

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

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 19, 2019

In the Matter of
Kevin Slattery and
Etchstone Properties, Inc.

Docket No. WET-2018-015
MassDEP File No. 259-0790

RECOMMENDED FINAL DECISION

INTRODUCTION

On October 22, 2018, the Petitioner Ronald Naimo filed this administrative appeal with the Office of Appeals and Dispute Resolution (“OADR”) challenging a Superseding Order of Conditions (“SOC”) that the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Kevin Slattery and Etchstone Properties, Inc. (collectively “the Applicants”) on October 11, 2018, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC authorized the Applicants’ Birch Drive roadway extension project in Pepperell, Massachusetts (“the proposed Project”) that is to support a planned 20 home affordable housing project. SOC Transmittal Letter, at p. 1. The proposed Project, which includes the Birch Drive roadway extension and supporting infrastructure, utilities, and stormwater management, was previously approved by the



Town of Pepperell's Conservation Commission ("PCC").

Currently pending for my ruling is the Applicants' Motion to Dismiss the Petitioner's appeal for failure to: (1) file a proper Appeal Notice in accordance with the Wetlands Regulations; and (2) state a claim upon which relief can be granted. The Department supports the Applicants' Motion to Dismiss. As discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision granting the Applicants' Motion to Dismiss and affirming the SOC.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS

The MWPA and the Wetlands Regulations "do not prohibit [per se] development in wetlands areas[,] [but rather,] "creat[e] a procedure requiring the [D]epartment to condition activities in certain [wetlands] areas so as to protect [the MWPA's] statutory mandate." Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010). The MWPA's statutory mandate is to protect wetlands areas and to regulate activities affecting those areas in a manner that promotes the following eight interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); New England Wind, 457 Mass. at 224, n.6; In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017), 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter¹ any [wetlands] area subject to protection under [the MWPA and Wetlands Regulations] without the required authorization, or cause, suffer or allow such activity”

G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7;

¹ The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

(a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;

(b) the lowering of the water level or water table;

(c) the destruction of vegetation;(d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

In the Matter of Kevin Slattery and

Etchstone Properties, Inc.,

OADR Docket No. WET-2018-015

Recommended Final Decision

Page 3 of 19

Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in the MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Conditions, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “order [by the Department] shall supersede the prior order of the conservation commission [issued pursuant to the MWPA and the Wetlands Regulations] . . . and

all work shall be done in accordance with the [Department's] order," Id., unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA "establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements" by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, a Superseding Order of Conditions issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based "on provisions of a local bylaw that are more protective than the [MWPA]." Oyster Creek, 449 Mass. at 866. However, this issue is not present in this case, because both the PCC and the Department approved the proposed Project pursuant to the MWPA and the Wetlands Regulations.

"[W]hen it receives an SOC request, '[t]he Department [conducts] a de novo review of [the proposed] Project [at issue], meaning that the review of the Project starts anew, and that the Department makes a determination independent of any local conservation commission determination regarding whether the Project should be authorized pursuant to the MWPA and the Wetlands Regulations.'" In the Matters of Richard Cuda and Town of Orleans Board of Selectmen, OADR Docket Nos. WET-2015-012 and WET-2016-014 ("Cuda"), Recommended Final Decision (December 13, 2017), at 40, adopted as Final Decision (January 8, 2018); In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET-2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS

7, at 15-16, adopted as Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6. “Indeed, in issuing an SOC affirming a local conservation commission’s approval of a proposed Project, the Department is not required by either the MWPA or the Wetlands Regulations “[to] adopt conditions identical to those adopted by [the] conservation commission.”” Id. “[T]he Department’s de novo review authority [also] carries over to an administrative appeal of an SOC filed with OADR. During the pendency of the administrative appeal before OADR, the Department ‘is [not] precluded from changing its position [on the SOC because] . . . its [primary] obligation [is] to defend the interests of the [MWPA].’” In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014); Cuda, at 40-41; Zarette, 2018 MA ENV LEXIS 7, at 15-16. “Hence, if during the pendency of an administrative appeal, ‘[the Department] becomes convinced’ based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, ‘that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],’ the Department is authorized to, and should change its position.” Id.

II. ADMINISTRATIVE APPEALS OF SOCS ISSUED BY THE DEPARTMENT

The Wetlands Regulations at 310 CMR 10.05(7)(j) authorize certain parties to file an administrative appeal with OADR to challenge an SOC issued by the Department, including: (1) an “aggrieved person, if previously a participant in the permit proceedings” and (2) a Ten Residents Group comprised of “any ten residents of the city or town where the land [for the proposed activity authorized or rejected by the SOC] is located, if at least one resident was

previously a participant in the permit proceeding.” 310 CMR 10.05(7)(j)2.a. The Regulations require these parties to file an administrative appeal with OADR within 10 business days after the SOC’s issuance and also require them to submit with their appeal an Appeal Notice that contains important information to prosecute the appeal. As discussed in the next section below, the Petitioner has failed to file a proper Appeal Notice with respect to his appeal of the SOC at issue in this case and such failure warrants dismissal of his appeal.

DISCUSSION

THE PETITIONER’S APPEAL SHOULD BE DISMISSED FOR FAILURE TO FILE A PROPER APPEAL NOTICE IN ACCORDANCE WITH THE WETLANDS REGULATIONS AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Under the Wetlands Regulations, a party filing an administrative appeal of an SOC as an “aggrieved person” must include in its Appeal Notice:

- (1) the party’s “complete name, address, phone number, fax number and email address and, if represented, counsel’s name, address, phone number, fax number and email address”;
- (2) “demonstration of participation in previous permit proceedings”;
- (3) “sufficient written facts to demonstrate status as a person aggrieved”; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the party contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]”

310 CMR 10.05(7)(j)2.b.iii, 2.b.v. Under 310 CMR 1.01(4)(b), as incorporated by 310 CMR 10.05(7)(j)9.b, the party or its authorized representative must also sign the Appeal Notice. “This

signature . . . constitute[s] a certification that the signer has read the [Appeal Notice] and believes the content of the [Appeal Notice] is true and accurate, and that the [Appeal Notice] is not interposed for delay. Signature by an authorized representative also certifies the full power and authority to represent the party.” 310 CMR 1.01(4)(b).

For a Ten Residents Group administrative appeal of an SOC, the Group’s Appeal Notice must include:

- (1) the “complete name, address, phone number, fax number and email address” of each Group member and, if represented, counsel's name, address, phone number, fax number and email address”;
- (2) the “complete name, address, phone number, fax number and email address” of the Group’s designated representative;
- (3) “demonstration of participation in previous [permit] proceedings” by at least one Group member; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Group contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] . . .”

310 CMR 10.05(7)(j)2.b.i, 2.b.iv, 2.b.v. Under 310 CMR 1.01(2)(b), as incorporated by 310 CMR 10.05(7)(j)9.b, the Appeal Notice of a Ten Residents Group “shall [also] include a signed affirmation by . . . each [Group] member . . . that the [individual identified in the Appeal Notice as the Group’s designated] representative is duly authorized to represent the party in [the] . . . appeal” if the individual is not an attorney.

Here, in filing his appeal of the SOC on October 22, 2018, the Petitioner failed to include an Appeal Notice; he simply filed a copy of the Adjudicatory Hearing Fee Transmittal Form

evidencing his payment of the \$100.00 filing fee for the appeal. Although the Form made a vague statement that the Petitioner was a “Group Rep.”, the Form did not clearly indicate that the Petitioner’s appeal was a Ten Residents Group appeal brought on behalf of 10 Pepperell residents, including him, opposed to the proposed Project. Indeed, the Form did not set forth any names of Pepperell residents, except for the Petitioner. As a result, the Form as filed with OADR, led me to believe that the Petitioner was pursuing the appeal as an aggrieved person.

The Petitioner’s failure to file an Appeal Notice with OADR was a valid ground for dismissal of his appeal of the SOC pursuant to 310 CMR 10.05(7)(j)2.c. However, exercising my discretion as Presiding Officer, I issued an Order on November 5, 2018 (“the November 5th Order”) granting the Petitioner the opportunity to file a proper Appeal Notice/More Definite Statement with OADR pursuant to 310 CMR 1.01(6)(e) and 11(b)² that:

- (1) set forth “sufficient written facts to demonstrate [the Petitioner’s] status as a person aggrieved” by the SOC;
- (2) contained “a clear and concise statement of the alleged errors contained in

² 310 CMR 1.01(6)(e) provides that:

Upon a Presiding Officer’s own initiative or by motion of any party, the Presiding Officer may order any party to file any pleading, reply to any pleading, or permit any party to amend or withdraw its notice of claim or other pleading upon conditions just to all parties.

310 CMR 1.01(11)(b), in turn, provides that:

Where a notice of claim for adjudicatory appeal is so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought, any party may move for, or the Presiding Officer may order, a more definite statement. The motion or order shall set forth the defects complained of and the details desired. A motion or order for a more definite statement also may seek or require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken. The more definite statement shall be filed within ten days of the Presiding Officer’s order being sent or within another time as may be ordered. If the more definite statement is not filed within the prescribed deadline, the Presiding Officer may either dismiss the adjudicatory appeal, grant the relief sought, or make another order as may be appropriate.

the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA]”; and

- (3) “includ[ed] reference[s] to the statutory or regulatory provisions [that the Petitioner contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] . . .”

My November 5th Order directed the Petitioner to file his Appeal Notice/More Definite Statement with OADR containing the information set forth above by Monday, November 19, 2018, and informed him that if he failed to do so, I would issue a Recommended Final Decision in accordance with 310 CMR 1.01(10) and (11)(b) recommending that the Department’s Commissioner issue a Final Decision dismissing this appeal.³

³ As noted in n. 2 above, at p. 9, under 310 CMR 1.01(11)(b) a “Presiding Officer may either dismiss [an] adjudicatory appeal . . . or make another order as may be appropriate” in response to a party’s failure to file a More Definite Statement. The provisions of 310 CMR 1.01(10) also authorize a Presiding Officer to issue sanctions against a party for failing to comply with a Presiding Officer’s directives. Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party’s pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) and 11(b) above, under 310 CMR 1.01(11)(a)2.f, a “Presiding Officer may [also] summarily dismiss [an appeal] sua sponte,” when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer’s appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to “issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions.”

When I issued my November 5th Order, OADR was not aware that on October 29, 2018, the Petitioner had submitted to the Department's Central Regional Office an Appeal Notice ("the Petitioner's Original Appeal Notice") challenging the SOC purportedly on behalf of a Ten Residents Group in Pepperell that included him (collectively "the Ten Pepperell Residents"). The Department provided OADR and the Applicants with a copy of the Petitioner's Original Appeal Notice on November 8, 2018 following the issuance of my November 5th Order.

The Petitioner's Original Appeal Notice, which was not signed by the Petitioner in violation of 310 CMR 1.01(4)(b), asserted that the SOC was improper because purportedly:

- (1) the proposed Project's "impact to the surrounding wetlands . . . will . . . be permanently forever negatively impacted along with the endangered boarding [*sic*] vegetation in the project area";
- (2) the SOC "[failed to] take into consideration that this project will . . . 'Disturb all Wetlands Areas' included [in] the Nashoba Conservation Trust 11 acre parcel adjacent to [the] proposed project from storm water discharge above pre-development peak";
- (3) "[t]he run off [from the proposed Project] will flood th[e] area and the water way there will be impacted negatively" and "[t]his area was not analyzed [by the Department] . . . and needs to be also considered as part of the storm water discharge";
- (4) the area is a "precious natural resource" that the Ten Pepperell Residents "rely on to support [their] well[s] and drinking water";
- (5) "Wetland[s] resources outside of the area will be impacted as the work will be within the 100 foot buffer zone for the majority of the proposed house and roadway";
- (6) the proposed Project will purportedly create pollution and "will have impacting [on] the surrounding drinking well and connected tributaries that lead to the Sucker Brook and ultimately the Nissitissit River and Nashua River watershed";
- (7) "[e]rosion [from the proposed Project] that could scour the

wetlands and waters will be a major factor of this project” and “[n]o evidence of any off site flooding increase has been made in regard to 100 year-24 hour storm pre and post development”;

- (8) “[n]o documentation has been provided to show infiltration bmp that will adversely impact nearby wetlands including Nashoba Conservation wetlands and Sucker tributary”;
- (9) “[p]et waste, snow disposal relative to the wetlands, road salt[,] and sand need to be factored into the projects of the adjacent wetlands”; and
- (10) “[n]itrates from fertilizers also will impact [the] water resources and local wells [that the Ten Pepperell Residents] drink from” because “[the] 20 plus homes” to be developed by the Applicants in connection with the proposed Project “will each have grass areas that use . . . cancer causing agents that will end up in . . . streams and rivers.”

In asserting these claims against the SOC, however, the Petitioner’s Original Appeal Notice failed to “includ[e] reference[s] to the statutory or regulatory provisions [that the Petitioner contended] ha[d] been violated by the [SOC].” This information was required by the Wetlands Regulations as discussed above.

In response to my November 5th Order, on November 14, 2018, the Petitioner filed a motion, in the form of an e-mail message, purportedly on behalf of the Ten Pepperell Residents requesting a 30 day extension of time to comply with my November 5th Order directing the Petitioner to file an Appeal Notice/More Definite Statement by November 19, 2018. The Petitioner asserted in his e-mail message that the Ten Pepperell Residents needed the 30 day extension of time in order “for [the Group’s] consultants and engineer team to complete their work regarding [Group’s] appeal” of the SOC and that a 30 day extension request was reasonable “based [on] current work loads and the holiday time of year.” Both the Applicants and the Department opposed the Petitioner’s request for a 30 day extension of time to comply

with my November 5th Order, contending that the request was unreasonable and brought for the purpose of delay.

I agreed with the Applicants and the Department that the Petitioner's request for a 30 day extension of time to comply with my November 5th Order was unreasonable because he should have filed a proper Appeal Notice with OADR nearly 30 days earlier on October 22, 2018, but failed to do so. Moreover, the Petitioner's unsigned Original Appeal Notice of October 29, 2018, which he only provided to the Department's Central Regional Office on that date, did not constitute the proper filing of an Appeal Notice with OADR, as discussed above. However, exercising my discretion as Presiding Officer, I accorded the Petitioner some leniency by issuing an Order on November 19, 2018 ("November 19th Order") granting him 14 additional days (from November 19, 2018 to December 3, 2018) to comply with my November 5th Order and file a signed and dated Amended Appeal Notice/More Definite Statement with OADR stating clearly whether his appeal of the SOC had been filed on behalf of himself as "an aggrieved person" and/or on behalf of the Ten Pepperell Residents listed in his Original Appeal Notice of October 29, 2018.

My November 19th Order stated that if the Petitioner was proceeding in the appeal as "an aggrieved person", his Amended Appeal Notice/More Definite Statement was to contain the following information required by the Wetlands Regulations:

- (1) the Petitioner's "complete name, address, phone number, fax number and email address and, if represented, counsel's name, address, phone number, fax number and email address";
- (2) "demonstration of [the Petitioner's] participation in previous permit proceedings" in this matter;
- (3) "sufficient written facts to demonstrate [the Petitioner's] status as a person

aggrieved”; and

- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Petitioner contended] ha[d] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC].”

My November 19th Order also stated that if the Petitioner was proceeding in the appeal as the authorized representative of the Ten Pepperell Residents, the Petitioner’s Amended Appeal Notice/More Definite Statement was to contain the following information required by the Wetlands Regulations:

- (1) the “complete name, address, phone number, fax number and email address” of each of the Ten Pepperell Residents listed in the Petitioner’s Original Appeal Notice of October 29, 2018 and, if represented, counsel’s name, address, phone number, fax number and email address”;
- (2) the “complete name, address, phone number, fax number and email address” of the Ten Pepperell Residents’ designated representative;
- (3) “demonstration of participation in previous [permit] proceedings” by at least one member of the Ten Pepperell Residents; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Ten Pepperell Residents contend] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] . . .”

In response to my November 19th Order, the Petitioner filed a document on December 3, 2018 purporting to be his Amended Appeal Notice/More Definite Statement, which failed to

comply with my November 19th Order for the following reasons.

First, the document was not signed and dated by the Petitioner as required by 310 CMR 1.01(4)(b). As a result, the Petitioner, in violation of 310 CMR 1.01(4)(b), has failed to “[certify in writing] that [he] has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay.”

Second, the document did not state clearly whether his appeal of the SOC had been filed on behalf of himself as “an aggrieved person” and/or on behalf of the Ten Pepperell Residents listed in his Original Appeal Notice of October 29, 2018. The document appeared to suggest that he was only proceeding in the appeal as the “Group Representative” of the Ten Pepperell Residents because the document: (1) identified him as the “Group Representative” and (2) failed to set forth “sufficient written facts to demonstrate [his] status as a person aggrieved” as required by the Wetlands Regulations at 310 CMR 10.05(7)(j)2.b.iii and my November 19th Order. On the latter point, the Petitioner’s failure to set forth those facts means he lacks standing to appeal the SOC as a “person aggrieved,” and, as such, his appeal is subject to dismissal if he has brought the appeal as a “person aggrieved.” In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 15-16, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10 (a party’s standing to pursue a claim is jurisdictional in nature).

Third, if the Petitioner has brought the appeal of the SOC as the Group Representative of the Ten Pepperell Residents, the appeal should be dismissed for failure to comply with 310 CMR 1.01(2)(b) as a result of the Petitioner’s failure to “include a signed affirmation by . . . each [Resident] member . . . that the [Petitioner] . . . is duly authorized to represent the [Resident] in

[the] . . . appeal.” In the Matter of Beechwood Knoll School, OADR Docket No. WET-2008-050, Recommended Final Decision (September 17, 2008), 15 DEPR 257, 259 (2008), adopted as Final Decision (September 19, 2008) (dismissing an appeal where “[t]here was no affirmation filed by the residents to designate a representative for this appeal, although [the appellant] had filed the appeal on behalf of the entire group”).

Lastly, regardless of whether he has brought the appeal of the SOC as a “person aggrieved” and/or as the Group Representative of the Ten Pepperell Residents, the Petitioner’s appeal of the SOC should also be dismissed due to his failure to set forth:

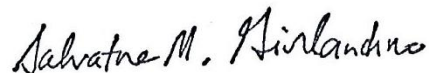
“a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Petitioner, individually and/or at the Representative of the Ten Pepperell Residents, contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]”

310 CMR 10.05(7)(j)2.b.i, 2.b.iii, 2.b.iv, 2.b.v.

CONCLUSION

For the reasons discussed above, I recommend that the Department’s Commissioner issue a Final Decision granting the Applicants’ Motion to Dismiss the Petitioner’s appeal and affirming the SOC because the Petitioner failed to: (1) file a proper Appeal Notice in accordance

with the Wetlands Regulations; and (2) state a claim upon which relief can be granted.



Date: September 19, 2019

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

Petitioner: Ronald Naimo
21 Heald Street
Pepperell, MA 01463
e-mail: Ron.Naimo@gmail.com;

Legal Representative: None listed in Petitioner's Appeal Notice;

Applicants: Kevin Slattery and Etchstone Properties, Inc.
179 Amherst Street
Nashua, New Hampshire 03064
e-mail: Applicants represented by legal counsel;

Legal representative: Adam Costa, Esq.
Mead, Talerman & Costa LLC
30 Green Street
Newburyport, MA 01950
e-mail: adam@mtclawyers.com;

Local Conservation Commission:

Town of Pepperell Conservation Commission
c/o Paula Terrasi, Conservation Administrator
Pepperell Town Hall
1 Main Street
Pepperell, MA 01463
e-mail: conservation@town.pepperell.ma.us;

Legal Representative: None listed in Petitioner's Appeal Notice;

The Department: Denise Child, Section Chief, Wetlands Program
MassDEP/Central Regional Office
Bureau of Water Resources
8 New Bond Street
Worcester, MA 01606
e-mail: Denise.Child@mass.gov;

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