

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

January 16, 2025

**In the Matter of
Lawrence Glick, trustee
Jeffrey Karp Irrevocable Trust of 2021
Jeffrey Karp & Lawrence Glick trustees
Jill Karp Irrevocable Trust of 2021**

**OADR Docket #WET-2023-005; 006
MassDEP-SE-020-1648
Edgartown, MA**

RECOMMENDED FINAL DECISION

This appeal involves a Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection Southeast Regional Office (“MassDEP”) on April 7, 2023 to Lawrence Glick trustee of the Jeffrey Karp Irrevocable Trust of 2021 (“Jeffery Karp Trust”) and Jeffrey N. Karp and Lawrence Glick as trustees of the Jill Karp Irrevocable Trust of 2021 (“Jill Karp Trust”) (collectively the “Applicant”). The SOC was issued pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131 §40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 as a result of an appeal filed by Brian Carty, Susan Rapoport, and James Rapoport as Trustees of the Brian T. Carty Family Trust (“Brian Carty Trust”) and Mary Carty, Susan Rapoport and James Rapoport as Trustees of the Mary V. Carty Family Trust (“Mary Carty Trust”), and Joseph Sieber (collectively the “Petitioners”) to challenge the Order of Conditions (“OOC”) issued by the Edgartown Conservation Commission (“ECC”) approving the construction of a new single family home, garage, barn, pool house, swimming pool, pickleball court, septic system, and driveway at 31 Edgartown Bay Road in Edgartown, Massachusetts. The SOC affirmed the OOC. While the Appeal Notice was timely

filed with Massachusetts Department of Environmental Protection's Office of Appeals and Dispute Resolution ("OADR"), if failed to comply with the rules for filing an appeal of wetlands permit decision. The Petitioner's response to the Order for a more definite statement of their claims failed to correct this deficiency. As a result, I recommend that this appeal be dismissed and that the Department's Commissioner issue a Final Order approving the SOC.

A. JURISDICTIONAL NATURE OF STANDING

"Standing 'is not simply a procedural technicality.' . . . Rather, it 'is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.'" In the Matter Brian Corey, OADR Docket No. WET 2017-023, 2018 MA ENV LEXIS 10, *27, Recommended Final Decision (February 28, 2018), adopted by Final Decision, 2018 MA ENV LEXIS 9, (March 15, 2018)(Buzzards Bay Coalition had standing to challenge the SOC as an aggrieved Person who previously participated in the permit proceedings), citing Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975).

The provisions of 310 CMR 10.05(7)(j)2.a states:

"Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision. Previously participating in the permit proceeding means the submission of written information to the conservation commission prior to close of the public hearing, requesting an action by the Department that would result in a Reviewable Decision, or providing written information to the Department prior to issuance of a Reviewable Decision."

"To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true." Brian Corey, *31

As the Massachusetts Appeals Court explained in Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005):

[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."

“Under 310 CMR 1.01(11)(d)(1), a party may move to dismiss an administrative appeal for lack of jurisdiction ‘In deciding [either] motion, the Presiding Officer shall assume all the facts alleged in the [appellant’s Appeal Notice] to be true,’ but ‘[the] assumption shall not apply to any conclusions of law’ alleged in the Appeal Notice. . . . This standard mirrors the standard applied by Massachusetts courts in civil cases when reviewing challenges to court pleadings based upon the court’s lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1)” In the Matter of Brice Estates, Inc., OADR Docket No. WET-2016-024, Recommended Final Decision (April 21, 2017), 2017 MA ENV LEXIS 46, *11-12, adopted as Final Decision, 2017 MA ENV LEXIS 45, (June 16, 2017)(“Brice Estates”)(Ten Resident Group with one member does not have standing, and that member was not a person aggrieved). “‘To show standing, a party need not prove by a preponderance of the evidence that his or her claim of particularized injury is true.’ . . . ‘Rather, the plaintiff must put forth credible evidence to substantiate his allegations.’” In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016, Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, *16-17, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10.

B. THE PETITIONERS FAILED TO PLEAD SUFFICIENT WRITTEN FACTS TO DEMONSTRATE STANDING AS PERSONS AGGRIEVED

An administrative appeal of a SOC is initiated when an Appeal Notice is filed with OADR. 310 CMR 1.01(c); 310 CMR 1.01(6)(a); 310 CMR 10.05(7)(j). The provisions of the wetlands regulations governing the appeal of a SOC, 310 CMR 10.05(7)(j)2.b., clearly specify the pleading requirements in such an appeal. For a petitioner claiming to be aggrieved by the Reviewable Decision, here, the SOC, the Appeal Notice must include a “demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)3.a. and sufficient written facts to demonstrate status as a person aggrieved.” 310 CMR 10.05(7)(j)2.b.iii. (Emphasis added). A “person aggrieved” is defined in the wetlands regulations as

any person who, because of an act or failure to act by the issuing authority, 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 interests identified in M.G.L. c. 131, § 40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

If the Appeal Notice does not contain this required information, then the appeal may be dismissed. 310 CMR 10.05(7)(j)2.c.

Additionally, the Rules for Adjudicatory Proceedings at 310 CMR 1.01(6)(b) state that an Appeal Notice “shall state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation.” Where an Appeal Notice does not meet the requirements of 310 CMR 1.01 and other applicable regulations, 310 CMR 1.01(6)(b) provides that the Presiding Officer “shall dismiss the appeal or require a more definite statement.” In the event a petitioner fails to file a more definite statement within the required time, the appeal “shall be dismissed.” Id. See also 310 CMR 10.05(7)(j)2.c. Further, the wetlands appeal regulation at 310 CMR

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10.05(7)(j)(2)b.v require an Appeal Notice to include:

a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision.

310 CMR 10.05(7)(j)(2)c provides that “[a]n Appeal Notice that does not contain all of the information required in 310 CMR 10.05(7)(j)1.b. may be dismissed.”

Here, the Petitioners’ appeal notice states that Petitioners are abutting land owners and previously participated in the permit proceedings, “including by submitting written materials to the Commission during the public hearings on the Project, by requesting action by the Department that would result in a Reviewable Decision, *i.e.*, the request for a superseding order of conditions as precursor to this Appeal Notice, and by providing written information to the Department in support of such prior request for a Reviewable Decision, *i.e.*, the request for a superseding order of condition resulting in the challenged Superseding Order.” As such, the Petitioners have demonstrated that they met the first part of standing, that they previously participated in the permit proceedings.

The Petitioners’ Appeal Notice does not, however, include written facts sufficient to demonstrate their status as a persons aggrieved who “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 interests identified in M.G.L. c. 131, § 40.” Rather than dismiss the appeal outright, by Order dated April 26, 2023, I provided the Petitioners with an opportunity to provide a more definite statement with sufficient written facts to demonstrate their status as persons aggrieved as defined in 310 CMR 10.04 and which meets the requirements of 310 CMR 10.05(7)(2)b.v. The

Petitioners responded on May 3, 2023 and the Applicant's filed a reply on May 8, 2023. On November 13, 2023 MassDEP filed a "Statement of the Department on Petitioner's Standing."

The Petitioners more definite statement contends that their abutting properties "are subject to flooding damage as a result of the vague nature of the SOC unless the Applicant is required to adequately landscape low ground cover to preserve the stability of the Coastal Bank." Pet. More Definite Statement, page 2. Regarding sufficient facts to demonstrate aggrievement, they contend that they are hampered by errors in the OOC related to whether the project impacts Bank or Coastal Bank such that it results in potential damage to the Coastal Bank that they cannot review unless the Applicant submits final landscaping plans. However, the SOC approved a plan revised after the OOC that "modified the stairway to remove the impact to Coastal Bank." SOC cover letter, page 1. As a result, the SOC does not authorize impact to the Coastal Bank.

The Petitioners also contend that without a landscaping plan they are unable to have expert witnesses conduct further modeling. However, before that step in the proceedings, the Petitioners must demonstrate that they 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 interests identified in M.G.L. c. 131, § 40." The Petitioner's contend that they should be allowed to prosecute the case as a matter of law "on the issue of whether the SOC and OOC deficiencies were fatal to the Applicant's NOI." Pet. Statement, page 5.

The Applicant responds that the plan change during the SOC proceedings eliminated the proposed pilings that would have impacted the Coastal Bank. This plan change was approved in the SOC. SOC cover letter, page 1. in which the Department contended that the Petitioners concession that they cannot support a showing that they will suffer an injury different in kind or magnitude from the general public demonstrates their lack of standing. Noting that the Petitioners' response to the Order for More Definite Statement made no additional showing, the Department contends that their position is conclusory and unsupported.

Thereafter the Applicant filed a Motion to Dismiss reiterating the same points to which the Petitioners responded, also making the same arguments previously set forth. MassDEP made no filing.

After reviewing the Parties filings I have determined that the Petitioners have failed to demonstrate standing as persons aggrieved for whom the project will or might cause them to suffer an injury in fact which will 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 interests protected by the Act and Wetlands Regulations. In sum, I recommend that the Department's Commissioner issue a Final Decision that (1) dismisses the Petitioners' appeal and (2) renders the SOC final.

Date: January 16, 2025



Margaret R. Stolfa
Presiding Officer

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

SERVICE LIST

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Applicant

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