

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: ESCV2010-00967-A

RE: Leavens v Massachusetts Department of Environmental Protection et al

TO: Louis M Dundin, Esquire
Mass Atty General's Office
Environmental Protection Div.
1 Ashburton Place
Boston, MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on 08/31/2011 the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS--Leavens' motion for judgment on the pleadings is DENIED. Judgment of dismissal shall enter in both cases. (Timothy Feeley, Justice) Copies mailed 8/31/2011.

Dated at Salem, Massachusetts this 31st day of August, 2011.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 744-5500 ext. 377

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2010-00967-A
NO. 2010-01556-A

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ROBERT LEAVENS,
Plaintiff

vs.

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Defendant

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS

This is an appeal of a final decision of an administrative agency under G. L. c. 30A, § 14. The complaints in this case were consolidated by order of this court on June 7, 2011. The separate complaints are essentially duplicative of each other, as they were filed at different times relative to the single administrative proceeding that produced the final decision of the Massachusetts Department of Environmental Protection ("MassDEP") that is subject to this Chapter 30A appeal.

This litigation arises out of property that has been a lighthouse station located on Baker's Island in Salem Harbor and controlled by the United States Government

for over two hundred years (the “lighthouse property”). The United States Coast Guard (the “USCG”) is the federal agency/department currently responsible for the property.¹ The lighthouse property constitutes only a portion of Baker’s Island. The remainder and larger portion of the island includes approximately sixty-five seasonal residences/properties. Plaintiff Robert Leavens (“Leavens”) is a seasonal resident of the island and an abutter to the lighthouse property. Leavens was represented by counsel until the hearing on the motion for judgment on the pleadings, when, after a colloquy with Leavens, his prior counsel was permitted to withdraw and Leavens was permitted to represent himself *pro se*. A non-evidentiary hearing was held on August 23, 2011, at which Leavens and counsel for MassDEP were heard by the court. For reasons discussed below, Leavens’ motion for judgment on the pleadings is **DENIED** and entry of judgment of dismissal shall be entered in the consolidated cases before the court.

BACKGROUND

Administrative proceedings commenced in August 2008, when the USCG filed a notice of intent with the Salem Conservation Commission (the “Commission”),

¹The USCG was originally named as a party in this litigation, which was commenced in Salem Superior Court. However, after removal of the case to federal court, Leavens agreed to a dismissal of the only claim against the USCG. With the USCG out of the case, the federal court remanded the case back to this court.

seeking approval under the Massachusetts Wetlands Protection Act and Salem Wetlands Protection Ordinance in connection with its proposed lead remediation project on a portion of the lighthouse property (the "project"). The project involves excavation and replacement of soils that are not in wetland resource areas, but are within the 100-foot "buffer zone" to the wetlands. Moreover, in order to remove contaminated soil, and replace it with clean fill, the USCG (through its contractors) will temporarily alter certain coastal wetlands through placement of an off-loading ramp, a large pad, and a staging area for construction equipment to be brought onshore from a boat/barge.² On January 8, 2009, the Commission approved the project and issued an order of conditions (the "OOC"), although at that time, the project plan proposed alternative access over coastal wetlands that was later revised to include the ramp, pad, and staging area.

On January 26, 2009, Leavens appealed the Commission's OOC, as issued under the Massachusetts Wetlands Protection Act, by filing a request for a superceding order of conditions with MassDEP. On August 14, 2009, the MassDEP issued a superceding order of conditions (the "SOC"), which included the ramp, pad, and staging area conditions.

²The remediation project will take place entirely on the lighthouse property. No portion of the remediation project, including the movement of equipment and soils over the coastal wetlands, will take place on Leavens' abutting property.

On August 25, 2009, Leavens filed a timely administrative appeal of the SOC to the MassDEP's Office of Administrative Appeals and Dispute Resolution. In his statement of claims, Leavens raised five issues: (1) the USCG cannot properly record the OOC/SOC because there was no chain of title for the lighthouse property (the "title issue"); (2) the lower federal lead cleanup standard was improperly used instead of the higher Commonwealth standard (the "cleanup standard issue"); (3) the SOC improperly made lead testing in certain untested areas optional, when it had been mandatory in the OOC (the "jeep shed issue"); (4) the SOC improperly allowed the USCG to change how it proposed to land its equipment without approval by the Commission (the "plan change issue"); and (5) Leavens was not able to comment on the plan change (the "comment issue"). Negotiations between the parties produced an agreement on three of the five issues, leaving only two issues for the hearing officer to consider and decide; (1) the title issue; and (2) the cleanup standard issue. Pertinent to this appeal, the jeep shed issue was resolved by acceding to Leavens' position and requiring mandatory testing on the jeep shed area and other areas, and requiring any further necessary approvals.

On March 23, 2010, after an evidentiary hearing, the hearing officer issued her recommended final decision, rejecting Leavens' arguments on the two contested issues (the title issue and the cleanup standard issue), but adopting the agreed

conditions resolving the three previously resolved issues. More specifically, the hearing officer concluded that a final order may issue on the project despite any title and recording issues, and that Leavens could not challenge the adequacy of the waste site cleanup standard in the appeal before her. The MassDEP adopted the recommended final decision on April 7, 2010. A later decision of the hearing office, recommending that Leavens' motion for reconsideration be denied, was adopted by the Mass DEP. It is the April 7, 2010 final decision and order of conditions (the "FOC") that is the subject of this appeal.

DISCUSSION

1. Chapter 30A Standard of Review

Judicial review of an appeal from an agency decision is limited to the administrative record. G. L. c. 30A, § 14(5); see also *Cohen v. Board of Registration in Pharm.*, 350 Mass. 246, 253 (1966). The party challenging the decision of the agency bears the burden of demonstrating that the decision is invalid. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The court's approach is "one of judicial deference and restraint, but not abdication." *Arnone v. Commissioner of Dep't of Soc. Servs.*, 43 Mass. App. Ct. 33, 34 (1997) (further citation omitted). When reviewing an agency decision, the court is required to give "due weight to the experience, technical competence, and

specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” G. L. c. 30A, § 14(7). The agency's decision must be supported by substantial evidence. *Id.* In assessing whether the underlying evidence is substantial, the court cannot displace an agency's decision between two fairly conflicting views, even though the court may have justifiably made a different decision. *Hotchkiss v. State Racing Comm'n*, 45 Mass. App. Ct. 684, 695-696 (1998). “Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion taking into account whatever in the record detracts from its weight.” *Lycurgus v. Director of Div. of Employment Sec.*, 391 Mass. 623, 627-628 (1984) (internal quotations omitted). The court must consider the record as a whole, but as long as the agency's findings are properly supported, the decision will not be disturbed by a reviewing court. *Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of the Div. of Employment & Training*, 54 Mass. App. Ct. 405, 408 (2002).

G. L. c. 30A, § 14(7) provides in pertinent part:

The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is –

(a) in violation of constitutional provisions; or

- (b) in excess of the statutory or jurisdiction of the agency; or
- (c) based on an error of law; or
- (d) made upon unlawful procedure; or
- (e) unsupported by substantial evidence; or
- (f) unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
- (g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Chapter 30A Standing Requirement

“Review of adjudicatory decisions of administrative agencies may be sought only by a “person or appointing authority aggrieved by a final decision . . .” *Group Ins. Commission v. Labor Relations Commission*, 381 Mass. 199, 202 (1980). The requirement that a challenger must be a “person aggrieved” is jurisdictional. *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211 (2003); *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681, n.2 (2002); *Ginter v. Commissioner of Insurance*, 427 Mass. 319, 322 (1998) (“We treat standing as an issue of subject matter jurisdiction.”). “In order to maintain an action for review, a party must be aggrieved in a ‘legal sense’ and show that ‘substantial rights’

have been 'prejudiced.'" *Group Ins. Commission*, 381 Mass. at 202, citing *Duato v. Commissioner of Pub. Welfare*, 359 Mass. 635, 637-638 (1971). "The question of standing is one of critical significance. 'From an early day it has been an established principle in this commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of government.'" *Tax Equity Alliance v. Commissioner of Revenue*, 423 Mass. 708, 715 (1996), quoting *Doe v. The Governor*, 381 Mass. 702, 704 (1980).

"Not every person whose interests might conceivably be adversely affected is entitled to review [under Chapter 30A]," *Group Ins. Commission*, 381 Mass. at 204. A plaintiff is a "person aggrieved" if he/she suffers some infringement of his legal rights, and the injury must be more than remote and speculative. *Id.* General community concerns that are not sufficiently specific to the plaintiff do not confer standing to contest a zoning board of appeals decision, *Denneny*, 59 Mass. App. Ct. at 213-214, and this court perceives no reason to construe that particular language in Chapter 30A differently from identical language in Chapter 40A.

3. Analysis

A. Standing

With the above legal guidance in mind, the court rules that Leavens lacks

standing to pursue this Chapter 30A appeal of the FOC. The record certainly precludes a finding that the FOC directly and adversely affects him. The work will be done entirely on the lighthouse property, and neither the remediation work nor the temporary adverse affects of the ramp, pad, and staging area for the removal and replacement of soils will take place on or affect Leavens' abutting property. Moreover, the presumption of standing applicable to Chapter 40A abutters is a statutorily granted right, G. L. c. 40A, § 11, and is not similarly provided for in Chapter 30A. Thus, because there is no presumption of standing, and because standing is jurisdictional, it can be raised at any time in this proceeding, even though it was not contested before the Commission and the MassDEP. See *Nickerson*, 53 Mass. App. Ct. at 681, n.2 (finding of standing by superior court judge does not preclude defendants from arguing on appeal that lack of standing provides an alternative ground for affirmance).

Even Leavens' most vigorous claim of aggrievement does not stand scrutiny. He argues that the inability to record the FOC in the chain of title, and the issuance of the FOC despite that claimed defect in procedure, harms him because the recording requirement gives him assurance that the work will be completed in accordance with the approved plans. The issuance of the FOC, even assuming a potential recoding problem, does not harm Leavens in the manner claimed. No one is more familiar with

the conditions imposed by the MassDEP on the remediation project than Leavens, and the recording of the FOC, or the failure to record the FOC, does not affect his knowledge of the conditions and his ability to monitor compliance with the FOC. Recording requirements are generally intended to put the public on notice of certain matters pertaining to real property, and such a general purpose does not satisfy Leavens' burden to show that he personally is aggrieved.

B. Title Issue

Despite Leavens' lack of standing, the court reaches the merits of his claims as an alternative basis for the court's denial of his motion for judgment on the pleadings. However, as the court is confident that it has ruled correctly on the standing issue, it will not address these issues at length.

Leavens primary argument before the MassDEP and on appeal is that the USCG will not be able to meet the statutory and regulatory requirement that the FOC be recorded at the appropriate registry of deeds prior to commencement of work. More specifically, G. L. c. 131, § 40 (twentieth para.) provides in pertinent part: "No work proposed in any notice of intention shall be undertaken until the final order, determination or notification with respect to such work has been recorded in the registry of deeds, . . ." The Mass DEP regulations, 310 CMR 10.05(6)(g), also provide in pertinent part:

Prior to the commencement of any work permitted or required by the Final Order . . . the Order . . . shall be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property . . . Certification of recording shall be sent to the issuing authority on the form at the end of Form 5. If work is undertaken without the applicant first recording the Order, the issuing authority may issue an Enforcement Order (Form 9) or may itself record the Order of Conditions.

The court rules that the MassDEP's decision to issue the FOC despite the recording issues raised by Leavens is not based on an error of law, unsupported by substantial evidence, or an abuse of discretion. First, there is no dispute that the United States Government owns and controls the property subject to the project, and has done so for over two hundred years.³ The hearing officer received evidence from the USCG that title to almost all federal property is held in the name of the United States of America, no federal law or regulation requires the United States to record deeds to its property, most federal land is not recorded, and federal property routinely lacks any instrument of conveyance in agency files.⁴ Second, Leavens' contention

³The USCG, on behalf of the United States, claims title in the name of the United States of America from eminent domain records of 1796, but acknowledges that no order of taking or taking deed was ever recorded. "Ownership of the [lighthouse property] was vested in the United States in 1797." *Baker's Island Lighthouse Preservation Society, Inc. and Robert Leavens v. United States Dept. Of Interior, National Park Service, et al.*, 2006 U. S. Dist. Lexis 76408 (October 17, 2006).

⁴Obviously, the legislature and MassDEP did not have in mind when the applicable statute and regulation were enacted the possibility that an applicant for a FOC under the Massachusetts Wetlands Protection Act would be the United States Government and the property in question would not have or might not have a normal chain of title. It is hard for this court to believe that undisputed federal ownership of property for hundreds of years, under less than typical conveyance records, could preclude issuance of an otherwise appropriate FOC. This court rejects, as did the MassDEP,

that title and recording problems warrant denial of the project is misplaced and premature. Even assuming that the FOC must be recorded within the chain of title before work commences, the project has not yet begun. The USCG is not in violation of the statute or regulation at this time. Third, Leavens' argument will be mooted by filing the FOC within the chain of title before work commences, and there is no reason to anticipate that the USCG will not comply with that requirement before work commences. In this court's view, the MassDEP would have abused its discretion if it had refused to issue the FOC because of a speculative concern about a post-approval, pre-work condition. Fourth, the FOC is valid without being recorded at the appropriate registry, and the question will be, or perhaps will be, one of enforcement, not validity, of the FOC. The USCG and the anticipated successor in interest to the United States Government will be subject to the FOC, and the MassDEP will be fully able to conduct enforcement against any person or entity acquiring the property. The MassDEP adequately addressed the recording issue in its FOC by recommending that the FOC be referenced or recorded with the quit claim deed that will be created to memorialize the anticipated conveyance (after the remediation work is complete) to the Essex National Heritage Commission, and that the Essex National Heritage

Leavens' argument that "conditioning of the title is required to proceed. No recorded title, i.e. there can be no order of conditions."

Commission be provided a copy of the FOC.

C. Cleanup Standard Issue

Before the MassDEP, Leavens argued that the USCG should be held to a lower (more stringent) lead remediation standard applicable under certain Massachusetts law, rather than a higher standard specified in EPA cleanup standards. The hearing officer concluded that provisions related to the standard for lead remediation could not be adjudicated within the challenge to the FOC. Leavens has not appealed that ruling to this court.

D. Jeep Shed Issue


The jeep shed issue involves possible additional lead contamination on the lighthouse property that had not, at the time of the proceedings before the MassDEP, been investigated. The OOC required the USCG to investigate and seek approval as necessary for the jeep shed area, but allowed the rest of the project to proceed. The SOC removed the condition and made lead testing in certain untested areas (i.e., near the jeep shed) optional. Leavens challenged that condition before the MassDEP, insisting that the testing and approval (if necessary) be a mandatory condition. Prior to the hearing, that issue was resolved in Leavens' favor. The USCG and MassDEP agreed to use the mandatory OOC condition in the FOC. Thus, the jeep shed issue was not adjudicated by the MassDEP. Despite that, Leavens now argues that it was

error for the MassDEP to authorize a majority of the lead remediation project, but to require further testing and authorization (if necessary) of an additional, potentially contaminated area of the lighthouse property (i.e., the jeep shed area). That is, Leaven argues that it was error for the FOC to permit the remediation project to proceed in a piecemeal fashion, which is just another way of challenging the jeep shed issue that was resolved before the hearing below. Due to Leavens' failure to raise the issue before the MassDEP, this court will not address the issue as part of its Chapter 30A review of the FOC. *Matter of Cobb*, 445 Mass. 452, 477, 479 (2005); *Sugarman v. Board of Registration in Med.*, 422 Mass. 338, 347 (1996). Moreover, Leavens waived his right to challenge the additional testing condition/piecemeal approach by agreeing to the mandatory testing condition prior to the adjudicatory hearing. The additional testing condition on its face produces a piecemeal approach to the remediation project (assuming contamination is found), so Leavens can hardly now complain about a piecemeal approach that he agreed to.

ORDER

Leavens' motion for judgment on the pleadings is DENIED. Judgment of dismissal shall enter in both cases.

August 31, 2011


Timothy Q. Feeley
Associate Justice of the Superior Court

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# ESCV2010-00967

RE: Leavens v Massachusetts Department of Environmental Protection et al

TO: Louis M Dundin, Esquire
Mass Atty General's Office
Environmental Protection Div.
1 Ashburton Place
Boston, MA 02108

NOTICE OF JUDGMENT ENTRY

This is to notify you that a judgment in the above referenced action has been entered on the docket. A copy of the judgment is enclosed.

Dated at Salem, Massachusetts this 31st day of August,
2011.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY:.....
Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 744-5500 ext. 377

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# ESCV2010-00967

Robert Leavens
vs
Massachusetts Department of Environmental Protection,

JUDGMENT ON THE PLEADINGS

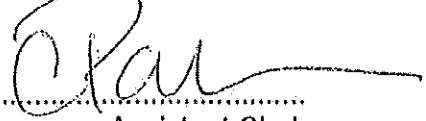
This action came on before the Court, Timothy Feeley, Justice, presiding, and the court having denied plaintiff's motion for judgment on the pleadings, and upon consideration thereof:

It is ORDERED and ADJUDGED:

That the complaint be and hereby is DISMISSED and the decision of Massachusetts Department of Environmental Protection is AFFIRMED.

Dated at Salem, Massachusetts this 31st day of August, 2011.

Thomas H. Driscoll Jr.,
Clerk of the Courts

By: 
Assistant Clerk

Copies mailed 08/31/2011