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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

October 8, 2021

In the Matter of
Northeast Cultivation LLC

OADR Docket No. WET-2021-032
Pittsfield, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

Caitlin Pemble (“Petitioner”) filed this appeal concerning the real property at 997 Pecks Road, Pittsfield, Massachusetts (“the Property”). The Petitioner challenges a Superseding Determination of Applicability (“SDA”) that the Massachusetts Department of Environmental Protection’s Western Regional Office (“MassDEP”) issued to the Applicant, Northeast Cultivation, LLC, pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00.

The SDA determined that Applicant’s agricultural project to cultivate Cannabis (“the Project”) is not subject to the Wetlands Protection Act’s agricultural exemption under 310 CMR 10.04 because it is not proposed on land in agricultural use. The SDA did determine, however, that the Project involves cultivation of an agricultural commodity under 310 CMR 10.04 which constitutes “new agriculture” under 310 CMR 10.58(2)(a)3.c; that finding reduces the extent of the Riverfront Area to 100 feet away from the river’s mean annual high-water line, not the

normal 200 feet. The SDA also determined that several proposed activities constitute minor exempt activities, which the Petitioner does not contest.

Ironically, if the Petitioner succeeded in challenging the SDA determination that the agricultural exemption did not apply, that could leave a Final Determination of Applicability less protective of the resource areas, specifically the river, because the Applicant could potentially place the project within 100 feet of the river. The Applicant does not contest the SDA finding that the project does not meet the agricultural exemption for land in agricultural use.

Soon after the appeal was filed, MassDEP filed a Motion to Dismiss for lack of standing. The Applicant later joined MassDEP in moving to dismiss for lack of standing. A few days later at the Pre-Hearing Conference that I held with all the parties I discussed the Petitioner's failure thus far to show standing and stated that I would be issuing an order to require that showing.

I also determined that the Petitioner's Notice of Claim was too ambiguous, especially here where there are technical wetlands issues. Consequently, on September 2, 2021, I issued an Order for Petitioner to Provide a More Definite Statement and to Show Cause why Appeal Should Not be Dismissed ("Order").

I stated in the Order that the Notice of Claim did not sufficiently allege a claim for relief in compliance with 310 CMR 10.05(7)(j)2.b.v and 310 CMR 1.01(6). The former provision requires the following: "a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision." 310 CMR 10.05(7)(j)2.b.v.

With respect to standing, I explained in the Order that standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975). 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"); 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").

The provision at 310 CMR 10.05(7)(j)2. specifies who may have standing to appeal a Reviewable Decision, such as an SDA, and abutters are not included, unless, like others, they show aggrievement. "Person Aggrieved means any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40. . . ." 310 CMR 10.04 (Person Aggrieved).

Thus, to show standing the Order required the Petitioner to demonstrate: (1) that the Applicant's project might possibly adversely impact the *interests of the Act*; and (2) *those* adverse impacts would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of the Petitioner. Matter of Digital Realty Trust, Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013); Matter of Plum Island, LLC, Docket No. WET 2019-012, Recommended Final Decision (July 25, 2019), adopted by Final Decision (August 12, 2019). The impact to the asserted right or interest must be one that the Wetlands Protection Act is designed to protect. Id.

"[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." *Id.* (quoting Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998)). It is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Collins, *supra*. "Rather, [when standing is challenged] the plaintiff must put forth credible *evidence* to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." *Id.* (quoting Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996) (emphasis added)).

For all the above reasons, the Order established September 21, 2021, as the deadline by which the Petitioner was required to: (1) file a written, signed statement, pursuant to 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j), that specifically, clearly and concisely set forth the facts and claims (including each element of the claims) which are grounds for the appeal, the relief sought, and the Petitioner's standing; and (2) file written credible evidence from a "competent source" in support of her claims and standing, pursuant to 310 CMR 1.01(11)(b). That provision required the Petitioner to "file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken." I explained that the evidence must be signed and authenticated under the penalties of perjury and indicate the witness' qualifications and background.

Finally, I stated that the failure to comply with the above requirements would result in dismissal of this appeal, absent a showing of good cause.¹ For the reasons discussed below, I recommend that this appeal be dismissed.

¹ At the Pre-Hearing Conference I also questioned whether as a matter of law the Petitioner could pursue her claim to essentially require the Applicant to apply for an agricultural exemption for its project, something the Petitioner has deliberately chosen not to do.

DISCUSSION

On September 17, 2021, the Petitioner filed a request to extend the September 21, 2021, deadline. She represented that she needed an additional 30 days to comply with the Order. I partially allowed the request, extending the deadline until September 30, 2021.

On September 30, 2021, the Petitioner filed her response to the Order. In that response, the Petitioner failed to comply with the Order in several respects: First, she continued to press an ambiguous and internally contradictory claim. She contended that even though the Applicant did not dispute MassDEP's determination that the project was not proposed for land in agricultural use and thus was not an exempt agricultural project, she believed it was an "undisputed fact" that it was land in agricultural use. In fact, despite the Applicant's position, she asserted that the Pittsfield Conservation Commission's determination that it was land in agricultural use was correct and should be controlling. I had previously explained in the Conference that this appeal was a de novo proceeding, not one to review the Conservation Commission's determination, which has no binding effect in an SDA appeal.

The Petitioner's internally contradictory position culminated with the relief she requested: "The relief I seek is that the local decision be allowed to stand, still allowing the project to continue with a Positive Determination that reinstating the 200' setback from the Mean Annual High-Water Mark and fully protecting the entire resource area without agricultural exemption as the WPA specified." The irony is that the relief the Petitioner seeks here—"fully protecting the entire resource area without agricultural exemption"—could be substantially undermined by her position that the Property is land in agricultural use and thus exempt from the Wetland Protection Act.

In sum, the Petitioner failed to comply with the Order's requirement that she provide a more definite statement of her claim. For this reason alone, the appeal should be dismissed for

the failure to comply with the Order and to state a claim upon which relief can be granted. See 310 CMR 1.01(5)(a).

Second, the appeal should also be dismissed because the Petitioner failed to provide evidence from a competent source to meet her burden of going forward, as required by the Order and 310 CMR 1.01(11)(b).

Last, the appeal should be dismissed because the Petitioner failed to demonstrate standing. Her only assertion of standing is that there is an intermittent stream on the Property that eventually flows through her property. There is no credible evidence, particularly evidence from a competent source, showing how the Project could possibly lead to an adverse impact to the resource areas on the Property that could possibly impact the Petitioner's property. The continuous thread of irony is that if the Petitioner were to succeed with her claim that the Project is subject to an agricultural exemption because it is on land in agricultural use, that could allow work within the inner one-hundred feet of the Riverfront area, leaving her property less protected than the current SDA, which primarily only allows limited work for approximately two months of the year in the outer 100 feet of the two-hundred-foot Riverfront Area.

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision adopting this Recommended Final Decision and dismissing the appeal.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the 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 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 shall file a

motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: October 8, 2021



Timothy M. Jones
Presiding Officer

SERVICE LIST

IN THE MATTER OF:

Northeast Cultivation LLC

Docket No. WET-2021-032

**File No. SDA
Pittsfield, MA**

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