

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**September 8, 2023**

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In the Matter of  
Melanie Amir, Trustee

Consolidated with

In the Matter of  
Debra Coonan

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OADR Docket Numbers: WET-2023-008  
WET-2023-009

DEP File Nos. SDA  
MassDEP CERO  
Webster, MA

**RECOMMENDED FINAL DECISION**

Karen Bartholomew (“the Petitioner”) has filed these two consolidated appeals with the Office of Appeals and Dispute Resolution (“OADR”) of the Massachusetts Department of Environmental Protection (“Department”) challenging two Superseding Determinations of Applicability (“SDA”) that the Department’s Central Regional Office issued to Melanie Amir, in her capacity as Trustee,<sup>1</sup> and Debra Coonan<sup>2</sup> (“the Applicants”) on April 27, 2023, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00, *et seq.* (“Wetlands Regulations”).<sup>3</sup>

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<sup>1</sup> Ms. Amir is the Applicant in WET-2023-008.

<sup>2</sup> Ms. Coonan is the Applicant in WET-2023-009.

<sup>3</sup> The SDAs are Reviewable Decisions in a Wetlands Permit case within the meaning of the Wetlands Regulations that can be appealed to OADR. 310 CMR 10.04 and 10.05(7)(j).

The SDA to Ms. Amir ("Amir SDA") approved the installation of a seasonal dock at 24 Pleasant Point Road, Webster, Massachusetts, affirming the Negative Determination of Applicability of the Webster Conservation Commission ("Commission"). The SDA to Ms. Coonan ("Coonan SDA") permitted her to install a seasonal dock at 32 Pleasant Point Road, Webster, Massachusetts, reversing the Commission's Positive Determination of Applicability. The Department determined in each instance that the proposed project "is within areas subject to protection under the [MWWA], but will not remove, fill, dredge, or alter those areas [and therefore] said work does not require a Notice of Intent." The Petitioner disagrees with the Department's determinations and has brought these appeals seeking an order that the Applicants be required to prepare Land Court plans of their respective properties.

**I. Facts and Procedural History.**

These appeals both involve the proposed installation of seasonal docks at the Applicants' respective properties. The Petitioner's property abuts both of the Applicants' properties. Amir Appeal Notice, p. 1; Coonan Appeal Notice, p. 1.

**A. Amir's Determination of Applicability.**

On April 7, 2022, Ms. Amir filed with the Commission a Request for Determination of Applicability. Request, p. 4. Ms. Amir sought to install a seasonal aluminum stock boat dock at her property. Id. at pp. 5-6. The Commission issued a Negative Determination of Applicability on June 25, 2022. Amir SDA, p. 1.

On July 1, 2022, the Petitioner appealed the Commission's negative determination. Id. The Department conducted a site visit, id., and determined that to the extent that the Petitioner claimed that Ms. Amir lacked the property rights to install the dock, it lacked jurisdiction to render a decision on that issue. Id. at p. 2.

The Department concluded that "the work described in [Amir's Request for Determination of Applicability] is within the areas subject to protection under the [MWPA], but will not remove, fill, dredge, or alter those areas, therefore said work does not require a Notice of Intent." Id. at p. 2. The Department issued a Superseding Determination of Applicability on April 27, 2023, affirming the Commission's findings. Id. at p. 1. The Petitioner timely appealed to OADR. See Amir Appeal Notice.

**B. Coonan's Determination of Applicability.**

On April 22, 2022, Ms. Coonan filed with the Commission a Request for Determination of Applicability. Appeal Notice, p. 6. Ms. Coonan sought to install a seasonal aluminum stock boat dock at her property. Id. The Commission entered a decision conditionally finding "that the area described on the reference plan is an area subject to protection under the [Massachusetts Wetlands Protection Act]." Id. The Commission "voted to issue a Positive Determination of Applicability, because there was evidence that the land that the dock will be attached to is historic fill." Id. (citing Positive Determination of Applicability). The Commission requested "proof of ownership of the land or evidence of an easement to use the land." Id. (citing Positive Determination of Applicability).

On June 22, 2022, Ms. Coonan appealed the Commission's positive determination. Id. The Department conducted a site visit, id. at p. 7, and determined that "the work described in [Coonan's Request for Determination of Applicability] is within the areas subject to protection under the [MWPA], but will not remove, fill, dredge, or alter those areas. Therefore said work does not require a Notice of Intent." Id. The Department issued a Superseding Negative Determination of Applicability on April 27, 2023. Id. at p. 6. The Petitioner timely appealed to OADR. See Coonan Appeal Notice.

**C. Procedural History.**

Given the common issues and parties, on June 9, 2023, I entered an order consolidating Matter of Melanie Amir, Trustee, OADR Docket No. WET-2023-008, with Matter of Debra Coonan, OADR Docket No. WET-2023-009. On August 7, 2023, the Department filed a motion to dismiss the consolidated actions, arguing that the Appeal Notices in the two actions raise claims of property ownership over which OADR lacks jurisdiction. The Petitioner did not file an opposition to the motion to dismiss.

The Petitioner's Appeal Notice against Ms. Coonan raised, as an additional count, that Ms. Coonan had not filed her request for a Superseding Determination of Applicability to the Department within the 10-day period of 310 CMR 10.05(3)(c). I requested that Ms. Coonan and the Department respond specifically to this issue, which they did on August 21, 2023, providing affidavits and other evidence suggesting that Ms. Coonan received the Determination of Applicability ("DOA") after June 6, 2022, which would make the filing timely. On August 22, 2023, I issued the following order:

With respect to the claim in WET-2023-009 that Ms. Coonan's request to the Department to issue a Superseding Determination of Applicability was untimely, Ms. Coonan and the Department have provided evidence that Ms. Coonan did not receive the Determination of Applicability until after June 6, 2022, which would make the request for action timely. Pursuant to my authority under 310 CMR 10.05(7)(j)9.b. and 310 CMR 1.01(5)(a), I am treating the motion to dismiss on the timeliness issue as a motion for summary decision under 310 CMR 1.01(11)(f). The Petitioner is given until September 6, 2023, to submit "affidavits[] made on personal knowledge [setting] forth such facts as would be admissible in evidence in Massachusetts courts, and [showing] affirmatively that the affiant is competent to testify to the matters stated in the affidavit" to demonstrate whether there exists a genuine issue of material fact with respect to the timeliness issue. Id.

The Petitioner did not submit a response to this order.

## **II. Analysis.**

### **A. The Motion to Dismiss the property claims.**

#### **1. The applicable standard for a motion to dismiss.**

Under 310 CMR 1.01(11)(d)2., a party may seek dismissal of an appeal for failure to state a claim upon which relief can be granted. In the Matter of Chris Stasinis, Recommended Final Decision (December 5, 2011), 2011 MA ENV LEXIS 137, \*4, adopted as Final Decision (December 28, 2011), 2011 MA ENV LEXIS 136. "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. Id.; see 310 CMR 1.01(11)(d)2.; see Ginther v. Comm'r of Insurance, 427 Mass. 319, 322 (1998) ("we accept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true"); Schaer v. Brandeis Univ., 432 Mass. 474, 477-78 (2000) ("In evaluating a rule 12 (b)(6) motion, we . . . accept [the plaintiff's] factual allegations as true[,] [but] we do not accept legal conclusions cast in the form of factual allegations"). This standard mirrors that of Mass. R. Civ. P. 12(b)(6) in civil cases. Stasinis, 2011 MA ENV LEXIS 137 at \*4.

#### **2. The Department lacks authority to adjudicate questions of property ownership.**

It is long settled that the Department may not adjudicate a property dispute. Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. Ct. 623, 411 N.E. 2d 187 (1980). Jurisdiction over matters of title is granted only to the Superior Court, see G.L. c. 212, § 4, and Land Court. See G.L. c. 185, § 1. "The Department does not adjudicate property disputes and typically will accept a colorable claim of ownership as the basis for the submittal of a Notice of Intent." Matter of John Schindler, OADR Docket No. WET-2011-024 and 026, Recommended

Final Decision (Dec. 5, 2011), 2011 MA ENV LEXIS 135, \*7, Adopted as Final Decision (Dec. 27, 2011), 2011 MA ENV LEXIS 134.

**3. The Petitioner has failed to state a claim for which relief can be granted.**

As the procedural rule suggests, a petitioner must (1) state a claim for relief and (2) seek relief that the Department has the authority to grant. The Petitioner's claims fail on both counts.

First, the Petitioner argues with respect to Ms. Amir that the cove where her property is located "has a large volume and area of unlicensed fill...." Amir Appeal Notice, p. 1. Because of this, she asserts, Ms. Amir has essentially annexed part of Webster Lake, which was previously held by the Commonwealth. Accordingly, the Department was in error approving Ms. Amir's SOC because she does not have the right to the land where the dock will be built. The Petitioner alleges that "DEP raise[d] the issue of underlying land ownership" but concluded that those "aspects [fell] outside of their purview." *Id.* at p. 2. The Department therefore "narrowly focused on wetland impact, not" the ownership of the land and "sidestepp[ed] their responsibility to ensure that the applicant actually owned the property as implied...." *Id.* at pp. 2-3.

The Petitioner further alleges that Ms. Amir "ignored the law and appeal process and placed her unlicensed docks in the water." *Id.* at p. 3. She alleges that the placement of those docks violates the MWPA and "illegally impedes the public's right to public land, limits navigability within the small cove, negatively effects habitat and natural resources and divests the public of their vested protected rights held in trust by the Commonwealth." *Id.*

The Petitioner makes a similar argument with respect to Ms. Coonan. She asserts that Ms. Coonan is also the beneficiary of unlicensed filling and is claiming to own parts of the lake that properly belong to the Commonwealth. Coonan Appeal Notice, p. 1. Again, the Department was allegedly in error approving Ms. Coonan's SOC because she does not have the right to the land where the dock will be built. *Id.* at p. 2. She accuses Ms. Coonan of misleading the Department

by failing to adequately disclose that the Commonwealth has an ownership interest in the land.<sup>4</sup>

Id. This is not a claim that can be pursued in this forum.

Second, even if there was a claim arising under the WPA, the relief that the Petitioner requests is unavailable. In both of the consolidated matters, the Petitioner asks me to require Ms. Amir and Ms. Coonan to prepare Land Court plans to determine what lands are owned by the Applicants and what is owned by the Commonwealth. Even assuming that this would resolve the parties' dispute, I have no authority to issue or enforce such an order. See G.L. c. 131, § 40; 310 CMR 1.01. There is therefore no claim for which relief can be granted.

**B. The Motion for Summary Decision on the timeliness of the request for a Superseding Determination of Applicability.**

**1. The applicable standard for summary decision.**

310 CMR 1.01(11)(f) states, in relevant part,

Any party may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the adjudicatory appeal.... The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. A summary decision interlocutory in character may be made on any issue although there is a genuine controversy as to other issues. Summary decision, when appropriate, may be made against the moving party....

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that

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<sup>4</sup> The Petitioner skirts the line of decorum in her accusations that Attorney Lane in particular "purposely misrepresented property owned by the Commonwealth as property owned by his clients" and "has prior experience with filing applications that misrepresent property ownership." Petitioner Pre-Hearing Memorandum, p. 2. If such accusations are supported with substantial evidence, they deserve a full and fair hearing in the appropriate forum. Imputing fraudulent motives to Attorney Lane without evidence is an *ad hominem* attack that breaches decorum. See Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (Aug. 28, 2014), 2014 MA ENV LEXIS 76, \*40, Adopted as Final Decision (Date), 2014 MA ENV LEXIS 77. "Inappropriate argument and unsubstantiated statements [by a party] may infect an otherwise meritorious appeal so pervasively as to make it frivolous." Avery v. Steele, 414 Mass. 450, 456 (1992).

the affiant is competent to testify to the matters stated in the affidavit....

When a motion for summary decision is made and supported as provided in 310 CMR 1.01(11)(e), a party opposing the motion may not rest upon the mere allegations or denials of said party's pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.

This rule is "designed to avoid needless [evidentiary] adjudicatory hearings" in administrative appeals. In the Matter of SEMASS P'ship, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 MA ENV LEXIS 34, at 12, adopted by Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37; Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980) ("administrative summary judgment procedures" are appropriate to resolve administrative appeals without an adjudicatory hearing "when the papers or pleadings filed [in the case]... conclusively show... that [a] hearing can serve no useful purpose...").

The summary decision standard "mirrors the standard set forth in [Mass. R. Civ. P.] 56... governing [summary judgment motions in] civil suits in Massachusetts trial courts." SEMASS P'ship, 2013 MA ENV LEXIS 34, at 14. Thus, "[a] party seeking a summary decision must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." Id. at 14-15. "If the moving party meets this burden, the opposing party 'may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.'" Id.; 310 CMR 1.01(11)(f); cf. Mass. R. Civ. P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant). In deciding a motion for summary decision, all reasonable inferences are drawn against the non-moving party. Matter of Town of Hopkinton,



2011 MA ENV LEXIS 88, \*7 (citing King v. City of Boston, 71 Mass. App. Ct. 460 (2008), quoting Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996)).

## **2. The burden of proof.**

The Petitioner has the burden of proof in her challenge of the SDA. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). The Petitioner is required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted). See, e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004).

**3. The evidence, taken in the light most favorable to the Petitioner, establishes that Ms. Coonan received the Determination of Applicability after June 6, 2022.**

Under 310 CMR 10.05(3)(c),

Following a positive or negative Determination of Applicability, the identification of the scope of alternatives for work within the riverfront area, or the failure of a conservation commission to make a determination within 21 days, any person specified in 310 CMR 10.05(7) may, within ten days, request the Department to issue a Superseding Determination of Applicability pursuant to the procedures set forth in 310 CMR 10.05(7).

"All time periods of ten days or less [are] computed using business days only." 310 CMR 10.05(1). "The timeliness of a request for Department action, including an intervention by the Department, is jurisdictional so that failure to act during the ten-day period typically warrants dismissal of the request or a lack of jurisdiction to intervene." Matter of M.G. Hall Company, OADR Docket No. WET-2012-023, Recommended Final Decision (May 7, 2013), 2013 MA ENV LEXIS 105, \*15, Adopted as Final Decision (Mar. 19, 2014), 2014 MA ENV LEXIS 16.

On June 6, 2022, the Commission entered a Positive Order of Determination and requested additional information from Ms. Coonan. Coonan Appeal Notice, p. 3. On June 22, 2022, she filed her request for a Superseding Order of Determination. Id. The Positive Order of Determination stated that it was "issued to the applicant and delivered as follows: by hand delivery on 6/6/2022." Coonan Appeal Notice, Exhibit 5, p. 4.

Here, June 20, 2022, was a state holiday observing Juneteenth. M.G.L. c. 4, § 7 ("Legal holiday' shall include... June nineteenth..., or the day following when [the day] occurs on Sunday..."). Ten business days from June 6 was therefore June 21, 2022. The Request for Superseding Order of Applicability was not filed until June 22, 2022. If Ms. Coonan received the Determination of Applicability on June 6, 2022, her filing would have been one day late, and the Department would have lacked jurisdiction to issue a Superseding Order of Applicability.

That said, the undisputed evidence demonstrates that Ms. Coonan did not receive the DOA on June 6, 2022. The minutes of the Commission meeting from June 6, 2022, show that the meeting was called to order at 5:33 p.m.. Department Position Memo., Ex. 1. The Chapter 91 license pertaining to 32 Point Pleasant Road was discussed in this meeting and a vote was held on the DOA. Id. The meeting adjourned at 10:25 p.m.. Id. It is highly unlikely that the DOA was hand-delivered after 10 p.m. at night, and Ms. Coonan's affidavit confirms this. She testifies that the DOA "was not made available [to her] until about June 20, 2022, when the [Commission] staff person called me to tell me it was ready to be picked up." Aff. Coonan, ¶ 4 (Aug. 21, 2023). Her filing was therefore timely.

Despite having been given an opportunity to oppose Ms. Coonan's testimony, the Petitioner has not submitted any evidence that raises a genuine issue of material fact on this issue. The Applicant and the Department are therefore entitled to summary decision.

### **III. Conclusion.**

The Petitioner has failed to state a claim for which relief can be granted on the issue of the Applicant's property rights. Ms. Coonan has also demonstrated that there is no genuine issue of material fact whether she received the DOA after June 6, 2022, and that her request to the Department for action was therefore timely. She therefore succeeds as a matter of law. I recommend that the Commissioner issue a Final Decision affirming the Superseding Determinations of Applicability and directing the Department to prepare a Final Determination of Applicability consistent with the Final Decision for the Commissioner's signature.



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Patrick M. Groulx  
Presiding Officer

**Date:** September 8, 2023

### **NOTICE OF RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the 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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