

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

December 4, 2019

In the Matter of
Michael Gleason

OADR Docket No. WET-2017-019
DEP File No.: 135-0257
Clinton, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, the Petitioner John C. Schumacher challenges a decision of the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) denying his request for a Superseding Order of Conditions (“SOC”) 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 Petitioner made the SOC Request seeking to overturn an Order of Conditions (“OOC”) that the Town of Clinton’s Conservation Commission (“Clinton CC”) had issued to Michael Gleason (“the Applicant”) authorizing the Applicant’s re-construction project involving a three family home (“the proposed

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Project”) at 1204 Main Street in Clinton, Massachusetts (“1204 Main Street”).

The Wetlands Regulations at 310 CMR 10.05(7)(a) authorize certain parties to request an SOC from the Department to challenge a local conservation commission’s OOC, including:

- (1) “the owner of the land on which the project is located, if the owner is not the applicant,” 310 CMR 10.05(7)(a)2;
- (2) “any person aggrieved by [the OOC],” 310 CMR 10.05(7)(a)(3); and
- (3) “any owner of land abutting the land on which the work is to be done,” 310 CMR 10.05(7)(a)4.

The party’s SOC Request must, as required by 310 CMR 10.05(7)(c), “state clearly and concisely the [party’s] objections to the [challenged OOC], . . . [and] how the [OOC] is inconsistent with [the Wetlands Regulations] and does not contribute to the protection of the interests identified in [the MWPA].”

Here, the Petitioner made his SOC Request to the Department pursuant to: (1) 310 CMR 10.05(7)(a)2, claiming ownership of 1204 Main Street, the site of the proposed Project; and (2) 310 CMR 10.05(7)(a)4, claiming ownership of abutting real property located south of 1204 Main Street known as “the Mill Pond belonging to Fuller Parcel” (“the MPF Parcel”).

Petitioner’s SOC Request (July 6, 2017). The Department denied the Petitioner’s SOC Request for lack of standing to make the request pursuant to 310 CMR 10.05(7)(a)2 and 7(a)4) because its “review of information available at the Clinton and Lancaster Assessors’ Offices did not show that [the Petitioner was] among the owners of [1204 Main Street] . . . or any of the abutting properties.”¹ Department’s Determination Letter (September 18, 2017), at p. 1. The Department made no determination at that time whether the Petitioner’s SOC Request complied with the

¹ As discussed in detail below, at pp. 12-13, the Department does not resolve property ownership disputes when it reviews an SOC request, but instead, determines whether the party making the SOC request has demonstrated a colorable claim of title to the real property that the party claims to own.

requirements of 310 CMR 10.05(7)(c) discussed above. However, on the Petitioner's appeal here before the Office of Appeals and Dispute Resolution ("OADR") challenging the Department's denial of his SOC Request, the Department contends for the first time that it properly denied the SOC Request for the additional reason that the SOC Request failed to comply with the requirements of 310 CMR 10.05(7)(c) because it failed to set forth the Petitioner's specific objections to the Clinton CC's OOC and how it violated the MWPA and the Wetlands Regulations. Department's Motion for Summary Decision, at pp. 2-3.

In challenging the Department's denial of his SOC Request, the Petitioner contends that the Department erred in denying his SOC Request pursuant to 310 CMR 10.05(7)(a)2 and 7(a)4 by claiming again that he owns 1204 Main Street and the abutting MPF Parcel. Petitioner's Appeal Notice (October 3, 2017), at pp. 1-2. He also has expanded his claim of abutter status pursuant to 310 CMR 10.05(7)(a)4 by claiming for the first time ownership of real property located west of 1204 Main Street ("the Railroad Parcel") that he purportedly purchased from the Boston and Maine Corporation ("B & M") in January 2006. *Id.*, at p. 2. He also asserts for the first time that he has standing to make the SOC request pursuant to 310 CMR 10.05(7)(a)3 as "[a] person aggrieved" by the Clinton CC's OOC approving the proposed Project. *Id.*, at p. 2. As for compliance with the requirements of 310 CMR 10.05(7)(c), the Petitioner, while not specifically citing the Regulation, contends for the first time that the proposed Project will cause 1204 Main Street and the abutting MPF Parcel to suffer "[the] disturbance of vegetation" and "run-off and drainage [problems]." *Id.*, at p. 2.

Currently pending for my ruling are the parties' Cross-Motions for Summary Decision pursuant to 310 CMR 1.01(11)(f) regarding whether the Department properly denied the Petitioner's SOC Request for lack of standing to make the Request and/or failure to comply with

the requirements of 310 CMR 10.05(7)(c) as discussed above. The Petitioner seeks Summary Decision in his favor, contending that he owns 1204 Main Street and the abutting MPF Parcel and Railroad Parcel, and as such, he has standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)2 and 7(a)4, respectively. He also asserts for first time, as noted above, that he also has standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)3 as “[a] person aggrieved” by the Clinton CC’s OOC approving the proposed Project. In response, the Applicant and the Department seek Summary Decision in their favor, contending that the Department properly denied the Petitioner’s SOC Request for lack of standing and for failure to comply with the requirements of 310 CMR 10.05(7)(c).

As discussed in detail below, based on the undisputed material facts and as a matter of law, the Applicant and the Department are entitled to Summary Decision in their favor because the Department properly denied the Petitioner’s SOC Request for the following reasons.

First, the Petitioner lacks standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)2 because he failed to demonstrate that he has a colorable claim of title to 1204 Main Street.

Second, the Petitioner lacks standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)4 because he failed to demonstrate that he has a colorable claim of title to the abutting MPF Parcel and Railroad Parcel.

Third, the Petitioner lacks standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)3 because he failed to demonstrate that he is “[a] person aggrieved” by the Clinton CC’s OOC approving the proposed Project.

Lastly, the Department properly denied the Petitioner’s SOC Request because he failed to comply with the requirements of 310 CMR 10.05(7)(c) by failing to “state clearly and concisely

[his] objections to the [Clinton CC's OOC], . . . [and] how the [OOC] is inconsistent with [the Wetlands Regulations] and does not contribute to the protection of the interests identified in [the MWPA].”

Accordingly, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's denial of the Petitioner's SOC Request by granting the Applicant's and the Department's respective Motions for Summary Decision and denying the Petitioner's Motion for Summary Decision.

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 alter² 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;

² 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.

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 the Clinton CC approved the proposed Project pursuant to the MWPA and the Wetlands Regulations and the Department essentially affirmed the approval when the Department declined to consider the Petitioner’s SOC request seeking to overturn the approval.

If a party is authorized to make an SOC request to the Department pursuant to 310 CMR 10.05(7)(a) and the request contains the information required by 310 CMR 10.05(7)(c) as discussed above, “[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. “[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. However, the Presiding Officer adjudicating an administrative appeal challenging a Department determination “[is] not bound by MassDEP’s prior orders or statements [in the case], [but] instead [is] responsible . . . for independently adjudicating [the] appeal[l] and making a recommendation to MassDEP’s Commissioner [for final resolution of the appeal] that is consistent with and in the best interest of the [MWPA] and . . . [the Wetlands] Regulations” Soursourian, 2014 MA ENV LEXIS 49, at 34-36; Zarette, 2018 MA ENV LEXIS 7, at 16-17; In the Matter of Brian Corey, OADR Docket No. WET-2016-023, Recommended Final Decision (February 28, 2018), 2018 MA ENV LEXIS 10, at 58, adopted as Final Decision (March 15, 2018), 2018 MA ENV LEXIS 9; In the Matter of Christopher N. Colby, OADR Docket No. WET-2016-012,

Recommended Remand Decision (October 12, 2018), 2018 MA ENV LEXIS 63, at 26-27, adopted as Remand Decision (October 26, 2018), 2018 MA ENV LEXIS 62.

DISCUSSION

I. THE SUMMARY DECISION STANDARD OF 310 CMR 1.01(11)(f)

“[The] summary decision [rule in 310 CMR 1.01(11)(f)] is . . . designed to avoid needless [evidentiary] adjudicatory hearings” in administrative appeals. In the Matter of SEMASS Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 MA ENV LEXIS 34, at 12, adopted as Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37; In the Matter of Lowe's Home Centers, Inc., OADR Docket No. WET-2009-013, Recommended Final Decision (June 19, 2009), 16 DEPR 115, 116 (2009), adopted as Final Decision (June 30, 2009); 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 rule provides in relevant part that:

[a]ny party [to an administrative appeal] may move with or without supporting affidavits³ for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the . . . 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. . . .

““This standard mirrors the standard set forth in Rule 56’ . . . governing [summary judgment

³ Under 310 CMR 1.01(11)(f), “[affivadits] [s]upporting [or] opposing [a motion for summary decision] 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 the affiant is competent to testify to the matters stated in the affidavit.”

motions in] civil suits in Massachusetts trial courts.” SEMASS, supra, 2013 MA ENV LEXIS 34, at 14; Lowe’s, supra, 16 DEPR 116; In the Matter of Roland Couillard, OADR Docket No. WET-2008-035, Recommended Final Decision, at 4 (July 11, 2008), adopted as Final Decision (August 8, 2008).

In sum, “[a] party seeking a summary decision [pursuant to 310 CMR 1.01(11)(f)] 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.” SEMASS, supra, 2013 MA ENV LEXIS 34, 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); Lowe’s, supra, 16 DEPR 116; In the Matter of William and Helen Drohan, OADR Docket No. 1995-083, Final Decision, 1996 MA ENV LEXIS 67, at 4 (March 1, 1996); cf. Mass. R. Civ. P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007) (same). As discussed below, the Petitioner has failed to make the required demonstration for Summary Decision in his favor, but the Applicant and the Department have made the required demonstration for Summary Decision in their favor.

II. THE DEPARTMENT PROPERLY DENIED THE PETITIONER’S SOC REQUEST FOR LACK OF STANDING TO MAKE THE REQUEST

A. The Jurisdictional Nature of Standing

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 (“Webster Ventures II”), Recommended Final Decision (June 3, 2016),

2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 18-19, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); Marchese v. Boston Redevelopment Authority, 483 Mass. 149, 156 (2019); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”); Webster Ventures II, 2016 MA ENV LEXIS 27, at 19. “Where a [party] lacks standing to bring an action, the [tribunal] lacks [subject matter] jurisdiction . . . and must therefore dismiss the case.” Marchese, 483 Mass. at 156.

B. Based On The Undisputed Material Facts And As A Matter Of Law, The Petitioner Lacks Standing To Make The SOC Request Pursuant To 310 CMR 10.05(7)(a)2 Because He Failed To Demonstrate That He Has A Colorable Claim Of Title To 1204 Main Street

As previously discussed above, the provisions of 310 CMR 10.05(7)(a)2 authorize a party to request an SOC from the Department to challenge a local conservation commission’s OOC if the party is “the owner of the land on which the project is located, if the [party] is not the applicant” of the project. When reviewing SOC Requests made pursuant to 310 CMR 10.05(7)(a)2, the Department does not resolve property ownership disputes, but instead, determines whether the party making the SOC request has demonstrated a colorable claim of title to the real property that the party claims to own. In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 2012), 2012 MA ENV

LEXIS 97, at 31, n.20, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99, citing, Tindley v. Department of Environmental Protection, 10 Mass. App. Ct. 623, 626-27 (1980); In the Matter of John Schindler, OADR Docket Nos. WET-2011-024 and 026, Recommended Final Decision (December 5, 2011), 2011 MA ENV LEXIS 135, at 7, 13, 37-38, adopted as Final Decision (December 27, 2011). The same holds true if an SOC Request is made by an abutter to the project site pursuant to 310 CMR (7)(a)4. A party demonstrates a colorable claim of title to real property by presenting competent evidence demonstrating that the party may have an ownership interest in the real property. Town of Brewster, 2012 MA ENV LEXIS 97, at 31-40 (party failed to demonstrate colorable claim of title to the real property on which the proposed project would take place because “his cross-examination testimony repudiat[ed] his prior claim that [a] . . . deed evidenc[ed] his ownership of [the] real property” and his other documentary evidence, consisting of a certified abutters list and a municipal real property tax assessor’s card, failed to contain any indicia of a possible ownership interest in the real property); Compare, John Schindler, 2011 MA ENV LEXIS 135, at 7, 13, 37-38 (project proponent demonstrated a colorable claim of title to the real property on which the project would take place by presenting competent testimonial and documentary evidence supporting the claim).

Here, in moving for Summary Decision on his claim that he has standing to make his SOC Request pursuant to 310 CMR 10.05(7)(a)2 as the owner of 1204 Main Street, the Petitioner failed to present any competent evidence demonstrating that he may have an ownership interest in 1204 Main Street. All the Petitioner did was to submit a “Verified Motion for Summary Decision” signed by him under the pains and penalties of perjury setting forth his view of the purported title history of 1204 Main Street. Petitioner’s Verified Motion for Summary Decision, at p. 1 (¶¶ 1, 3); p. 2 (¶¶ 5-7). Undisputedly, the Petitioner is not a real

estate title expert and he failed to present an Affidavit from a real estate title expert supporting his claim or demonstrating that he may have an ownership interest in 1204 Main Street.

Moreover, the Petitioner did not submit any official or other documentation evidencing an ownership interest that could possibly support a colorable claim of title to 1204 Main Street.

In contrast, the Applicant, through the Affidavit of R. Craig Reynolds (“Mr. Reynolds”), a real estate conveyancing attorney with more than three decades of experience in the field, including determining title to real property, presented undisputed admissible evidence demonstrating that as a matter of law the Petitioner lacks any colorable claim of title to 1204 Main Street. Mr. Reynolds’ Affidavit, ¶¶ 1-6. This admissible evidence includes the following previous court judgments rendered against the Petitioner and filings with the Worcester District Registry of Deeds (“the Registry”) demonstrating that “[the Petitioner] previously own[ed] [1204 Main Street], but lost it to foreclosure in 2009”:

- (1) a September 16, 2009 Final Judgment of Foreclosure issued by the Massachusetts Land Court in Case No. 09-Misc-396093 against the Petitioner and in favor of the US Bank National Association, which divested the Petitioner of title to 1204 Main Street and was recorded on March 8, 2010 in the Registry in Book 45537, Page 273 (“the 2009 Mortgage Foreclosure Judgment”);
- (2) a January 13, 2011 Final Judgment of the Worcester Superior Court in Case No. 1085CV01947 (“the 2011 Superior Court Suit”) against the Petitioner and in favor of the US Bank National Association, which dismissed the Petitioner’s suit against the Bank challenging the 2009 Mortgage Foreclosure Judgment;
- (3) a May 25, 2012 Summary Process Judgment of the Worcester Housing Court in Case No. 10H85SP001207 issued against the Petitioner and in favor of the US Bank National Association, which ordered the Petitioner’s eviction from 1204 Main Street (“the 2012 Summary Process Judgment”);
- (4) a March 12, 2014 judgment of Massachusetts Supreme Judicial Court in

U.S Bank National Association v. Schumacher, 467 Mass. 421 (2014), which affirmed the 2012 Summary Process Judgment against the Petitioner (“the 2014 SJC Decision”); and

- (5) a September 8, 2015 Quitclaim Deed recorded on September 9, 2015 in the Registry in Book 54273, Page 172 in which the US Bank National Association conveyed 1204 Main Street to the Applicant for \$53,000.00 (“the 2015 Deed”).

Id., ¶¶ 4-6.

In his Affidavit, Mr. Reynolds also presented undisputed admissible evidence that in 2017, the Petitioner filed suit against the Applicant in Worcester Superior Court in Case No. 1785CV01503 (“the 2017 Superior Court Suit”) seeking to regain title to 1204 Main Street and did not prevail. Id. The Worcester Superior Court’s docket in the case, which is a public record and admissible evidence, indicates that on September 27, 2017, a Worcester Superior Court Judge denied the Petitioner’s Motion for a Preliminary Injunction prohibiting the Applicant from “destroy[ing], demolish[ing] and/or raz[ing] the [existing] residential building at [1204 Main Street] . . . and to prevent him from trespassing and encroaching upon” real property abutting 1204 Main Street “certain real estate parcels.”

In denying the Petitioner’s Motion for a Preliminary Injunction, the Worcester Superior Court Judge ruled that the Petitioner “ha[d] failed to demonstrate that he ha[d] a likelihood of success on the merits in th[e] case, particularly given the extended (and ongoing) litigation in other courts on the same or related issues.” Worcester Superior Court Docket Entry (September 27, 2017). Earlier this year, on January 23, 2019, the Worcester Superior Court entered Final Judgment against the Petitioner in the 2017 Superior Court Suit by dismissing the Suit. Worcester Superior Court Docket Entry (January 23, 2019). Although the Petitioner has

appealed the dismissal to the Massachusetts Appeals Court,⁴ he does not have a reasonable expectation of prevailing on appeal given the previous court judgments and Registry filings discussed above, which demonstrate as a matter of law that the Petitioner lacks a colorable claim of title to 1204 Main Street. In short, the Applicant and the Department are entitled to Summary Decision in their favor on their claim that the Petitioner lacks standing to make his SOC Request pursuant to 310 CMR 10.05(7)(a)2 because he lacks a colorable claim of title to 1204 Main Street.

C. Based On The Undisputed Material Facts And As A Matter Of Law, The Petitioner Lacks Standing To Make The SOC Request Pursuant To 310 CMR 10.05(7)(a)4 Because The Petitioner Failed To Demonstrate That He Has A Colorable Claim Of Title To The Abutting MPF Parcel And Railroad Parcel

1. The MPF Parcel

In his SOC Request to the Department, the Petitioner claimed ownership of the MPF Parcel through inheritance from his late cousin, Edna H. Schumacher (“Edna”). Petitioner’s SOC Request (July 6, 2017). He repeated the same claim in his Appeal Notice here challenging the Department’s denial of his SOC Request. Petitioner’s Appeal Notice (October 3, 2017), at pp. 1-2. In his Appeal Notice, the Petitioner asserted that he “is the lawful owner of the [MPF Parcel] . . . inherited . . . by him in 2004 under a Last Will and Testament executed by his late cousin [Edna].” *Id.* In moving for Summary Decision on this claim, however, he did not present any competent evidence demonstrating that he inherited or possibly inherited the MPF Parcel from Edna. Petitioner’s Verified Motion for Summary Decision, at p. 1 (¶¶ 2-4); p. 3 (¶ 3). He

⁴ Schumacher v. Gleason, Docket No. 2019-P-0673.

merely repeated the allegations of his SOC Request and Appeal Notice that he inherited the MPF Parcel from Edna. Id.

While it is true that the Petitioner provided copies of certain documents purportedly filed with the Worcester Probate and Family Court in Case No. 04P1116EP1 in connection with the probating of Edna's Last Will and Testament ("Will"), these documents do not contain any indicia of a possible ownership interest of the Petitioner in the MPF Parcel. These documents are purported copies of:

- (1) Edna's Will, executed by her on April 12, 2000, in which she "bequeath [to the Petitioner] all of [her] estate," including all real property she had an ownership interest at the time of her death, but did not specifically identify any of her real property interests;
- (2) the Petitioner's April 20, 2004 Petition to Probate Edna's Will, which did not specifically identify any real property interests that Edna held at the time of her death on March 6, 2019; and
- (3) the Bond Without Sureties that the Petitioner filed with the April 20, 2004 Petition to Probate Edna's Will, which estimated the value of Edna's real estate interests at the time of her death as "0" (zero dollars).

The Petitioner also failed to demonstrate that he has colorable claim of title to the MPF Parcel by failing to substantiate the allegations of his SOC Request and Appeal Notice here challenging the Department's denial of his SOC Request regarding the location of the MPF Parcel's boundary line. In his SOC Request, the Petitioner alleged that that "[t]he southern boundaries of the [proposed Project] work site are incorrectly represented by the Applicant [in his Plan of Record for the Project and] [i]f allowed to go forward[,] [the] proposed [Project] activities will cross the title boundary [of 1204 Main Street] onto [the MPF Parcel] . . . that is not owned by the Applicant[,] . . . but rather[,] . . . by [the Petitioner]." In his Appeal Notice, the Petitioner asserted that "[he] is the lawful owner of the abutting . . . [MPF Parcel], which is

immediately to the south of 1204 Main Street . . . and upon which [the Proposed Project will] . . . invade, trespass[,] and encroach upon [the MPF Parcel].” Appeal Notice, at p. 1. However, in moving for Summary Decision in his favor, he failed to support these claims with any admissible evidence, including affidavits from a real estate title expert or professional land surveyor establishing the MPF Parcel’s boundary line as he claims. Instead, he merely rested on the allegations of his SOC Request and Appeal Notice as discussed above that he owns the MPF Parcel and that the Applicant misrepresented the property’s boundary line in his Plan of Record for the proposed Project. Petitioner’s Verified Motion for Summary Decision, at p. 1 (¶¶ 2, 4); p. 5 (¶ 3).

In response to the Petitioner’s unsupported claims, the Applicant and the Department presented unrefuted admissible evidence in their Summary Decision papers demonstrating that contrary to the Petitioner’s assertions, the proposed Project activities will take place solely within the boundaries of 1204 Main Street and will not cross over to the MPF Parcel as alleged by the Petitioner.

The Applicant’s unrefuted admissible evidence is the Affidavit testimony of Mr. Reynolds regarding the boundary of the MPF Parcel. Specifically, Mr. Reynolds stated in his Affidavit that he “examined the title to [that property and 1204 Main Street,] as well as assessor maps, surveyor maps[,] and available public record[s] regarding the same [parcels]” and determined the following:

- (1) “[t]he southern boundary in the legal description of 1204 Main Street is ‘Mill Pond belonging to Fuller,’” Mr. Reynolds’ Affidavit, ¶ 7;
- (2) “[a]t one time, many years ago, there was a mill pond in that location[,] [which] no longer exists, but there is evidence of the location of the brook that fed the pond,” *Id.*, ¶ 8; and

- (3) the Applicant’s land surveyor determined the line of the brook in question “as being the southern boundary of [1204 Main Street]” based “on the [SJC’s] 1875 decision in Phinney v. Watts (75 Mass. 269), which held, in simple terms, that a [real] property boundary that consists of water boundary changes with the water line.” Id.

Mr. Reynolds’ statements concerning the mill pond that once existed south of 1204 Main Street were corroborated by Gary Dulmaine (“Mr. Dulmaine”), a senior Wetlands Analyst in the Wetlands Program in the Department’s Central Regional Office, who submitted an Affidavit in support of the Department’s Motion for Summary Decision. Mr. Dulmaine’s Affidavit, ¶¶ 1-6.⁵ In his Affidavit, Mr. Dulmaine stated that “a mill pond known as Fullers Mill Pond was drained many years ago” and based on the site views he conducted of 1204 Main Street in August 2017 and May 2018, “[t]here is no pond area on or abutting [1204 Main Street].” Id., ¶¶ 5-6.

In sum, the Petitioner has failed to meet his burden on Summary Decision to demonstrate that he has a colorable claim of title to the MPF Parcel, and accordingly, the Applicant and the Department are entitled to Summary Decision in their favor on this claim.

2. The Railroad Parcel

The Railroad Parcel is a 6,000 square foot parcel of land that abuts 1204 Main Street to the west. Mr. Reynolds’ Affidavit, ¶ 10. As discussed previously above, the Petitioner claims for the first time here on appeal before OADR that he also has abutter status pursuant to 310 CMR 10.05(7)(a)4 as the purported owner of the Railroad Parcel. Petitioner’s Appeal Notice, at pp. 1-2. In seeking Summary Decision on this claim, the Petitioner submitted a document purporting to be a copy of a January 6, 2006 deed in which B & M conveyed the Railroad Parcel to the Petitioner for \$7,500.00. See copy of document entitled “Release Deed” attached to

⁵ Mr. Dulmaine has served in the Department for nearly 30 years: since 1991. Mr. Dulmaine’s Affidavit, ¶ 1. He has significant experience in wetlands permitting under the MWPA and the Wetlands Regulations. Id., ¶ 2.

Petitioner's Appeal Notice; Petitioner's Verified Motion for Summary Decision, at p. 2 (¶ 8); Mr. Reynolds' Affidavit, ¶¶ 10-11. As a matter of law, this document fails to demonstrate that the Petitioner has a colorable claim of title to the Railroad Parcel for the following reasons.

First, the document, which is marked "COPY", has not been authenticated as a true copy of an original deed by B & M conveying the Railroad Parcel to the Petitioner. In support of his Motion for Summary Decision, the Petitioner failed to present any Affidavits from a duly authorized representative of B & M confirming that the document is a true copy of such a deed and corroborating the Petitioner's representations that B & M provided "two [identical original] deeds [that] were signed by all parties" for B & M's conveyance of the Railroad Parcel to the Petitioner, with "one [of the original] deed[s] . . . kept by [B & M] and [the other original deed] delivered to the Petitioner." Petitioner's Verified Motion for Summary Decision, at p. 2 (¶ 8). All the Petitioner presented was his representation that "[he] cannot currently locate his original deed" and an inadmissible hearsay statement by him claiming that after speaking with an unidentified individual, "he has confirmed that [B & M's] original deed is still in [its] possession and available for inspection and certified copying, etc. upon inquiry . . . [to] Darlene Ligor, Assistant to the Sr. V.P. Real Estate Department" at Pan Am Systems, Inc. located at "1700 Iron Horse Park, N. Billerica, MA" Id.

Even if the document at issue is a true copy of an original deed by B & M conveying the Railroad Parcel to the Petitioner, the deed still does not demonstrate that the Petitioner has a colorable claim of title to the Railroad Parcel and the attendant abutter status pursuant to 310 CMR 10.05(7)(a)4 because: (1) Mr. Reynolds presented undisputed admissible evidence in his Affidavit on behalf of the Applicant that the deed was never recorded with the Registry, Mr.

Reynolds' Affidavit, ¶¶ 11-12; and (2) as an unrecorded deed, its enforceability by the Petitioner is limited by G.L. c. 183, § 4 to only certain parties, not including the Applicant.

Under G.L. c. 183, § 4 an unrecorded deed for the conveyance real property “shall not be valid as against any person except”:

- (1) the grantor in the unrecorded deed;
- (2) the grantor's heirs and devisees; and
- (3) any person who received a subsequent deed from the grantor conveying the same real property conveyed by the unrecorded deed if the person “ha[d] actual notice of [the unrecorded deed]” when the person received the subsequent deed from the grantor.

Allen v. Allen, 86 Mass. App. Ct. 295, 300-02 (2014) (brother could not enforce an unrecorded deed against his sister that their mother had provided to brother because the sister did not have actual knowledge of that deed prior to the mother providing the sister a deed conveying the same real property that the mother had conveyed to the brother in the unrecorded deed). Here, the Petitioner cannot enforce against the Applicant, the unrecorded deed that the Petitioner purportedly received from B & M for the Railroad Property because, undisputedly, the Applicant is neither: (1) the grantor in the unrecorded deed (B & M is); nor (2) the grantor's (B & M's) heir or devisee; nor (3) a person claiming title to the Railroad Property. Instead, undisputedly, the Applicant is a person attempting to re-develop his abutting real property at 1204 Main Street pursuant to the Clinton CC's OOC. In sum, the Petitioner has failed to demonstrate that he has a colorable claim of title to the Railroad Parcel, and, accordingly, the Applicant and the Department are entitled to Summary Decision in their favor on their claim that the Petitioner

lacks any such colorable claim of title.

C. Based On The Undisputed Material Facts And As A Matter Of Law, The Petitioner Lacks Standing To Make The SOC Request Pursuant To 310 CMR 10.05(7)(a)3 Because The Petitioner Failed To Demonstrate That He Is “[A] Person Aggrieved” By The Clinton CC’s OOC Approving The Proposed Project

On appeal here to OADR, the Petitioner has attempted to salvage his SOC Request by asserting a new claim that he has standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)3 as “[a] person aggrieved” by the Clinton CC’s OOC approving the proposed Project. Petitioner’s Appeal Notice, at p. 2. Specifically, the Petitioner asserts in his Appeal Notice here challenging the Department’s denial of his SOC Request that he “is indeed a Person Aggrieved by the [Clinton CC’s OOC] and development plans proposed by [the Applicant for 1204 Main Street]” because of “[the] disturbance of vegetation at [1204 Main Street and the MPF Parcel]” and “run-off and drainage [the Applicant’s] proposed development plans would create upon both the 1204 Main Street . . . property and also upon the [MPF Parcel].” *Id.* As discussed below, based on the undisputed material facts and as a matter of law, the Petitioner has failed to demonstrate that he has standing to make his SOC Request pursuant to 310 CMR 10.05(7)(a)3 as “[a] person aggrieved” by the Clinton CC’s OOC approving the proposed Project.

The Wetlands Regulations at 310 CMR 10.04 define a “person aggrieved” 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 [MWPA]. . . .

“A ‘person aggrieved’ as that term is used in the MWPA must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of

particular importance, the right or interest asserted must be one that the statute . . . intends to protect.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; Vacirca, 2017 MA ENV LEXIS 22, at 28-29; In the Matter of Ronald and Lois Enos, OADR Docket No. WET -2012-019, 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision, 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, OADR Docket No. WET -2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

To demonstrate standing, “the [party] must put forth *credible evidence* to substantiate [the party’s] allegations.” Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005) (emphasis supplied); Webster Ventures I, 2015 MA ENV LEXIS 14, at 16-17; Vacirca, 2017 MA ENV LEXIS 22, at 30-31; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29. This “credible evidence” standard to demonstrate standing “has both a quantitative and a qualitative component.” Butler, 63 Mass. App. Ct. at 441. Specifically:

[q]uantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the [party seeking to establish standing] has made[,] . . . [and] *[q]ualitatively*, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the [challenged governmental] action. Conjecture, personal opinion, and hypothesis are therefore insufficient [to establish standing] [If] the judge

determines that the evidence is both quantitatively and qualitatively sufficient . . . [to] establis[h] standing, the inquiry [regarding whether the party has standing] stops [and the party is not] required to persuade the judge that [the party's] claims of particularized injury are, more likely than not, true.

Id., at 441-42 (emphasis supplied).

To summarize, in order for him to obtain Summary Decision in his favor on his claim that he has standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)3 as a “person aggrieved” by the Clinton CC’s OOC approving the proposed Project, the Petitioner was required to put forth a minimum quantum of specific factual and undisputed admissible evidence that qualitatively a reasonable person could rely upon to conclude that the proposed Project will or might cause the Petitioner 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 interest protected by the MWPA and the Wetlands Regulations. Butler, 63 Mass. App. Ct. at 441-42; 310 CMR 10.04; See also Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. The Petitioner failed to meet this threshold for several reasons.

First, the Petitioner failed to demonstrate that the Clinton CC’s OOC approving the proposed Project has impacted a private right, a private property interest, or a private legal interest he holds because, as discussed above, he failed to demonstrate that he has a colorable claim of title to 1204 Main Street and the abutting MPF Parcel, the real properties he claims will suffer “[the] disturbance of vegetation” and “run-off and drainage [problems]” as a result of the proposed Project. Petitioner’s Appeal Notice, at p. 2. He offered no explanation of how these purported adverse wetlands impacts violate the MWPA and the Wetlands Regulations, which, as

discussed in the next section below, he was also required to provide in order to demonstrate compliance with 310 CMR 10.05(7)(c). Additionally, these claims of adverse wetlands impacts are just mere allegations because they are not supported by an Affidavit from a Wetlands Expert. Lastly, the Petitioner failed to present any admissible evidence demonstrating that these adverse wetlands impacts are unique to him: that they are different either in kind or magnitude from any injury, if any, that the general public could suffer from the proposed Project and which is within the scope of the public interest protected by the MWPA and the Wetlands Regulations. Accordingly, the Applicant and the Department are entitled to Summary Decision in their favor that the Petitioner has failed to demonstrate that he has standing to make his SOC Request pursuant to 310 CMR 10.05(7)(a)3 as a “person aggrieved” by the Clinton CC’s OOC approving the proposed Project.

III. THE DEPARTMENT PROPERLY DENIED THE PETITIONER’S SOC REQUEST FOR FAILURE TO COMPLY WITH THE PROVISIONS OF 310 CMR 10.05(7)(c)

As discussed above, 310 CMR 10.05(7)(c) requires all SOC Requests to “state clearly and concisely the [Requestor’s] objections to the [challenged OOC], . . . [and] how the [OOC] is inconsistent with [the Wetlands Regulations] and does not contribute to the protection of the interests identified in [the MWPA].” Here, the Petitioner’s July 2017 SOC Request to the Department failed to comply with 310 CMR 10.05(7)(c) because the Request failed to “state clearly and concisely [his] objections to the [Clinton CC’s OOC approving the proposed Project], . . . [and] how the [OOC] is inconsistent with [the Wetlands Regulations] and does not contribute to the protection of the interests identified in [the MWPA].” Indeed, the Petitioner’s SOC Request made no assertion that the Clinton CC’s OOC approving the proposed Project was detrimental to protected wetlands in violation of the MWPA and the Wetlands Regulations, but

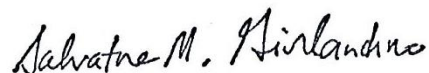
instead, focused exclusively on his claims that he owned 1204 Main Street and the abutting MPF Parcel, and as such, he had standing to make the SOC Request pursuant to 310 CMR 10.05(7)(a)2 and (7)(a)4, respectively.

On appeal here before OADR, the Petitioner has attempted to establish compliance with the requirements of 310 CMR 10.05(7)(c) by asserting for the first time in connection with his new standing claim pursuant to 310 CMR 10.05(7)(a)3 as discussed in the previous section, that the proposed Project will cause 1204 Main Street and the abutting MPF Parcel to suffer “[the] disturbance of vegetation” and “run-off and drainage [problems].” Petitioner’s Appeal Notice, at p. 2. However, these new claims of adverse wetlands impacts do not establish the Petitioner’s compliance with the requirements of 310 CMR 10.05(7)(c) because, as discussed in the previous section above, the Petitioner has offered no explanation of how these purported adverse wetlands impacts violate the MWPA and the Wetlands Regulations. Also, as previously discussed above, these claims of adverse wetlands impacts are the Petitioner’s mere allegations and not supported by an Affidavit from a Wetlands Expert. In sum, the Applicant and the Department are entitled to Summary Decision in their favor on their claim that the Department properly denied the Petitioner’s SOC Request for failure to comply with 310 CMR 10.05(7)(c).

CONCLUSION

For all the reasons discussed in detail above, I recommend that that the Department’s Commissioner issue a Final Decision affirming the Department’s denial of the Petitioner’s SOC Request by granting the Applicant’s and the Department’s respective Motions for Summary

Decision and denying the Petitioner's Motion for Summary Decision.



Date: December 4, 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.

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