

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

**July 7, 2022**

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**In the Matter of  
James Valis**

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**Docket No. 2021-015  
DEP File No.:**

Simplified Waterways License Application  
No. 21-WW06-0001-APP  
Hopkinton, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

This appeal involves a dispute between next-door neighbors who own real property on Pine Island Road in Hopkinton, Massachusetts (“Pine Island Road”), which fronts Lake Maspenock. The Lake is a Great Pond of the Commonwealth subject to the regulatory jurisdiction of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) pursuant to G.L. c. 91 (“Chapter 91”) and the Waterways Regulations at 310 CMR 9.00.<sup>1</sup> The neighbors involved in the dispute are Jill and Malcolm Page (“the Pages” or “the Petitioners”), who live at 74 Pine Island Road (“the Pages’ Property”) and James Valis (“Mr.

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<sup>1</sup> “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>.

Valis” or “the Applicant”), who lives with his family at 76 Pine Island Road (“Mr. Valis’ Property”). At issue in the appeal is whether MassDEP properly issued a Draft Simplified Waterways License (“the Draft License”) to Mr. Valis on May 28, 2021 pursuant to Chapter 91 and the Waterways Regulations authorizing his proposed construction of a boat dock and boat lift (“the proposed Project”) on his Property that will be located one foot away from his shared property line with the Pages.

The Pages have a dock on their Property that is not located near their shared property line with Mr. Valis but is approximately 130 linear feet away from the line and provides them with clear and unobstructed access to Lake Maspenock. The Pages will continue to have that access after Mr. Valis constructs the proposed boat dock and boat lift on his Property one foot away from his shared property line with the Pages as authorized by the Draft License. Nevertheless, the Pages filed this appeal contending that the Draft License violates the 25-foot setback requirement of the Waterways Regulations at 310 CMR 9.36(2) because the proposed boat dock and boat lift on Mr. Valis’ Property will be located one foot away from his shared property line with the Pages.<sup>2</sup> However, as explained in detail below, at pp. 12-21, the Pages’ real objection to Mr. Valis’ construction of the proposed boat dock and boat lift on his Property one-foot away from their shared property line is not because those proposed structures would purportedly

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<sup>2</sup> 310 CMR 9.36(2) provides that:

*[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 provisions of 310 CMR 9.36(2) are discussed in detail below, at pp. 9-23.

violate the 25-foot setback requirement of 310 CMR 9.36(2). Instead, the Pages' real objection, as revealed by the Petitioner Malcom Page's ("Mr. Page") sworn pre-filed testimony ("PFT") in the appeal<sup>3</sup> is that, at some point in the future, the Pages might desire to build a new dock on their Property near the same shared property line with Mr. Valis and that they will not be able to build that new dock if Mr. Valis builds his proposed boat dock and boat lift on his Property one foot away from the shared property line as authorized by the Draft License. Simply stated, the Pages contend in one breath that Mr. Valis cannot construct his proposed boat dock and boat lift on his Property one foot away from his shared property line with the Pages because of the 25-foot setback requirement of 310 CMR 9.36(2), but contend in another breath that it will not be improper for the Pages to build similar structures in the future on their Property near the same shared property line.

The Pages' real objection to Mr. Valis' proposed Project is not only inequitable in nature,<sup>4</sup> but also not a valid legal claim under Chapter 91 and the Waterways Regulations at 310 CMR 9.00 to challenge the Department's issuance of the Draft License to Mr. Valis. See below, at pp. 9-23. The Pages' real objection to the Draft License also demonstrates that they lack standing to challenge the Draft License as "person[s] aggrieved" by the Draft License pursuant to 310 CMR 9.17(1)(b).<sup>5</sup> Id., at pp.6-21. The Pages also have no reasonable expectation of

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<sup>3</sup> Mr. Page filed the PFT for the evidentiary Adjudicatory Hearing that was scheduled to take place on February 18, 2022 but was postponed indefinitely as a result of my issuance of an Order to Show Cause to the Pages on February 16, 2022. See below, at pp. 4-6.

<sup>4</sup> The Pages' real objection brings to mind the long-established equity maxim: one who seeks equity must do equity. See e.g. Atwood v. Walter, 47 Mass. App. Ct. 508, 514-18 (1999) (plaintiff's request for court injunction enforcing deed restriction prohibiting property owners in real estate development from using asphalt shingles for roofing their homes denied because plaintiff had also violated the same restriction); Strecker v. Tavares, 77 Mass. App. Ct. 1101 (2010) (Unpubl. 2010).

<sup>5</sup> As explained below, at pp. 11-12, the Petitioner Jill Page ("Mrs. Page") also lacks standing because she did not file any PFT.

prevailing on the merits in this appeal because they failed to present sufficient evidence demonstrating that Mr. Valis' construction of the proposed dock and boat lift on his Property one foot away from his shared property line with the Pages will significantly interfere with the Pages' littoral or riparian property rights to access their Property from Lake Maspenock and to access the Lake from their Property. See below, at pp. 21-23. Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision pursuant to 310 CMR 1.01(11)(e) dismissing the Pages' appeal of the Draft License and affirming the Draft License because the Pages have no reasonable likelihood of prevailing in the appeal due to their failure to present sufficient evidence demonstrating: (1) their standing to challenge the Draft License as "person[s] aggrieved" by the Draft License pursuant to 310 CMR 9.17(1)(b); and (2) that MassDEP issued the Draft License to Mr. Valis in violation of 310 CMR 9.36(2).

## **DISCUSSION**

### **I. THE DIRECTED DECISION STANDARD OF 310 CMR 1.01(11)(e)**

The Adjudicatory Proceeding Rules at 310 CMR 1.01 govern the adjudication of this appeal. The Rules at 310 CMR 1.01(11)(e) provide that:

*[u]pon the petitioner's submission of prefiled testimony, . . . any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue. Decision on the motion or order to show cause may be reserved until the close of all the evidence. . . .*

(emphasis supplied). "Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." In the Matter

of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

Here, the Pages' appeal of the Draft License was scheduled for an evidentiary Adjudicatory Hearing ("Hearing") on February 18, 2022 at which the Pages', Mr. Valis', and MassDEP's respective witnesses, including expert witnesses, were to appear for cross-examination under oath on the sworn PFT and documentary evidence that they had filed supporting the Pages', Mr. Valis', and MassDEP's respective positions in the appeal. However, after reviewing the PFT and documentary evidence of every witness, including the PFT, Rebuttal PFT, Amended PFT, and documentary evidence that Mr. Page had submitted for the Hearing,<sup>6</sup> I issued an Order to Show Cause on February 16, 2022 postponing the Hearing indefinitely and directing the Pages to file a legal memorandum by Wednesday, March 2, 2022, demonstrating cause why I should not issue a Recommended Final Decision ("RFD") recommending that MassDEP's Commissioner issue a Final Decision pursuant to 310 CMR 1.01(11)(e) dismissing

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<sup>6</sup> Mr. Page and the Pages' expert witness, Scott Goddard ("Mr. Goddard"), were the Pages' only witnesses for the Hearing. Mrs. Page did not file any PFT. See below, at pp. 11-12. Prior to my February 16, 2022 issuance of the Order to Show Cause discussed above in the text, the Pages' separate Motions to: (1) strike from the Hearing evidentiary record the Pre-filed Testimony of Mr. Valis' expert witness, William Halsing ("the Petitioners' Motion to Strike"), for purportedly failing to satisfy the requirements for expert testimony; and (2) file Mr. Page's amended Rebuttal PFT were pending. After reviewing those two Motions and Mr. Valis' and the Department's responses to the Motions, I denied the Pages' Motion to Strike Mr. Halsing's PFT but granted the Pages' Motion to Amend Mr. Page's Rebuttal PFT.

the Pages' appeal of the Draft License and affirming the Draft License due to the Pages' failure to present sufficient evidence demonstrating their standing to challenge the Draft License.<sup>7</sup>

The Pages subsequently filed a timely Memorandum responding to my Order to Show Cause. As discussed below, the Pages' Memorandum did not dissuade me from issuing an RFD recommending that MassDEP's Commissioner issue a Final Decision pursuant to 310 CMR 1.01(11)(e) dismissing the Pages' appeal of the Draft License and affirming the Draft License due to the Pages' failure to present sufficient evidence demonstrating their standing to challenge the Draft License as "person[s] aggrieved" by the Draft License pursuant to 310 CMR 9.17(1)(b). See below, at pp. 6-21. The Pages' Memorandum also not dissuade me from recommending that MassDEP's Commissioner dismiss the Pages' appeal of the Draft License and affirm the Draft License for the additional reasons advanced by MassDEP in its Motion to Dismiss,<sup>8</sup> specifically the Pages' failure to present sufficient evidence demonstrating that MassDEP issued the Draft License to Mr. Valis in violation of 310 CMR 9.36(2). See below, at pp. 21-23.

## **II. THE PAGES FAILED TO PRESENT SUFFICIENT EVIDENCE DEMONSTRATING THEIR STANDING TO CHALLENGE THE DRAFT LICENSE AS "PERSONS AGGRIEVED" BY THE DRAFT LICENSE PURSUANT TO 310 CMR 9.17(1)(b)**

### **A. The Jurisdictional Nature of Standing**

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of

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<sup>7</sup> Pending at the time I issued the Order to Show Cause, was the Department's Motion to Dismiss the Pages' Appeal [Or for Directed Decision on the merits] pursuant to 310 CMR 1.01(11)(e) due to the Pages' purported failure to submit sufficient evidence supporting their claim that the Draft License was issued in violation of 310 CMR 9.36(2). I deferred making a ruling on MassDEP's Motion to Dismiss pending my review of the Pages' Memorandum responding to the Order to Show Cause and Mr. Valis' and MassDEP's respective Reply Memoranda to the Pages' Memorandum. Having performed that review for this RFD, I am now recommending that MassDEP's Commissioner grant the Department's Motion to Dismiss in his Final Decision. See above, at pp. 21-23.

<sup>8</sup> See n. 7 above.

Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034 (“Onset Bay II Corp.”), Recommended Final Decision (August 28, 2020), 2020 MA ENV LEXIS 79, at 40-41, adopted as Final Decision (September 23, 2020), 2020 MA ENV LEXIS 82, affirmed, Norfolk Superior Court (June 8, 2022).<sup>9</sup> Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 41. As a jurisdictional prerequisite, a party’s standing to maintain an appeal can be raised at any time during the appeal. In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 2012), 2012 MA ENV LEXIS 97, at 34-35, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99 (appellant’s standing to appeal a Wetlands Permit challenged at conclusion of Hearing because of appellant’s damaging cross-examination testimony).

Under 310 CMR 9.17(1)(b), “any person aggrieved by the decision of the Department to grant [a Chapter 91] license . . . who . . . submitted written comments within the public comment period” may file an administrative appeal with OADR challenging the License within 21 days after its issuance. Webster Ventures II, 2016 MA ENV LEXIS 27, at 38; Onset Bay II

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<sup>9</sup> See Tramontozzi v. Massachusetts Department of Environmental Protection, Norfolk Superior Court, C.A. No. 2082CV01007.

Corp., 2020 MA ENV LEXIS 79, at 41. The Waterways Regulations define “person” as “any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority.” 310 CMR 9.02.

Here, there is no dispute that the Pages previously participated in the permitting proceedings involving the Department’s issuance of the Draft License to Mr. Valis. The only issue regarding the Pages’ standing is whether they are each “[a] person aggrieved by the [Draft License]” within the meaning of 310 CMR 9.17(1)(b).

The Waterways Regulations at 310 CMR 9.02 define an “aggrieved person” as:

any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A.

310 CMR 9.02; Webster Ventures II, 2016 MA ENV LEXIS 27, at 38-39; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 41-42. An “aggrieved person” as that term is used in 310 CMR 9.02 and 310 CMR 9.17(1)(b) “must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that [Chapter 91] . . . intends to protect.’” Webster Ventures II, 2016 MA ENV LEXIS 27, at 39; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 42.

“To show standing, [however,] a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.” Webster Ventures II, 2016 MA ENV LEXIS 27, at 39, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 42. As the Massachusetts Appeals Court explained



in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth **credible evidence** to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441 (emphasis supplied); Webster Ventures II, 2016 MA ENV LEXIS 27, at 39-40; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 42-43. This “credible evidence” standard to demonstrate standing “has both a quantitative and a qualitative component.” Butler, 63 Mass. App. Ct. at 441. Specifically:

**[q]uantitatively**, the evidence must provide specific factual support for each of the claims of particularized injury the [party seeking to establish standing] has made[.] . . . [and] **[q]ualitatively**, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the [challenged governmental] action. **Conjecture, personal opinion, and hypothesis are therefore insufficient [to establish standing]** . . . . [If] the judge determines that the evidence is both quantitatively and qualitatively sufficient . . . [to] establis[h] standing, the inquiry [regarding whether the party has standing] stops [and the party is not] required to persuade the judge that [the party’s] claims of particularized injury are, more likely than not, true.

Id., at 441-42 (emphasis supplied).

To summarize, in order to demonstrate that they are each “[a] person aggrieved by the [Draft License]” within the meaning of 310 CMR 9.17(1)(b), the Pages were required to put forth a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that Mr. Valis’ construction of the proposed boat dock and boat lift on his Property one foot away from his shared property line with the Pages as authorized by the Draft License might or would cause the Pages to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer

and which is within the scope of the public interest protected by G.L. c. 91. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 43-44. To make this showing the Pages were required to present a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that Mr. Valis' construction of the proposed boat dock and boat lift on his Property one foot away from his shared property line with the Pages as authorized by the Draft License might or would significantly interfere with the Pages' littoral or riparian right to approach their Property from Lake Maspenock and approach the Lake from their Property in violation of 310 CMR 9.36(2). This is the case because the Chapter 91 public interest protected by 310 CMR 9.36(2) is the protection of "[the] littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from [their] property." Specifically, 310 CMR 9.36(2) provides that:

[a] [proposed] project [or structure] ***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 . . . .

(emphasis supplied). 310 CMR 9.36(2) also provides that "[i]n evaluating whether . . . a proposed structure" will significantly interfere with the littoral and riparian property owners' right to approach their property from a waterway, and to approach the waterway from their property, the Department:

- (1) "***may*** consider the proximity of the structure to abutting littoral or riparian property and the density of existing structures"; and
- (2) "***shall require*** its placement at least 25 feet away from such abutting

property lines, *where feasible*<sup>10</sup> if the structure will extend perpendicular to the shore.

Id. (emphasis supplied).<sup>11</sup>

As discussed below, at pp. 11-21, the Pages failed to meet the evidentiary threshold to proceed through the “[s]tanding . . . gateway . . . to [the] inquiry on the merits” regarding whether the Department properly issued the Draft License to Mr. Valis. Butler, 63 Mass. App. Ct. at 441-42; Webster Ventures II, 2016 MA ENV LEXIS 27, at 41; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 44. As a result, their appeal of the Draft License should be dismissed for lack of standing and the Draft License should be affirmed.

**B. The Petitioner Jill Page Has Failed to Present Sufficient Evidence Demonstrating She Has Standing to Challenge the Draft License As a Person Aggrieved by the Draft License Pursuant to 310 CMR 9.17(1)(b)**

Although Mr. Page filed PFT, Rebuttal PFT, and Amended PFT in the appeal (discussed in Section C below, at pp. 12-21), his wife, Mrs. Page, did not file any PFT in the appeal. Contrary to the Pages’ assertions in the Memorandum that they filed responding to my Order to Show Cause, Mrs. Page was required to file her own sworn PFT as a separate, individual party/witness supporting her claims in the appeal. Onset Bay II Corp., 2020 MA ENV LEXIS

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<sup>10</sup> The Merriam-Webster Dictionary provides the following definitions of “feasible”:

- 1: capable of being done or carried out // a *feasible* plan
- 2: capable of being used or dealt with successfully: SUITABLE
- 3: REASONABLE, LIKELY // gave an explanation that seemed *feasible* enough.

“Feasible.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/feasible>.

<sup>11</sup> The circumstances under 310 CMR 9.36(2) where a proposed structure will significantly interfere with the littoral and riparian property owners’ right to approach their property from a waterway, and to approach the waterway from their property, are discussed below, at pp. 13-15.

79, at 44-45 (claims of certain Intervenor challenging Chapter 91 License dismissed for lack of standing due their failure file any PFT).

It is well settled that pre-filed testimony of a party/witness in an administrative appeal such as this case is “the actual, sworn [direct] testimony of the witness [which] . . . substitutes for [oral] direct testimony [that would be] given [by the witness] . . . at a hearing where the [direct] testimony [would] be presented [orally].” In the Matter of Town of Bourne, OADR Docket No. 98-150, Final Decision (August 31, 1999), 1999 MA ENV LEXIS 751, at 5. “As such, [pre-filed testimony] is a party’s direct case, and must do everything for a party that [oral] testimony would do, including fulfilling burdens of proof<sup>12</sup> [and] . . . [the] [f]ailure to file pre-filed direct testimony is thus the equivalent of [the witness] failing to appear at a hearing where the [direct] testimony is [would] be presented [orally] . . . .” Id.; See also In the Matter of City of Quincy School System, Recommended Final Decision, OADR Docket No. WET-2009-054 (February 11, 2010), 2010 MA ENV LEXIS 7, at 4-5, adopted as Final Decision (February 26, 2010). Accordingly, having failed to file any PFT, a directed decision entered against Mrs. Page pursuant to 310 CMR 1.01(11)(e) dismissing her claims in the appeal is appropriate due to her failure to present the minimum quantum of qualitative, specific evidence required to demonstrate her standing to challenge the Draft License as a person aggrieved by the Draft License pursuant to 310 CMR 9.17(1)(b).

**C. The Petitioner Malcolm Page Has Failed to Present Sufficient Evidence Demonstrating that the Pages Have Standing to Challenge the Draft License As Persons Aggrieved by the Draft License Pursuant to 310 CMR 9.17(1)(b)**

Assuming only for the sake of argument that Mr. Page’s PFT, discussed below, at

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<sup>12</sup> The Pages, the parties challenging the validity of the Draft License, have the burden of proof on all issues in the appeal.

pp. 15-21, also constituted Mrs. Page's PFT (as the Pages asserted in their Memorandum responding to my Order to Show Cause), they would not prevail on the issue of whether they have standing to challenge the Draft License as persons aggrieved by the Draft License pursuant to 310 CMR 9.17(1)(b) for the following reasons.

As previously discussed above, 310 CMR 9.36(2) protects "[the] littoral or riparian property owners' right to approach their property from a waterway, and to approach the waterway from [their] property" by prohibiting the Chapter 91 Licensing of any proposed project or structure that will significantly interfere with that right. However, the protection of littoral rights in 310 CMR 9.36(2) "does not provide that access to [real property] and from any particular direction [on a waterway] is protected." In the Matter of Keith and Valerie Stamp ("Stamp"), OADR Docket No. 2015-024, Recommended Final Decision (August 4, 2016), 2016 MA ENV LEXIS 43, at 23, adopted as Final Decision (August 8, 2020), 2016 MA ENV LEXIS 42; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 103-04. Additionally, "[t]he rights of [littoral] owners are not without limits." Id. "[A] significant interference [with the littoral property owner's right] must be greater than a mere inconvenience or increase in difficulty in access." Stamp, 2016 MA ENV LEXIS 43, at 24-25; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 103-04. Such a significant interference exists only if the littoral property owner is "wholly cut off" from his or her property by a structure built on an adjoining landowner's foreshore. In the Matter of Stanley A. Sylvia, OADR Docket No. 95-110, Final Decision (February 4, 1997), 1997 MA ENV LEXIS 122, at 8-9 (appellants failed to demonstrate that proposed pier would significantly interfere with their right to access their property from the water); In the Matter of Point of Pines Yacht Club, Inc., OADR Docket No. 91-116, Final Decision (November 20, 1997), 1997 MA ENV LEXIS 19, at 33 (appellant failed to demonstrate that portion of proposed

pier would significantly interfere with his right to access his property from the water); Stamp, 2016 MA ENV LEXIS 43, at 23-26 (appellants failed to demonstrate that construction of proposed access pathway, pier, ramp, and floats would significantly interfere with their right to access their property from the water); Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 104-05 (certain Intervenor challenging Chapter 91 License approving proposed marina expansion project failed to demonstrate that the project would significantly interfere with their right to access their property from the water). If the party challenging a proposed Chapter 91 project has reasonable alternative access to his or her property from the water, there is no significant interference with party's littoral or riparian rights. Id.

As also previously discussed, 310 CMR 9.36(2) provides that “[i]n evaluating whether . . . a proposed structure” will significantly interfere with the littoral and riparian property owners’ right to approach their property from a waterway, and to approach the waterway from their property, the Department “*may* consider the proximity of [a proposed] structure to abutting littoral or riparian property and the density of existing structures” and “*[must] require* [the structure’s] placement at least 25 feet away from such abutting property lines, *where feasible*” if the structure will extend perpendicular to the shore. (emphasis supplied). “The purpose of [the] 25-foot setback requirement [of 310 CMR 9.36(2)] ‘[is] to provide a distance between structures that [will] provide safe navigation and berthing [of vessels], and provide adequate clearance for property owners to approach their property [by vessel] from a waterway and approach the waterway [by vessel] from [their] property.’” Webster Ventures II, 2016 MA ENV LEXIS 27, at 90 (proposed docking facility’s compliance with 25-foot setback requirement “not [in] issue . . . because it [would] be located more than 25 feet from the abutting property line”); Jimary Realty Trust, 2018 MA ENV LEXIS 51, at 40-42 (project proponent’s proposed L Shape float structure

rejected for lack of persuasive evidence demonstrating that placement of structure at least 25 feet away from abutting property line was not feasible); Barstow, 2020 MA ENV LEXIS 16, at 2, 5 (appellants’ appeal of Draft License approving proposed construction of dock dismissed due to appellants’ repeated failure to substantiate claim that dock “[would] be ‘dangerously close’” to appellants’ property in violation of 25-foot setback requirement). However, “a 25-foot setback [often] is not feasible [for a proposed structure], 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.

Here, the Department’s expert witness, Christine Hopps (“Ms. Hopps”), the Assistant Director of the Department’s Chapter 91 Program, provided detailed, persuasive testimony supporting the Department’s determinations that: (1) Mr. Valis’ construction of the proposed dock and boat lift on his Property one foot away from his shared property line with the Pages will not significantly interfere with the Pages’ littoral and riparian property rights; and (2) the 25-foot setback requirement of 310 CMR 9.36(2) is not feasible for placement of the proposed structures on Mr. Valis’ Property and that placing those structures one-foot away from his shared property line with the Pages is the only feasible placement of those structures. Ms. Hopps’ PFT, ¶¶ 14-19. Specifically, Ms. Hopps provided the following testimony.

Ms. Hopps testified that “[w]hen a docking structure otherwise meets the standards at 310 CMR 9.00 and there is no potential navigational impact or impact to riparian/littoral rights of access, and a project site presents physical limitations and challenges to safe navigability, the priority is to provide safe use of the structure, including during ingress/egress.” Ms. Hopps’ PFT, ¶ 17. She testified that “[t]he [Mr. Valis’] proposed structures (floating dock, boatlift, floating dual jet ski platform) measure a combined length of approximately 28 feet” and that

“[b]oth a set of access stairs and the large rocks and boulders situated along the shoreline are present beginning at approximately 30 feet from the shared property line.” Id., ¶ 18. She testified that “[b]ased on the design of the floats, the structure and framing of the boatlift supports, without the removal of the large rocks and boulders the structures cannot be installed in a location at, or north of 30 feet from the shared property line.” Id. She testified that “[b]y siting the [Mr. Valis’ proposed] structures as close to the south property line as possible, routes of ingress/egress are most direct and closest to the deepest water adjacent to the property.” Id., ¶ 19. She testified that “[e]very potential foot further north from the property line put the vessels’ access routes in closer proximity to the large rocks and boulders, which increases the potential for damage” and that “[i]n the absence of any navigational interference or impact to riparian/littoral rights of access, the Department’s priority is to ensure that structures are sited in the safest location possible.” Id. She testified that “although based on the combined length of the structures it may be possible to shift the location to two feet from the shared property line, it is the [Department’s] finding . . . that in the absence of any impact to the Petitioner[s] or to the general public, any avoidable increase in potential safety impacts and limits to navigability of the Applicant is not feasible.” Id.

Ms. Hopps testified that “[t]he portion of the [Pages’] property closest to [their] shared property line [with Mr. Valis] is landscaped with dense vegetation as documented in multiple photos that were provided as Exhibits to [Mr. Page’s] testimony and does not appear to facilitate access to the water.” Id., ¶ 14. She testified that “[i]t was confirmed by the [Pages] during the January 4, 2022 site visit that the area [on their Property] adjacent to [their] shared property line [with Mr. Valis] is not used for water access and that their dock is located on the other side of their property.” Id. She testified that “[t]he Department was unable to identify any current or



prior Chapter 91 license for a dock at the [Pages'] property and [as a result could not] confirm whether there is a licensed location for a dock, but a review of aerial records revealed that a dock has been located at the [Pages'] property since at least 1995.”<sup>13</sup> Id. She testified that “[t]he configuration of the [Pages'] dock has varied, but the location was not documented to have been any closer than approximately 130 linear feet away from the shared property line” and that “[t]here is nothing to indicate [that Mr. Valis'] proposed structures would interfere with the [Pages'] private access to littoral or riparian property.” Id.

Ms. Hopps testified that “[a]ccess through the ‘channel’ (as described by the [Pages]) between [Mr. Valis'] shoreline and the large rock outcropping located approximately 60 feet from the existing dock was observed at the [January 4, 2022] Site Visit” and that “[t]he Department agrees with [Mr. Valis'] statements provided during the Site Visit . . . and considers that portion of the waterway as unlikely to be used by vessels other than [Mr. Valis'] shallow-draft non-motorized vessels (e.g., kayaks/canoes), as there is open area of clear watersheet extending between the large rocky outcropping approximately 500 feet to the west.” Ms. Hopps’ PFT, ¶ 15. She testified that “[t]he Department does not consider this area as being an established course for vessels” and “based on a review of aerial photos, the prior property owner maintained a mooring ball and moored their vessel approximately 40 feet waterward of the shoreline at the existing dock.” and as a result, “the 30 foot maximum extension of the proposed structures will result in less of an impact to any use of the portion of the waterway between the

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<sup>13</sup> Had Ms. Hopps presented conclusive evidence that the Pages’ dock is an unlicensed structure in violation of Chapter 91 and the Waterways Regulations, I would have required the Pages to show cause why their appeal of the Draft License should not be dismissed due to the inequity of the Pages bringing this appeal claiming violations of Chapter 91 requirements by the Department in issuing the Draft License to Mr. Valis and at the same time being in violation of Chapter 91 requirements by having an unlicensed dock on their Property. See n. 4, at p. 3 above.

shoreline and the large rock outcropping.” Id.

In response to Ms. Hopps’ PFT, Mr. Page admitted in his Rebuttal PFT that “the portion of the [Pages’] property closest to the shared property line [with Mr. Valis] is in the process of being landscaped” and “will be completed in the spring of 2022,” but nevertheless contended that “[t]here would be potential future impact” to the Pages’ riparian/littoral rights of access to their Property from Lake Maspenock and from the Lake to their Property because “[p]lacement of [Mr. Valis’] boat lift one foot from the shared property line will forever limit the functional use of that portion of the [Pages’] property for ingress and egress to the lake.” Mr. Page’s Rebuttal PFT, ¶¶ 12,15. Contrary to Mr. Page’s assertions, his testimony does not establish that placement of Mr. Valis’ proposed boat dock and boat lift on his Property one foot away from his shared property line with the Pages will significantly interfere with the Pages’ littoral and riparian property rights in violation of 310 CMR 9.36(2) for the following reasons.

First, it is undisputed that the Pages currently do not have a dock or active waterfront access on their Property near the shared property line with Mr. Valis but, as Ms. Hopps testified, have access to Lake Maspenock from their own dock on the other side of their Property, approximately 130 linear feet away from the shared property line.

Second, Mr. Page’s contention that the potential future use of the Pages’ Property near their shared property line with Mr. Valis should be considered in the analysis of what constitutes a significant interference with their littoral or riparian access to and from Lake Maspenock is without merit because 310 CMR 9.36(2) does not require the evaluation of potential future structures. The Regulation states that: “[i]n 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*” and “[must] require [the

structure's] placement at least 25 feet away from such abutting property lines, *where feasible*" if the structure will extend perpendicular to the shore. (emphasis supplied).

Third, Mr. Page's speculation that at some unidentified point in the future the Pages may wish to move their current dock or to construct a dock and/or boat lift on their Property near their shared property line with Mr. Valis does not constitute proof that construction Mr. Valis' proposed boat dock and boat lift on his Property one foot away from the shared property line will significantly interfere with the Pages' littoral or riparian rights. In fact, it constitutes an admission by Mr. Page that construction or placement of those structures near the shared property line as the Draft License has authorized Mr. Valis do on his side of the property line would be appropriate under 310 CMR 9.36(2) notwithstanding Mr. Page's claims to the contrary because placement of the structures at least 25 feet away from the property line is not feasible.

Lastly, the Memorandum that the Pages submitted responding my Order to Show Cause, did not establish that the Pages had submitted sufficient evidence demonstrating that they have standing to challenge the Draft License as "person[s] aggrieved" by the Draft License pursuant to 310 CMR 9.17(1)(b). To the contrary, in their Memorandum the Pages acknowledged the lack of evidence demonstrating that Mr. Valis' construction of the proposed structures one foot away from the shared property line might or will significantly interfere with the Pages' littoral or riparian rights. However, they argued that the lack of such evidence does not matter and should not be considered in determining whether they have standing to challenge the Draft License as "person[s] aggrieved" by the Draft License pursuant to 310 CMR 9.17(1)(b) because consideration of the lack of such evidence would make the 25-foot set back requirement of 310 CMR 9.36(2) "superfluous." Petitioners' Memorandum, at p. 4. The

Pages' claim is without merit for the following reasons.

First, as discussed previously, the Chapter 91 public interest protected by 310 CMR 9.36(2) is the protection of “[the] littoral or riparian property owners’ right to approach their property from a waterway, and to approach the waterway from [their] property.” Therefore, logically, 310 CMR 9.36(2) requires any project opponent appealing the Department’s Chapter 91 licensing of a proposed structure to demonstrate standing to challenge the licensing by presenting a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that construction of the proposed structure might or will significantly interfere with the project opponent’s littoral or riparian right to approach their property from a waterway and approach the waterway from their property. This requirement applies to all proposed structures regardless of whether they will be located 25 feet, less than 25 feet, or more than 25 feet away from a shared property line. Indeed, the issue of whether it is feasible within the meaning of 310 CMR 9.36(2) for a proposed structure that has received Chapter 91 licensing authorization from the Department to be located less than 25 feet away from a shared property line to be located 25 feet or more away from the line is not even reached if the project opponent fails to present the required minimum quantum of qualitative, specific factual evidence demonstrating that construction of the proposed structure might or will significantly interfere with the project opponent’s littoral or riparian rights to access their property from the waterway at issue and access the waterway from their property.

To sum up, the Pages have failed to demonstrate they have standing to challenge the Draft License because they have failed to put forth a minimum quantum of specific factual evidence that qualitatively a reasonable person could rely upon to conclude that construction of the proposed boat dock and boat lift on Mr. Valis’ Property as authorized by the Draft License

might or will significantly interfere with the Pages' littoral or riparian rights to access their Property from Lake Maspenock and access the Lake from their Property. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 9.02; 310 CMR 9.17(1)(b); Webster Ventures II, 2016 MA ENV LEXIS 27, at 40-41; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 43-44. Accordingly, a directed decision should be entered against the Pages pursuant to 310 CMR 1.01(11)(e) dismissing their appeal due to their lack of standing to challenge the Draft License.

### **III. THE PAGES DO NOT HAVE A REASONABLE LIKELIHOOD OF PREVAILING ON THE MERITS IN THE APPEAL**

In addition to their appeal failing due to their lack of standing to challenge the Draft License as discussed above, at pp. 6-21, the Pages' appeal also fails on the merits for the following reasons.

The rules governing the determination of whether a proposed project will significantly interfere with the project opponent's littoral or riparian property rights to approach their property from a waterway and to approach the waterway from their property were discussed above, at pp. 13-15, and include that a significant interference with the project opponent's littoral or riparian rights exists only if the project opponent will be "wholly cut off" from their property by a structure built on the project proponent's foreshore.<sup>14</sup> Here, Mr. Valis' construction of the proposed boat dock and boat lift on his Property one foot away from his shared property line with the Pages will not "wholly cut off" the Pages from their Property because undisputedly, the dock on the Pages' Property is not located anywhere near their shared property line with Mr. Valis, but is approximately 130 linear feet away from the property line and will continue to

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<sup>14</sup> Sylvia, 1997 MA ENV LEXIS 122, at 8-9; Point of Pines Yacht Club, Inc., 1997 MA ENV LEXIS 19, at 33; Stamp, 2016 MA ENV LEXIS 43, at 23-26; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 104-05.

provide them with a clear and unobstructed access to their Property from Lake Maspenock and from the Lake to their Property after Mr. Valis' construction of the proposed structures.

Also, undisputedly, the area of the Pages' Property closest to their shared property line with Mr. Valis is landscaped with dense vegetation and is not used by the Pages for water access as documented in the photographs that Mr. Page submitted as Exhibits with his PFT. As previously discussed above, the Pages' speculative claim, that at some unidentified point in the future they may wish to move their current dock or to construct a dock and/or boat lift on their Property near their shared property line with Mr. Valis is not a valid legal claim under 310 CMR 9.36(2) because this Regulation deals with present uses of real property on waterways subject to Chapter 91 that might be impacted by proposed structures authorized by a Department issued Chapter 91 license. Moreover, the protection of littoral and riparian rights in 310 CMR 9.36(2) "does not [guarantee] access to [real property] and from any particular direction [on a waterway] . . . ."<sup>15</sup> If the party challenging a proposed Chapter 91 project has reasonable alternative access to their property from the water, there is no significant interference with party's littoral or riparian rights.<sup>16</sup> The Pages have that reasonable alternative access from the existing dock on their Property.

It is also very important to note that the Pages' speculative claim that in the future they might want to have a dock and/or boat lift on their Property near their shared property line with Mr. Valis constitutes an admission by the Pages that construction or placement of the type of structures that the Draft License authorized Mr. Valis to build on his Property one foot away from his shared property line with the Pages would be appropriate under 310 CMR 9.36(2)

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<sup>15</sup> Stamp, 2016 MA ENV LEXIS 43, at 23; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 103-04.

<sup>16</sup> Sylvia, 1997 MA ENV LEXIS 122, at 8-9; Point of Pines Yacht Club, Inc., 1997 MA ENV LEXIS 19, at 33; Stamp, 2016 MA ENV LEXIS 43, at 23-26; Onset Bay II Corp., 2020 MA ENV LEXIS 79, at 104-05.

notwithstanding the Pages' claims to the contrary because placement of the structures at least 25 feet away from the property line is not feasible. It also constitutes an admission by the Pages that "there [will be] enough room for vessels to pass each other safely" with the structures located less than 25 feet from the property line.<sup>17</sup>

### **CONCLUSION**

For the reasons set forth above, I recommend that MassDEP's Commissioner issue a Final Decision pursuant to 310 CMR 1.01(11)(e) dismissing the Pages' appeal of the Draft License and affirming the Draft License because the Pages have no reasonable likelihood of prevailing in the appeal due to the Pages' failure to present sufficient evidence demonstrating: (1) their standing to challenge the Draft License as "person[s] aggrieved" by the Draft License pursuant to 310 CMR 9.17(1)(b); and (2) that MassDEP issued the Draft License to Mr. Valis in violation of 310 CMR 9.36(2).

### **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

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<sup>17</sup> Webster Ventures II, 2016 MA ENV LEXIS 27, at 90; Jimamy Realty Trust, 2018 MA ENV LEXIS 51, at 40-42; Barstow, 2020 MA ENV LEXIS 16, at 2, 5.

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.



**Date: July 7, 2022**

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Salvatore M. Giorlandino  
Chief Presiding Officer



## **SERVICE LIST**

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