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

August 3, 2018

In the Matter of
Jimary Realty Trust

OADR Docket No. 2016-015
DEP File No.: Waterways Application
No. W14-4276, Draft Waterways License
Gloucester, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

Brown's Yacht Yard, Inc. ("BYY") and its principal, Peter VanPelt Brent ("Mr. Brent"), operate a full service boat yard in the Gloucester Inner Harbor in Gloucester, Massachusetts ("Gloucester"). Jimary Realty Trust ("Jimary" or "the Applicant") operates a boat yard abutting BYY's and Mr. Brent's boat yard. In this appeal, BYY and Mr. Brent (collectively "the Petitioners") challenge a portion of a Draft Waterways License ("the Draft Chapter 91 License") that the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Applicant on May 5, 2016 with respect to the Applicant's boat yard, pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations at 310 CMR 9.00. The Draft Chapter 91



License authorized the Applicant:

to extend pile stabilized floats and consolidat[e] . . . [the] permitting of revetments, wharves, and buildings [(“the proposed Project”)] in the Gloucester Inner Harbor at the East Gloucester Marina II in and over the waters of Gloucester Inner Harbor at 8 Norwood Court in . . . Gloucester [(“the Project Site”)] and in accordance with the locations shown, details[,] and dimensions indicated on the accompanying [Draft] License Plan [prepared by Hancock Associates of Danvers, Massachusetts¹ and dated August 21, 2014].

Draft Waterways License, at p. 1. “The structures authorized [by the Draft Chapter 91 License are] limited to . . . provid[ing] commercial access to navigable waters” and “[the existing] [f]ill and structures on the [Project Site at the time of the Draft License’s issuance] were not previously authorized” by the Department. *Id.*

The Petitioners challenge that portion of the Draft Chapter 91 License that authorized the Applicant’s “extension of pile stabilized floats . . . [that] are configured as an ‘L’ being 20 [feet] x 8 [feet] long by 32 [feet] x 4 [feet] deep in size.” Petitioners’ Post-Hearing Brief, at p. 1. The Petitioners contend that the Department erred in authorizing the extension of these pile stabilized floats (“the Applicant’s L shaped float structure”) because it: (1) significantly interferes with public rights of navigation as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g and (2) fails to comply with the 25 foot setback requirement of 310 CMR 9.36(2).² Petitioners’ Pre-Hearing Statement, at p. 5, ¶¶ 4(c), 4(d); Petitioners’ Post-Hearing Brief, at pp. 2, 21-26. The Applicant and the Department dispute the Petitioners’ claims and request that the Draft Chapter 91 License be affirmed in its entirety, including its authorization of the Applicant’s L shaped float structure. Applicant’s Pre-Hearing Statement, at pp. 1-3; Department’s Pre-Hearing Statement, at pp. 1-2;

¹ Hancock Associates is a private land surveying, civil engineering, and a wetlands science firm. <https://www.hancockassociates.com/services>.

² The provisions of 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g and 310 CMR 9.36(2) are discussed below, at pp. 9-11 and 23.

Applicant's Post-Hearing Closing Brief, at pp. 1-14; Department's Closing Brief, at pp. 1-4.

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve the Petitioners' claim that the Department erred in approving the Applicant's L shaped float structure in issuing the Draft Chapter 91 License to the Applicant. Specifically, the Issues for Resolution at the Hearing were whether the Applicant's L shaped float structure: (1) significantly interferes with public rights of navigation as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g; and/or (2) fails to comply with the 25 foot setback requirement of 310 CMR 9.36(2). At the Hearing, the parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions in the case. The witnesses were cross-examined under oath on sworn Pre-filed Testimony ("PFT") that they had filed prior to the Hearing in support of the parties' respective positions in the case. The Hearing was recorded by a certified court stenographer/reporter at the Petitioners' expense, and the subsequent Hearing Transcript was made available to the parties, which assisted them in preparing their respective Closing Briefs in the case.

Two witnesses testified on behalf of the Petitioners at the Hearing:

- (1) Mr. Brent, individually and as BYY's President; and
- (2) Philip Hoysradt ("Mr. Hoysradt"), the Petitioners' expert witness.

Two witnesses testified on behalf of the Applicant at the Hearing:

- (1) James V. Montagnino, the Applicant's principal ("Mr. Montagnino"); and
- (2) Thomas Orrell ("Mr. Orrell"), the Applicant's expert witness.

One witness testified on behalf of the Department at the Hearing: its expert witness Ben Lynch, the Chief of the Department's Waterways Regulation Program.

As discussed in detail below, based on a preponderance of the expert testimony and

documentary evidence presented by the parties at the Hearing, I find that the Department erred in approving the Applicant's L shape float structure in issuing the Draft Chapter 91 License to the Applicant because the structure significantly interferes with public rights of navigation as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g. that exist "in and over the waters of Gloucester Inner Harbor" by:

- (1) "impair[ing] [the] line of sight required for navigation" in violation of 310 CMR 9.35(2)(a)1.c;
- (2) "requir[ing] the alteration of an established course of vessels" in violation of 310 CMR 9.35(2)(a)1.d; and
- (3) "generat[ing] water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections" in violation of 310 CMR 9.35(2)(a)1.g.

The Applicant's L shaped float structure also fails to comply with the 25 foot setback requirement of 310 CMR 9.36(2). Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Draft Chapter 91 License in all respects except for its approval of the Applicant's L shaped float structure and directing the Department to issue a Final Chapter 91 License to the Applicant consistent with the Commissioner's Final Decision.

STATUTORY AND REGULATORY FRAMEWORK

"Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property." In the Matter of The Landing Group, Inc., OADR Docket No. 2014-025, Recommended Final Decision (October 27, 2015), 2015 MA ENV LEXIS 85, at 3, citing, Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629, 631 (1979).

“Since the Magna Carta, the land below the high water mark has been impressed with public rights designed to protect the free exercise of navigation, fishing, and fowling in tidal waters.” The Landing Group, 2015 MA ENV LEXIS 85, at 3, citing, Boston Waterfront, 378 Mass. at 632; Arno v. Commonwealth, 457 Mass. 434, 449 (2010). “Thus, ‘[a]t common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in the Crown [and eventually the Massachusetts Bay Colony, followed by the Commonwealth] but subject to the rights of the public to use the coastal waters for fishing and navigation.’” The Landing Group, 2015 MA ENV LEXIS 85, at 3-4, citing, Opinion of the Justices, 365 Mass. 681, 684 (1974).

“In the 1640's, faced with an underdeveloped coastline and a need for wharves to promote commerce in the colonies, 'the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line,' i.e., to include tidal flats.” The Landing Group, 2015 MA ENV LEXIS 85, at 4, citing, Arno, 457 Mass. at 449. “However, ‘this ownership always had strings attached,’ . . . because the Colonial Ordinance of 1641-1647, which authorized the transfer of title to private individuals, ‘expressly specifie[d] that the public [was] to retain the rights of fishing, fowling and navigation’ in the area between the high and low water marks, otherwise known as tidal flats.” The Landing Group, 2015 MA ENV LEXIS 85, at 4, citing, Boston Waterfront, 378 Mass. at 637; Arno, 457 Mass. at 449; Opinion of the Justices, 365 Mass. at 685.

“[T]his body of law that retains public access rights is generally known as the public trust doctrine.” The Landing Group, 2015 MA ENV LEXIS 85, at 4-5, citing, In the Matter of Boston Boat Basin, OADR Docket No. 2012-008 and 009, Recommended Final Decision (October 18, 2013), adopted as Final Decision (November 14, 2014). “Under the public trust doctrine the

Commonwealth holds tidelands in trust for public use.” The Landing Group, 2015 MA ENV LEXIS 85, at 5, citing, Boston Waterfront, 378 Mass. at 629; Arno, 457 Mass. at 449.

“Tidelands generally include flowed tidelands below the high water mark and filled tidelands below the historic high water mark.” The Landing Group, 2015 MA ENV LEXIS 85, at 5, citing, 310 CMR 9.02. “The traditional uses of tidelands, called water-dependent uses, include fishing, fowling, and navigation.” The Landing Group, 2015 MA ENV LEXIS 85, at 5, citing, Moot v. Department of Environmental Protection, 448 Mass. 340, 342 (2007); Fafard v. Conservation Commission of Barnstable, 432 Mass. 194, 198 (2000). “The [Massachusetts] [L]egislature delegated authority to [the Department] under Chapter 91 to ‘preserve and protect’ the public’s rights in tidelands by allowing only water-dependent uses or another proper public purpose.” The Landing Group, 2015 MA ENV LEXIS 85, at 5, citing, Moot, 448 Mass. at 342; G.L. c. 91, § 2. The Department, however, “is not authorized . . . to relinquish public rights; only the legislature may do that, and only under prescribed circumstances in furtherance of its fiduciary role.” The Landing Group, 2015 MA ENV LEXIS 85, at 6, citing, Moot, 448 Mass. at 352; Opinion of the Justices, 383 Mass. at 905.

“[T]o carry out its statutory obligations [under Chapter 91] and the responsibility of the Commonwealth for effective stewardship of trust lands,” the Department promulgated the Waterways Regulations at 310 CMR 9.00. 310 CMR 9.01(2). “The general purposes served by [the Waterways Regulations],” include:

- (a) [the] protect[ion] and promot[ion] [of] the public’s interest in tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the public trust doctrine, as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts;
- (b) [the] preserv[ation] and protect[ion] [of] the rights in tidelands of the

inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose; [and]

- (c) [the] protect[ion] [of] the public health, safety, and general welfare as it may be affected by any project in tidelands, great ponds, and non-tidal rivers and streams

310 CMR 9.01(2)(a)-2(c).

THE PETITIONERS' BURDEN OF PROOF AT THE HEARING

As the parties challenging that portion of the Draft Chapter 91 License approving the Applicant's L shaped float structure, the Petitioners had the burden of proving at the Hearing by a preponderance of credible evidence through the sworn testimonial and documentary evidence of their witnesses that the Department erred in approving the structure. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. It is well settled that:

[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.

In the Matter of Palmer Renewable Energy, LLC, Docket No. 2011-021 and 022, Recommended Final Decision After Remand, July 8, 2012 p. 10, citing, Massachusetts Jury Instructions, Civil, 1, 14(d).

My review of the evidence presented by the parties at the Hearing was de novo, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the Draft Chapter 91 License to the Applicant. In the Matter of Woods Hole, Martha's Vineyard

& Nantucket Steamship Authority, OADR Docket No. 2016-025, Recommended Final Decision (March 27, 2017), 2017 MA ENV LEXIS 29, at 31, adopted as Final Decision (April 13, 2017), 2017 MA ENV LEXIS 31. Put another way, as the Presiding Officer responsible for adjudicating the appeal, “[I was] not bound by MassDEP’s prior orders or statements [in the case], [but] instead [was] responsible . . . for independently adjudicating [the] appeal[I] and [issuing a Recommended Final Decision] to MassDEP’s Commissioner that [was] consistent with [Chapter 91] and . . . [the Waterways] Regulations” Cf, In the Matter of John Soursourian, OADR Docket No. WET -2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014). The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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 . . . rest[ed] within the discretion of the Presiding Officer. . . .” Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (petitioners’ expert testimony “that pharmaceuticals, toxins, and other

potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable”).

FINDINGS

I. BASED ON A PREPONDERANCE OF THE EXPERT TESTIMONY AND DOCUMENTARY EVIDENCE PRESENTED BY THE PARTIES AT THE HEARING, THE APPLICANT’S L SHAPED FLOAT STRUCTURE AS APPROVED BY THE DEPARTMENT IN THE DRAFT CHAPTER 91 LICENSE SIGNIFICANTLY INTERFERES WITH PUBLIC RIGHTS OF NAVIGATION AS SET FORTH IN 310 CMR 9.35(2)(a)1.c, 1.d, AND 1.g

A. The Requirements Of 310 CMR 9.35(2)(a)1.c, 1.d, And 1.g

310 CMR 9.35(2)(a) is entitled “Navigation” and provides that a “[proposed] project shall not *significantly interfere* with public rights of navigation which exist in all waterways,”³ and that “[s]uch rights include the right to conduct any activity which entails the movement of a boat, vessel, float, or other watercraft; the right to conduct any activity involving the transport or the loading/unloading of persons or objects to or from any such watercraft; and the natural derivatives thereof.” (emphasis supplied). The Regulation provides that “[t]he Department *shall find* that the standard is not met” in certain specific circumstances, including those set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g. (emphasis supplied). These regulatory provisions require the Department to find that a proposed project will significantly interfere with public rights of navigation if the project will:

- (1) “impair [a] line of sight required for navigation” (310 CMR 9.35(2)(a)1.c);
- (2) “require the alteration of an established course of vessels” (310 CMR 9.35(2)(a)1.d); or

³ As noted above in the text, 310 CMR 9.35(2)(a) uses the terms “significantly interfere” and “substantially interfere.” “The remainder of the [Waterways] regulations generally utilize the term ‘significant’ when considering interference.” In the Matter of David Fuhrmann, OADR Docket No. 2013-037, Recommended Final Decision (February 19, 2015), 2015 MA ENV LEXIS, 17, at 25, n.12, adopted as Final Decision (April 8, 2015), 2015 MA ENV LEXIS 16. “[T]here is [no] material difference between ‘significant’ and ‘substantial’ in this context.” *Id.*

- (3) “generate water-borne traffic that will substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections” (310 CMR 9.35(2)(a)1.g).

Accordingly, the question presented here is whether the Applicant’s L shaped float structure as approved by the Department in the Draft Chapter 91 License it issued to the Applicant

“significantly interfere[s] with public rights of navigation” by either:

- (1) “impair[ing] any line of sight required for navigation” in violation of 310 CMR 9.35(2)(a)1.c;
- (2) “requir[ing] the alteration of an established course of vessels” in violation of 310 CMR 9.35(2)(a)1.d; or
- (3) “generat[ing] water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections” in violation of 310 CMR 9.35(2)(a)1.g.

By its terms, 310 CMR 9.35(2)(a) imposes “an explicit regulatory obligation [upon the Department] to [only authorize] . . . those structures such *that the legal and reasonably foreseeable* waterborne traffic associated with them does not significantly interfere with the public trust rights,” including those set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g, as discussed above. Fuhrmann, 2015 MA ENV LEXIS 17, at 29-30 (emphasis supplied); 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 73, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32. This “legal and reasonably foreseeable waterborne traffic” standard is a rational, objective standard based on Chapter 91 regulatory requirements and is consistent with prior Final Decisions in administrative appeals involving challenges to Chapter 91 Licenses issued by the Department. See Fuhrmann (Chapter 91 License required modification to include conditions avoiding proposed structure’s significant

interference with public rights of navigation); Webster Ventures II (proposed structures authorized by Chapter 91 License would not significantly interfere with public rights of navigation).

For the reasons discussed below, based on a preponderance of the expert testimony and documentary evidence presented by the parties at the Hearing, the Applicant's L shaped float structure as approved by the Department in the Draft Chapter 91 License it issued to the Applicant significantly interferes with public rights of navigation as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g because the structure:

- (1) "impair[s] [a] line of sight required for navigation" in violation of 310 CMR 9.35(2)(a)1.c;
- (2) "require[s] the alteration of an established course of vessels" in violation of 310 CMR 9.35(2)(a)1.d; and
- (3) "generate[s] water-borne traffic that will substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections" in violation of 310 CMR 9.35(2)(a)1.g.

B. The Testimony Of The Petitioners' Expert Witness, Mr. Hoysradt, Demonstrated That The Applicant's L Shaped Float Structure Significantly Interferes With Public Rights Of Navigation As Set Forth In 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g

The Petitioners' expert witness at the Hearing, Mr. Hoysradt, is a retiree from the maritime industry and is very familiar with the waters of Gloucester Harbor. At the time of Hearing, Mr. Hoysradt had nearly 50 years (since 1968) of substantial experience as a sailor and nearly 40 years (1976 to 2013) of substantial experience as a commander/operator of medium to large sized sea vessels in the maritime industry. His experience includes the following.

From 1968 to 1971, Mr. Hoysradt served in the Peace Corps in Costa Rica and during his

tenure there, he built his own 32 foot Tahiti ketch sailboat,⁴ which he sailed from the country's west coast to Gloucester for several years after he left the Peace Corps. Mr. Hoysradt's PFT, ¶ 7. While in the Peace Corps, Mr. Hoysradt also served as a Second Captain on research vessels in Costa Rica for the United Nations Development Program. Mr. Hoysradt's PFT, ¶ 6; Mr. Hoysradt's Resume (attached to Mr. Hoysradt's PFT).

For nearly 30 years: from 1976 to 2005, Mr. Hoysradt served as the Captain of a 50 ton passenger carrying fishing vessel owned by the Yankee Fishing Fleet based in Gloucester.⁵ Mr. Hoysradt's PFT, ¶ 6; Mr. Hoysradt's Resume (attached to Mr. Hoysradt's PFT). As the vessel's Captain, Mr. Hoysradt was "[i]n charge of [the vessel's] daily fishing trips, maintenance, and overall operation . . ." *Id.* He was licensed to command this vessel by the United States Coast Guard. Mr. Hoysradt's PFT, ¶ 7. At the time of his retirement from the maritime industry in May 2013, Mr. Hoysradt had been licensed for a number of years by the United States Coast Guard as a U.S. Merchant Marine Officer and Master of Steam or Motor Vessels. Mr. Hoysradt's PFT, ¶ 7; Mr. Hoysradt's Resume (attached to Mr. Hoysradt's PFT). This license authorized Mr. Hoysradt to command any vessel up to 200 tons within 200 miles of land. *Id.*

While employed by the Yankee Fishing Fleet, Mr. Hoysradt also served for 17 years (1982 to 1999) as the President of Cape Ann Fishing Parties, Inc., a private charter/commercial fishing company based in Gloucester. Mr. Hoysradt's PFT, ¶ 6; Mr. Hoysradt's Resume

⁴ A Tahiti ketch is "[a] type of full keel sailboat having comfortable accommodations for long passages, and a ketch rig." http://www.seatalk.info/cgi-bin/nautical-marine-sailing-dictionary/db.cgi?db=db&uid=default&FirstLetter=t&sb=Term&view_records=View+Records. A keel is "[t]he central longitudinal structure member of a ship to which all the frames, stem[,] and sternpost are fastened." *Id.* A ketch rig is "[a] two-masted sailing rig with the main mast mounted somewhat forward of the beam, and a mizzen mounted forward of the rudder post." *Id.* A mizzen is "[t]he smaller aftermost mast on a ketch [sailboat]." *Id.*

⁵ The Yankee Fishing Fleet has operated out of Gloucester for more than 70 years: since 1944. <https://www.yankeefleet.com/about-yankee-fleet/faqs/>

(attached to Mr. Hoysradt's PFT). In that role he owned and managed a 50 foot private charter/commercial fishing vessel. Id.

From 2005 to 2006, Mr. Hoysradt served as a Deck Engineer for the Constellation Tug Corporation ("Constellation"), a Boston based marine company. Mr. Hoysradt's PFT, ¶ 6; Mr. Hoysradt's Resume (attached to Mr. Hoysradt's PFT). At Constellation, Mr. Hoysradt was in charge of the engine room of a 92 foot bow tugboat that performed towing services for other vessels. Id. One of the Constellation's job assignments involving this vessel during Mr. Hoysradt's tenure on the vessel, was the towing of an 80 foot by 280 foot, 2,800 ton deck barge over a 15 day period from Boston to Louisiana. Id.

In 2006, Constellation was acquired by Foss Maritime Company ("Foss"), a marine company based in Seattle, Washington.⁶ From 2006 to 2010, Mr. Hoysradt served as a Mate/Captain for Foss on towing vessels that performed towing services for other vessels in Boston and Philadelphia. Mr. Hoysradt's PFT, ¶ 6; Mr. Hoysradt's Resume (attached to Mr. Hoysradt's PFT).

From 2010 to 2013, Mr. Hoysradt served as a Mate/Captain for TransAtlantic Lines performing ocean towing of supply barges between Jacksonville, Florida and Guantanamo, Cuba. Mr. Hoysradt's PFT, ¶ 5; Mr. Hoysradt's Resume (attached to Mr. Hoysradt's PFT). He retired from the company in 2013. Id.

At the time of the Hearing, Mr. Hoysradt, although retired, owned and operated a 43 foot cutter sailboat for recreation. Mr. Hoysradt's PFT, ¶ 7.

Mr. Hoysradt is familiar with the Petitioners' boat yard abutting the Applicant's facility in the Gloucester Inner Harbor because for at least three years prior to the Hearing, he regularly

⁶ <http://www.tugboatinformation.com/company.cfm?id=73>.

sailed a 42 foot single screw Westmac sailing vessel entitled "Last Boat IV" that his elderly brother-in-law owned and was berthed at the Petitioners' boat yard. Mr. Hoysradt's PFT, ¶ 9. The Petitioners retained Mr. Hoysradt to render an opinion on access, navigational, and safety issues relating to vessels entering and exiting out of a section of the Petitioners' boat yard from the South Channel in Gloucester Inner Harbor impacted by the Applicant's L shaped float structure as authorized by the Department in the Draft Chapter 91 License it issued to the Applicant. Mr. Hoysradt, ¶ 8. Mr. Hoysradt rendered his opinion based on a demonstration or simulation he conducted on August 11, 2016 of sailing conditions in the water fairway ("the fairway") between the Petitioners' floats and the Applicant's L shaped float structure that attempted to simulate "real life [navigation] situations" in the fairway. Mr. Hoysradt, ¶ 10. The demonstration involved Mr. Hoysradt and the Petitioners' counsel sailing on a 20 foot Eastern Center Console motor boat ("the Eastern") operated by the Petitioners' counsel in accordance with Mr. Hoysradt's instructions. Mr. Hoysradt's PFT, ¶¶ 12-18. The demonstration was as follows.

In the mid-afternoon of August 11, 2016, Mr. Hoysradt berthed the Last Boat IV near the beginning of the Petitioners' fuel/transient boat dock at the Petitioners' boat yard after returning on a fishing trip with his brother-in-law. Mr. Hoysradt's PFT, ¶ 12. "[The weather] [c]onditions . . . were sunny [and] hot, [with a] light [wind] breeze from the south (which [was] the prevailing wind direction at [that] time of year)" Mr. Hoysradt's PFT, ¶ 13. Mr. Hoysradt then boarded the Eastern that was being operated by the Petitioners' counsel. Mr. Hoysradt's PFT, ¶ 14. Per Mr. Hoysradt's instructions, the Petitioners' counsel sailed the Eastern into the South Channel of the Gloucester Inner Harbor. Mr. Hoysradt's PFT, ¶ 14. The Eastern first made a pass by the fairway between the Petitioners' floats and the Applicant's L

shaped float structure because Mr. Hoysradt wanted to simulate the approximate course any vessel would take, staying to the right in the South Channel. Mr. Hoysradt's PFT, ¶ 15.

Photographs that the Petitioners introduced in evidence at the Hearing as the Petitioners' Exhibits 9, 10, 11, and 12 respectively, accurately depict what was present in that area during Mr. Hoysradt's demonstration. Id.

Before making the pass by the fairway, a 50 foot (plus) vessel was attempting to locate the fuel dock at the Petitioners' boat yard. Id.; Petitioners' Exhibit 9. Mr. Hoysradt waited for that vessel to dock at the outside of the Petitioners' fuel dock before instructing the Petitioners' counsel to make a pass by the fairway with the Eastern. Mr. Hoysradt's PFT, ¶ 15.

After the Eastern made a pass of the fairway from the north, Mr. Hoysradt instructed the Petitioners' counsel to point the Eastern "towards the fairway and deliberately [allow the vessel to] drift [in order] to gauge the effect of the wind and coming tide on the vessel [I]n one (1) minute in the light wind and coming tide[,] the Eastern was 'pushed' [approximately 45 feet] from a point perpendicular to the rear of [a] black vessel . . . tied to the [Petitioners'] face fuel dock." Mr. Hoysradt's PFT, ¶¶ 16-17; Petitioners' Exhibits 13 and 14. Mr. Hoysradt also had the Eastern "ma[ke] passes in and out of the fairway[,] . . . pulling in forward and backing out." Mr. Hoysradt's PFT, ¶ 18. These passes are depicted in the photographs the Petitioners introduced in evidence at the Hearing as Petitioners' Exhibits 15, 16, 17, and 18. Id.

Based on the observations that he made during the demonstration and his substantial experience as a sailor and in the maritime industry as discussed above, Mr. Hoysradt opined that the Applicant's L shaped float structure significantly interferes with public rights of navigation that exist in and over the waters of Gloucester Inner Harbor as set forth in 310 CMR

9.35(2)(a)1.c, 1.d, and 1.g for the following reasons.

First, visual access for vessels to the fairway from the south, which is the more frequent access path for transient vessels, was non-existent until the vessels “[were] virtually perpendicular to the fairway.” Mr. Hoysradt’s PFT, ¶ 19.a. “[A] vessel berthed at the end float of the [Applicant’s L shaped] float [structure] . . . obstruct[ed] an adequate view of the fairway to safely facilitate accessing the fairway from the channel.” Id. “Visual access from the north [was] also seriously impaired” Id.

Second, “the width of [the] fairway is unusually narrow and the presence of vessels on each side [of the fairway gave] the impression that this [could not] be a transient dock for anything except small boats.” Mr. Hoysradt’s PFT, ¶ 19.b.

Third, prior to his demonstration, Mr. Hoysradt was able to dock the Last Boat IV near the beginning of the Petitioners’ fuel/transient boat dock because he had two experienced crew members on the vessel and the benefit of knowledge of the site. Mr. Hoysradt’s PFT, ¶ 19.c. However, he would not have docked the vessel further into the fairway out of concerns of the vessel’s ability to exit the berth safely. Id.

Fourth, there was “insufficient room [for vessels] to turn around and the wind [and water] currents [would] mak[e] lining up the initial entry [in the fairway] more challenging.” Mr. Hoysradt’s PFT, ¶ 19.d. Mr. Hoysradt supported his opinion with photographs taken during the demonstration and introduced in evidence at the Hearing by the Petitioners depicting the Eastern being pushed by wind and/or water currents towards the Last Boat IV after the Eastern entered the fairway from the channel. Mr. Hoysradt’s PFT, ¶ 19.d; Petitioners’ Exhibits 15 and 17.

Fifth, “assuming the conditions and the berthed vessel placement [that took place during

the demonstration occur], any appropriately powered vessel with more than 9.5 feet of beam would not be able to safely navigate through and back out of the fairway without assistance both on board and from ashore.” Mr. Hoysradt’s PFT, ¶ 19.e. This assumes that the vessel has an experienced operator and at least one on crew member on board. Id. “[T]here is insufficient width in the fairway for two boats even as small as the size of the Eastern to safely pass each . . . other in the fairway.” Id.

Sixth, to undock the Last Boat IV from its berthing station at the Petitioners’ boat yard, it is necessary for Mr. Hoysradt to back the vessel out of the fairway and to do so safely, he must “kick out the [vessel’s] stern” Mr. Hoysradt’s PFT, ¶ 19.f. If another vessel is not behind the Last Boat IV, only a minor kick out of the Last Boat IV’s stern is necessary to get the stern far enough off of the dock. Id. “If there is [another vessel] of any size behind [the Last Boat IV, Mr. Hoysradt would] need to kick out the [Last Boat IV’s] stern . . . even further to a distance greater than the [other vessel’s] beam” Id. He would do this “by engaging the [Last Boat IV’s] engine into forward, keeping the aft spring line taut and turning the wheel in the opposite direction and powering the vessel,” which “[would] cause the stern to move away from the dock.” Id. “[G]iven the existing narrowness of the fairway, this more extreme kick out would be very difficult if there was [another vessel behind the Last Boat IV].” Id.

Seventh, “there is inadequate sight distance into the channel when backing out of the fairway. As is the case [when] entering the fairway, the obstruction is created by the vessels berthed at the [Applicant’s L shaped] float structure Since visual access to the fairway from the channel is non-existent, vessels in the channel would not be expecting a vessel to be backing

into the channel which creates an additional navigation hazard. This is an unsafe navigational condition.” Mr. Hoysradt’s PFT, ¶ 19.g.

Lastly, “the net width of the . . . fairway (ie total width less width occupied by vessels) is inadequate for access by sailboats under power of almost any size unless there are crew onboard [the vessel] and on shore” because “sailboats under power are less maneuverable than power boats . . . due in part to general differences in power and rudder configuration.” Mr. Hoysradt’s PFT, ¶ 19.h.

C. The Testimony Of The Applicant’s Expert Witness, Mr. Orrell, Was Not Persuasive Regarding Whether The Applicant’s L Shaped Float Structure Significantly Interferes With Public Rights Of Navigation As Set Forth In 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g

The Petitioners’ expert witness at the Hearing, Mr. Orrell, is an experienced sailor and operator of medium to large sized sea vessels. In 1982, Mr. Orrell obtained a Captain’s license from the United States Coast Guard authorizing him to operate and command sea vessels up to 100 tons. Mr. Orrell’s PFT, ¶ 5. From 1982 to 1986, Mr. Orrell operated and captained boats for the Yankee Fishing Fleet in the waters of Gloucester, New England, and Key West, Florida. Mr. Orrell’s PFT, ¶ 6. In 1990, he returned to Yankee Fishing Fleet as an Operations Manager and purchased the company in 2008. Mr. Orrell’s PFT, ¶¶ 7, 8. When he purchased Yankee Fishing Fleet, the company had two vessels: 65 feet and 75 feet respectively. Mr. Orrell’s PFT, ¶ 8. After purchasing Yankee Fishing Fleet, Mr. Orrell leased a 100 foot vessel for the company. Mr. Orrell’s PFT, ¶ 8.

Mr. Orrell testified that since 1990, “[he has] been involved in every aspect of charter boat management[,] including maintaining[,] repairing[,] and maximizing dockage configurations to accommodate 6 to 7 charter boats in and about Gloucester Harbor.” Mr.

Orrell's PFT, ¶ 9. He testified that "[t]he main objective" of his charter boat management has been "providing safe operation from the departure to the arrival of [these] boats and the safety of tens of thousands of people who desire to be on the waterways [of] the Commonwealth." Mr. Orrell's PFT, ¶ 10. He testified that Yankee Fishing Fleet has three different dock locations in Gloucester Harbor for its vessels, with one of the locations exclusively for loading and unloading passengers, and as such, he is "literally moving boats almost daily [from] one dock to another within [the] Harbor." Mr. Orrell's PFT, ¶¶ 12, 13.

In his PFT, Mr. Orrell testified that the Applicant's L shaped float structure does not significantly interfere with public rights of navigation that exist in and over the waters of Gloucester Inner Harbor as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g based on his: (1) review of Mr. Bent's and Mr. Hoysradt's PFT; (2) "personal observations as a daily navigator in Gloucester Harbor"; (3) "familiarity in particular of the fairway in question"; and (4) experience "[as a US Coast Guard] licensed Captain." Mr. Orrell's PFT, ¶¶ 17(a)-17(e). I do not find Mr. Orrell's testimony persuasive for the following reasons.

First, on cross examination by the Petitioners' counsel at the Hearing, Mr. Orrell admitted that his testimony regarding his "familiarity in particular of the fairway in question" was limited to the observations that he may have made from his own vessels while navigating in the South Channel of the Gloucester Inner Harbor and that he has never actually navigated any boat in or out of the fairway. Hearing Transcript, at p. 145, lines 7-24; p. 146, lines 1-6.

Second, on cross examination by the Petitioners' counsel at the Hearing, Mr. Orrell also backtracked on his PFT taking issue with the demonstration that Mr. Hoysradt conducted at the Project Site on August 11, 2016 as discussed above simulating the sailing conditions in the fairway. Mr. Orrell's PFT, ¶ 17(d); Hearing Transcript p. 161, line 22 through p. 168, line 8. In

his PFT, Mr. Orrell testified that “one can create any boat scenario to show unfavorable nautical situations, even with the pre-existing license dock configurations.” Mr. Orrell’s PFT, ¶ 17(d). However, on cross-examination at the Hearing, Mr. Orrell testified that: (1) there was nothing inherently unfair or biased about Mr. Hoysradt’s demonstration; and (2) he personally would not take a vessel with a beam of ten (10) feet or more into the fairway without making “advance arrangements.” Hearing Transcript p. 161, line 22 through p. 168, line 8. He also testified that the Petitioners’ photograph Hearing Exhibits 9, 10, 12, and 13 were a fair representation of what a boat operator would have seen of the fairway opening traveling from south to north in the South Channel in the middle of August 2016. Hearing Transcript, p. 148, line 2 through p. 151, line 1.

D. The Testimony Of The Department’s Expert Witness, Mr. Lynch, Was Not Persuasive Regarding Whether The Applicant’s L Shaped Float Structure Significantly Interferes With Public Rights Of Navigation As Set Forth In 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g

The Department’s expert witness at the Hearing, Mr. Lynch, is the Section Chief of the Department’s Waterways Regulation Program, a position that he has held since 2002. Mr. Lynch’s PFT, ¶ 1. He joined the Program in 1995 after working in the private sector for 10 years, including five years in the construction and real estate development industry. Mr. Lynch’s PFT, ¶¶ 1-2.

As the Section Chief of the Department’s Waterways Regulation Program, Mr. Lynch is responsible for reviewing and approving every c. 91 License that the Department issues to parties. Mr. Lynch’s PFT, ¶ 1. He testified that “[his] review [of a proposed c. 91 License] includes analyzing and understanding the underlying physical and contextual factors influencing the [Department’s] decision [to issue the License], ensuring that the . . . [L]icense and its

conditions meet all regulatory standards, and that all [of] procedural requirements have been met.” Mr. Lynch’s PFT, ¶ 1. During his tenure as Section Chief, Mr. Lynch has reviewed and approved more than 5,000 water-dependent c. 91 Licenses. Mr. Lynch’s PFT, ¶ 3.

Since joining the Department in 1995, Mr. Lynch “[has] worked extensively with municipal harbor masters, the Boston Harbor Pilots, the Army Corp of Engineers, the United States Coast Guard, and with mariners in a variety of settings, including in the planning and evaluation of water-dependent use projects ranging from residential docks and piers to larger commercial facilities such as marinas, infrastructure projects, and shipbuilding and repair facilities. Mr. Lynch’s PFT, ¶ 3. He also has been a regular participant in the Department’s Eelgrass Mapping Project,⁷ which has entailed his piloting a 26 foot working sea vessel to sample and map Eelgrass fields. *Id.* He also has been the regular operator of a private 22 foot recreational sea vessel for more than 25 years. *Id.*

With respect to the Draft c. 91 License that the Department issued to the Applicant in this case, Mr. Lynch testified in his PFT⁸ that “there [was] no basis” for the Petitioners’ claim that

⁷ Eelgrass “is a marine plant that grows in the shallow coastal waters of Massachusetts [and] is an important nursery habitat for a variety of marine fisheries species.” <https://www.mass.gov/service-details/eelgrass-restoration-and-monitoring>.

⁸ The Adjudicatory Proceeding Rules at 310 CMR 1.01(12)(f) mandate that “[a]ll pre-filed testimony shall be subject to the penalties of perjury,” meaning that it must be signed by the witness under the pains and penalties of perjury. Undisputedly, Mr. Lynch, who was represented by legal counsel at the Hearing, did not sign his PFT under the pains and penalties of perjury. Hearing Transcript, p. 14, lines 13 through 22; p. 190, line 2 through p. 191, line 1. At the Hearing, I brought this to Mr. Lynch and his legal counsel’s attention and asked Mr. Lynch whether “[he was] prepared to sign” his PFT at the Hearing under the pains and penalties of perjury as required by 310 CMR 1.01(12)(f). Hearing Transcript, p. 190, line 2 through p. 191, line 1. Mr. Lynch answered in the affirmative: “Yes, I am” and then re-signed his PFT in the presence of his legal counsel. Hearing Transcript, p. 190, lines 2 through 15. In their Post-Hearing Brief at pp. 19-20, the Petitioners brought to my attention that when Mr. Lynch re-signed his PFT at the Hearing, he did not include the words “under the pains and penalties of perjury” to make clear that it was sworn testimony in accordance with 310 CMR 1.01(12)(f). Given that omission, the Petitioners request that I strike Mr. Lynch’s PFT from the record. Petitioners’ Post-Hearing Brief at pp. 19-20. Although it is puzzling that Mr. Lynch, represented by legal counsel, did not re-sign his PFT at Hearing under the pains and penalties of perjury, I decline to strike his PFT from the record for several reasons. First, under oath at the Hearing, Mr. Lynch acknowledged that the PFT was his testimony. Hearing Transcript, p. 190, line 2 through p. 191, line 15; *Hernandez-Lemus v. Arias-Diaz*, 480 Mass. 1002 (2018) (although record-appendix for appeal before SJC

the Applicant's L shaped float structure significantly interferes with public rights of navigation that exist in and over the waters of Gloucester Inner Harbor as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g. Mr. Lynch's PFT, ¶¶ 6-9. I do not find Mr. Lynch's testimony persuasive for the following reasons.

First, Mr. Lynch testified in his PFT that he "[is] familiar with the project site, and [has] visited it and its environs on several occasions." Mr. Lynch's PFT, ¶ 3. However, on cross-examination by the Petitioners' counsel at the Hearing, Mr. Lynch testified that he did not go the Project Site prior to filing his PFT and that his last visit to the Project Site "[c]ould have been as much as 20 years" prior to the Hearing. Hearing Transcript, p. 200, line 24 through p.201, line 21; Webster Ventures II, 2016 MA ENV LEXIS 27, at 101-07 (testimony of expert witness retained by individuals challenging Draft c. 91 License not persuasive because among other reasons "[expert] did not view the proposed Project Site . . . prior to preparing his PFT" and Department's expert witness viewed Site prior to filing his PFT).

Second, Mr. Lynch's opinion that the Applicant's L shaped float structure does not significantly interfere with public rights of navigation that exist in and over the waters of Gloucester Inner Harbor as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g was based on the testimony of the Applicant's expert witness, Mr. Orrell. Mr. Lynch's PFT, ¶¶ 6-7; Hearing Transcript, p. 211, lines 5-18. As discussed above, Mr. Orrell's testimony was not persuasive. Accordingly, Mr. Lynch's reliance on Mr. Orell's testimony makes Mr. Lynch's testimony unpersuasive.

challenging Probate and Family Court judgment included "copy of . . . child's affidavit . . . [that was] unsigned, . . . the child affirmed the truth of the contents of the affidavit" at hearing before probate judge). I also decline to strike Mr. Lynch's PFT because the Petitioners counsel cross-examined Mr. Lynch under oath and at length at the Hearing regarding the contents of his PFT, and, accordingly, the Petitioners were not prejudiced by Mr. Lynch not having signed his PFT under the pains and penalties of perjury. Hearing Transcript, p. 200, line 24 through p. 219, line 14.

II. BASED ON A PREPONDERANCE OF THE EXPERT TESTIMONY AND DOCUMENTARY EVIDENCE PRESENTED BY THE PARTIES AT THE HEARING, THE APPLICANT'S L SHAPED FLOAT STRUCTURE AS APPROVED BY THE DEPARTMENT IN THE DRAFT CHAPTER 91 LICENSE FAILS TO COMPLY WITH THE 25 FOOT SETBACK REQUIREMENT OF 310 CMR 9.36(2)

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). As 310 CMR 9.36(2) makes clear, proposed structures extending perpendicular to the shore must comport with the regulation's requirement that the structures be set back at least 25 feet from abutting property lines, "where feasible." The purpose of this 25 setback requirement "[is] to provide a distance between structures that [will] provide safe navigation and berthing, and provide adequate clearance for property owners to approach their property from a waterway and approach the waterway from [their] property." Webster Ventures II, 2016 MA ENV LEXIS 27, at 90. "Often a 25 foot setback is not feasible, due to lot sizes and other restrictions," and "[i]n those instances, [proposed] projects may still be approved because there is enough room for vessels to pass each other safely." Id.

Here, the Petitioners contended at the Hearing that the Applicant's L shaped float structure fails to comply with 25 foot setback requirement of 310 CMR 9.36(2), but their expert witness, Mr. Hoystat, did not address this requirement in his PFT. Nevertheless, I find that the

Applicant's L shaped float structure fails to comply with that requirement for the following reasons.

First, the Applicant offered no expert testimony supporting its contention that it is not feasible for the Applicant's L shaped float structure to be located at least 25 feet away from abutting property lines because their expert witness, Mr. Orell, did not address the 25 foot setback requirement of 310 CMR 9.36(2) in his PFT.

Second, Mr. Lynch's expert testimony on behalf of the Department at the Hearing on cross-examination by the Petitioners' counsel that it is not feasible for the Applicant's L shaped float structure to be located at least 25 feet away from abutting property lines was not persuasive.⁹ Mr. Lynch testified that "in the context of the [c. 91] licensing that [he has done] throughout the Commonwealth in busy working harbors, [the Department] often find[s] that the 25 feet of setback is not feasible to achieve." Hearing Transcript, p. 204, lines 13-16. He testified that in making the feasibility determination regarding the Applicant's L shaped float structure, the Department reviewed the license plan that accompanied the Applicant's c. 91 License application and "concluded that it was . . . infeasible to move a structure of that size for the purpose for which [it is] being used to some other part [of the Applicant's marina]." Hearing Transcript, p. 206, lines 15-22. However, Mr. Lynch made that determination without having viewed the Project site. Webster Ventures II, 2016 MA ENV LEXIS 27, at 101-07.

Additionally, his testimony "was partly influenced" by the Department's determination that the Applicant's L shaped float structure does not significantly interfere with public rights of navigation that exist in and over the waters of Gloucester Inner Harbor as set forth in 310 CMR

⁹ Mr. Lynch did not address the 25 foot setback issue in his PFT. Hearing Transcript, p. 204, lines 1-19; p. 206, line 14-24; p. 208, lines 1-3; p. 209, lines 2-16; p. 209, lines 23 through p. 211, line 4.

9.35(2)(a)1.c, 1.d, and 1.g. Hearing Transcript, p. 210, line 18 through p. 211, line 4. As discussed above, that determination was based on the testimony of the Applicant's expert witness, Mr. Orrell, which was not persuasive.

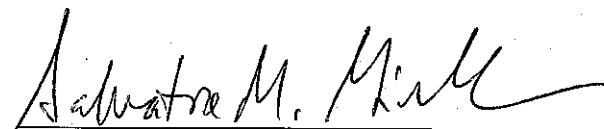
CONCLUSION

Based on the foregoing, I recommend that the Department's Commissioner issue a Final Decision affirming the Draft Chapter 91 License in all respects except for its approval of the Applicant's L shaped float structure and directing the Department to issue a Final Chapter 91 License to the Applicant consistent with the Commissioner's Final Decision. As discussed above, based on a preponderance of the expert testimony and documentary evidence presented by the parties at the Hearing, the Department erred in approving the Applicant's L shape float structure in issuing the Draft Chapter 91 License to the Applicant because structure significantly interferes with public rights of navigation as set forth in 310 CMR 9.35(2)(a)1.c, 1.d, and 1.g. that exist "in and over the waters of Gloucester Inner Harbor" by:

- (1) "impair[ing] [the] line of sight required for navigation" in violation of 310 CMR 9.35(2)(a)1.c;
- (2) "requir[ing] the alteration of an established course of vessels" in violation of 310 CMR 9.35(2)(a)1.d; and
- (3) "generat[ing] water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections" in violation of 310 CMR 9.35(2)(a)1.g.

The structure also fails to comply with the 25 foot setback requirement of 310 CMR 9.36(2).

Date: 08/03/18

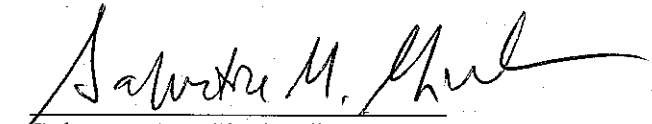

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and 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 notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

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: 08/03/18


Salvatore M. Giorlandino
Chief Presiding Officer

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