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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

October 11, 2016

In the Matter of
Ferry Street Partners Investment
Trust and Daniel J. Messier, Trustee

OADR Docket No. 2015-008
Easthampton, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

Daniel J. Messier and Ferry Street Partners Investment Trust ("Trust") challenge the Unilateral Administrative Order ("UAO") that the Massachusetts Department of Environmental Protection's Western Regional Office ("DEP") issued to both Messier and the Trust. The UAO pertains to alleged violations of the laws regarding solid waste (G.L. c. 150A and 150A ½, 310 CMR 19.000, and 310 CMR 16.00), asbestos (G.L. c. 111 § 142A-O and 310 CMR 7.15), and hazardous waste (G.L. c. 21C and 310 CMR 30.00). The UAO relates to property owned by the Trust at One Ferry Street, Easthampton ("Property"). When the Trust purchased the Property in 2008 it contained several large and vacant, historical mill buildings. Messier is trustee and beneficiary of the Trust, which is a Massachusetts business trust.

After the Trust purchased the Property in 2008 it commenced a project to develop the Property into high-end residential condominiums. That involved large scale asbestos abatement and demolition of several buildings. Substantial amounts of demolition debris remain on the

Property. DEP issued the UAO in March 2015¹, alleging that both Messier and the Trust were liable for violations of asbestos, solid waste, and hazardous waste laws. In particular, DEP alleges that: solid waste was improperly disposed at the Property, creating an unpermitted and unlawful dumping ground; asbestos inside buildings has degraded and not been properly maintained, allowing potential human exposure; and hazardous wastes were not properly handled and disposed.

Messier and the Trust vigorously opposed all of DEP's claims. They claim that Messier cannot be held individually liable because he has only been involved in the project in his capacity as trustee, effectively immunizing him from liability. On the merits, they claim that the demolition debris has not been disposed at the Property; instead, it is there temporarily, pending its reuse, and thus there have been no violations of the solid waste laws. They claim that since issuance of the UAO all standing buildings have been sealed up so that there can be no release of asbestos to the ambient air from inside the buildings. They also argue that they have properly handled all hazardous wastes. Last, they assert that they cannot financially afford to perform the requirements of the UAO.

After holding an adjudicatory hearing and reviewing the administrative record, I find that a preponderance of the evidence supports DEP's issuance of the UAO. Messier is individually liable and not immunized from liability under Massachusetts trust law. Messier and the Trust have improperly disposed of solid waste or stored debris at the Property, pending disposal, in violation of applicable solid waste laws. Messier and the Trust failed to properly maintain asbestos inside the buildings, potentially exposing individuals to dangerous asbestos fibers in the remaining buildings. Messier and the Trust also failed to show that they properly managed and

¹This appeal was stayed for several months upon the request of the parties, who believed they would be able to reach a settlement agreement. The stay was lifted after settlement discussions proved to be unfruitful.

disposed of hazardous wastes. Last, the alleged financial difficulties are not a defense to compliance with the UAO. Even if they were, there is insufficient evidence demonstrating alleged financial inability to comply with the terms of the UAO. For all the above reasons, I recommend that DEP's Commissioner issue a Final Decision affirming the UAO.

THE BURDEN OF PROOF

In an adjudicatory proceeding involving DEP's enforcement of a UAO, DEP has the burden of proving the elements of its case by a preponderance of the evidence. See Matter of Iron Horse Enterprises, Docket No. 2014-22, Recommended Final Decision (May 2, 2016), adopted by Final Decision (May 5, 2016). This includes proving by a preponderance of the evidence that the measures the UAO has directed Messier and the Trust to perform are reasonable remedial measures intended to correct the purported violations. Matter of James A. Ficociello, DDS, PC, OADR Docket Nos. 2013-039 & 40, Recommended Final Decision (December 3, 2014), adopted by Final Decision (December 22, 2014); Matter of West Meadow Homes, Inc., OADR Docket No. 2009-023, Recommended Final Decision (June 20, 2011), adopted by Final Decision (August 18, 2011) (remedial measures ordered by UAO affirmed as reasonable to correct party's wetlands violations); Matter of William T. Matt, Trustee, East Ashland Realty Trust, OADR Docket No. 97-011, Final Decision (administrative order's directives affirmed as being reasonable to address party's solid waste and wetlands violations).

"A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .”

BACKGROUND

Messier has been engaged in the asbestos abatement, demolition, and construction industries for over 30 years. He is a licensed asbestos supervisor under the Massachusetts Department of Labor Standards. He has supervised, directed, or performed over one thousand asbestos abatement projects during the course of his career. He also has substantial experience in large scale demolition projects. Messier PFT², pp. 1-3, Exhibit 3.

The two witnesses involved in this project for DEP are Saadi Motamedi and Daniel Hall. Motamedi has been employed with DEP for 24 years. He has served as DEP’s Compliance and Enforcement Section Chief for the Bureau of Air and Waste, Western Region, since 2000. Previously, he worked with the Florida Department of Environmental Regulation for 3 years. He holds BS and MS degrees in geology.

Hall has been employed with DEP in its Solid Waste section for 25 years. He has been employed as the Solid Waste Section Chief for DEP’s Western Region since 2001. Previously, he

² “PFT” is the acronym for “Pre-filed Testimony.”

was employed with an environmental compliance and consulting firm for 2 years. Hall holds BS degrees in environmental health and technology and biology and an AS degree in environmental science.

The Trust was created in 2005 by the then co-trustee Peter Ward. Ward resigned as trustee in 2008, leaving Messier as the sole trustee. The Trust was created to acquire and redevelop the westerly portion of the former Hampton Company textile manufacturing complex at one Ferry Street, Easthampton. Messier PFT, Exhibit 4. The easterly portion of the complex was purchased by an entity called October Company. See Messier PFT, ¶ 14-15 (discussing property ownership and layout), Exhibits 5-5A. When The Trust purchased the property it contained approximately 11 large, historic, brick mill buildings.³ Messier PFT, Exhibit 5A. A canal runs through approximately the mid-section of the property. The Trust purchased the Property with the intention of developing it into a high-end condominium complex it refers variously to as “Hamptons on the Pond,” “Hampton Mills Project,” and “Hampton Mills Development.” One goal was to preserve the existing structurally sound buildings. Messier PFT, p. 3. Those that were structurally unsound would be demolished and replaced with new buildings for the condominium development.

With “preliminary [finance] commitments” in place, the trust “commenced work [in about 2010] to address safety and access issues, including abatement and demolition of structures.” Messier PFT, p. 4. By 2012, The Trust had abated and demolished a number of large buildings on the property (building numbers 2, 3, 19, 20, 21, 22), leaving approximately 66% of the existing buildings. Messier PFT, pp. 5-6, Exhibits 10-11. It had abated a number of

³ It is difficult to precisely state how many separate buildings are on the property because some buildings that one might consider to be separate buildings are connected to other buildings. Messier PFT, Exhibit 5A.

other buildings and left them standing. All the buildings on the eastern side of the canal are to be demolished eventually, with the exception of building number 15.

Messier has provided an unquantified amount of personal assets to the Trust to finance the work, including his own expertise and skills from decades of work in asbestos abatement and building demolition. Messier PFT, p. 8. In 2008, as a consequence of the severe economic downturn in the United States, the “Trust’s anticipated investors withdrew and commercial and private financing became unavailable. The Trust lost and was unable to maintain, replace, or secure financing for the [project].” Messier PFT, p. 6. According to Messier, the Trust’s assets had been effectively reduced to the real estate value itself. Messier PFT, p. 7. Messier has since paid the real estate taxes by advancing personal funds. At one point Easthampton initiated a foreclosure action when tax payments were not current due to “lack of funds.” Messier PFT, p. 7. The Trust has not been able to sell the Property or find investors or other financing to fund development. Messier PFT, p. 7. Messier testified that he has not had the “necessary personal financial assets to provide the Trust funding” for the condominium development project. Id.

In May 2010, DEP staff observed very large amounts of debris at the Property, including: construction and demolition debris piles (crushed and uncrushed), piles of brick and concrete, trash, plastics, old bundled paper, metal pieces, wood planks, and wood waste. DEP also observed exposed asbestos covered pipes that were associated with underground storage tanks (“UST”), some were exposed to the ambient air and adjacent to a public bike path. Motamedi PFT, ¶ 6. The pipes were covered by asbestos referred to as Thermal System Insulation (“TSI”). Id., Exhibit 2. The TSI was highly deteriorated and in some locations it had fallen to the ground under the pipes. DEP advised Messier that the asbestos must be promptly abated. Id. Messier replied that he did not see how the asbestos endangered anyone. DEP disagreed, and instructed

him to promptly address the situation because the asbestos was close to the bike path and could be spread by the wind. Three months later the demolition waste and TSI asbestos problems remained unaddressed. Id. at ¶ 8. Photographs and lab tests indisputably corroborate this testimony concerning the deposition of waste materials and asbestos. Id., Exhibits 3 and 4. In August 2010, DEP further instructed Messier on how to handle the waste and asbestos. Id., Exhibit 5, 6. DEP also informed him the demolition debris and other refuse could not be stored at the site for a long time and had to be removed.

DEP performed follow up inspections in January, May, and November, 2012. Motamedi PFT, p. 4. Drums of hazardous waste and waste oil and transformers were observed in one of the buildings. Id., p. 4, Exhibit 7. The large piles of demolition and renovation debris remained at the Property. Exhibit 7. In the boiler-power plant building there was also asbestos TSI on pipes and other components, some of which was highly deteriorated and had fallen to the floor. Motamedi PFT, p. 4, Exhibit 8, 9. Some of the deteriorated TSI was observed to be located near large broken windows, exposing them to the outside ambient air. Based upon the experience of the DEP staff it was believed that the insulation contained asbestos. Motamedi PFT, p. 5, Exhibit 10; Hall PFT, p. 3, Exhibit 5. There were also very substantial piles of co-mingled demolition debris. Hall PFT, P. 2.

DEP performed another inspection in April 2013, and observed that there were no significant changes to the accumulated waste, except that there was additional waste from a recently demolished building. In addition, Messier stated that he had brought some of the observed scrap steel and other metal to the Property from another location. Motamedi PFT, ¶ 12. Messier was told again, after being told previously on a number of occasions, that the existing site conditions were in noncompliance with the solid waste regulations and that the conditions

constituted a dumping ground. Hall PFT, P3, Exhibits 2, 4. It was explained that the demolition debris needed to be removed for disposal or recycling in accordance with the regulations at an appropriate facility. Hall PFT, pp. 3-4, Exhibits 4, 6.

In follow-up visits it appeared that Messier and the Trust had addressed the issues related to TSI on the piping associated with the underground storage tanks and removed the USTs and some waste oil. Nevertheless, DEP reported that much of the demolition and renovation waste remained and much of the asbestos that was inside buildings and exposed to the ambient air via broken windows remained unaddressed. Motamedi PFT, ¶ 13. By October of 2013, it appeared that no significant progress had been made at the Property. Hall PFT, p. 4. When DEP followed up later in 2014, there still had not been any significant progress at the site. Hall PFT, p. 4.

On July 11, 2014, DEP held an enforcement conference with Messier and his attorney to address the status of the Property and attempt to reach a resolution. The parties were unable to reach a mutually agreeable resolution.

On March 5, 2015, DEP issued the UAO to Messier and The Trust. The UAO alleges multiple violations of the solid waste management laws at the Property. In particular, it alleges that in the course of demolishing and renovating a number of old mill buildings, large quantities of solid waste have accumulated at the Property, including: construction and demolition debris piles (crushed and uncrushed), piles of brick and concrete, trash, plastics, old bundled paper, metal pieces, wood planks, and wood waste. UAO, p. 2. DEP also alleged that there were several pipes covered with degraded asbestos that were inside buildings and exposed to the ambient air via broken windows. In addition, the degraded asbestos material was allegedly unlawfully being unmaintained and potentially exposing individuals who entered the buildings to exposure. The UAO alleged that there were dump sites at the Property which constitute

unpermitted dumping grounds or open dumps under 310 CMR 19.006 and in violation of 310 CMR 19.014, which provides:

19.014: Prohibition on Open Dumps and Dumping Grounds and Illegal Disposal of Solid Waste

- (1) No person shall establish, construct, operate or maintain a dumping ground or operate or maintain a landfill in Massachusetts in such manner as to constitute an open dump. For the purpose of 310 CMR 19.014, the phrase "establish, construct, operate or maintain" shall include without limitation, disposing or contracting for the disposal of refuse in a dumping ground or open dump.
- (2) No person shall dispose or contract for the disposal of solid waste at any place in Massachusetts which has not been approved by the Department pursuant to M.G.L. c.111, § 150A, 310 CMR 16.00: Site Assignment Regulations for Solid Waste Facilities or 310 CMR 19.000.
- (3) No person shall dispose or contract for the disposal of solid waste at any facility in Massachusetts that is not approved to manage the particular type of solid waste being disposed.

Paragraph 18 of the UAO ordered The Trust and Messier to perform, in pertinent part, the following actions to address the alleged violations:

- A. Within 180 days of the date of this order, the respondents shall remove from the facility and properly dispose or recycle at permitted, off-site disposal or recycling facilities, all of the accumulated solid wastes at the facility, including, but not limited to, all of the C&D debris piles (both crushed and uncrushed), piles of brick and concrete, trash, plastics, old bundled paper, scrap metal pieces and wood waste. Also, within 180 days of the date of this order, the respondents shall submit written documentation to the Department demonstrating the disposal or recycling of the C & D material at permitted, off-site disposal or recycling facilities.
- B. Within 180 days of the date of this order, the respondents shall identify all hazardous waste and hazardous material (including waste oil), if any, present at the facility and ensure that the facility is in full compliance with the regulations at 310 CMR 30.000 for the storage, handling and disposal of hazardous waste and hazardous materials.

- C. Within 120 days of this order, the respondents shall remove, and dispose of any ACM at the facility which is in violation of 310 CMR 7.15 (3)(f) and/or (g). If all ACM at the facility is operable and in good condition, the respondent shall within 120 days submit a written notification to the department that all ACM at the facility is compliant with 310 CMR 7.17 (3)(f) and (g). All ACM which is removed shall be disposed only at permitted off-site disposal facilities. Asbestos waste is a listed "special waste" under 310 CMR 19.061 (3) and must be handled accordingly. The removal and disposal of the ACM shall be performed in accordance with all applicable regulations of the Commonwealth of Massachusetts, including, but not limited to 310 CMR 7.15.
- D. The respondent shall have an asbestos survey performed prior to conducting any demolition or renovation of the facility. The survey shall, at a minimum, encompass all areas where the demolition or renovation is anticipated to occur, in accordance with 310 CMR 7.15 (4). The survey shall be completed by an independent, third-party, licensed asbestos inspector. . . .

Messier and the Trust appealed the UAO to the Office of Appeals and Dispute Resolution.

REGULATORY FRAMEWORK

The provisions of G.L. c. 111, s. 150A govern the disposal of refuse or solid waste. The statute defines "refuse" as:

all solid or liquid waste materials, including garbage and rubbish, and sludge, but not including sewage, and those materials defined as hazardous wastes in [G.L. c. 21C, s. 2] and those materials defined as source, special nuclear or by-product material under the provisions of the Atomic Energy Act of 1954.

The statute prohibits any party from operating "a dumping ground for refuse or any other works for treating, storing, or disposing of refuse" without prior approval from the local Board of Health. G.L. c. 111, § 150A. Under the statute, such a dumping ground is considered a solid waste "facility" and the statute makes clear that:

[a]ny person desiring to maintain or operate a site for a new facility or the expansion of an existing facility shall submit an application for a site assignment to the local board of health and simultaneously provide copies to [MassDEP] and the [Massachusetts] department of public health

Id. (emphasis supplied). The statute also provides that:

[n]o facility shall be established, constructed, expanded, maintained, operated, or devoted to any past closure as defined by regulation, unless detailed operating plans, specifications, a public health report, if any, and necessary environmental reports have been submitted to [MassDEP] and [MassDEP] has granted a permit for the facility, and notice of such permit is recorded in the registry of deeds, or if the land affected thereby is registered land in the registry section of the land court for the district wherein the land lies. . . . Said permit may limit or prohibit the disposal of particular types of solid waste at a facility in order to extend the useful life of the facility or reduce its environmental impact.

Id. The statute also requires that "[e]very person maintaining or operating a facility, . . . shall maintain and operate the same in such manner as will protect the public health and safety and the environment," and that "[n]o person shall dispose or contract for the disposal of solid waste at any place which has not been approved by [MassDEP] pursuant to the provisions of th[e] [statute] or other applicable law." Id.

Also in accordance with its statutory authority under G.L. c. 111, s. 150A, DEP has promulgated regulations at 310 CMR 19.000, et seq., to regulate "the storage, transfer, processing, treatment, disposal, use and reuse of solid waste in Massachusetts." 310 CMR 19.001; 310 CMR 19.002. The regulations are "intended to protect public health, safety and the environment[.]" 310 CMR 19.002, and prohibit a party from "establish[ing], construct[ing], operat[ing] or maintain[ing] a dumping ground or operat[ing] or maintain[ing] a landfill in Massachusetts in such manner as to constitute an open dump." 310 CMR 19.014(1). This

prohibition "include[s] without limitation, disposing or contracting for the disposal of refuse in a dumping ground or open dump." *Id.* The regulations also prohibit a person from "dispos[ing] or contract[ing] for the disposal of solid waste at any place in Massachusetts which has not been approved by the Department [,]" and "dispos[ing] or contract[ing] for the disposal of solid waste at any facility in Massachusetts that is not approved to manage the particular type of solid waste being disposed." 310 CMR 19.014(2); 310 CMR 19.014(3). The regulations at 310 CMR 16.00 govern site assignment for solid waste facilities.

DISCUSSION

I. Messier May Be Held Individually Liable Under the UAO

DEP issued the UAO against both the owner of the Property (the Trust) and Messier, the Trust's trustee. The Trust and Messier claim that because Messier is the trustee, he is insulated from liability and cannot be held individually liable under the UAO. DEP disagrees. I am persuaded that pursuant to Massachusetts trust law Messier is individually liable for the UAO.

The solid waste and asbestos regulations at issue place liability for violations of the regulations on "owners" and "operators." 310 CMR 19.081; 310 CMR 7.15. "Owner means any person who alone or in conjunction with others has legal ownership, a leasehold interest, or effective control over the real property upon which a facility is located, or the airspace above said real property; 'owner' does not mean persons holding bare legal title for the purpose of providing security for financing." 310 CMR 19.006. The Trust is indisputably the owner.

Operator "means any person who has care, charge or control of a facility subject to 310 CMR 19.000, including without limitation, an agent or lessee of the owner or an independent contractor." 310 CMR 19.006. "Wherever 310 CMR 19.000, or any approvals or orders issued pursuant thereto, requires that the owner and/or operator shall take action or refrain from taking

action, the owner and operator shall be jointly and severally liable such that the Department may take action for any violations of 310 CMR 19.000 against the owner, the operator or both.” 310 CMR 19.081(1).

Under the asbestos regulations that are at issue, “owner/operator” means “any person, any department or instrumentality of the federal government, or any public or private group which: (a) has legal title, alone or with others, of a facility; or (b) has the care, charge, or control of a facility.” 310 CMR 7.00.

An overwhelming preponderance of the evidence demonstrates that Messier meets the definition of operator. He has had care, charge, and control of the Property for several years, at least since 2008. Messier argues, however, that he cannot be held liable because he was acting in his capacity as trustee of the Ferry Street Partners Investment Trust, which is a business trust. Thus, they conclude, liability cannot be premised on Messier’s capacity as beneficiary or trustee.

In Massachusetts, however, the trustee of a business trust may be held liable for torts committed in the administration of the trust. First Eastern Bank. NA. v. Jones, 413 Mass. 654, 658-59, 602 N.E.2d 211(1992). Thus, for example, the courts have found a trustee liable for a trust’s construction activities on the trust property that damaged the plaintiff’s neighboring property. The tort at issue was private nuisance. Von Henneberg v. Generazio, 403 Mass. 519, 531 N.E. 2d 563 (1988).

While it is true that liability in this case is not based directly upon a common law tort, the regulatory and statutory bases are premised upon solid waste and asbestos management, which are rooted in the law of public nuisance—a well-established common law tort. Moreover, had there been an intent to exclude trustees from those who are liable as operators the regulations would have explicitly provided for such an exception. The absence of such an exception

evidences the intent to at least include all those individuals who would otherwise be liable, such as trustees of business trusts. As a consequence, there is a sufficient nexus to the common law to impose liability on Messier as trustee, if liability exists. In addition, here, Messier's liability as a trustee may be premised not only on the fact that liability is alleged to have occurred in the administration of a trust but also because Messier personally committed the actions that resulted in the alleged liability. First Eastern Bank. NA., supra. Indeed, Messier performed much of the work himself. Motamedi PFT, ¶ 7. For all the above reasons, Messier can be held individually liable under the UAO, to the extent that liability exists.

II. Solid Waste Is Located At The Property Pursuant to G.L. c. 111 § 150A and 310 CMR 19.006 and Messier and The Trust Must Comply With The Applicable UAO Provisions

Messier and The Trust dispute DEP's claim that they are maintaining an illegal dumping ground or open dump; they argue that the large piles of demolition debris at the site do not meet the definition of solid waste. The gist of their argument is that even though there has been an enormous amount of demolition debris located at the Property for approximately six years it has not been finally disposed of and may in fact be recycled or otherwise reused. As a consequence, they conclude it is not solid waste. DEP disagrees, arguing that there is a preponderance of the evidence showing it is solid waste. I agree with DEP.

Applicable regulations. The solid waste regulations at 310 CMR 19.000 are intended "to protect public health, safety and the environment by comprehensively regulating the storage, transfer, processing, treatment, disposal, use and reuse of solid waste in Massachusetts. Protection of public health, safety and the environment is primarily the prevention of pollution from the site, but also encompasses the operation of the facility within an integrated solid waste

management system which maximizes material reuse and the conservation of energy.” 310 CMR 19.002.

The UAO alleged that Messier and the Trust were operating a Dumping Ground. “Dumping Ground” means “a facility or place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit in accordance with M.G.L. c. 111, § 150A, 310 CMR 16.00: Site Assignment Regulations for Solid Waste Facilities or 310 CMR 19.000.” 310 CMR 19.006.

“Solid waste” or “waste” are defined as “useless, unwanted or discarded solid, liquid or contained gaseous material resulting from industrial, commercial, mining, agricultural, municipal or household activities that is *disposed* or is *stored*, treated, processed or transferred *pending* such disposal, but does not include . . . (i) materials which are recycled, composted, or converted in compliance with 310 CMR 16.03: Exemptions From Site Assignment, 310 CMR 16.04: General Permit for Recycling, Composting or Aerobic and Anaerobic Digestion Operations; or 310 CMR 16.05: Permit for Recycling, Composting or Conversion (RCC) Operations” 310 CMR 19.006 (emphasis added).

Exempt for recycling? It is worth noting at the outset that there is no evidence showing that the materials either now or in the future will satisfy the preceding solid waste recycling exemptions at 310 CMR 16.03 or 16.04. In fact, a preponderance of the evidence shows that the debris would not qualify for the recycling exemptions. Hall Rebuttal PFT, p. 3. DEP has worked with Messier over the last several years to help him attempt to meet these recycling exemptions but those efforts proved unsuccessful. Hall Rebuttal PFT, pp. 3-4. One problem, among several, is that the materials have been accumulated for more than the six month limitation in the regulations. Hall Rebuttal PFT, pp. 3-4, ¶ 5; 310 CMR 16.03(2)(b)5. Also, the

large piles of wood on site constitute a type of construction and demolition waste because under 310 CMR 16.02 (“construction and demolition”) the wood resulted from demolition; moreover, it is not clean wood, which “means discarded material consisting of trees, stumps and brush, including but not limited to sawdust, chips, shavings, bark, and new or used lumber. Clean wood does not include: (a) wood from comingled construction and demolition waste.” Hall Rebuttal PFT, p. 5. Last, the debris piles would not meet the recycling exemption because they contain materials that are too large for recycling and they are comingled with other debris. Hall Rebuttal PFT, pp. 3-4.

Has the debris been disposed or stored pending disposal? Given the debris does not meet the recycling exemptions, the next question is whether it has been disposed at the Property or stored there pending disposal. If it meets either criterion, it is solid waste. “Disposal” means “the final dumping, landfilling or placement of solid waste into or on any land or water or the combustion of solid waste.” 310 CMR 19.006. “Storage means temporary containment of a material or solid waste in a manner which does not constitute disposal.” 310 CMR 19.006.

The demolition debris that was generated at the Property is generally classified as “Construction and Demolition Waste (C&D).” C&D is defined as “the waste building materials and rubble resulting from the construction, remodeling, repair or demolition of buildings, pavements, roads or other structures. Construction and demolition waste includes but is not limited to, concrete, bricks, asphalt pavement, masonry, plaster, gypsum wallboard, metal, lumber and wood.” 310 CMR 19.006; 310 CMR 16.02. It is not disputed that the debris in large piles at the Property are C&D. Hall Rebuttal PFT, p. 5.

Messier and the Trust, however, argue that the debris is not solid waste because it has not been disposed or stored pending disposal. A preponderance of the evidence demonstrates otherwise.

The photographs attached as exhibits indisputably show a tremendous amount of demolition debris in large piles at the Property, as detailed by DEP's witnesses. DEP documented that accumulation of debris as early as 2010. See e.g., Motamedi PFT, Exhibit 3; Motamedi Rebuttal PFT, p. 2. For the next five years, DEP persistently attempted to work with Messier to have the debris properly disposed or recycled. DEP's requests were largely ignored, resulting in issuance of the UAO. Even shortly after the UAO issued, a DEP site visit confirmed that in June 2015 (3 months after the UAO issued) there were still large piles of demolition debris at the Property. Hall Rebuttal PFT, ¶ 3. The waste included comingled trash, plastic, paper, and wood wastes. Id.

Messier's testimony generally does not dispute DEP's observations of enormous amounts of demolition debris at the Property. Messier's position, however, is that the debris is not being disposed or stored for disposal. Instead, it is being used for an alternative purpose. He testified that the debris is being left in place to build a temporary ramp for access to and from Ferry Street for heavy equipment. Indeed, when Messier performed demolition operations he left a "small portion of the first floor of building 19 abutting Ferry Street because it is the location where the Trust intended to use wood and other materials to create a temporary ramp for access to and from Ferry Street." Messier PFT, p. 12. The "temporary ramp was (and is) critical to allow for appropriate management of the useful materials on site, deployment of equipment for demolition of building 18" Messier PFT, p. 12. Construction of that temporary ramp has apparently already been underway. Messier PFT, P. 25. But Messier testified that he has insufficient

materials to complete the “temporary ramp” because DEP purportedly will not allow him to demolish anymore buildings “pending management of the materials remaining from demolition of Buildings 19, 20, 21, and 22” Messier PFT, p. 14, 17, 18.

Messier has moved much of the waste from where it was located before the UAO issued. Messier PFT, p. 16, Exhibits 25A-25H. He claims that this is part of ongoing preparation of the temporary ramp to allow for access from Ferry Street to the easterly portion of the facility. Messier PFT, p. 16. Exhibit 25D appears to confirm that construction of the ramp is ongoing. One area of the photograph shows a freshly graded and gently sloping landscape down to the concrete pad, and it appears that concrete, bricks and other material were used as part of the fill for that sloped ramp. Messier PFT, p. 16, Exhibit 25D. It also appears that much of the demolition waste was moved to locations where it was placed within the walls of foundation of the demolished buildings.

In addition to the temporary ramp, Messier testified that the project “requires a permanent access way to the easterly portion of the project from Ferry Street sufficient to support two-lane entrance and exit motor vehicle traffic and pedestrian walkways.” Messier PFT, p. 14 (emphasis added). Because there is an elevation difference between the property and Ferry Street of approximately 20 feet, a “large volume of composite fill material is necessary to create this access way.” Messier PFT, p. 15. He testified that the Trust intends to use all of the existing “wood, brick, and concrete” debris from the demolition of buildings 19, 20, 21, and 22 to construct the permanent ramp, including the materials shown in Exhibit 18. Messier PFT, p. 15.

Regarding other demolition debris, Messier testified that metal from demolition “has been and will be separated and maintained for its value, whether as ornamental items with the

exterior or interior of the future residential structures, as a resource in the metal fabrication industry or as potential gift or sale of items to academic, industrial, or historic archival or preservation institutions.” Messier PFT, p. 15.

Messier testified that insufficient funding “delayed the Trust’s accomplishment of off-site management of demolition components that the Trust could not or did not intend to use in developing the Hampton Mills Project.” Messier PFT, p. 12. As a consequence he testified that the materials were piled temporarily on the concrete and pavement on the westerly portion of the site near building 3 within the footprints of the demolished buildings depicted as 2 and 3 on Exhibit 5.” Messier PFT, p. 12. He added that “[e]ventually, the Trust was able to arrange for removal of these materials.” Messier PFT, p. 12. Messier testified that the Trust “has not disposed” nor has it “intended to dispose of demolition solid waste on or into land or water at the” property. Messier PFT, p. 13, 16.

Despite Messier’s claim that certain “materials” were shipped off-site, DEP witnesses Hall and Motamedi testified that no documentation had been submitted showing that wastes have left the facility for proper disposal or recycling. Hall Rebuttal PFT, ¶ 3; Motamedi Rebuttal PFT, p. 2. In Hall’s experience, such documentation would include a description of the materials shipped, the location of origin, the receiving destination, and the associated tonnage depicted on waste receipts from the receiving facility. Hall Rebuttal PFT, ¶ 3. Motamedi agreed, stating that although Messier claims that waste has been removed from the site, there is no documentation of this. Motamedi Rebuttal PFT, ¶ 4. Hall generally believes that the photographs provided by Messier and the Trust merely demonstrate that the materials have been moved around on site since DEP’s last site visit in June 2015. Hall Rebuttal PFT, ¶ 4. Much of the material appears to have been merely deposited below grade. Hall Rebuttal PFT, ¶ 4.

The debris is solid waste. Messier's position on behalf of himself and the Trust suffers from a number of fatal flaws and more than a preponderance of the evidence demonstrates that the debris is solid waste. First, although Messier claims that a significant amount of debris has been shipped off-site, there is no documentation to support that; I am persuaded by the testimony of Hall and Motamedi that it appears the debris has been moved around and organized differently at the Property. In addition to the lack of corroborating documentary evidence, this finding is based upon my assessment of Messier's credibility. As discussed below, his credibility suffers from a number of inconsistent statements that undermine his testimony and positions.

Second, as DEP has made clear to Messier, which he admits, for him to use the demolition debris to construct the ramp on the property he must receive approval from DEP in the form of a Beneficial Use Determination ("BUD"). Messier PFT, p. 18. The Beneficial Use Determination process is a permitting process through which DEP may declassify certain materials for reuse in a manner not specifically authorized by the regulations. Hall Rebuttal PFT, p. 6; 310 CMR 19.060.

Also, Messier testified that it is his understanding that DEP will not allow a BUD to use the wood demolition material in the ramp construction and that if he intends to sell it for "use or as incinerator feed stock" he would need a separate BUD. Messier PFT, p. 18. It is also Messier's understanding that DEP would require a BUD if the wood were sold to be used to be shred and used as mulch. Messier PFT, p. 18. Messier has not applied for a BUD to reuse the wood debris.

In sum, Messier and the Trust need a BUD for the proposed alternative uses. Nevertheless, they have not yet even applied for a BUD to use debris in constructing the ramp, despite the passage of 6 years.

Messier's failure to apply for these BUDs over the last six years is perplexing. It undermines Messier's credibility. It leads me to conclude that Messier does not intend to properly process the debris by attempting to receive a BUD; instead I reasonably infer that he intends to dispose of the debris on the Property or to store it there pending disposal elsewhere. Indeed, I infer that he has not applied for a BUD because its possible denial would eliminate the remaining legal alternative uses of the debris. Without such alternative uses, the administrative record establishes that that there would be no possible alternative designation for the debris other than solid waste.

In addition, Messier's own testimony leads to the conclusion that he intends the final resting place for the debris to be the Property; thus, without a BUD it must be considered solid waste. He testified that he intends to use the existing and future debris for both temporary and *permanent* ramps to access the Property from Ferry Street. Therefore, his own admission that he intends to leave the debris in place in conjunction with his failure to apply for a BUD compel the conclusion that the debris is solid waste. The only way to avoid this conclusion would have been for him to receive a BUD.

Messier's only explanation as to when he would apply for the BUD further undermines his credibility. He testified that he would apply for a BUD "at such time as conserved demolition materials are to be permanently placed at the site." Messier PFT, p. 19. There are two problems with that explanation and its circular logic. First, Messier needs a BUD to use the debris for a temporary ramp. Second, and regardless of the temporary ramp, he testified that the demolition debris piles are to be "permanently placed at the site," as a permanent ramp from Ferry Street. Despite this intended permanent placement, Messier has still not applied for a

BUD. The debris, however, cannot be permanently placed at the Property without a BUD. As a consequence, I find Messier's circular explanation to undermine significantly his credibility.

In addition to all the above, DEP correctly argues Messier's conclusory statement of his intent is insufficient without more compelling, corroborating evidence. DEP asserts that if his mere statement of intent were accepted, any owner or operator could leave in place what is in reality solid waste so long as the operator maintained that he did not intend to leave the waste in place permanently. DEP's concern is well founded and it is supported by past decisions concluding that passage of time and other surrounding circumstances should be considered in assessing the persuasiveness of one's statements of intent. See e.g. Matter of Matt, Docket No. 97-011, Final Decision (October 7, 1998); Matter of Pan Am Railways/Boston & Maine, Docket No. 2007-080 and 081, Memorandum of Decision and Order Granting Partial Summary Decision (January 28, 2010). In Matt, construction and demolition debris and other materials were piled on the property for a period of approximately two years. The owner maintained that the materials would be reused or recycled but there was no evidence to support the owner's statement of intent. Rather the evidence demonstrated that the materials had reached their "final resting place" or they were being stored pending disposal. As a consequence, the materials were found to be solid waste.

Likewise, in Pan Am the railroad argued that used railroad ties piled along the railroad lines had not been disposed because they were there only temporarily and that they were to be removed for recycling or incineration. That argument was rejected because a preponderance of the evidence demonstrated that the ties had in fact been there for a number of years and in some cases they were being left to rot and be overgrown with vegetation. As a consequence, it was found that they were being disposed at the location or stored pending disposal at another

location. They were therefore solid waste. See also Wood Waste of Boston v. Bd. Of Health of Everett, 96-2642, 9 Mass. L. Rep. 425 (Mass. Super. 1998) (court deferred to DEP's interpretation that there had been solid waste at the site); Board of Health v. Hagopian, 37 Mass. App. Ct. 174, 638 N.E.2d 48 (1994) (retention of debris from destruction of chicken houses constituted a dumping ground).

For all the above reasons, there is more than a preponderance of the evidence demonstrating that the demolition debris piles on site are solid waste. Paragraph 18A of the UAO requires proper handling and disposal of the solid waste within 180 days. This is a reasonable measure to address the violations, especially given the substantial amount of time that has already passed.

III. Messier and The Trust Must Comply With The UAO Provisions Regarding Asbestos

DEP alleges that there continues to be degraded asbestos inside the buildings that has the potential for exposing individuals to dangerous asbestos fibers. Messier and the Trust respond that they have sealed up the broke windows on the buildings with plastic sheeting, and thus there is no longer a threat that the fibers could impact the ambient air outside the buildings and they have complied with the law. I agree with DEP; regardless whether the windows have been sealed with plastic, under certain circumstances that are applicable here the law requires owners and operators to maintain asbestos in a condition that will not be a means for exposure through the air, whether inside or outside of a building.

The dangers of asbestos are serious and well known, as discussed in prior decisions. Asbestos is a highly potent carcinogen. It is well recognized as one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings.

The hazards posed by asbestos have been well documented and researched: Exposure to asbestos

causes many painful, premature deaths due to mesothelioma and lung, gastrointestinal, and other cancers, as well as asbestosis and other diseases. Studies show that asbestos is a highly potent carcinogen and that severe health effects occur even after short-term, high level or longer-term, low level exposure to asbestos. Matter of Wood Mill, Docket No. 2010-038 and -039, Recommended Final Decision (March 20, 2012), adopted by Final Decision (March 30, 2012); Matter of RDA Construction Corporation, Docket No. 2009-015, Recommended Final Decision (June 16, 2010), adopted by Final Decision (June 22, 2010) (quoting 40 CFR s. 763, January 12, 1989, published in the Federal Register, Vol. 54, No. 132, at 29467); Environmental Encapsulating Corp., Central Jersey Coating, Inc., v. City of New York, 855 F.2d 48 (2nd Cir. 1988) ("Exposure to airborne asbestos fibers - often one thousand times thinner than a human hair - may induce several deadly diseases . . .").

The UAO allegations and demands relative to asbestos are relatively limited. DEP stated that asbestos notifications had been filed with DEP, "indicating that some asbestos abatement has been undertaken." There are no allegations or evidence that abatement of asbestos from the demolished buildings was improperly performed.

The UAO also alleged that based upon DEP's inspections, the notifications submitted by the Respondents, and the age of the Facility buildings, the remaining buildings at the Facility (including specifically the Power Plant building), "may contain asbestos." UAO, ¶ 9. The UAO also alleges that "[s]ome or all of the materials at issue do or may constitute Asbestos Containing Material (ACM) and/or Asbestos Containing Waste Material (ACWM) (as defined at 310 CMR 7.00), and/or 'solid waste' as defined at 310 CMR 19.006." UAO, ¶ 12. Last, it alleged that the "facility" (defined as 1 Ferry Street, or the Property) is not "an approved asbestos waste disposal facility."

The preceding terms have the following definitions under 310 CMR 7.15:

ASBESTOS-CONTAINING MATERIAL (ACM) means any material containing 1% or more asbestos as determined by a laboratory using protocols set forth in the *Method for the Determination of Asbestos in Bulk Building Materials* found in EPA report EPA/600/R-93/116, or another method as directed by the Department. **ASBESTOS-CONTAINING MATERIAL (ACM)** includes, but is not limited to, sprayed-on and troweled-on materials applied to ceilings, walls, and other surfaces; insulation on pipes, boilers, tanks, ducts, and other equipment, structural and non-structural members; tiles; asphalt roofing or siding materials; or asbestos-containing paper.

ASBESTOS-CONTAINING WASTE MATERIAL (ACWM) means any ACM removed during a demolition or renovation project and anything contaminated with asbestos in the course of a demolition or renovation project including, but not limited to, asbestos waste from control devices, bags or containers that previously contained asbestos, contaminated clothing, materials used to enclose the work area during the demolition or renovation operation, and demolition or renovation debris. **ASBESTOS-CONTAINING WASTE MATERIAL (ACWM)** shall also include ACM on and/or in facility components that are inoperable or have been taken out of service and any ACM that is damaged or deteriorated to the point where it is no longer attached as originally applied or is no longer serving the intended purpose for which it was originally installed.

FACILITY means any dumping ground, or any installation, structure, building establishment or ship, and associated equipment. (emphasis added)

Paragraphs 18(C) and (D) of the UAO ordered the following with respect to asbestos:

- C. Within 120 days of this order, the respondents shall remove, and dispose of any ACM at the facility which is in violation of 310 CMR 7.15 (3)(f) and/or (g). If all ACM at the facility is operable and in good condition, the respondent shall within 120 days submit a written notification to the department that all ACM at the facility is compliant with 310 CMR 7.17 (3)(f) and (g). All ACM which is removed shall be disposed only at permitted off-site disposal facilities. Asbestos waste is a listed "special waste" under 310 CMR 19.061 (3) and must be

handled accordingly. The removal and disposal of the ACM shall be performed in accordance with all applicable regulations of the Commonwealth of Massachusetts, including, but not limited to 310 CMR 7.15.

- D. The respondent shall have an asbestos survey performed prior to conducting any demolition or renovation of the facility. The survey shall, at a minimum, encompass all areas where the demolition or renovation is anticipated to occur, in accordance with 310 CMR 7.15 (4). The survey shall be completed by an independent, third-party, licensed asbestos inspector. . . .

In this appeal, paragraph C above is focused on enforcement of 310 CMR 7.15(3)(f) and (g), which provide the following:

(f) No person shall abandon or leave inoperable or out-of-service asbestos-containing facility components that are not in compliance with 310 CMR 7.15(3)(g) and are located above ground or have been exposed by excavation on site.

(g) Except as otherwise permitted by 310 CMR 7.15, no person shall fail to maintain ACM in a facility in good condition, and serving the intended purpose for which it was originally installed.

In sum, the prohibition in these provisions applies to inoperable and/or out-of-service asbestos-containing facility components that are not in good condition. It also applies to situations where the Asbestos-Containing Material has deteriorated and is not serving the intended purpose for which it was originally installed. If asbestos is in good condition and it does not pose a health hazard, no laws or regulations require that it be removed. The import of these regulations is that building owners are required to keep asbestos in good repair to prevent releases of visible or particulate asbestos emissions to which individuals could potentially be exposed.⁴

⁴DEP's "Answers to Common Asbestos Questions"
<http://www.mass.gov/eea/agencies/massdep/air/programs/answers-to-common-asbestos-questions.html#DoesAsbestoshavetoberemoved>

There are a number of reasons why paragraph 18(C) is a reasonable enforcement provision. First and foremost, paragraph 18(C) requires nothing more than compliance with existing laws within 120 days. Indeed, all owners and operators under 310 CMR 7.15 are subject to the provisions of 310 CMR 7.15(3)(g) and (h). In fact, there is significant public benefit to ensuring that building owners maintain ACM in good condition to protect workers, tenants and the general public.⁵ Here, there is more than ample evidence in the administrative record to find that there may be noncompliant asbestos in the remaining buildings at the Property. Motamedi Rebuttal PFT, p. 4. Photographs demonstrate deteriorated materials, almost certainly asbestos TSI, close to broken windows, with potential for emission to the ambient air. Motamedi Rebuttal PFT, pp. 4-6. The ambient air is the “unconfined space occupied by the atmosphere above the geographical area of the District which includes the air outside a facility or structure.” 310 CMR 7.00.

Messier testified that buildings 15, 16, and 17 continue to contain asbestos and they are the only buildings “where abatement has not occurred.” Hall Rebuttal PFT, ¶ 8. Despite this admission, Messier testified that the building windows were sealed off at some point after the UAO issued and after June 5, 2015, when the last site visit occurred. Hall Rebuttal PFT, ¶ 9.

“RESPONSE TO COMMENTS, 2012 Regulatory Reform: Amendments to Air Pollution Control and Asbestos Regulations (310 CMR 7.00 and 310 CMR 7.15), STATUTORY AUTHORITY: M.G.L. c. 111, Sections 142A through 142O, June 20, 2014.”

<http://www.mass.gov/eea/docs/dep/air/laws/asbestosrtc14.pdf>

⁵DEP’s “Answers to Common Asbestos Questions”

<http://www.mass.gov/eea/agencies/massdep/air/programs/answers-to-common-asbestos-questions.html#DoesAsbestoshavetoberemoved>

“RESPONSE TO COMMENTS, 2012 Regulatory Reform: Amendments to Air Pollution Control and Asbestos Regulations (310 CMR 7.00 and 310 CMR 7.15), STATUTORY AUTHORITY: M.G.L. c. 111, Sections 142A through 142O, June 20, 2014.”

<http://www.mass.gov/eea/docs/dep/air/laws/asbestosrtc14.pdf>

Thus, he believes the broken windows through which DEP observed degraded asbestos have been sealed off with reinforced 6 mL poly propylene barriers. Messier PFT, P. 23.

While Messier's efforts to seal the ambient air from asbestos fibers should be lauded, he must still comply with 310 CMR 7.15(3)(g) and (h). Those provisions require that owners and operators keep asbestos in good repair to prevent releases of particulate asbestos emissions inside the buildings, regardless whether the asbestos is sealed off from the ambient (or outside) air. Although no one presently occupies the buildings in this case, they are nevertheless still standing and accessible in the future, whether legally or illegally. To the extent that Messier allows persons inside the buildings to perform work or for other reasons, these regulations are designed to protect those persons. The regulations also protect other individuals such as police officers, firefighters, and other public safety officials who may have to enter the building for public safety reasons. Hall also points that not only is there a regulatory obligation to comply with 310 CMR 7.15(3)(f) and (g) but it appears that there is a "real potential for exposure to individuals who may trespass." Hall Rebuttal PFT, ¶ 10. His statement is based upon what appears to be recent graffiti declaring: "Put up all the fences you want we will break them down" and "Put up Boards! We'll go around." Hall Rebuttal PFT, ¶ 10; see also Motamedi Rebuttal PFT, p. 6. Messier is aware of the trespassing problem, stating: "Monitoring site security poses a consistent challenge, acknowledged by public safety officials. As the graffiti messages fairly and accurately depicted (and appropriately censored) in Exhibit 28A and 28B show, trespassers have attitude and commitments to violate the law." Messier PFT, p. 19.

For all the above reasons, paragraph 18(C) is a reasonable enforcement provision in the UAO. Similar to paragraph 18(C), paragraph 18(D) requires compliance with the existing regulations in 310 CMR 7.15(4). Given Messier's and The Trust's prior compliance issues with

asbestos⁶, this provision reasonably requires that the asbestos survey be completed by an independent, third party, licensed asbestos inspector, instead of Messier.

IV. Messier and The Trust Must Comply With The UAO Provisions Regarding Hazardous Waste

There is evidence in the administrative record regarding hazardous wastes found at the Property, including but not limited to di-electric fluid, waste oil, and drums with unidentified contents. Motamedi PFT; Motamedi Rebuttal PFT, p. 6. Messier testified that certain hazardous wastes from transformers and containers of di-electric fluid have been removed by appropriately licensed transporters. Messier also testified that the Trust has “consistently and continuously managed transformers and di-electric fluid carefully and prudently.” Messier PFT, p. 19. It removed all exterior transformers, drained the fluid, and secured the fluid and transformers in a “secure, centralized location.” “Drained transformers and containers of di-electric fluid have been removed from the [property] by appropriately licensed transporters for management at appropriately licensed facilities. Manifests for transport have been provided to the Department in the ordinary course of licensed transporter business.” Messier PFT, p. 19.

Despite the above testimony, DEP testified to a number of unexplained areas regarding compliance with hazardous waste laws under 310 CMR 30.000. For example, Messier did not provide any documentation or testimony regarding when the transformers were drained and by whom they were drained. They also do not provide a copy of the hazardous waste manifest for the shipment of those wastes. Motamedi Rebuttal PFT, p. 6. Messier also does not discuss what transpired with the other “waste oil/hazardous waste and/or hazardous materials” that were observed and photographed. *Id.*; Motamedi PFT, Exhibit 7. In addition, even though hazardous

⁶ See *supra*. at pp. 6-7.

waste and waste oil were generated, that generator status was never registered pursuant to 310 CMR 30.000.

Given this state of the administrative record, the UAO's requirement in paragraph 18(B) that Messier and the Trust comply with the hazardous waste laws within 180 days is reasonable and should be enforced. In addition, Messier and the Trust shall allow DEP to inspect the facility upon reasonable notice to confirm compliance with the hazardous waste laws within 180 days.

V. Messier's and The Trust's Alleged Financial Circumstances Do Not Constitute An Affirmative Defense to Complying with The UAO

Messier and the Trust argue that they have insufficient financial resources to comply with the UAO. They assert that this is an affirmative defense that enables them to avoid compliance. DEP disagrees; it asserts that the applicable law does not provide a basis for Messier and the Trust to assert financial inability as a defense. I agree. While it is true that some DEP regulatory programs allow parties to raise inadequate capitalization⁷ as a defense under certain circumstances, the statutes and regulations at issue in this appeal do not contain analogous defenses. Had there been an intent for financial inability to serve as a defense the regulations or statutes would explicitly provided for that, as in other programs. This intent not to allow financial inability as a defense under the circumstances of this case is consistent with general principles of environmental law that prioritize public health and welfare over defenses to performance based upon economic or technological considerations. Thus, unless there is an explicit statutory or regulatory exemption or defense, financial inability is not a defense to complying with environmental laws.

⁷ See e.g. 310 CMR 40.0172; 310 CMR 5.25(10); Matter of Kiley, Docket No. 2008-147, Recommended Final Decision (March 29, 2011), adopted by Final Decision (April 7, 2011).

Even if Messier and the Trust could raise this defense, their evidentiary foundation is unpersuasive. First, it is merely premised upon conclusory statements of inadequate finances with no supporting documentation, such as corroborating financial records. This is an insufficient evidentiary foundation. See Matter of Roofblok, Docket No. 2006-047 and 048, Final Decision, n. 6 & 7 (May 7, 2010); Matter of Blackinton Common, LLC, Docket No. 2007-115 & 147, Recommended Final Decision (September 25, 2009) (financial inability defense “must include financial statements, tax returns and other competent “kind[s] of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.”), adopted by Final Decision (January 7, 2010). Also, Messier has presented no evidence that he attempted through multiple different avenues to obtain financing but was unsuccessful. Instead, we are left only with Messier’s unsupported conclusory statements that he simply cannot afford to comply with the UAO.⁸

In addition to the above, there is evidence in the administrative record that tends to undermine Messier’s claims of financial hardship. His resume states that the demolition company that he owned and operated from 1981 to 2006 handled up to \$13 million in annual contracts. Messier PFT, Exhibit 3. From 2013 to the present he has worked as a “national demolition and abatement contractor project manager/superintendent.” Id. Also, from 2005 to the present he has “acquire[d], clean[ed] up, and raze[d] old industrial properties and mills including: Champlain Mills, Whitehall, NY; Concord Wire, Worcester, MA; Mele Manufacturing, Utica, NY. Last, he is a principal of another company identified as Hampton Mills Contracting through which he performs work. Messier PFT, p. 10, Exhibit 14C (April 10,

⁸ Although DEP had the burden of proving that the environmental violations asserted in the UAO took place and the remedial measures it ordered the Trust and Messier to perform were reasonable, the Trust and Messier had the burden of proving any financial inability claim. Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), adopted by Final Decision (April 2, 2013).

2012 letter from Messier identifying his "new construction company" as Hampton Mills Contracting, LLC"). Messier has provided no explanation how on the one hand he can represent this substantial and ongoing business success and on the other hand claim insufficient financial resources to comply with the UAO.

CONCLUSION

For all the above reasons, I recommend that DEP's Commissioner issue a Final Decision affirming the UAO.

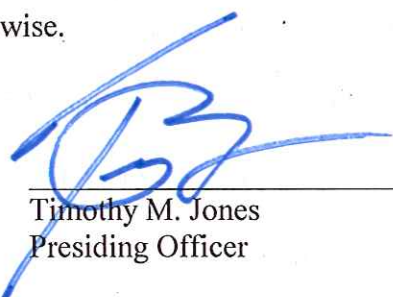
NOTICE- RECOMMENDED FINAL DECISION

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:

10/11/16



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Ferry Street Partners Investment Trust, Daniel
J. Messier, Trustee

Docket No. 2015-008

File No. UAO-WE-15-4001
Easthampton

Representative

Party

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