rewarded with still more time and substantial financial expense to the Applicant[s] . . . or to the Department . . . ." Applicants' Opposition, at p. 1. The Applicants contended that "[t]he [Petitioners'] obligations for stating and sustaining [their] appeal with OADR [were] explicit and clear" and "were laid out in paragraphs 7 and 8 of the Presiding Officer's Scheduling Order and were repeatedly reiterated to the [Petitioners] in a series of emails [as discussed above]." Id. The Applicants contended

that "[the] Petitioners chose to ignore these obligations, costing the Commonwealth and the Applicants time and money" and that the Adjudicatory Proceeding Rules as discussed above "provide for dismissal as sanction for good reasons, to prevent just these abuses from being perpetuated." Id. The Applicants contended that "[e]ven after the [Petitioners] were warned by the Chief Presiding Officer dismissal [of their appeal] was possible, they still failed to meet their responsibility to file a basic Issue Statement for the Pre-Hearing Conference, not even an email stating their concerns and the evidence for their claims." Id.

Several hours before the Department filed its response to the Petitioners' Motion for Reconsideration on December 6, 2019, the Petitioners forwarded an electronic mail message to OADR's Case Administrator, which included a six page letter addressed to my attention. Most of the letter consisted of digital photographs purportedly taken by the Petitioners of the site of the proposed dock at the Property and abutting real properties, including the Petitioners' property, which the Petitioners contended supported their claim that the proposed dock violates the 25 foot setback requirement of 310 CMR 9.36(2). In their letter, the Petitioners denied the Applicants' claim that the Petitioners' appeal of the Draft c. 91 License lacked merit and was brought for the purpose of delay. The Petitioners also "apologiz[ed] to the OADR" for the Petitioners' purported: (1) "lack of understanding of the [appeal] process" and (2) "inability to respond on [a] timely [basis]" to the Three Orders. However, the Petitioners failed again to explain why they had waited until after issuance of the November 21st Order to bring to my attention their purported difficulties in complying with the Three Orders. The Petitioners also neither requested additional time to file their Settlement and Pre-Hearing Statements nor stated when they anticipated filing them.

In its December 6, 2019 response to the Petitioners' Motion for Reconsideration, the

Department "concur[red] . . . with the Applicant[s] [that] . . . [t]he Petitioner[s] ha[d] violated the requirements of the [Three] Orders," but also stated that "the Petitioner[s] ha[d] made at least some effort to comply . . . and as . . . Pro Se litigant[s], [the] Petitioner[s] ha[d], not unexpectedly, found the process a bit confusing." Electronic Mail Message of Department's Counsel to OADR Case Administrator (December 6, 2019). However, the Department conceded that "if it is determined that [the] Petitioner[s]' noncompliance [was] for the purpose of delay or to require the Applicants to incur additional costs, then [the] Petitioner[s]' appeal should be dismissed immediately." Id. The Department indicated that "[it] is not sure whether that is the case, and [left] the decision in the sound discretion of the Presiding Officer." Id.

D. Ruling on the Petitioners' Motion for Reconsideration of the November 21st Order

Based on the record of this appeal, I decline to vacate the November 21st Order and recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the Draft c. 91 License because the Petitioners have repeatedly failed to substantiate their claims in the appeal by failing to comply with the Three Orders that I issued to facilitate the appeal's adjudication. Additionally, the Petitioners' failure to comply has been for the purpose of delay. I have reached these conclusions for the following reasons.

First, as discussed above, the Petitioners' pro se status in the appeal does not excuse them from complying with any of the Three Orders.

Second, the Petitioners are astute litigants. When they filed this appeal in August 2019 challenging the Department's issuance of the Draft c. 91 License approving the proposed dock, the Petitioners were not new to the scene because they had actively opposed the proposed dock since at least June 28, 2019, when they submitted written comments to the Department while the

Applicants' c. 91 application for the proposed dock was under review by the Department. Department's Basic Documents (Petitioners' Electronic Mail Message to Susan You and Christine Hopps of Department's c. 91 Program (June 28, 2019). The Petitioners' written comments opposing the proposed dock were for essentially the same reasons that they have asserted in this appeal challenging the Department's issuance of the Draft c. 91 License. Id.; Petitioners' Appeal Notice (August 4, 2019), at p. 1; Petitioners' November 21, 2019 Electronic Mail Message to OADR's Case Administrator; Petitioners' Letter to Chief Presiding Officer (December 6, 2019). Hence, seven months later, it is not unreasonable to expect the Petitioners to have at least identified by this time, as mandated by Pre-Hearing Statement filing requirement of the Three Orders, the witnesses, including expert witnesses, who would provide sworn testimonial and documentary evidence at a Hearing supporting the Petitioners' claim that the proposed dock approved by the Draft c. 91 License violates the 25 foot setback requirement of 310 CMR 9.36(2). To date, the Petitioners have failed to identify any witnesses, including expert witnesses, and their failure to do so constitutes a serious breach of their obligation to prosecute and substantiate their claims in the appeal, especially when they have the burden of proof in the appeal.

Third, the directives of the initial October 15th Scheduling Order requiring the Petitioners to initiate settlement discussions with the Applicants and the Department and to file Settlement and Pre-Hearing Statements with OADR within specific deadlines prior to the Pre-Hearing Conference, were clear and repeated to the Petitioners in the subsequent November 5th and 20th Orders.

Fourth, at no time prior to the issuance of the November 21st Order, did the Petitioners inform OADR of any difficulties in complying with any of the Three Orders. Specifically, the

Petitioners did not inform OADR of any difficulties: (1) understanding any of the Three Orders; (2) initiating or conducting settlement discussions with the Applicants and Department as required by the Three Orders; and/or (3) preparing their Settlement Statement or Pre-Hearing Statement as also required by the Three Orders. They also did not request any additional time to conduct settlement discussions with the Applicants and the Department and to file their Settlement and Pre-Hearing Statements with OADR. Indeed, to date, two months after their Settlement and Pre-Hearing Statements were due and at least seven months after they first opposed construction of the proposed dock, the Petitioners have failed to state when they anticipate filing these Statements. In sum, it is reasonable to conclude that the Petitioners ignored the Three Orders and only came forward on November 21, 2019 ***after*** the issuance of the November 21st Order when they faced the specter of dismissal of their appeal for failing to comply with the Three Orders.

Lastly, the Petitioners' failure to comply with the Three Orders warrants dismissal of their appeal and affirmance of the Draft c. 91 License because the Petitioners were aware that their failure to comply with any of the Three Orders could result in sanctions against them, including dismissal of their appeal. As discussed above, the initial October 15th Scheduling Order informed all of the parties, including the Petitioners, that if the parties "fail[ed] . . . to comply with any requirements of [the October 15th Scheduling] Order," they could be sanctioned, and the range of sanctions that could be imposed was clearly spelled out in the October 15th Scheduling order, including dismissal of the Petitioners' appeal of the Draft c. 91 License if they failed to comply with the October 15th Scheduling Order. I reminded the Petitioners of the dismissal sanction in the November 20th Order which noted their failure to file their Settlement and Pre-Hearing Statements in violation of the October 15th Scheduling Order

and November 5th Order, but granted them leniency for their non-compliance by extending the filing deadline for their Settlement and Pre-Hearing Statements by one extra day to 2:00 p.m., November 21, 2019. The Petitioners failed to take advantage of that opportunity. Under these circumstances, therefore, dismissal of the Petitioners' appeal and affirmance of the Draft c. 91 License would be appropriate.

CONCLUSION

For all the reasons discussed in detail above, I recommend that that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the Draft c. 91 License.

Salvatore M. Giorlandino

Date: January 22, 2020

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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