

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

July 25, 2019

In the Matter of
Plum Island, LLC.

OADR Docket No. WET-2019-012
Newburyport, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

Robert A. Germinara (“Petitioner”) filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”) concerning the real property at 77, 79a, 79 Parker Street, Newburyport, Massachusetts (“the Property”). The Petitioner challenges the Massachusetts Department of Environmental Protection’s Northeast Regional Office’s (“MassDEP”) denial of his request for a Superseding Order of Conditions (“SOC”). The dismissal was issued and this appeal was filed pursuant to the Wetlands Regulations, 310 CMR 10.00, and the Wetlands Protection Act, G.L. c. 131 § 40. MassDEP dismissed the appeal on the grounds that the Petitioner did not have standing as an aggrieved person. See 310 CMR 10.05(7) and 310 CMR 10.04 (aggrieved). Plum Island, LLC is the Applicant and Property owner seeking approval of its commercial development project for a brewery expansion.

After considering the entire administrative record and the applicable law, I recommend that MassDEP’s Commissioner issue a Final Decision affirming the denial of the SOC request and allowing the Applicant’s and MassDEP’s motions to dismiss the appeal because the

Petitioner: (1) has not demonstrated standing; (2) failed to comply with an Order to Show Cause and Order for More Definite statement; and (3) failed to state a claim upon which relief may be granted.

DISCUSSION

Upon receipt of this appeal, I determined that there were significant deficiencies with the Petitioner's Notice of Claim. I therefore issued the Order to Show Cause and Order for More Definite Statement ("Order"). In the Order, I stated that the Petitioner's: "Notice of Claim is very ambiguous and does 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.

I found that the Petitioner's Notice of Claim does not comply with this provision. Instead, it is a two-page, single-spaced statement of: the Petitioner's alleged legal interests in the Property; conclusory allegations of violations of the Wetlands Regulations and Wetlands Act; conclusory allegations of violations of local ordinances; and alleged ethical violations by the Applicant and its consultants.

I also determined that the Petitioner had thus far also not shown standing pursuant to 310 CMR 10.05(7)(j)2.b.iii. and 310 CMR 10.04 (aggrieved). And last, I determined that the Petitioner's purported claims appear to be based upon speculation and conjecture with respect to technical issues under the Wetlands Protection Act and the Regulations. See Order.

Therefore, I required the Petitioner 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, and the relief sought, and (2) file with OADR written credible evidence from a “competent source” in support of his claims, 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.” The evidence was to be signed and authenticated under the penalties of perjury and indicate the witness’ qualifications and background. See Order.

The Petitioner responded to the Order, asserting that he had adequately alleged a claim and he had standing. The Applicant and MassDEP also responded, both requesting that I dismiss the appeal, arguing that the Petitioner did not demonstrate standing and did not comply with the Order. After reviewing the parties’ pleadings, the administrative record, and the applicable law I conclude that the Applicant’s and MassDEP’s requests to dismiss the appeal should be allowed.

The Petitioner Failed To Demonstrate Standing. To have standing under 310 CMR 10.05(7)(j)2.b.iii, the Petitioner was required to include in his Notice of Claim “sufficient written facts to demonstrate status as a person aggrieved.” See also 310 CMR 1.01(6)(b) (setting forth requirements for filing notice of claim). “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. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.” 310 CMR 10.04.

In particular, the Petitioner must demonstrate that the Applicant's project (1) might possibly 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 Town of Southbridge Department of Public Works, Docket No. WET-2009-022, Recommended Final Decision, (September 18, 2009), adopted by Final Decision (October 14, 2009). The impact to the asserted right or interest must be one that the Wetlands Protection Act is designed to protect. Id.; Matter of Lepore, Recommended Final Decision (September 2, 2004), adopted by Final Decision (December 3, 2004); Matter of Whouley, Docket No. 99-087, Final Decision (May 16, 2000). "[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998). "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." Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996).

The Petitioner has failed as a matter of law to meet the standing threshold. The Petitioner's only alleged basis for standing is that he is a plaintiff in a Massachusetts Superior Court case in which he alleges an ownership interest in 77 Parker Street, where some of the work will allegedly occur. The Petitioner failed to disclose that the Superior Court Judge determined that the Petitioner had no ownership interest in the Property. That decision was appealed to the Massachusetts Court of Appeals, where it remains pending. See Findings of Fact, Rulings of Law and Order for Entry of Separate and Final Judgment after Trial Before the Court, Essex

Superior Court, Civ. Action No. 1477CV00058 (May 13, 2019) (“Superior Court Decision”). In sum, the Petitioner failed to demonstrate he holds a cognizable legal interest in the Property; his allegations of an interest and his belief that the Superior Court Decision will be overturned on appeal are too speculative to support a claim of standing. Any claim that the project should not proceed until the property rights litigation is resolved should be brought where the adjudication of property disputes is appropriate and where the Petitioner could seek an injunction, not in this forum, where adjudication of such disputes is barred. Tindley v. Dep't of Env'tl Quality Eng., 10 Mass. App. Ct. 623, 411 N.E.2d 187 (1980); Matter of Beckman, Docket No. WET 2018-013, Recommended Final Decision (May 22, 2019), adopted by Final Decision (June 18, 2019) (petitioner’s claim of ownership to land that was pending in Massachusetts Land Court did not demonstrate ownership interest to support standing).

The Petitioner Failed to Comply with The Order. Because Petitioner’s claim of aggrievement was conclusory, ambiguous, and premised upon a scientific and technical assertion that wetlands interests would be impaired by the project, the Order required the Petitioner to file with OADR written credible evidence from a “competent source” in support of his claims, 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.” The evidence was to be signed and authenticated under the penalties of perjury and indicate the witness’ qualifications and background. The Order explained in detail who is considered to be a competent source: A “competent source” is a witness who has sufficient expertise to render testimony on the technical issues on appeal. “The crucial issue, in determining whether a witness is qualified to give an expert opinion, is 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. 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); 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); Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003)(insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned).

I stated in the Order that the “failure to comply with this Order may result in dismissal of this appeal, absent a showing of good cause.” The Petitioner failed without good cause to comply with the requirement that he file evidence from a competent source, and thus his appeal should be dismissed. See 310 CMR 1.01(3)(e), 1.01(10), 1.01(11)(b); see Matter of Tucard, LLC, Docket No. 2009-076, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010); Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

The Notice of Claim Fails to State a Claim Upon Which Relief May be Granted. The appeal should also be dismissed because the Notice of Claim did not comply with 310 CMR 1.01(11)(b) because it was “so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought . . .” 310 CMR 1.01(11)(b). see Matter of Gormally, Docket No. 2003-037, Recommended Final Decision (November 4, 2003), adopted by

Final Decision (November 19, 2003); Matter of Symes, Docket No. 2002-054, Decision and Order on Restated Claims, 9 DEPR 155 (June 4, 2002); Matter of Cormier Construction Co., Decision and Order on Motion to Dismiss, Docket No. 93-071 (November 23, 1993); Simmons v. Abruzzo, 49 F.3d 83, 86 (2nd Cir. 1995)(complaint should be dismissed where it is “so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised”); Green v. Massachusetts, 108 F.R.D. 217, 218 (D. Mass. 1985) (similar statement of the law). The Petitioner’s response to the Order did not remedy those defects. Indeed, the Petitioner’s ambiguous claims vary from alleged ethical and legal violations by the Applicant and consultants; to alleged impacts on the “Red Tailed Hawk and other Wildlife Species”; to past allegedly unlawful cutting of trees on the Property; and to a conclusory statement that the Applicant’s project will allegedly alter drainage and wetlands.

CONCLUSION

For all the above reasons, I find that the motions to dismiss have merit and should be allowed. As a consequence, I recommend that MassDEP’s Commissioner issue a Final Decision affirming the denial of the Petitioner’s SOC request.

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: July 25, 2019

A handwritten signature in black ink, appearing to read 'T. Jones', written over a horizontal line.

Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Plum Island, LLC.

Docket No. WET-2019-012

File No. 051-1004
Ashland

Representative

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July 25, 2019