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PROPOSED DEBARMENT OF KEVIN FLAHERTY AND FLAHERTY EXCAVATION AND CONTRACTING, LLC

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APPENDIX A-1

DECISIONS/RULINGS

Debarment Hearings (M.G.L. c. 29, §29F)

On March 11, 2010 MassDOT, acting through its Highway Administrator, Luisa Paiewonsky, notified Flaherty that it intended to debar Flaherty "from bidding on and being awarded any public contract from any public agency of the Commonwealth of Massachusetts" on the ground of Flaherty's conviction for the crimes of presenting a false claim to a government agency (G.L. c. 266, s. 67B) and larceny over $250 (G.L. c. 266, s.30(1)), crimes included within G.L. c. 29, s. 29F(c)(1).

On March 24, 2010 Flaherty, through counsel, demanded a hearing on the intended debarment, contending "as far as my clients are concerned, no valid suspension is in effect as a result of the correspondence dated June 23, 2009 and March 11, 2010." Flaherty contended that the "alleged 'suspension' " of June 23, 2009 was "procedurally defective in numerous respects."

On April 14, 2010 MassDOT through counsel denied any procedural defects and notified Flaherty that it "will continue to enforce the suspension pending resolution of the debarment proceedings."

On April 29, 2010 this office notified the parties that a hearing would be held.[3] On June 4, 2010 MassDOT sent Flaherty a formal notice of hearing pursuant to G.L. c.30A. The hearing date was continued from time to time by agreement to July 15, 2010.

Between April 29, 2010 and continuing to the present, MassDOT has agreed to produce, and has in fact produced, documents in its possession relating to MassDOT's previous decisions concerning debarment under G.L. c.20, s.29F.

On May 12, 2010 MassDOT moved for summary decision under 801 C.M.R. 1.01(7)(h). On June 23, 2010, Flaherty opposed the motion for summary decision.

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[3] The notice stated that the hearing would be held pursuant to Section 29F under the administrative procedure set forth in G.L. c. 30A (Chapter 30A) and the rules set forth in 801 C.M.R. The parties stipulated that the hearing shall be conducted under the formal procedure of Chapter 30A.

DISCUSSION

A motion for summary decision is appropriate under 801 C.M.R. 1.01(7)(h) where there is no genuine issue of fact relating to all or part of a claim and where a party is entitled to prevail as a matter of law.

MassDOT's motion contends that there is no genuine issue of fact and that the documents attached to the motion provide facts that adequately support Flaherty's debarment under G.L. c. 29, s.29F(c). MassDOT's motion is supported by 18 exhibits, among which are Flaherty's indictment, the verdict slips from his criminal trial and sentencing memoranda. The motion's attachments also provide the relevant administrative record of this matter, including the June 23, 2009 suspension letter, relevant correspondence between the parties and press releases of the Attorney General. This record as a whole constitutes overwhelming, substantial evidence that Flaherty was indicted and convicted of crimes that G.L. c.29, s. 29F(c)(1) specifies as grounds for disbarment as a matter of law.

Flaherty opposed MassDOT's motion for summary decision. Its opposition offers no evidence to contest any factual assertion made in MassDOT's motion; it did not offer any affirmative evidence of a mitigating circumstance. Flaherty does not contest that Kevin Flaherty has been convicted of crimes that G.L. c. 29, s.29F(c)(1) specifies are grounds for debarment as a matter of law.

Flaherty opposes MassDOT's motion by raising procedural issues that it contends show that MassDOT violated G.L. c.29, s.29F. Its arguments are without merit.

Flaherty first contends that June 23, 2009 notice of suspension purports to be an emergency suspension but that no emergency order of suspension was signed by the

secretary or the commissioner and is thus invalid. The emergency suspension was proper. The secretary may act through his designees. See G.L. c.29, s.29F(a). MassDOT's chief engineer is a proper designee of the secretary for matters relating to the performance of public contracts. See Section 5.0 of the Standard Specification of Highways and Bridges. The chief engineer properly relied on the fact that Flaherty was indicted and convicted of crimes specified in G.L. c. 29, s.29F(c)(1) to immediately suspend Flaherty from public work and terminate his contracts with MassDOT.

Flaherty next contends that MassDOT's notice of suspension did not notify Flaherty of his supposed right to respond or request a hearing. Such notice was not required. G.L. c. 29, s. 29F(d) does not provide for a hearing if a suspension is based upon an indictment, which a fortiori plainly includes a conviction based upon an indictment. No further determination by MassDOT is required where suspension is based upon an indictment or a conviction of a felony specified under G.L. c. 29, s.29F(c)(1).

Flaherty also argues that the suspension violates G.L. c.29, s.29F(d) because it did not specify a time period and "was clearly intended, by its express terms, to be either permanent in nature or, at least, indefinite." MassDOT's suspension was not intended to last more than 12 months and was not indefinite. On March 11, 2010 MassDOT gave notice to Flaherty that it intended to begin debarment proceedings, 8 months after the June 23, 2009 suspension.[4]

Flaherty finally contends that a summary decision is not appropriate since it does not take into consideration "all the mitigating facts and circumstances." Flaherty's

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[4] The June 23, 2009 suspension was lawful even if exceeded 12 months since the criminal proceeding against Kevin Flaherty could have and in fact did result in a conviction of an offense listed in G.L. c.29, s.29F(c)(1).

opposition asserted no mitigating facts; its opposition is devoid of any suggestion that such circumstances exist. Flaherty will have an opportunity to adduce facts constituting mitigating circumstances to determine the appropriate term of his debarment at the hearing to be held on July 15, 2010.

Flaherty's procedural objections are all infected by an overriding flaw: he has neither alleged nor shown any prejudice that resulted from any MassDOT's action. MassDOT clearly acted in the public interest when it immediately suspended Flaherty after it discovered Flaherty had been convicted of felonies related to public contracting. The government was authorized to immediately suspend Flaherty without a hearing and it did so. To insist that Flaherty receive a notice that informed him of a right to a hearing when he had no such right does not constitute prejudice. Flaherty knew that MassDOT has suspended him on June 23, 2009 but never then raised the complained of defects to MassDOT. Nowhere does Flaherty explain when or why he was prejudiced by any official MassDOT action under G.L. c.29, s. 29F.

Based on MassDOT's uncontested submissions, I find the following facts constitute substantial evidence that prove that Kevin Flaherty should be debarred under G.L. c.29, s.29F as a matter of law.

(1) On June 29, 2007 Kevin Flaherty was indicted for among other things the crimes of (i) larceny over $250 and (ii) presentation of a false claim.

(2) On June 2, 2009 Flaherty was found guilty by a jury and convicted of felony larceny and the presentation of a false claim.

(3) On June 23, 2009, the secretary of MassDOT, acting through his designee Frank Tramontozzi, MassDOT's chief engineer, lawfully suspended Flaherty by letter

notifying him that he was forthwith prohibited from performing work on highway construction projects and that his snow and ice control contracts were terminated.

(4) On March 11, 2010, MassDOT notified Flaherty of its intent to debar Flaherty from bidding on and being awarded any public contract from any public agency of the Commonwealth of Massachusetts.

(5) On June 4, 2010 MassDOT notified Flaherty that a formal adjudicatory hearing would be held to determine whether MassDOT should uphold Flaherty's suspension and whether it should debar Flaherty pursuant to G.L. c. 20, s.29F.

CONCLUSION

I conclude that the evidence shows as a matter of law that debarment should be imposed upon Kevin Flaherty. This ruling constitutes a tentative decision within the meaning of 801 C.M.R. 1.01 (11)(c). With respect to the term of debarment, I conclude that Flaherty has not had the opportunity to adduce evidence to show mitigating circumstances concerning the term of debarment. See G.L. c.29, s.29F(g). Accordingly, I grant that part of MassDOT's motion for summary decision that seeks a finding that Flaherty should be debarred. I also conclude that a hearing should be held on the question of the appropriate length of Flaherty's debarment. It is ORDERED that the parties appear on July 15, 2010 at 10:00 a.m. to be heard on the issue of the length of Flaherty's debarment.

____
Stephen H. Clark
Administrative Law Judge
MassDOT

Dated: July 12, 2010

MEMORANDUM OF DECISION
ON MASSDOT'S MOTION TO QUASH SUBPOENA

MassDOT moved pursuant to G.L. c. 30A, s.12(4) and 801 C.M.R. 1.01(10)(g) to quash and vacate two subpoenas served one week before the scheduled hearing under G.L. c. 29, s.29F on the debarment of Kevin Flaherty (Flaherty) from public contracting work. The subpoenas seek testimony of Luisa Paiewonsky, MassDOT Highway Administrator (Paiewonsky) and Monica Conyngham, MassDOT General Counsel (Conyngham) and the production of the following documents, to wit: "copies of any and all files of suspensions or debarments that you have been involved with in the past five (5) years."

MassDOT argues, among other things, that the subpoenas should be quashed because (1) they are unreasonable and oppressive; (2) seek improper testimony that inquires into the mental process of the administrator (Paiewonsky) or (3) would violate the attorney-client privilege (Conyngham).

Flaherty responds that (1) inquiry into the mental processes of the administrative decision maker is appropriate here since no findings of fact were made; and (2) MassDOT violated G.L. c.29, s.29F in bad faith.[1]

DISCUSSION

On July 12, 2010, I ruled that summary decision should be granted to MassDOT on its motion to disbar Flaherty based on documents that provided substantial evidence that Flaherty was indicted and convicted of felony larceny and presenting a false claim. I ruled that such offences are by statute grounds for debarment as a matter of law. See

[1] The parties also dispute whether the subpoenas were lawfully issued. I find that they were. See G.L. c. 30A, s. 12(3).

G.L. c. 29, s.29F(c)(1). I also ruled that a hearing should be held on July 15, 2010 at 10:00 a.m. on MassDOT's proposed term of debarment so that Flaherty may present evidence of mitigating circumstances, if any. See G.L. c. 29, s.29F(g). In light of that ruling the only issue remaining in this proceeding is the term of the debarment to be imposed.

The subpoenas of Paiewonsky and Conyngham should be quashed as both are oppressive and unreasonable. MassDOT correctly points out, and Flaherty concedes, that neither official may be required to testify about the mental process of decision making engaged in by either public official relating to Flaherty's debarment or the term thereof, or the mental process engaged in on past debarment cases under G.L. c.29, s.29F.[2] Conyngham may not be compelled to testify concerning her legal opinions, or her recommendations or determinations relating to past or current suspensions and debarments because such attorney communications are not subject to disclosure. See Suffolk Constr. Co. v. Division of Capital Asset Management, 449 Mass. 444 (2007). Flaherty does not argue that either official has any testimony to offer from personal knowledge that is relevant to any issue yet be decided.

The subpoena of documents is likewise oppressive. The subpoena seeks documents relating to the terms of debarments imposed by MassDOT. MassDOT has in good faith been engaged on a search for such records since April 9, 2010, when it voluntarily agreed to produce the same or did so pursuant to Flaherty's public records

[2] Flaherty contends that an exception that the rule applies in this case since "at the time" MassDOT "purportedly suspended" Flaherty "no findings of fact were made." The record shows otherwise. MassDOT's June 23, 2009 emergency suspension letter states the factual findings on which MassDOT suspended Flaherty from performing public work: "This decision is based on your recent conviction for larceny and presentation of false claims in connection with your work as a municipal public works employee."

requests. MassDOT has in fact produced and delivered documents responsive to the subpoenas from Flaherty, thereby making any production burdensome, repetitious and duplicative. Insofar as Flaherty's subpoenas seeks to expand by two years on the eve of hearing the scope of its own discovery and public records requests made to MassDOT in April, 2010 and thereafter, the subpoenas unreasonable and oppressive.

I conclude that both the Paiewonsky and Conyngham subpoenas are overly burdensome, unreasonable and oppressive. MassDOT's motion to quash and vacate the subpoenas is ALLOWED.

____

Stephen H. Clark
Administrative Law Judge
MassDOT

Dated: July 12, 2010

The Debarment Statute intends that the government be able to initiate a debarment proceeding without first suspending a subcontractor if it so chooses.[5] It is structured so that suspension and debarment is each a distinct remedy. Under Subsection 29F(d) a suspension may take place without a hearing upon indictment for the offenses specified in G.L. c.29, s.29F(c)(1). In the absence of a suspension the government may initiate debarment by following the procedures set forth in Subsection 29F(e). As well, the statute permits the government to avail itself of each remedy, *seriatim*, as here.

Flaherty points to no language in the Debarment Statute that suggests the government is required to suspend a contractor before it initiates a debarment proceeding. No such language exists. Nothing in G.L. c.29, s.29F limits when the government may bring a debarment action--except the requirement under Subsection 29F(e) that it give prior notice of its intent to debar. That MassDOT did.[6]

Flaherty's arguments are without merit. The motion to dismiss is DENIED.

____

Stephen H. Clark
Administrative Law Judge

Dated: August 6, 2010

[5] "If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period." Subsection 29F(e). The plain statutory language demonstrates that the Debarment Statute contemplates that debarment may proceed in the absence of a prior suspension.

[6] Flaherty incorrectly contends his constitutional rights were violated because of alleged defects in the June 23, 2009 suspension notice. By adhering to Subsection 29F(d) and suspending Flaherty without a hearing for two felony convictions MassDOT did not violate Flaherty's constitutional rights. "The minimum requirements of due process are notice and an opportunity for hearing appropriate to the nature of the case." Transco Security, Inc. v. Freeman 639 F.2d 318, 321 (6th Cir.1981). In this case, the suspension notice cited his convictions; and the March 11, 2010 Notice of his debarment hearing informed Flaherty of his statutory right to a formal adjudicatory hearing. Due process does not require more.

DEVAL L. PATRICK
GOVERNOR
TIMOTHY P. MURRAY
LT. GOVERNOR
JEFFREY B. MULLAN
SECRETARY & CEO

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Scott F. Gleason, Esq.
Gleason Law Offices, P.C.
163 Merrimack Street
Haverhill, Massachusetts 01830

Kevin Flaherty
2 Strawberry Lane
Haverhill, Massachusetts 01835

Charles D. Rennick, Esq.
Legal Counsel
Massachusetts Department of Transportation
10 Park Plaza, Suite 3170
Boston, Massachusetts 02116

RE: PROPOSED DEBARMENT OF KEVIN FLAHER TY AND FLAHERTY EXCAVATION AND CONTRACTING, LLC PURSUANT TO G.L. c. 29, s. 29F

Dear Sirs:

Enclosed please find the following:

1. Notice of Decision by the Presiding Officer; and
2. Decision by the Presiding Officer and attachments.

Very truly yours,

____
Lisa Harol, Administrator
Office of the Administrative Law Judge

DATE: August 19, 2010

DEVAL L. PATRICK
GOVERNOR
TIMOTHY P. MURRAY
LT. GOVERNOR
JEFFREY B. MULLAN
SECRETARY & CEO

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Kevin Flaherty
Scott F. Gleason, Esq.
Charles D. Rennick, Esq.

cc: Jeffrey B. Mullan, Secretary & CEO MassDOT
Luisa Paiewonsky, Commissioner MassDOT
Frank Tramontozzi, Chief Engineer MassDOT
Monica Conyngham, Esq., General Counsel MassDOT

Date: August 19, 2010

Re: Proposed Debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC pursuant to G.L. c. 29, s. 29F

NOTICE OF DECISION BY THE PRESIDING OFFICER

Notice is hereby given pursuant to G.L. c. 30A, s.11(8) of the Decision by the Presiding Officer, in the matter of the proposed debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC. The Decision is in writing and stated on the record. The parties have been notified by registered mail, or by in hand delivery.

The Decision of the Presiding Officer has been filed on August 19, 2010 with the Secretary of the Massachusetts Department of Transportation (Agency).

The Decision of the Presiding Officer is an initial decision pursuant to 801 CMR s. 1.01 (11)(b) and a tentative decision pursuant to 801 CMR s. 1.01(11)(c).

Pursuant to 801 CMR s. 1.01(11)(c)(1), the Parties shall have the opportunity to file written objections to the tentative decision with the Agency which may be accompanied by supporting briefs. The Parties shall have 30 days from the filing of the tentative decision or the transcript corrections under 801 CMR 1.01(10(i)(2), whichever occurs last, to file written objections. Parties may file responses to objections within 20 days of receipt of a copy of the objections. The Agency may order or allow the parties to argue orally. A Party requesting oral argument shall file the request with the party's written objections or response.

Pursuant to 801 CMR s. 1.01(11)(c)(2), the Agency may affirm and adopt the tentative decision in whole or in part, and it may recommit the tentative decision to the Presiding Officer for further findings as it may direct. The same procedural provisions applicable to the initial filing of the tentative decision shall apply to any re-filed tentative decision after recommittal. If the Agency does not accept the whole of the tentative

decision, it shall provide an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt. However, the Agency may not reject a Presiding Officer's tentative determinations of credibility of witnesses personally appearing. The Agency's decision shall be on the record, including the Presiding Officer's tentative decision, and shall be the final decision of the Agency not subject to further Agency review.

Pursuant to 801 CMR s. 101(11)(c)(3), if the Agency fails to issue a final decision within 180 days of the filing or re-filing of the tentative decision, the initial decision shall become the final decision of the Agency, not subject to further Agency review.

Written objections, briefs, and all other papers shall be addressed to Secretary Jeffrey B. Mullan, with copies to Commissioner Luisa Paiewonsky, General Counsel Monica Conyngham, and Lisa Harol.

Very truly yours,

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Lisa Harol, Administrator
Office of the Administrative Law Judge

DEVAL L. PATRICK
GOVERNOR
TIMOTHY P. MURRAY
LT. GOVERNOR
JEFFREY B. MULLAN
SECRETARY & CEO

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

RE: PROPOSED DEBARMENT OF KEVIN FLAHERTY AND FLAHERTY EXCAVATION AND CONTRACTING, LLC PURSUANT TO M.G.L. c. 29, s. 29F

DECISION OF THE PRESIDING OFFICER

Pursuant to the requirements of G.L. c.29, s.29F (Debarment Statute), Chapter 30A (Administrative Procedure Act) and 801 CMR 1:01 et seq. (Formal Rules of Adjudicatory Proceedings) the undersigned Presiding Officer hereby files with the Massachusetts Department of Transportation (MassDOT) this initial and tentative decision pursuant to 801 CMR 1.01(11) (b) and (c) in the matter of the proposed debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC by MassDOT.

Following proper notice the debarment proceeding was conducted pursuant to the Administrative Procedure Act, the Debarment Statute and the Formal Rules of Adjudicatory Proceedings.

Debarment

I find and rule that there is sufficient evidence to support the debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC (Flaherty) from all public work in the Commonwealth of Massachusetts and prohibit Flaherty from bidding on or being awarded any public contract from any public agency of the Commonwealth of Massachusetts because on June 2, 2009 Kevin Flaherty was convicted after a trial by jury of felony larceny and the presentation of a false claim, crimes for which debarment is

appropriate as a matter of law pursuant to G.L. c. 29, s. 29F(e). Findings of fact supporting and rulings of law explaining the decision to debar Flaherty are found in the MEMORANDUM OF DECISION AND ORDER ON MASSDOT'S MOTION FOR SUMMARY DECISION dated July 12, 2010, which is attached hereto and incorporated herein by reference.

Period of Debarment

I find and rule that there is sufficient evidence to support a reasonable period of debarment, commensurate with the seriousness of Flaherty's offenses, of two years and seven months, to start retroactively on October 15, 2009 and to end on May 15, 2012. The period of two years and seven months is required to protect the integrity of the public contracting process. Findings of fact supporting and rulings of law explaining the period of debarment to be imposed on Flaherty are found in the MEMORANDUM OF DECISION ON TERM OF DEBARMENT OF KEVIN FLAHERTY AND FLAHERTY EXCAVATION AND CONTRACTING, LLC dated August 19, 2010, which is attached hereto and incorporated herein by reference.

ORDER: Kevin Flaherty is hereby debarred from the Commonwealth of Massachusetts for a period of two years and seven months to start retroactively October 15, 2009 and to end on May 15, 2012.

By:

____
Stephen H. Clark
Administrative Law Judge

Dated: August 19, 2010

MEMORANDUM OF DECISION

ON TERM OF DEBARMENT OF
KEVIN FLAHERTY
AND
FLAHERTY EXCAVATION AND CONTRACTING, LLC

INTRODUCTION

On July 15, 2010 I conducted a continued debarment hearing to consider the period of debarment to be imposed upon Kevin Flaherty and Flaherty Excavating and Contracting, LLC (Flaherty) under G.L. c.29, s. 29F (Debarment Statute). The hearing was limited to considering the period of debarment since, on July 12, 2010, I allowed MassDOT's motion for summary decision under 801 C.M.R. 1.01(7)(h) to debar Flaherty from public contracting.[1]

After considering the evidence and argument I conclude that the reasonable period of time commensurate with the seriousness of Flaherty's offenses should be two years and seven months, to start on October 15, 2009 and end on May 15, 2012.

BACKGROUND AND FINDINGS

The July 15, 2010 hearing was held under the formal rules for adjudicatory hearings under G.L. c.30A. Kevin Flaherty was the sole witness. MassDOT and Flaherty each introduced documents in evidence by stipulation.[2]

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[1] MassDOT showed by uncontradicted substantial evidence that on June 2, 2009 Kevin Flaherty was convicted of crimes that require debarment. See G.L. c. 29, s. 29F(c)(1).

[2] Flaherty's exhibit (Ex.#1) consists of (1) June 23, 2009 letter of Chief Engineer Frank Tramontozzi prohibiting Flaherty from performing public work; (2) the May 7, 2010 list of contractors decertified by the Division of Capital Asset Management (DCAM) [no firms currently debarred by DCAM]; (3) the debarment lists of the Office of the Attorney General (Fair Labor Division) for March 5, 2008, May 1, 2008, December 16, 2008, April 30, 2010; (4) documents relating to the suspension/debarment of McCourt; (5) documents relating to the suspension/debarment of P.A. Landers.

On June 2, 2009 Kevin Flaherty was convicted of felony larceny and the presentation of a false claim, also a felony.[3] When he committed those crimes Kevin Flaherty was a municipal employee of the city of Haverhill. Flaherty stole paving materials owned by Haverhill and used them in its private construction business; and he presented a claim to the city for new and replacement parts for a dump truck owned by Flaherty and used on its private jobs. On June 12, 2009 Kevin Flaherty was terminated from his public employment by the city of Haverhill.

On June 23, 2009 MassDOT acting through its Chief Engineer, Mr. Tramontozzi, "prohibited" Kevin Flaherty from working on any MassHighway construction project and terminated Flaherty's MassDOT contract for snow and ice control for 2008-2010. See G.L. c. 29, s.29F(d).[4] Flaherty understood "prohibited" to mean "stop completely." In accordance with the provisions of the Debarment Statute Flaherty was suspended without a hearing since the basis of his suspension was the indictment for and conviction of crimes specified in G.L. c.29, s.29F(c)(1).[5] "An indictment … charging a criminal offense for any of the offenses listed in [Subsection 29F(c)(1)] shall constitute adequate evidence to support a suspension." G.L. c. 29, s.29F(d).

MassDOT's exhibit (Ex. #1) consists of (A) indictment of Kevin Flaherty; (B) verdict slips relating to Kevin Flaherty's conviction; (C) June 23, 2009 suspension letter of Chief Engineer Frank Tramontozzi prohibiting Flaherty from performing public work; (D) October 14, 2009 letter from Newport to Flaherty; (E) Massachusetts Debarment Statute, G.L. c.29, s.29F; (F) statutory history of Debarment Statute; (G) July 6, 2010 Debarment List of the Attorney General; and (H) October 16, 2009 letter of Newport Construction to Luisa Paiewonsky, MassDOT Highway Administrator.

[3] Flaherty Excavation and Contracting LLC, a known affiliate of Kevin Flaherty, was the formal entity through which Kevin Flaherty conducted his private business, including using stolen paving materials. I find that the criminal acts of Kevin Flaherty are appropriately imputed to Flaherty Excavating and Contracting LLC. See G.L. c.29, s.29F(f).

[4] Mr. Tramontozzi's letter stated: "This decision is based on your recent conviction for larceny and presentation of false claims in connection with your work as a municipal public works employee."

[5] Before Flaherty received MassDOT's suspension letter of June 23, 2009, MassDOT, District 4, orally notified Kevin Flaherty that he would be suspended from all MassDOT public work.

October 21, 2010

Jeffrey B. Mullan, Secretary and Chief Executive Officer
Massachusetts Department of Transportation
10 Park Plaza, Suite 3510
Boston, Massachusetts 02116

Re: Debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC

Dear Secretary Mullan:

Enclosed for your consideration please find the proposed Final Decision and Order of Debarment in the matter of the debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC (Flaherty). As presiding officer at the adjudicatory hearing held on MassDOT's proposed debarment of Flaherty, I concluded that Kevin Flaherty should be debarred for a term of two years and seven months (2 years and 7 months), commencing on October 15, 2009 and terminating on May 15, 2012.

Attached for your convenience are four decision memoranda, since by its terms the proposed Final Decision adopts and incorporates all findings and rulings therein. My conclusion with respect to the appropriate term of debarment is found in the "Memorandum of Decision on the Term of the Debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC," dated August 19, 2010.

Notice of the Final Decision should be sent to both Mr. Kevin Flaherty and his attorney, Mr. Scott Gleason, Esq. See G.L. c.30A, s.11(8). The Notice should state that Flaherty may appeal the Final Decision within 30 days. See G.L. c. 30A, s. 14.

Very truly yours,

Stephen H. Clark
Administrative Law Judge

cc: Monica Conyngham, Esq.
Chief Counsel, MassDOT

IN THE MATTER OF
THE DEBARMENT OF KEVIN FLAHERTY
AND
FLAHERTY EXCAVATION AND CONTRACTING, LLC

FINAL DECISION AND ORDER OF DEBARMENT

This Final Decision of the Massachusetts Department of Transportation (MassDOT) in the matter of the debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC (Flaherty) is made pursuant to G.L. c.29, s. 29F.

On March 11, 2010 MassDOT gave statutory notice that it intended to debar Flaherty from public contracting in Massachusetts. Flaherty then requested an adjudicatory hearing under G.L. c. 30A to contest the proposed debarment.

I address two issues: (i) whether there is cause to debar Flaherty; and, if so, (ii) the appropriate term of debarment.

On the question of debarment, before the hearing MassDOT moved for summary decision pursuant to 801 CMR 1.01(7)(g). It contended that debarment was warranted because Kevin Flaherty had been indicted, convicted and sentenced for the felonies of theft and presentation of a false claim. The presiding officer, the Administrative Law Judge of MassDOT, granted the motion, ruling that Flaherty should be debarred as a matter of law. He then ordered that a hearing be held under 801 CMR 1.10 to determine the appropriate term. See Memorandum of Decision and Order on MassDOT's Motion for Summary Decision, July 12, 2010.

On the question of the term, on July 15, 2010 the presiding officer conducted a formal adjudicatory hearing under 801 CMR 1.01. [1] Based on the evidence adduced and arguments made, the presiding officer ruled in a tentative decision that

> the period of reasonable debarment for Flaherty required to protect the integrity of public contracting and the risk to public funds, commensurate

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[1] On July 14, 2010 Flaherty moved to "Dismiss MassDOT's Notice of Intent to Debar." The presiding officer denied the motion. See Memorandum of Decision, August 6, 2010.

> with the gravity of all his offenses, should be two years and seven months (2 years, 7 months) commencing on October 15, 2009, the day after he was removed from his unlawful subcontract with Newport, and terminating on May 15, 2012. See Memorandum of Decision on the Term of the Debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC," August 19, 2010.

On September 15, 2010, Flaherty timely filed written objections to the tentative decision pursuant to 801 CMR s. 1.01(11)(c)(1). On October 6, 2010 MassDOT filed a written response. After considering the objections and response, the presiding officer concluded that there was no need to disturb any finding or ruling he previously made. See Memorandum of Decision, October 14, 2010.

I hereby adopt in full the findings, rulings and conclusions of the presiding officer, as set forth in the four attached memoranda.[2] I make this final decision under the authority of G.L. c.29, s.29F, G.L. c.30A and 801 CMR 1.01(11)(d).

ORDER OF DEBARMENT

Kevin Flaherty and Flaherty Excavation and Contracting, LLC are hereby debarred for a term of two years and seven months (2 years and 7 months) commencing on October 15, 2009 and terminating on May 15, 2012.

____
Jeffrey B. Mullan, Secretary
Massachusetts Department of Transportation

Dated: __________

2 (i) Memorandum of Decision and Order on MassDOT's Motion for Summary Decision, July 12, 2010; (ii) Memorandum of Decision, August 6, 2010; (iii) Memorandum of Decision on the Term of the Debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC," August 19, 2010; (iv) Memorandum of Decision, October 14, 2010

Deval L. Patrick
Governor
Timothy P. Murray
Lt. Governor
Jeffrey B. Mullan
Secretary & CEO

To: Scott F. Gleason, Esq.
Gleason Law Offices, P.C.
163 Merrimack Street
Haverhill, Massachusetts 01830

Kevin Flaherty
2 Strawberry Lane
Haverhill, Massachusetts 01835

Charles D. Rennick, Esq.
Legal Counsel
Massachusetts Department of Transportation
10 Park Plaza, Suite 3170
Boston, Massachusetts 02116

RE: WRITTEN OBJECTIONS OF FLAHERTY AND RESPONSE OF MASSDOT

Dear Sirs:

Enclosed please find the following:

1. Memorandum of Decision, October 14, 2010

Very truly yours,

____
Lisa Harol, Administrator
Office of the Administrative Law Judge

DATE: October 14, 2010

MEMORANDUM OF DECISION

On September 15, 2010, following my Memorandum of Decision on the Term of the Debarment of Kevin Flaherty and Flaherty Excavation and Contracting, LLC (August 19, 2010), Kevin Flaherty filed Written Objections (Objections) to the tentative decision. On October 6, 2010 MassDOT filed a written response (Response).

Nothing in the governing regulations or G.L. c.30A, s. 11(8) requires that the agency answer or address in writing Flaherty's Objections or MassDOT's Response where a decision is accompanied by a statement of reasons. See Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 315-16 (1981). Nonetheless, I find that neither the Objections of Flaherty nor the Response of MassDOT raise any factual or legal issues to address. Flaherty's Objections have been previously addressed and decided; MassDOT does not contend that the term of Flaherty's debarment of two years and seven months, as set forth in the tentative decision, should be modified.

Having reviewed and considered the Objections and Response I conclude that I should not disturb any finding or ruling I have previously made. Nothing in the Objections or Response persuades me to alter the conclusion that Kevin Flaherty and Flaherty Excavation and Contracting, LLC should be debarred for two years and seven months (2 years, 7 months) commencing on October 15, 2009 and terminating on May 15, 2012.

____

Stephen H. Clark
Administrative Law Judge

Dated: October 14, 2010

APPENDIX B-1

DECISIONS/RULINGS

Outdoor Advertising Appeals

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: David P. Mullen, Esq.
c/o McGrail Law Office
51 Fremont Street
Needham, MA 02494

Christopher A. Quinn, Esq., Counsel
MassDOT Office of Outdoor Advertising
Ten Park Plaza, Rm. 6133
Boston, MA 02116

cc: Richard A. Davey, Secretary & CEO, MassDOT
Rachael S. Rollins, Esq., General Counsel, MassDOT

Date: August, 28, 2012

Re: Appeal of Capital Advertising, LLC,
OOA Application Nos. 2011008 and 2011009

NOTICE OF FINAL AGENCY DECISION

Notice is hereby given pursuant to G.L. c. 30A, §11(8) of the Final Agency Decision by the Administrative Law Judge in the above-captioned matter. The decision is in writing. The parties have been notified by certified mail dated August 28, 2012 or by in hand delivery. The Final Agency Decision was filed on August 28, 2012 at the office of the Secretary & C.E.O. of MassDOT.

The Final Agency Decision by the Administrative Law Judge is a Direct Agency Decision pursuant to 801 Code of Mass. Regs. §1.01(11)(a) and is a Final Decision pursuant to 801 Code of Mass. Regs. §1.01(11)(d) and G.L. c. 30A, §11(8).

Pursuant to G.L. c. 30A, §14, any person or appointing authority aggrieved by the Final Agency Decision is entitled to a judicial review. Proceedings for judicial review of the Final Agency Decision must be commenced, pursuant to G.L. c. 30A, §14, within 30 days after receipt this notice of decision.

Very truly yours,

____
Lisa Harol, Administrator
Office of the Administrative Law Judge

The Proposed Billboard

Capital applied to the OOA for a permit at the Site just south of the Rte. 3 highway layout line. Ex. *O* and A. Capital seeks to erect a "V" shaped billboard, with one side facing northbound traffic, the other southbound. Ex. A.[6] The billboard is 35 feet above grade and lighted at night. Id.; Burns testimony.

The Neighborhood of the Site

There are presently no commercial off site billboards alongside Rte. 3 in Chelmsford. View; Belansky testimony.

To the north of the Site across Rte. 3, the area surrounding the highway is wooded land with a residential apartment complex less than 500 feet away. View; Ex. *O*.

To the south of Rte. 3 is a large parcel of town-owned land (about 125 acres) that is zoned "P," "Public District," ("These are lands owned or leased by federal, state or municipal governments for governmental purposes"). See Ex. AA, K, BB. The entire area is "public zoned and essentially the primary land uses that are permitted there are municipal, open space, recreation." Belansky testimony.

Within the 125 acre parcel lies one part of the District (approximately 12 acres) and the Site. Ex. O. The dominant features of the District are open space and natural areas, including a football field, playing fields and playground with 6 tennis courts, 3 basketball courts and 2 street hockey rinks. Beyond the District area are the two public schools, parking lots, a track and two soccer fields. View; Ex. K, S, and O.

[6] 23 C.F.R. §750.703 defines a sign, display or device as "an outdoor advertising sign, light, display … billboard or other thing which is designed, intended, or used to advertise or inform … which is visible from any place on the main-travelled way of the Interstate or Primary Systems, whether the same be permanent or portable." For the ease of the reader, I call the sign, display or device at issue a "billboard."

The high school is outside the District, approximately 650 feet from the Site. Ex. *O*. On the view Capital pointed to two business activities in the high school. The first is a credit union exclusively serving staff and students. View. It is located in a small windowless office with no separate entrance or exterior sign. Id. The second is a student-run business training program called the "Lions Club," which is affiliated with DECA, an international association promoting the training of high school students in business principles and techniques. Ex. KK. The Lions Club has no fixed location except a basement corridor where students assemble. View.

The land in the District and beyond is predominantly open space (athletic fields) and natural areas (woods, fields); the two public schools are about 150 feet outside the District. Ex. *O*; View.

View From Rte. 3

When viewing from Rte. 3, within a 500-foot radius of the Site, one can see: (1) looking north, a massive wooden sound barrier (hiding the residential complex) along Rte. 3 northbound and trees beyond; (2) looking southwest, the tops of six tall light standards to illuminate the football field; (3) looking south, the District; and (4) looking west, a one-acre wooded area. View. Within the 500-foot radius of the Site, no business activities can be seen. Ex. *O*; View.

When viewing from Rte. 3, beyond the 500-foot radius from the Site, one can see (1) to the south, the upper half of the Chelmsford high school and wooded land beyond; (2) to the east and west open space and natural areas; (3) to the north, trees. View. No business activities can be seen. Id.

In sum, the land in sight from Rte. 3 to the north, south, east and west is predominantly open space and natural areas. The land has a rural character. The only man made structures to be seen are the sound barrier across Rte. 3, the six light standards (within 500 feet) and the wall of the high school (some 650 feet distant). View; Ex. O. No business activities exist within view of Rte. 3. View.

DISCUSSION

At issue is whether MassDOT, through its OOA, properly denied Capital's billboard application (1) under federal and state statutes that require billboards to be located on land zoned commercial or industrial; (2) under a federal regulation that requires MassDOT to not "recognize" the town's zoning District permitting billboards; and (3) under a MassDOT regulation that requires billboards be located on land "of a business character."

Federal Law

The FHBA imposes federal jurisdiction over Rte. 3 and at least 660 feet to each side. The purposes of the FHBA are to protect public investment, promote the safety and recreational value of travel, and preserve natural beauty. See 23 U.S.C. §131(a).

The FHBA limits where billboards may be located. It provides in relevant part

> [Billboards] may be erected and maintained … within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law…. 23 U.S.C. §131(d).

A state must provide for "effective control" of billboards to avoid a reduction of up to ten per cent in federal highway funds. 23 U.S.C. §131(b); see State of South Dakota v. Adams, 506 F. Supp. 60 (1980) (affirming FHWA decision to withhold funds).

The Supreme Court of California succinctly summarized "effective control."

> Such control permits the erection and maintenance of certain types of displays—primarily directional signs and those advertising the sale of real estate or commercial activities on the property on which they are located—in virtually any location. (§ 131 (c).) Congress also provided for the needs of the billboard industry, which derives income mainly by leasing space on advertising displays unrelated to the property on which they stand, by allowing the state to permit outdoor advertising in areas zoned industrial or commercial under authority of state law. (§ 131(d).) United Outdoor Advertising Co. v. Business, Transportation and Housing Agency, 44 Cal.3d 242, 245 (1988) (United Outdoor).

The federal Secretary of Transportation (Secretary) prescribes regulations and sets minimum standards for the states to regulate billboards. See 23 U.S.C. §315; 23 C.F.R. §750.701 ("Purpose") and 23 C.F.R. §§750.705 (a) through (j) ("Effective control"). To comply with the FHBA the several states enacted legislation to enforce the national standards prescribed by the Secretary. In 1971, Massachusetts added Chapter 93D to the General Laws through St. 1971, c.1070, §1, "An Act Providing For the Implementation of the Federal Highway Beautification Act of 1965." Local laws enacted to implement federal statutes are to be construed in conjunction with the purposes of underlying federal law. See In Re Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits, 664 N.W.2d. 1, 7 (2003) (Supreme Court of Minnesota) (Eller Media).

Chapter 93D prohibits all billboards unless located in "areas which are zoned industrial or commercial"; authorizes the Commonwealth to issue permits for billboards that "comply with … standards" issued by the Secretary; authorizes "the department of highways of the commonwealth" [now MassDOT] "to establish standards" for billboards and to enter into an agreement with the Secretary; and, "adopt[] lawful regulations imposing stricter limitations" than the Secretary's for billboards "on the interstate and primary systems." See G.L. c. 93D, §§ 2, 3 and 7. Accordingly, the Commonwealth

2009, were needed because the outdoor advertising board (OAB), which had regulated billboards, was abolished with the creation of MassDOT. See St. 2009, c. 25, §18.

MassDOT Regulations

711 C.M.R. §3.07(3) (Subsection 3.07(3)) provides in relevant part

> No permit shall be granted … for a sign that is not located in an area of a business character. An area shall be deemed to be of a business character only if, when viewed from the principal highway upon which the sign is to face, both of the following requirements are met:
>
> (a) At least two separate business, industrial or commercial activities are being conducted within a distance of 500 feet from the proposed location of the sign…. The term "business, industrial, or commercial activities" … shall not include … any activity not visible from the principal highway upon which the sign is to face.
>
> (b) The area in which the sign is to be located is not predominantly residential, agricultural or open space or natural area.

Because both Capital and the OOA address the applicability of Subsection 3.07(3) in this appeal, I analyze their contentions notwithstanding the fact that Capital's permit must be denied under G.L. c. 93D, §2, 23 U.S.C. §131(d) and 23 C.F.R. §708(b).

Applicability of Subsection 3.07(3)

Capital argues that the OOA, an office within MassDOT, has no authority to issue regulations to bind Capital because G.L. c. 93, §29 (Section 29) only authorized the OAB to regulate signs "on public ways or on private property within public view of any highway…." The contention has no merit. MassDOT's authority to issue regulations is conferred by its enabling act, G.L. c. 6C, §3(1), not Section 29. See supra at 11, n. 8. Although the OAB was abolished, MassDOT may nonetheless issue regulations needed

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MassDOT advised the board to adopt the emergency regulations to control outdoor advertising due to the contingent nature of federal funds; (2) the board voted affirmatively (Item I-J) to issue regulations to regulate outdoor advertising; (3) the regulations were published by the State Secretary as of November 2, 2009. The MassDOT regulations were in substance the same as those issued by OAB.

to control billboards adjacent to interstate and primary system highways under its authority to "exercise any powers necessary for the commonwealth to be in compliance with 23 U.S.C. §302." See G.L. c.6C, §3(3). MassDOT regulations may prohibit billboards allowed under federal law, or "establish more stringent" requirements than federal regulations governing billboards. See 23 C.F.R. §750.701.

Subsection 3.07(3)

Capital did not prove that its billboard will be located "in an area of a business character," as required by Subsection 3.07. The test to find the existence of "business character" has two separate prongs, each of which must be satisfied. See Subsection 3.07(3); Plamondon, at 851. First, Subsection 3.07(3)(a) requires a finding that, when viewed from Rte. 3, two businesses are being conducted within a radius of 500 feet of the proposed Site. Second, Subsection 3.07(3)(b) requires a finding that, when viewed from Rte. 3, the area is of a "business character" after a preliminary, independent finding that the "area in which the sign is located is not predominantly residential, agricultural or open space or natural area." [11] Subsection 3.07(3)(b).

With respect to the first test, under Subsection 3.07(3)(a), overwhelming evidence supports the OOA finding that "two separate business … activities" are not being conducted "within" a distance of 500 feet from the Site. The closest arguable business activities to the Site are the Credit Union and the Lions Club. Capital's own evidence shows that both are inside the high school, far beyond the 500-foot radius from the Site. See Ex. O. Neither is visible from Rte. 3. I find that, because no business activity is

[11] In the words of the Appeals Court, "subsection [3.07(3)] (b) necessarily requires some evidence that the neighborhood is of a business character in addition to the presence of two businesses within 500 feet." Plamondon at 851.

conducted within 500 feet of the Site, Capital did not prove the area was "of a business character" under Subsection 3.07(3)(a).

With respect to the second test, under Subsection 3.07(3)(b), clear and convincing evidence supports the OOA finding that the character of the relevant area, viewed from Rte. 3, is not of "a business character." The actual uses in view from Rte. 3 near the Site are governmental, not commercial or industrial. Aside from the two schools, the predominant land uses are athletic fields, open fields, extensive tennis and basketball courts open to the public, open space and natural areas. See Ex. *O*. The existing uses do not support a finding that the land is "of a business character" under Subsection 3.07(3)(b).

CONCLUSION

The land along Rte. 3 where Capital seeks to locate its billboard is rural in character with existing uses compatible only for a Public District. No primary use in the area is commercial or industrial under federal or state law. The OOA was correct to find that a District created specifically to allow billboards could not be "recognized as zoning for outdoor advertising control purposes" under 23 C.F.R. §708(b). The OOA properly determined that the area around the Site was not "of a business character" under MassDOT's regulations. Capital's application was properly denied.

____
Stephen H. Clark
Administrative Law Judge

APPENDIX C-1

DECISIONS/RULINGS

Relocation Appeals
(M.G.L. c. 79A and 760 CMR 27.00 et seq.)

To: Secretary Bernard Cohen, EOT

Through: Under Secretary, Jeffrey Mullin, Esq., EOT
Commissioner Luisa Paiewonsky, MHD

From: Stephen H. Clark, Administrative Law Judge, EOT

Date: April 27, 2007

Re: Report and Recommendation

I am pleased to submit for your consideration the attached report and recommendation.

D. Krutiak Construction (Krutiak), a displaced person eligible for relocation payments because MassHighway acquired by eminent domain real property on which it operated a contracting business in Adams, seeks "actual direct loss of property" (ADLP) damages for personal property under G.L. c. 79A and 760 CMR 27.00 et seq. Krutiak's contracting business, which required a large inventory of cranes, trucks and heavy road construction equipment, in 1997 elected not to relocate but sell at auction all its personal property. If the sale proceeds did not equal the "in place value" of its property, Krutiak was entitled to the difference between "in place value" and the auction proceeds plus any additional payments made by MassHighway as ADLP damages. Krutiak says the "in place value" of its property is $2,379,383.50. Krutiak received $1,298,685 in auction proceeds plus $595,807.50 in two ADLP damage payments from MassHighway, for total compensation of $1,894,385.00. Krutiak here claims further ADLP damages of $524,538.62 for the "in place value" of some 2,200 auction lots of cranes, trucks, heavy equipment, tires, miscellaneous, and scrap metal.

I recommend that MassHighway pay $46,145 in ADLP damages to compensate Krutiak for cranes, trucks, heavy equipment and tires. I recommend that MassHighway pay no additional compensation for Krutiak's miscellaneous property or scrap metal.

INTRODUCTION AND SUMMARY

David Krutiak Construction Inc. (Krutiak) claims statutory relocation damages of $524,538.62 from the Massachusetts Highway Department (Department) for the actual direct loss of property (ADLP damages), namely heavy machinery and other personal property used in its contracting business. The ADLP damage claim follows the Department's July 22, 1996 acquisition of Krutiak's land on which Krutiak had operated a general contracting and heavy equipment rental business. Under the statutory scheme Krutiak is entitled to relocation benefits, which are measured by the "fair market value [of its business personal property] for continued use at its location prior to displacement" (In Place Value).[1] *See* 760 CMR 27.09(20)(e).[2] If the proceeds from the sale of its personal property do not equal its In Place Value, Krutiak is entitled to ADLP damages, which is measured by the difference between In Place Value and the sale proceeds.

The property at issue, all of which was used in Krutiak's contracting business, was sold at a two-day public auction on September 12 and 13, 1997. Krutiak received $1,298,577.50 in net auction sale proceeds. Krutiak claimed that the In Place Value of the property sold at auction was $2,379,383.50, the amount of its pre-auction appraisal. After the auction the Department's appraiser estimated that the In Place Value of Krutiak's property to be $1,728,765, $430,187.50 more than the auction proceeds. The Department then paid Krutiak $430,187.50 as full compensation for all ADLP damages ($1,298,577.50 + 430,187.50 = $1,728,765).

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[1] In Place Value measures the price that a buyer would pay to replace the personal property "for the continued use" in a business "at [the] location [of the seller's property] prior to displacement." See infra page 20.

[2] The version of 760 CMR 27.00 et seq. in effect in 1997 was dated July 1, 1993. The 1993 text of 760 CMR 27.00 was replaced on July 1, 1998.

I conclude that Krutiak is entitled to additional ADLP damages. By category of property such ADLP damages are:

Category	Amount
Cranes	$6,259
Trucks	$14,550
Yellow Iron	$23,368
Tires	$1,968
Scrap	$0
Misc.	$0
Total	$46,145

I recommend that the Department pay Krutiak $46,145 in ADLP damages.

BACKGROUND

Testimony of David Krutiak

The testimony of David Krutiak and exhibits provide the following background.

On July 22, 1996 the Department acquired by eminent domain three parcels of Krutiak real estate in the town of Adams on which Krutiak operated its general contracting and equipment leasing business. The Department's land acquisition necessitated that Krutiak move its contracting business, which in turn made it a displaced person entitled to business relocation assistance under G.L. c.79A (Chapter 79A) and 760 CMR 27.00 and 42 U.S.C. §4601 *et seq*. Under Chapter 79A and 760 CMR 27.00 Krutiak could elect not to relocate but cease business operations and receive certain payments. Krutiak elected to cease business operations. Krutiak was then entitled to receive (1) the proceeds of a *bona fide* sale of its personal property and also (2) "receive … payment … for any actual direct loss for any of its tangible personal property … which it chooses not to relocate." 760 CMR 27.09(20)(a).

Krutiak owned many trucks, cranes, yellow iron and associated equipment used in its contracting business, which regularly served two substantial local customers, Pfizer

KRUTIAK'S APPEAL

<u>Krutiak's Claim on Appeal</u>

Krutiak recognizes that the total ADLP damages it may lawfully receive for all the property sold on day one is "capped" at $462,576.62 by operation of 760 CMR 27.09(20)(b)(1).[11]

After the hearing, Krutiak's post hearing memorandum stated that it sought "payment for the unrealized value of its property" sold on day one plus "payment for additional scrap" of $61,962, "making Krutiak's total claim of $524,538.62 [$462,576.20 + $61,962]." *See* March 15, 2005 Memorandum, p. 2; ALJ Ex. #2 (Krutiak "revised Ex. #13"). *See also* Appendix D.

Krutiak nowhere breaks out the elements of a $462,576.62 claim for the "unrealized value of its property." Instead, the Summary Sheet attached to its March 15, 2000 Memorandum at Tab C details $528,484 of In Place Value "variance" it disputes with the Department. The Summary Sheet breaks out Krutiak's In Place Value dispute by category, namely, cranes, trucks, yellow iron, scrap and miscellaneous property but makes no reference to Krutiak's claim for "payment" of $61,962 "additional scrap." *See* Summary Sheet, Appendix A.

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[11] Under 760 CMR 27.09(20)(b)(1) the total ADLP damages recoverable may not exceed the cost to move that property 50 miles. "The amount of the payment for actual direct loss of property is the lower of: the value not recovered by the sale [or] the estimated moving expenses which would have been incurred had the personal property been moved." 760 CMR 27.09 (20) (b)(1). Krutiak's recoverable ADLP damages are the difference between its estimated moving costs of $1,058,384.12 and the Department's ADLP payments to date of $595,807.50, or $462,576.62. *See* Statement of Claim. Krutiak's In Place Value "not recovered" exceed its estimated moving costs. Krutiak's appraised In Place Value for all property was $2,379,383.50; the auction proceeds were $1,298,577.50. Thus, its total In Place Value estimate "not recovered" was $1,080,806 ($2,379,383.50 - $1,298,577.50). *See* Appendix C. As the total In Place Value "not recovered" of $1,080,806 is greater by $22,421.88 than Krutiak's estimated moving costs of $1,058,384.12, Krutiak's total ADLP damages are subject to the "cap" imposed by law. *See* <u>infra</u> page 9, n.12.

Krutiak's presentation of its claim confuses the amount of In Place Value it disputes with the amount of damages it may potentially recover. The only practical way to address Krutiak's claim is by the disputed In Place Value detailed by property category in its Summary Sheet, since each category is expressly keyed by Krutiak to exhibits that list the 2,200 auction lots at issue by such category. I note that Krutiak has actually asserted In Place Value disputes against the Department totaling $590,446 ($528,484 + $61,962), not $524, 538.62.[12]

On March 28, 2005, the Department filed a post-hearing memorandum in which it maintained that, based on the In Place Value estimate of its appraiser, Krutiak was not entitled to any ADLP damages; but if it was, ADLP damages could not exceed the "cap" of $462,576.62. The Department objected to Krutiak's amended claim seeking $61,962 for "additional scrap" on the ground it should be dismissed as time barred.

Ultimately, whether Krutiak's claim is for $524,538.62 or some other number[13] is inconsequential because the total of all ADLP damages I recommend the Department pay Krutiak does not exceed $462,576.62. I analyze Krutiak's ADLP claim as stated on its Summary Sheet. As Krutiak states its "amended" claim for scrap separately, I address it separately.

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[12] Krutiak's presentation of its claim may be explained by the $43,486.50 overpayment of ADLP damages received for day two property. *See* supra page 7, n. 10. Krutiak's In Place Value "not recovered" is $1,080, 806. *See* supra page 8, n. 11 and Appendix C. The $1,080,806 "not recovered" was reduced by the Department's two payments totaling $595,807.50, reducing Krutiak's In Place Value "not recovered" to $484,998.50. When the $528,484 "variance" of In Place Value on Krutiak's Summary Sheet is corrected to account for the $43,486.50 overpayment of In Place Value, the In Place Value in dispute here is reduced to $484,998.50 ($528,484 - $43,486.50 = $484,998.50). *Compare* Summary Sheet, Appendix A *with* Corrected Summary Sheet, Appendix B. The $43,486.50 overpayment also explains how the "cap" operates to limit Krutiak's recovery. $484,998.50 - $462,576.62 equals $22,421.88, the amount by which the "cap" limits Krutiak's ADLP recovery ($1,080,806 - $1,058,384.12 = $22,421.88). *See* supra page 8, n. 11 and Appendix C.

[13] *See* Appendix D, which summarizes Krutiak's varying characterizations of its ADLP claim.

The Hearing

A hearing was held on February 1 and 3, 2005. Attending were

David Krutiak	D. Krutiak Construction
Kevin T. Smith, Esq.	Counsel for Krutiak
Jay E. Beard	Krutiak Appraiser
Michael J. McParland	Consultant to Krutiak
Dawn Paddock	MHD, Relocation Manager
Christopher Quinn, Esq.	Counsel for MHD
Merritt Agabian, FASA	MHD Appraiser
Stephen H. Clark	Administrative Law Judge

Krutiak offered the following exhibits, which were accepted in evidence.

Ex. 1	Compilation of auction prices, also containing Krutiak (Beard) and Department (Agabian) appraised "in place" fair market values (44 pages)
Ex. 2	Two Day Auction Catalogue (43 pages)
Ex. 3	Copy of Commonwealth check to Krutiak for $430,187.50
Ex. 4	Copy of Commonwealth check to Krutiak for $165,620.00
Ex. 5(a) & (b)	Photographs of scrap metal
Ex. 6	Letter of John McNickles to D. Krutiak dated July 10, 1997 stating opinion of value for 647 tons of scrap metal @ $80/ton
Ex. 7.	Letter of John McNickles to D. Krutiak dated July 20, 1997 (and Attachments) specifying location where scrap metal was found on Krutiak's land, by ton at each location.
Ex. 8	Telefax dated January 7, 2005 to D. Krutiak signed by Henry Moak, Schuylerville, NY, listing 1421.53 tons of scrap metal by 8 types of metal "purchased" by Moak at auction.
Ex. 9(a)	Schedule of 6 cranes and 8 clam shell buckets by lot showing auction price, appraised values by Agabian and Beard, difference in appraisal estimates that constitute Krutiak's claim for additional ADLP damages, with offering prices from trade publications assembled by Mr. Krutiak of "same or similar model."
Ex. 9(b)	Schedule of 20 heavy trucks showing auction price, appraised values by Agabian and Beard, difference in appraisal estimates that constitute Krutiak's claim for additional ADLP damages, with offering prices from trade publications assembled by Mr. Krutiak of "same or similar model."
Ex. 9(c)	Schedule of 16 pieces of "yellow iron" heavy equipment showing auction price, appraised values by Agabian and Beard, difference in appraisal estimates that constitute Krutiak's claim for additional ADLP damages, with offering prices from trade publications assembled by Mr. Krutiak of "same or similar model."
Ex. 10	Appraisal of Jay Beard for Krutiak (as of May 29, 1997).

Ex. 11	9 invoices showing purchase price of 27 spare parts purchased by Krutiak in 1996 and 1997.
Ex. 12	Videotape showing equipment when prepared for sale [keyed to narrative of D. Krutiak on hearing tape number 4].
Ex. 13	Chalk ("Krutiak Relocation Claim" for $546,960.50) [2/1/05].
Ex. 14	Schedule of auctioned items containing Mr. Agabian's notes showing adjustments to initial appraisal following auction.
Ex. 15	Lyon brochure advertising auction (8 pages with photos).
Ex. 16	13 color photographs of equipment, labeled by D. Krutiak

The Department offered the following exhibits, which were accepted in evidence.

Ex. 1	MHD's advertising and printing costs for the auction
Ex. 2	Appraisal of Merritt Agabian for MHD (as of May 29, 1997).
Ex. 3	Minutes of Right of Way Bureau's Business Relocation Claim Advisory Committee

After the hearing I accepted four post-hearing submissions in evidence.

Ex. 1	Stipulation ("Costs to Move Krutiak Equipment")
Ex. 2	Krutiak revised Ex. #13 ("Krutiak Relocation Claim" for $524,538.62) [2/28/05].
Ex. 3	Stipulation ("Valuation Methodology [Stipulated Property]")
Ex. 4	Schedules of lots sold at auction by property category.

FINDINGS

Testimony of the Expert Appraisers

Krutiak called one valuation witness, Mr. Jay Beard, an appraiser. The Department called its expert appraiser, Mr. Merritt Agabian, and also its current relocation manager, Ms. Paddock. Both appraisers qualified as experts.

Inspection and Condition

Before valuing the equipment Mr. Beard[14] spent a week at Krutiak's business locations to inventory, inspect and test the machinery and equipment. He found the condition of the heavy equipment to be "good" or "better" and "ready to go to work."

[14] Mr. Beard was a professional appraiser, a veteran auctioneer and a broker/dealer in yellow iron nationally and internationally. While he had less personal experience in valuing cranes or trucks he consulted in depth with broker/dealer colleagues who had the experience he lacked.

Mr. Beard marked up the wholesale price to reflect the price an end user would have to pay. Typically the amount of the mark up was the broker's sale commission, which depended on the value of the item. For heavy equipment with a wholesale price of $25,000 the mark up to an end-user price would be about 25%; for an item with a wholesale price of $100,000 the mark up would be 10%. Mr. Beard testified that trucks purchased by a dealer at auction would be marked up 15 to 40% for resale. Before reaching his final opinion of In Place Value for an item, Mr. Beard apparently added the transportation cost to move the sold item from the auction site.

Mr. Beard testified that the offering price in trade journals was "seldom less" and "pretty much the same" as the price at retail. Mr. Beard did not use the prices paid at the Krutiak auction in his appraisal; nor did he rely on the prices paid at auction for similar equipment. He applied the same methodology to each item of property.

Mr. Agabian's method to find In Place Value was also directed at finding the price an end user would pay. Mr. Agabian prepared an initial pre-auction appraisal shortly after his inspection of the property. For each item he first consulted auction prices paid for similar heavy equipment, which he found in publications such as "Top Bid." "Top Bid" identifies the winning bid at equipment auctions conducted by major auction houses, but does not reveal the number of registered bidders or how extensively an auction was marketed. Mr. Agabian also researched the "price new" for equipment, since buyers at auction typically know the price for "new" equipment before they bid on a used item. Finally, Mr. Agabian identified what brokers and dealers listed as offering prices in ads published in trade journals and equipment guides.

Mr. Agabian testified in effect that together his sources established a range of values: on the top end, the price new and the offering price for used equipment; on the low end, the "base price" paid at a forced sale auction. Mr. Agabian considered these market data before making his initial estimate of In Place Value. He noted that asking prices in trade journals do not publish the sale price actually paid by end users. Mr. Agabian did not rely on conversations with dealers to form his opinion because in his experience dealers and brokers would "not commit to a value [of a piece of equipment] over the phone without inspecting the item to see its condition."

Mr. Agabian considered it normal appraisal practice to adjust an initial opinion of value after an auction sale of the specific items being appraised. The Krutiak auction was conducted under conditions where winning bids could assist Mr. Agabian in understanding the wholesale and retail price of an item. He did not know the identity of the particular buyers of the Krutiak equipment.[18] He placed significant weight on the Krutiak auction price, particularly when the auction results showed "a mistake" in his initial appraisal. The auction price was only one factor used to estimate "in place value"; but it was important, as the sale was of an item of known condition at a known price.

Mr. Agabian rendered his final opinion of In Place Value on October 20, 1997, shortly after the Krutiak auction. The method he used to adjust his initial opinion was (1) look at the auction results, (2) compare the auction price with his own initial valuation, (3) review the valuation of the item in Mr. Beard's pre-auction appraisal, (4) review the original source material he had used (such as "Top Bid,") to make certain the auction price was not "way out of line with previous auction history," and (5) make an ultimate

[18] Mr. Agabian testified that knowing whether a buyer was an end user or a broker could have "swayed [his] opinion" in certain cases. Mr. Beard did not know the identity of buyers of particular lots, either.

judgment of the “in place value for continued use at its location prior to displacement.” *Compare* Day One recap sheet complied by Krutiak, Krutiak Ex. #1, *with* Mr. Agabian’s item by item adjustments to his initial values, Krutiak Ex. #14.

Ultimate Opinions of In Place Value

Mr. Beard’s ultimate opinion of In Place Value of all property sold at day one of the auction was $2,128,169. Mr. Beard did not revise his June 1997 pre-auction appraisal in light of the Krutiak auction results; he did not ground his opinion on sales data. In the aggregate, by category of property, Mr. Beard’s final opinion of In Place Value far exceeded the Krutiak auction prices.

Category	Krutiak In Place Value	Auction Price	Variance	Krutiak IPV as % Of Auction Price
Cranes	$376,320	$165,015	$211,305	228%
Trucks	$576,395	$306,055	$270,340	188%
Yellow Iron	$972,280	$669,245	$303,035	145%
Used Tires	$22,765	$12,725	$10,000	178%
Scrap	$51,760	$10,000	$41,760	518%
Misc.	$128,649	$55,690	$72,959	231%

Mr. Agabian’s ultimate opinion of In Place Value for all property sold on day one of the auction was $1,599,685. His final estimate of value took into account the Krutiak auction prices paid for each lot. In the aggregate, by category of property, Mr. Agabian’s final opinion of In Place Value somewhat exceeded the Krutiak auction prices.

Category	Department In Place Value	Auction Price	Variance	MHD IVP as % Of Auction Price
Cranes	$246,195	$165,015	$81,180	149%
Trucks	$434,340	$306,055	$128,285	142%
Yellow Iron	$806,700	$669,245	$137,455	121%
Used Tires	$18,825	$12,725	$6,100	145%
Scrap	$15,000	$10,000	$5,000	150%
Misc.	$78,625	$55,690	$22,935	141%

Testimony of the Department's Relocation Manager

Dawn Paddock was the Department's relocation manager in 2005, not in 1997. To familiarize herself with the actions the Department took in 1997 she reviewed the Krutiak file. Ms. Paddock testified that the Department paid a total of $41,731.47 to advertise the Krutiak auction, of which $11,726.48 was for advertisements in trade publications and newspapers and $30,004.47 for 27,132 auction brochures and 525 auction booklets. MHD Ex. #1. The Department paid $221,493.78 to Krutiak for auction expenses, including auctioneer's commission ($135,007.75), Krutiak labor ($44,029.56), advertising and printing ($41,731.47) and fuel ($725). MHD Ex. #3.

The Property Within Krutiak's ADLP Claim

After the hearing the parties entered into a stipulation about how I could efficiently determine the In Place Value of the 2,200 lots of property at issue. For lots where the parties' In Place Value dispute was $3,000 or more (Specified Property), I would make an In Place Value finding for each such lot. For the remaining lots, where the dispute between the parties was less than $3,000 (Stipulated Property), I would use a formula to find In Place Value. Using Krutiak's Summary Sheet as a starting point, the In Place Value dispute "variance" between the parties is

Cranes	$130,125
Trucks	$142,055
Yellow Iron	$165,580
Tires	$3,940
Scrap	$36,760
Misc.	$50,024
Total[19]	$528,484

[19] Although $528,484 appears on the Summary Sheet, the In Place Value "variance" still at issue is most properly stated as $484,998.50. *Compare* Appendix A "Summary Sheet" *with* Appendix B "Corrected Summary Sheet" *and* Appendix C. $484,998.50 is Krutiak's In Place Value "not recovered." *See* Appendix C.

Included in the schedule as Specified Property are these lots: 6 heavy cranes, 8 clamshell buckets, 20 trucks and 16 pieces of yellow iron. *See* Krutiak Exs. #9(a), 9(b) and 9(c). Other Specified Property to be valued by lot consists of various lots comprising 164 used tires, one lot of 647 tons of scrap metal and 384 lots of miscellaneous property. ALJ Ex. # 4. In all, the parties dispute $260,250 of In Place Value for all items of Specified Property.

The Stipulated Property consists of hundreds of lots of trucks, cranes and yellow iron (and associated equipment within each category) sold on day one.[20] *See* ALJ Ex. #4; Krutiak Exs. 9(a) through (c). To determine the In Place Value of lots within the Stipulated Property the parties have agreed to a valuation formula. *See* infra page 39. In all, the parties dispute $268,234 of In Place Value within the Stipulated Property.

I break down Krutiak's Summary Sheet to show the dispute of In Place Value by Specified and Stipulated Property.

Property	Specified Property	Stipulated Property	Total
Cranes	$79,000	$51,125	$130,125
Trucks	$92,750	$49,305	$142,055
Yellow Iron	$88,500	$77,080	$165,580
Tires	$3,940	NA	$3,940
Scrap[21]	$36,760	NA	$36,760
Misc.	$50,024	NA	$50,024
Total	$260,250	$268,234	$528,484

[20] For reasons not entirely clear it is not possible on this record to precisely tie each item specified in the Beard or Agabian appraisals to a particular Lyon lot sold. There are several possible explanations: (1) certain lots were combined during the auction itself; (2) certain lots may have been withdrawn or were "passed" on by bidders; (3) the lots Lyon assigned for sale at auction did not contain the same property that was appraised by Mr. Beard and Mr. Agabian.

[21] The "amended" scrap claim not included.

DISCUSSION

I first discuss the governing legal standard. I next discuss the principal contentions of the parties. Finally, I make findings of the In Place Value of the Specified and Stipulated property.

The Governing Standard: Chapter 79A and 760 CMR 27.00

Krutiak's claim for relocation assistance is governed by G.L. c. 79A (Chapter 79A) and regulations under it titled "Relocation Assistance." *See* 760 CMR 27.00 et seq; *see also* 49 CFR 24.00 et seq. Among other things, the legislative purpose of Chapter 79A is manifestly to provide a statutory means to compensate businesses that have been displaced because of the actions of government prosecuting public projects. Krutiak is entitled to relocation assistance due a displaced person.

In construing Chapter 79A regulations Massachusetts courts have recognized a "…design to minimize the adverse impact of displacement by help to … businesses whose survival will buttress in turn the economic and social well-being of the communities in which they function." Worcester Redev. Auth. v. Department of Housing & Community Dev., 47 Mass. App. Ct. 525, 528 (1999). Construction of Chapter 79A and 760 CMR 27.00 issued under its authority should therefore "tilt in favor of interpretation … that provides assistance to business so affected." Id. 760 CMR 27.01(5) ("General Program Requirements") specifically provides for "[t]he provision of relocation payments to all eligible persons to the full extent to which they are entitled." 760 CMR 27.01(5)(e).

Specified Property	Auction Price	Krutiak IPV	Krutiak IPV as % of Auction Price	MHD IPV	MHD IPV as % of Auction Price
Cranes	47,500	179,500	379%	100,500	216%
Trucks	75,250	216,000	287%	123,250	164%
Yellow Iron	130,550	274,500	210%	186,000	142%
Tires	12,725	22,765	179%	18,825	148%
Miscellaneous	55,690	128,649	231%	78,625	141%
Scrap	10,000	51,760	518%	15,000	150%
Stipulated Property					
Cranes	117,515	196,820	167%	145,695	124%
Trucks	230,805	360,395	156%	311,090	135%
Yellow Iron	538,695	697,780	130%	620,700	115%
Total	1,218,730	2,128,169	175%	1,599,685	131%

For each category of Specified Property the In Place Value estimates of both Krutiak and the Department are considerably above the Krutiak auction price. For cranes the Department's In Place Value was 216% of the auction price; Krutiak's In Place Value was 379%. For trucks the Department's In Place Value was 164% of the auction value; Krutiak's 287%. For yellow iron the Department's In Place Value was 142% of the auction price; Krutiak's 210%.

Neither Mr. Beard nor Mr. Agabian made a formal study that quantified the relationship between wholesale, auction and retail prices in the market for heavy equipment. Though Mr. Agabian used auction sales data, neither appraiser relied on arms length sales at In Place Value of used property comparable to Krutiak's. Since arms length sales data is usually the most reliable evidence of value, the lack of actual sales in the In Place Value market hindered both appraisals.

Mr. Agabian's final In Place Value estimates were consistently above the auction price, with minor exceptions. In gross terms, for all property, the total of Mr. Agabian's

final In Place Values was 131% of the total auction price. These results corroborated Mr. Agabian's understanding that auction prices set a "base" In Place Value estimate that was generally lower than In Place Value. Mr. Agabian's final In Place Value estimates for particular categories of property were between 124% and 216% of the "forced sale" Krutiak auction prices, an increase Mr. Agabian attributed in part to dealer mark ups and sales commissions. Mr. Agabian's final adjustments to estimate In Place Value were made on a lot by lot basis after he considered the available economic data in the wholesale, auction and end-user markets. I find Mr. Agabian's appraisal methods to be sound and his testimony credible and internally consistent.

Mr. Beard's In Place Value estimates were far higher than the prices brought at auction. In gross terms, for all property, the total of Mr. Beard's In Place Values was 175% of the total auction price. Mr. Beard made no adjustments to his value estimates in light of the Krutiak auction results; indeed, he did not consider any auction sales even though auctions were an established market method to transfer heavy equipment. His appraisal results for trucks show that his In Place Values were consistently outside the 15% to 40% mark up range from auction price to re-sale price that he testified was typical when dealers bought at "forced sale" auction prices. Mr. Beard's final In Place Value estimates by property category were consistently between 210% and 379% of the "forced sale" auction prices. Mr. Beard's final opinions of In Place Value conflicted with the price mark ups he testified were typical and went unexplained.

Mr. Beard placed great reliance on his experience as a market participant and knowledge of wholesale "asking prices" reported by third parties. He believed that an auction price was akin to "wholesale value," and that a retail markup would typically

include a broker commission—from 10% (for $100,000 items) to 25% (for $25,000 items)—for sale to an end user at the In Place Value price. He testified that wholesale offering prices were "pretty much the same" and "seldom less" than the end-user In Place Value price. But he pointed to no actual sales data in support of his testimony of how the heavy equipment market operated.

Mr. Beard's In Place Values were based entirely upon asking prices in wholesale markets, his consultations with dealers and his own experience. Because his final In Place Value results were not grounded on any type of actual sales data, Mr. Beard's opinions lack persuasive weight. The refusal to consider either the Krutiak or other auction sales data undermines results based exclusively on anecdotal sources in the wholesale market and pushes his ultimate opinions toward the speculative. While Mr. Beard was entitled to rely on his own experience, his refusal to consider the actual "forced sale" data of the very property subject to this appeal, or to make the adjustments to auction sales results that his own testimony indicated was possible, weakens the probative force of his conclusions. He never explained why the mark ups to auction prices he said were typical were in fact exceeded by the mark ups in his own appraisal, which showed far greater disparity between auction price and In Place Values.

DETERMINATION OF IN PLACE VALUE

In Place Value of the Specified Property

Cranes

Krutiak Ex. 9(a) identifies 6 cranes, and 8 "clam shell buckets" associated with cranes, for which the parties' respective opinions of In Place Value differ by $3,000 or

Miscellaneous

Krutiak claims that 384 lots of miscellaneous equipment and machinery have an In Place Value of $50,024 in excess of the auction proceeds. The miscellaneous items are listed on a schedule submitted after the hearing. *See* ALJ Ex. 4. (Schedule). The Schedule details equipment contained in 384 lots, but I need address only 41.[25] Of the 41 lots, 26 involve an In Place Value dispute more than $100, but less than $500; [26] 2 lots involve disputes of between $500 and $1,000;[27] and 13 lots involve disputes more than $1,000 (up to $3,550).[28] There is a great variety of equipment within the miscellaneous lots addressed: a Mercedes sedan, a Baltic spreader, an office trailer, scaffolding, 3 pallets glass blocks, boxes of Timken bearings, a V plow, 46 slabs of granite, and so on.

Krutiak claims ADLP damages of $33,607 for the 41 lots. The total auction proceeds for the 41 lots were $9,035. After the auction the Department paid Krutiak an additional $6,820. The Department's In Place Value for the 41 lots of Miscellaneous

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[25] Krutiak offered no testimony or argument at the hearing about any of the 384 lots. The sole evidence is contained on the Schedule and in the parties' respective appraisals. For each lot the Schedule provides the following information: (1) Krutiak's In Place Value estimate; (2) Department's In Place Value estimate; (3) the In Place Value "variance" between Krutiak and MHD; (4) the registered bidder number of the buyer; and (5) the auction price.

For 110 lots Krutiak provided no In Place Value estimate. Krutiak waived any ADLP damage claim for those lots because no ADLP damages can be calculated. Accordingly, the original 384 lots is reduced by 110 leaving 274 (384 – 110).

Of the remaining 274 lots the Department's estimate of In Place Value in 106 lots is equal to or exceeds Krutiak's In Place Value estimate. No ADLP damages can be assessed for the property within those 106 lots. Accordingly, the number of lots to be considered is reduced to 168 (274 – 106).

Of the remaining 168 lots, 105 involve property where the In Place Value dispute between the parties is $100 or less—most involve disputes of less than $25, some $10 or less. These disputes are de minimus and I do not consider them. Accordingly, the number of lots of miscellaneous property to be addressed is reduced to 63 (168 – 105). Of the 63, 22 lots involve property that was never sold at the auction or for which the information appearing on the Schedule is inadequate to calculate ADLP damages. Hence, I address only 41 lots (63-22).

[26] Lots 1,6,7,7B, 38, 870, 894, 916, 917, 918, 919, 922A, 969, 974, 1016, 1102, 1135, 1155, 1161, 1162, 1164, 1166, 1167, 1168, 1172 and 6666.

[27] Lots 1175 and 1176.

[28] Lots 101, 107, 559, 785, 858, 908, 1139, 1142, 1143, 1144, 1151, 1165 and 1173.

property is thus $15,855. In the aggregate Mr. Agabian's final In Place Value was 176% of the auction price.

The Department's estimated In Place Value of the Miscellaneous property is greater than the auction price for each lot save two. The record shows that Mr. Agabian reviewed and individually valued each of the 41 lots.

I find no basis to disturb the Department's estimate of In Place Value. Krutiak failed to meet its burden to prove that the Department's In Place Values are incorrect or that its own estimates should be substituted. In contrast to the cranes, trucks, yellow iron, tires and scrap Krutiak offered no testimony or argument about the 41 most valuable lots of Miscellaneous property. Unlike cranes, trucks and yellow iron, where the condition of the property was testified to, there is little evidence about the condition of the Miscellaneous property at issue. Krutiak advanced no persuasive reasons why its own appraisal figures should be substituted for the Department's for any of the 41 lots.

After reviewing Mr. Beard's appraisal, Mr. Agabian's appraisal, the Schedule and the record as a whole I think the final In Place Values shown in Mr. Agabian's appraisal for the 41 lots are supported by substantial evidence. Krutiak did not offer convincing evidence or argument to show that its expert's In Place Values were more probably correct and than the Department's expert's estimated In Place Values. No additional ADLP damages should be awarded.

Scrap Metal

(i) The Original 647 tons

Krutiak seeks ADLP damages of $36,760 for 647 tons of scrap in its original 1997 claim. The claim is without merit.

Krutiak offered a lot of 647 tons of scrap to be sold "as is" at the auction. The 647 tons of discarded equipment and various metal odds and ends were unsorted and undifferentiated.[29] The scrap sold for $10,000, or $15.45/ton. The Department paid Krutiak an additional $5,000 for the scrap after it estimated a final In Place Value of $15,000 ($23.18/ton). Krutiak contends the scrap is worth $80/ton, or $51,760, of which it has already received $15,000. Its claimed ADLP damages are thus $36,760 ($51,760 - $15,000).

Before the 1997 auction Krutiak hired Mr. John McNickles, the proprietor of Bay State Salvage, to determine the quantity and value of its scrap metal. Mr. McNickles, who was in the business of buying, refurbishing and selling scrap, measured the quantity of scrap and estimated its value at $80/ton. Mr. Krutiak then asked Mr. McNickles to specify the amount of scrap by ton where it lay on the premises. On July 20, 1997 Mr. McNickles broke down his estimate of 647 tons by location, specifying in words and drawings the 647 tons at 17 locations.

The buyer of the 647 tons of scrap at the auction was Mr. Henry J. Moak of Schuylerville, New York. Mr. Moak bought unsorted, undifferentiated scrap.

After his purchase Mr. Moak, with Mr. Krutiak's permission, spent two months cutting up, sorting and making up truckloads of the scrap, working seven days a week. Mr. Moak sold some truckloads of scrap directly to third parties; others he transported to Schuylerville. At no time in the fall of 1997 (when Mr. Moak was cutting up and

[29] Before it ceased business operations Krutiak had accumulated much undifferentiated scrap—for example, steel beams, pipes and fittings, bar scrap, discarded crane booms, shovels and drag boxes, truck frames and truck-bed bodies, and parts from various building demolition projects. Also included in the scrap were discarded engine parts (starters, generators), machinery parts of cast iron (engine blocks) and a large quantity of miscellaneous unsorted metal.

removing the sorted scrap) and at no time between 1997 and 2005 (before Krutiak first asserted its amended claim) did Mr. Krutiak ask Mr. Moak to confirm the total actual tonnage of scrap he purchased in 1997.

The sole basis for Krutiak's damages is the assertion that the Department's price of $23.25/ton is wrong and that Mr. McNickles's estimated price of $80/ton is correct.[30] I find Mr. McNickles' written estimate of $80/ton unsupported and unreliable. The only basis on this record for a price of $80/ton is Mr. McNickles' opinion. His memorandum makes no reference to 760 CMR 27.09 or any other legal standard. His one page memorandum provides no basis or explanation of his opinion. Mr. McNickles did not testify at the hearing. Mr. McNickles' hearsay opinion stands naked and uncorroborated. Mr. McNickles' opinion is entirely unsupported by anything on the record. His price is 518% of the price paid at auction.

By contrast, Mr. Agabian's price of $23.25/ton was supported by his own testimony and by reference to credible sources. He relied on the published price of "heavy metal steel" scrap of $50 to $55/ton "delivered" published in the Wall Street Journal. His final price estimate was lower than the Wall Street Journal since the Krutiak scrap was on site, not "delivered." With reference to the In Place Value standard set forth in 760 CMR 27.09, Mr. Agabian convincingly explained that the "in place value" for scrap had no "end use" to a buyer. No buyer would buy the undifferentiated Krutiak scrap for "continued use"—the only conceivable use of the scrap was an immediate sale to raise cash. Hence, the "in place value" for the Krutiak scrap was "what you can get, or recoup, for it." Mr. Agabian finally estimated a $15,000 In Place Value, or $23.25/ton, which was $5,000 (or 33%) above the auction price.

[30] Mr. Beard did not give any opinion of In Place Value for scrap.

I find that $23.25/ton is the Value In Place price for the 647 tons of Krutiak scrap. Without any explanation of the basis of his opinion or why Mr. McNickles' price of $80/ton is 5.17 times greater than the $15.50/ton price paid at auction, his hearsay opinion is not credible. I disregard it.

(ii) The Amended Claim For 774.53 Additional tons

On February 1, 2005, the first day of the hearing, Krutiak informed the Department of its "amended claim" for scrap metal.[31] Krutiak contends that it is entitled to an additional "payment" of $61,962 because the amount of scrap sold at auction was not 647 tons, but 1,421.53 tons.

In early January 2005, Mr. Krutiak called Mr. Moak to seek a detailed breakdown of the scrap Mr. Moak had salvaged. On January 7, 2007, Mr. Moak signed a one-page statement addressed to Mr. Krutiak concerning the tonnage of "the scrap metal I purchased at the auction in Mass."[32] It was not notarized or sworn. The schedule consists of 8 lines; each refers to a "type" of scrap and its weight in tons.[33] The total weight of scrap (all types) is stated to be 1,421.53 tons, of which 774.53 tons is within the amended claim.

Krutiak argues that the Department should make "an additional payment" of $61,962 for the 774.53 found tons based on Mr. Moak's hearsay measurements and Mr. McNickles' hearsay $80/ton price (774.53tons X $80/ton = $61,962).

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[31] At the hearing Mr. Krutiak agreed that "no submission was ever made to MassHighway as to the increased quantity of scrap or the increase in quantity … until this morning."

[32] *See* Krutiak Ex. #8. The schedule was faxed to Krutiak on January 25, 2005. Id.

[33] Plate and structural steel (458 tons); No 1 steel (328 tons); No. 2 steel (245 tons); cast iron (195 tons); motor blocks (121 tons); copper (10.4 tons); Aluminum (20.92 tons); and tin (43.37 tons).

The Department argues that Krutiak's "amended" claim is time barred. The Department points to specific requirements in the regulatory scheme that mandate relocation claims must be filed within 18 months after a move, see 49 CFR 24.207(d); or within 12 months after displacement, see 760 CMR 27.04 (4).[34]

I find that Krutiak's amended claim is precluded as a matter of law. *See* 760 CMR 27.04(4) ("A claim … shall be submitted … within a period of 12 months…."). I find that Krutiak's amended claim is also precluded by 49 CFR 24.207(d) (claims to be filed within 18 months after move).[35] The amended claim should be rejected.[36]

<u>In Place Value of the Stipulated Property</u>

The stipulation concerning valuation methodology is:

> The parties stipulate that the method for valuing the under $3,000 items for schedules 9A, 9B and 9C may be to compare the Administrative Law Judge's determination of value, expressed in terms of a % difference between the claimant and MHD, for exhibits 9A, 9B and 9C and apply the same percentage to the under $3,000 items for each category.

In applying the stipulation to find the In Place Value of the Stipulated Property in the categories of cranes ($51,125), trucks ($49,305) and yellow iron ($77,080) I first

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[34] 760 CMR 27.04(4)(c) provides: "Processing of Claims, Time Limit for Submission. A claim for relocation payment shall be submitted to the relocation agency within a period of 12 months after displacement of claimant. The relocation agency shall extend this time in cases of hardship." Krutiak pleads no hardship here.

[35] I find the amended claim is in actuality a new claim since it involves (i) property outside the original claim and (2) scrap differentiated into 8 separate types of separately weighed scrap metals--e.g. copper (10.4 tons), tin (4.37 tons), cast iron (195 tons)--not the undifferentiated scrap Mr. McNickles catalogued and mapped in 1997. The found scrap is different in kind from the original scrap.

[36] While it is unnecessary to pinpoint how the original 647 tons was augmented by 774.53 tons that Mr. McNickles never found, it is noteworthy that Mr. Krutiak testified that he added metal to the scrap pile both before and after the auction. "A lot of things were added to the pile between May and September [of 1997]…. Some things not sold [at the auction] just tossed on the scrap pile." Krutiak concedes in its post hearing memorandum that Mr. Krutiak added scrap to the pile.

found the percent of Krutiak's additional ADLP damages to the parties' In Place Value "variance" by category of Specified Property. The percentages derived in the Specified Property by category are: cranes (4.85%), trucks (10.2%) and yellow iron (14.1%). *See* schedules for cranes (p.29), trucks (p.31) and yellow iron (p.33). I calculated the ADLP damage for each category of Stipulated Property by multiplying the respective percentage by the "variance" of In Place Value of the Stipulated Property by category. The additional ADLP damages I recommend for the Stipulated Property by property category are: cranes ($2,459), trucks ($5,050) and yellow iron ($10,868).

Summary Stipulated Property

	Krutiak Appraisal	Auction Price	MHD Payment	MHD In Place Value (Auction Price + Add. Pay)	"Variance" Krutiak Claim ADLP Damages	**ALJ ADLP Damages**	% Diff of ALJ Damages And Krutiak ADLP Claim
CRANES	196,820	117,515	28,180	145,695	51,125	**2,459**	4.8%
TRUCKS	360,395	230,805	80,285	311,090	49,305	**5,050**	10.2%
YELLOW IRON	697,780	538,695	82,005	620,700	77,080	**10,868**	14.1%
Total						**18,377**	

Summary of ADLP Damages

As determined above I find that Krutiak is entitled to ADLP damages in the following amounts for Specified Property and Stipulated Property.

Property	Specified Property	Stipulated Property	Total
Cranes	$3,800	$2,459	$6,259
Trucks	$9,500	$5,050	$14,550
Yellow Iron	$12,500	$10,868	$23,368
Tires	$1,968	NA	$1,968
Scrap	$0	NA	$0
Misc.	$0	NA	$0
Total	$27,768	$18,377	$46,145

By category of property set forth in Krutiak's Summary Sheet, I conclude that the Department should pay Krutiak ADLP damages in the following amounts.

Category	Amount
Cranes	$6,259
Trucks	$14,550
Yellow Iron	$23,368
Tires	$1,968
Scrap	$0
Misc.	$0
Total	$46,145

CONCLUSION

Based on the record as a whole, in accordance with the requirements of 760 CMR 27.09(20) and the holding in Worcester Redev. Auth. v. Department of Housing & Community Dev., 47 Mass. App. Ct. 525, 528 (1999), I recommend that the Department pay Krutiak additional ADLP damages of $46,145.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: April 16, 2007

APPENDIX D-1

DECISIONS/RULINGS

Approval of Street Name Change (M.G.L. c. 85, §3)

To: Luisa Paiewonsky, Commissioner
Massachusetts Highway Department

From: Stephen H. Clark, Administrative Law Judge

Date: March 10, 2008

Re: Report on the Appeal of 89 Inhabitants of the Town of Wareham Challenging the Renaming of "Wankinquoah Avenue" to "Oceanside Drive"

Introduction

G.L. c. 85, s.3 provides that, if 25 inhabitants of a town file a petition with the Massachusetts Highway Department (MassHighway) within 30 days after a town has acted to change a street name that has been in existence for 25 years or more, the name change shall not take effect unless "approved" by MassHighway.[1]

89 inhabitants of the town of Wareham (Town) filed a petition in District 5 of MassHighway pursuant to G.L. c. 85, s.3 on April 11, 2007 to appeal a March 16, 2007 notice from the Town that the Wareham Board of Selectmen (Selectmen) had changed the name of Wankinquoah Avenue in the Swifts Beach neighborhood to Oceanside Drive. The Town accepted Wankinquoah Avenue as a Town way in 1928; the petition was signed by more than 25 inhabitants of Wareham; and it was timely filed with MassHighway. Accordingly, the purported name change to Oceanside Drive can not by law take effect unless MassHighway affirmatively "approves" the Town's action.

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[1] G.L. c.85, s.3 provides, "When the name of any public way, place or section, or of any public park, is changed by the board or officer having jurisdiction thereof, if the name changed has been in use for twenty-five years or more, there shall be a right of appeal from such action to the [Massachusetts Highway] department. Said appeal shall be taken within thirty days after such change, and shall be by petition of at least twenty-five inhabitants of the town in which such change has been made, requesting the reversal of such action. Notice of the filing of such petition shall forthwith be filed by the department in the office of the clerk of the town in which the change has been made, and upon the filing of such petition, a public hearing shall be given by said department, after such public notice as it shall determine, and unless the department shall approve of such change, the same shall be of no effect."

I recommend that the Commissioner disapprove the Selectmen's change of name of Wankinquoah Avenue to Oceanside Drive. No public safety reason exists that requires a name change of that street. Given the inconvenience to the residents of Wankinquoah Avenue and the flawed procedure employed by the Town, it is not in the public interest to approve the name change to Oceanside Drive.

Renaming Wankinquoah Avenue (in the Swifts Beach neighborhood)

In Wareham the Selectmen have the authority to change the names of streets. See St. 1895, C. 344; G.L. c.85, s.3; Wareham By-Law Division III, Article III.[2] The Wareham Planning Board (Planning Board) may recommend name changes to the Selectmen but has no authority itself to name (or rename) streets. The Selectmen may not delegate their authority to name streets to the Planning Board. See Opinion of Town Counsel, March 15, 2007.

In the spring of 2006, the Planning Board began a project to assess whether certain streets should be renamed. It did so under two erroneous assumptions: (1) that the Selectmen could delegate its authority to name streets to the Planning Board; and (2) that the Planning Board itself had the authority to rename private ways. Id.

The Planning Board wanted to eliminate duplicate street names that could cause confusion or impede the Town's response to 911 emergency calls. Among streets with duplicative names were four streets named "Wankinquoah," or some near variation thereof, such as "Wankinco," "Wanquinquoah," or "Wankinko." (All variations of the

[2] If a way is open for public use but not a public way, and its name may cause confusion, the Selectmen may change its name after they hold a hearing noticed by publication given at least once in each of two successive weeks. See G.L. c.41, s. 74. The Selectmen did not follow that statutory process as Wankinquoah Avenue is a public way.

name are pronounced /wan-KINK-oh/ and derive from the native American word "Wankinquoah," which means "near the water.")

Duplicate "Wankinquoah" street names existed in three neighborhoods: (1) Wankinko Avenue (off Warr Avenue), (2) Wanquinquoah Road (off Cromesett) and (3) Wankinco Avenue and Wankinquoah Avenue (in Swifts Beach).

The Planning Board began the renaming process by consulting with Town departments, the Wareham Historical Commission and individuals. It sought comment and appropriate substitute names. On August 10 and 17, 2006 it published notices in the Wareham Courier announcing that on August 28, 2006 it would hold a public hearing "to rename the following streets," specifically identifying the three neighborhoods where streets had a version of the name "Wankinquoah." It also sent official notices of the hearing by mail to residents in two neighborhoods, but not to the residents in Swifts Beach. On August 16, 2006 the staff of the Planning Board prepared an "agenda for the public hearing," including in Swifts Beach "Wankinco Ave –off Wankinquoah Ave, Map 50 paper street." See Map 50, Ex. A ("paper street" marked in blue). See also Ex. E (neighborhood map and labeled photograph). The Planning Board defined a "paper street" as a private way existing only on plans, at locations where no houses existed.

At the August 28, 2007 hearing the Planning Board adopted the name "Oceanside Drive" for the paper street—e.g. that portion of Wankinco Avenue in Swifts Beach that was a private way. [3] See Map 50 B-1, Ex. B ("paper street" marked in blue). The recorded unanimous vote of Planning Board stated, in part, "Wankinco Ave. to

[3] The names of Wankinco Avenue (off Warr) and Wankinquoah Road (off Cromesett) were also changed. No appeal was taken to MassHighway from those name changes. Those changes eliminated duplicate street names in two of three neighborhoods.

Town sign for “Oceanside Drive.” The “draft” minutes state: “The Board concurred to leave the roads the way they are & a memo be sent to correct the map number on the documentation [of the Planning Board].” The minutes do not identify what “error” was or what the “correct” map number should be.

On January 22, 2007 the police officer responsible for the Town’s 911 emergency registration system wrote the Selectmen calling attention to a public safety problem created by the new Oceanside Drive official town sign. “[A]s far as E-911 is concerned, this is unacceptable and in my opinion opens the Town to problems in the future.” The officer wrote that on December 23, 2006 a resident of Wankinquoah Avenue made a 911 call and that the Town’s emergency response had been delayed by the Oceanside Drive sign. The officer recommended that the sign be removed. He suggested that the one neighborhood resident who wanted the name changed to Oceanside Drive, Mr. Tenaglia, be permitted to place a “private way” sign signifying that name on a 100 foot private way connecting north-south “Wankinquoah Avenue” to east-west “Wankinco Avenue.” See Map 50, Ex. A (private way marked in red); see also Ex. E.

On February 27, 2007 the Board of Selectmen held a meeting recorded on video tape. The Selectmen gave no written notice to the residents of Swifts Beach, and no public meeting law notice that the Selectmen would consider a change of name for Wankinquoah Avenue. Street name change was mentioned twice in the meeting. The Selectmen first noted that the Planning Board had decided to hold a second public hearing at which they intended to rescind their August 28, 2006 vote to change the name of the “paper street” portion of Wankinco Avenue to Oceanside Drive and then reopen the name change of “Wankinquoah” for public discussion. The Selectmen noted that

they had delegated to the Planning Board their authority to rename streets and agreed that the Planning Board had no authority to either hold a second public hearing or rescind a decision it had voted at its August 28, 2006 public meeting.

The Selectmen then addressed a letter received from the chief of police requesting "immediate action to correct the street name/signage issue" at Swifts Beach. The chief noted that the new Oceanside Drive sign "effectively changed a portion of Wankinquoah Avenue to Oceanside Drive" and had "created a serious and dangerous public safety problem" since neither residents nor the E-911 coordinator had received official notice of "this change." The chief asked the Selectmen to either (1) affirm the Town's intent to change the name of Wankinquoah Avenue (and then renumber the houses and notify the residents) or (2) remove the Oceanside Drive sign.

The Selectmen by consensus apparently agreed to rename Wankinquoah Avenue Oceanside Drive, although the video tape does not record that the Selectmen acted by vote. The record as a whole shows that the Selectmen did not act to rename the "paper street" portion of Wankinco Avenue to Oceanside Drive, which was the action that the Planning Board took. Instead, the Selectmen gave the name Oceanside Drive to the north-south portion of Wankinquoah Avenue, the very street its own office had notified Town departments on January 9, 2007 was "**not**" affected by the Planning Board vote and had not been renamed Oceanside Drive. (Emphasis in the January 9, 2007 Selectmen's notice.)

The video tape of the Selectmen's meeting does not specify reasons of public safety or public interest why the north-south portion of Wankinquoah Avenue should be changed to Oceanside Drive. On stated reason for the name change was "to end" the

The Town's 911 coordinator testified that the requirements of the Town's 911 registration system did not require any name change of Wankinquoah Avenue. He pointed out that, since two streets named Wankinco/Wanquinquoah Avenue had been changed in two other neighborhoods, no public safety reason remained for changing the name change of Wankinquoah Avenue to Oceanside Drive at Swifts Beach. He said that the 911 registration system was based on the assessor's records, which were not ambiguous. The assessor listed all addresses on Wankinquoah and Wankinco Avenues at consecutively numbered addresses on "Wankinquoah Avenue," irrespective of spelling.[10] Because the Town's 911 dispatchers are trained to question callers as to exact location they do not confuse Wankinquoah and Wankinco Avenues at Swifts Beach. "The problem—and it is a safety issue—is that Oceanside Drive sign," which had caused a 911 response delay on December 23, 2006 and was "still" a possible cause of delay.

Discussion

Statutory Scheme

G.L. c.85, s. 3 provides that, if a street name has existed for 25 years or more, the "inhabitants" of a town have a legal interest in the continuation of that name unless MassHighway "approves" the action of the local authority to change it. There are no reported cases construing the statute.

Although the statute does not specify the legal standard MassHighway should employ in approving a name change, in past cases MassHighway has considered facts affecting the public safety. That is appropriate, as both the Town and the petitioners

[10] See Ex. A. The Town street sign located on the east-west portion of Wankinquoah Avenue is spelled "Wankinco Avenue," as is the "paper street." See Ex. A. The street sign marking the north-south portion of Wankinquoah Avenue before its disappearance had been spelled "Wankinquoah." Compare Ex. C, where both spellings appear on the east-west portion ("Wankinco Avenue" printed, "Wankinquoah Avenue" hand-written). The printed labels on the map at Ex. C are consistent with street signage.

agree. A broader public interest standard may also be appropriate—for example, if a traditional street or park name has historic significance or the governmental actions of a town are flawed or prejudice residents.

G.L. c. 85, s. 3 places the burden of persuasion on the town, not the petitioners. Once 25 petitioners have timely appealed and have established that the name of the "public way, place or section, or of any public park" has been in use for twenty-five years, the statute provides that a name change "shall be of no effect" unless MassHighway approves. I therefore construe the statute to mean that a town has the burden to show MassHighway why a name change should be "approved."

Analysis

The Town presented no public safety reason to MassHighway at the public hearing on November 2, 2007 to support the change of the traditional name "Wankinquoah Avenue" to "Oceanside Drive." The Selectmen offered no explanation of their decision and never identified at the public hearing a specific public safety concern as the reason for the street name change of Wankinquoah Avenue in Swifts Beach. Likewise, no reason was ever articulated why the name Oceanside Drive should be substituted over the objections of the residents.

The record convincingly shows that continuing to use the traditional names Wankinquoah Avenue (and Wankinco Avenue) poses no public safety hazard. The Town's 911 coordinator explained at the public hearing that, because of the details of the 911 registration system in place and the training of its personnel, leaving the name of Wankinquoah Avenue unchanged did not create a risk of delayed emergency response. To the contrary, he testified that the Town itself created a public safety problem in the

Swifts Beach neighborhood by permitting the erection of an unauthorized Oceanside Drive sign five months before the Selectmen even officially considered any name change. Once the Town changed the duplicative names for "Wankinquoah" streets in two other neighborhoods, there existed no public safety rationale for changing the name Wankinquoah Avenue in Swifts Beach.

Broadly viewed there is nothing in this record that supports changing the traditional street name of Wankinquoah Avenue to Oceanside Drive; indeed, there are three reasons why MassHighway should disapprove the name change. First, the Town followed a flawed process in the 2006-2007 name-change project. The Planning Board and the Selectmen acted under a misapprehension of their legal authority: the Selectmen erroneously purported to delegate their authority to change street names to the Planning Board; the Planning Board incorrectly believed that it could rename private ways on its own. It was only on March 15, 2007—the day before the Selectmen first notified the residents of Wankinquoah Avenue that henceforth they lived on Oceanside Drive—that the Town's legal counsel advised the Planning Board in writing of the legal authority of the Board and Selectmen to change street names. Second, the Town's public renaming process was largely conducted beyond public view. The Selectmen and Planning Board each failed to send notices to potentially affected residents of Wankinquoah Avenue before meetings where they intended to discuss and decide street name matters. Third, both the Planning Board and the Selectmen took confusing, ambiguous and ultimately prejudicial official actions—for example, the Planning Board purported to "officially" change the "paper street" portion of Wankinco Avenue but failed to accurately record what it did in its minutes; the Selectmen sent an official notice to all Town departments

on January 9, 2007 expressly stating that the name Wankinquoah Avenue had **"<u>not</u>"** changed to Oceanside Drive but never acted to remove the unauthorized "Oceanside Drive" street sign. On February 27, 2007, in contradiction of its widely published notice dated January 9, 2007, the Selectmen agreed without a recorded vote that Oceanside Drive was the new name, a fact that the residents of Wankinquoah Avenue only learned upon receiving the Selectmen's March 16, 2007 official notice.

Overall, the Town's public process was flawed to the point that MassHighway should disapprove the street name change. One email from a Town employee describing the events of 2006 and 2007 stated, "This has been the most confusing street name or renaming that I could ever imagine." A Selectman wrote in early March, 2007 "I am thoroughly and completely confused at this point as to what the name of this street [Wankinquoah Avenue] is, was or should be…." Both the public and the residents of Wankinquoah Avenue were prejudiced by the Town's governmental process.

The Town had the burden under G.L. c.83, s. 3 to convince MassHighway at the public hearing held on November 2, 2007 that it should approve the name change to Oceanside Drive. The Town did not meet that burden. I recommend that MassHighway not approve the street name change of Wankinquoah Avenue to Oceanside Drive.

To: Wareham Town Clerk

Pursuant to G.L. c.85, s.3, I hereby notify the Town of Wareham that the Massachusetts Highway Department (MassHighway) does not approve of the change of the street name Wankinquoah Avenue to Oceanside Drive in the Swifts Beach neighborhood of the town.

Wankinquoah Avenue was accepted as a town way in 1928 and its name has since remained as originally designated. On March 16, 2007, the Selectmen sent a notice to residents of Wankinquoah Avenue informing them that the name Wankinquoah Avenue had been changed to Oceanside Drive. Eighty-nine inhabitants of Wareham then appealed by petition to District 5 of MassHighway within 30 days of the notice asking that MassHighway not approve the name change. See G.L. c.85, s.3. In accordance with the requirements of the statute MassHighway filed notice of the petition with the Town Clerk, assembled the public records concerning the name change, and gave notice that, on November 2, 2007, it would hold a public hearing. The hearing was duly conducted by Stephen H. Clark, the Administrative Law Judge in the Executive Office of Transportation.

As a result of the testimonies and evidence brought forth from the public hearing, it does not appear that a public safety issue exists to support the name change of Wankinquoah Avenue in the Swifts Beach neighborhood. According to the report of the Administrative Law Judge, the Selectmen did not testify at the November 2, 2007 public hearing and MassHighway never received written documentation or any other communication by the Town Selectmen expressing any public safety concern in regard to Wankinquoah Avenue. The Administrative Law Judge recommended against the name change.

After reviewing the recommendation of the Administrative Law Judge, I have determined that there was no public safety reason to change the name of Wankinquoah Avenue. The name change of Wankinquoah Avenue to Oceanside Drive, as described on the Selectmen's notice of March 16, 2006, is therefore not approved.

By: Luisa Paiewonsky, Commissioner
Massachusetts Highway Department

Dated: June 2, 2008

REPORT ON THE APPEAL OF 42 INHABITANTS OF THE TOWN OF WAREHAM
RECOMMENDING MASSHIGHWAY NOT APPROVE THE CHANGE OF
"WANKINQUOAH AVENUE" TO "OCEANSIDE DRIVE"

AUGUST 6, 2014

To: Frank DePaola, Administrator
MassDOT Highway Division

From: Stephen H. Clark, Administrative Law Judge

Date: August 6, 2014

Re: Report on the Appeal of 42 Inhabitants of the Town of Wareham Recommending MassHighway Not Approve the Change of "Wankinquoah Avenue" to "Oceanside Drive"

INTRODUCTION

I recommend MassHighway not approve the name change to Oceanside Drive.

This is the second appeal of petitioners to MassHighway requesting that it disapprove the change of the traditional name Wankinquoah Avenue to Oceanside Drive by the town of Wareham (Town). The petitioners' first appeal was filed with MassHighway on April 11, 2007. On June 2, 2008 MassHighway disapproved the change of Wankinquoah Avenue to Oceanside Drive. See Appendix B (Decision).

On December 2, 2008 the Town's board of selectmen again changed the name of Wankinquoah Avenue to Oceanside Drive and, on December 5, 2008, forthwith implemented that street name without MassHighway's approval. The petitioners petitioned MassHighway for a second time on December 30, 2009.

G. L. c. 85, s. 3 (Statute)[1] requires MassHighway[2] to decide whether to approve the renaming of the public way Wankinquoah Avenue (Avenue or Wankinquoah

[1] G. L. c. 85, s. 3 provides: "When the name of any public way, place or section, or of any public park, is changed by the board or officer having jurisdiction thereof, if the name changed has been in use for twenty-five years or more, there shall be a right of appeal from such action to the [Massachusetts Highway] department. Said appeal shall be taken within thirty days after such change, and shall be by petition of at least twenty-five inhabitants of the town in which such change has been made, requesting the reversal of such action. Notice of the filing of such petition shall forthwith be filed by the department in the office of the clerk of the town in which the change has been made, and upon the filing of such petition, a public hearing shall be given by said department, after such public notice as it shall determine, and unless the department shall approve of such change, the same shall be of no effect."

houses sequentially on both segments (lowest numbers at the north end of the north-south segment, continuing southerly, then westerly with the highest number at the intersection of Murphy Street). Id. The Town sent a formal notice of the correct spelling and house numbering to affected residents, the Town Administrator and clerk, and to the police, EMS, fire, assessing, municipal maintenance, inspectional services, and school department, as well as to public utilities and four local post offices. Id. Although the spelling "Wankinquoah Avenue" was mandated, the Town at an unknown later date erected a misspelled street sign—"Wankinco Avenue"—on the east-west segment. See Appendix A (photo/map). The Town never corrected the "Wankinco" spelling on the 1987 assessor's map 50A. See Appendix A (maps). After the selectmen in 1998 imposed the uniform spelling of "Wankinquoah," the confusion caused by variant spellings of /wan-KINK-oh/ ceased.

Neighborhood Politics and Lawsuits: Zoning, Development, Permitting, Eminent Domain

From 2001 through 2010 (and beyond) residents of the Swifts Beach neighborhood and the then selectmen were embroiled in disputes and litigation. On May 23, 2001 Ms. Barbara Haupt, owner of a vacant 5.35 acre waterfront parcel at the foot of the north-south segment of Wankinquoah Avenue, leased part of that parcel to selectman Bruce Sauvageau to operate a parking business for beachgoers. See July 23, 2009 Hearing, Ex. 12; see also Appendix D. Later in 2001 Ms. Haupt refused to renew

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Wankinquoah Avenue . . . ." An attachment lists the residents at 37 numbered addresses on both the north-south and east-west segments of "Wankinquoah Avenue." 25 addresses that had been "using" the spelling "Wankinco Avenue" were changed to the "correct" spelling "Wankinquoah Avenue." The Order identifies the three assessing maps that together show the public way Wanquinquoah Avenue: map 50-A, map 50-B-3 and map 50-C-1. The maps may be seen at Appendix A (maps).

The Town's Suit Against The Commonwealth

On July 2, 2008 the Town filed an action against the Commonwealth in Suffolk Superior Court seeking judicial review under G. L. c. 30A. See Town of Wareham v. Commonwealth, SUCV 2008-02944-6. By the Town's motion, assented to by the Commonwealth, the proceedings were stayed on October 16, 2008. The case was dismissed with prejudice by stipulation on March 16, 2009. The court made no rulings. I know of no stipulation of the parties conditioned on the dismissal of the action.

On December 2, 2008 The Town Again "Changed" The Name of Wankinquoah Avenue

1. Notices Published Before The Meeting

Before the December 2, 2008 meeting, the selectmen published two notices in the Wareham Courier for two successive weeks and gave notice to residents. See July 23, 2009 Hearing, Ex. 5. There were two versions of the published notice. The first stated the subject of the December 2, 2008 meeting as:

> Whether to change the names of two streets, which now are known as Wankinco Avenue and Wankinquoah Avenue.

The second published version stated:

> The purpose of renaming is mandated by 9-1-1 regulations for public safety and under the provisions of MGL c. 85.

Critical factual statements in each notice are plainly wrong.

The names of the "two streets" "which now are known" are wrong. As a matter of fact (de facto) the name of the north-south segment of Wankinquoah Avenue was then "known" (and had been since March 16, 2007) as Oceanside Drive—it was not "Wankinco" or "Wankinquoah" Avenue. The name of the east-west segment was then

"known" by all (and had been since June 1, 1998) as "Wankinquoah Avenue," spelled as such. No "street" "Wankinco Avenue" in fact existed as a public way—the only "Wankinco Avenue" then "known" was the dirt foot path, the "paper street."

The second notice was also factually incorrect. No 9-1-1 regulation required the renaming of the lawfully existing (de jure) street "Wankinquoah Avenue," which was, in December, 2008, legally configured precisely as it had been since June 1, 1998, in full compliance with E 9-1-1 regulations.

2. The December 2, 2008 Selectmen's Meeting

When the selectmen met on December 2, 2008 to again consider re-naming Wankinquoah Avenue, selectman Bruce Sauvageau, who had acted on February 27, 2007 to implement the name Oceanside Drive, left the room. The remaining four selectmen heard from two people who favored keeping "Wankinquoah Avenue," and then from Rose Sauvageau who wanted the north-south segment renamed Oceanside Drive. See Hearing of July 23, 2009, Ex. 13(a).

The selectmen reiterated the "facts" stated on the Notice: that "two" streets "known as" "Wankinquoah Avenue" and "Wankinco Avenue" pronounced identically actually existed and caused a public safety "concern" for 9-1-1 responders.[22] The selectmen acted as if the north-south segment of "Wankinquoah Avenue," incontestably "known as" Oceanside Drive by the residents, was then "known as"

[22] Selectman Bruce Sauvageau's wife's written statement well summarizes the incorrect facts the selectmen both assumed and relied on: "The end of Swifts Beach Road [sic] cuts through Wankinco and Wankinquoah. When an emergency vehicle is dispatched it comes to the end of Swift Beach Road [sic] and it becomes unclear whether to take a right or a left." July 23, 2009 Hearing, Ex. 13(a).

The Selectmen Acted On December 5, 2008 Meeting To Implement the Name Change

On December 5, 2008, prior to the expiration of the 30 day petition period, the Town acted in its official capacity to forthwith give the name Oceanside Drive legal "effect." It ordered all Town departments to use Oceanside Drive in place of the name Wankinquoah Avenue. It officially notified the U.S. Postal Service and public utilities to use the name Oceanside Drive. It sequentially re-numbered "Oceanside Drive" and "Wankinquoah Avenue" separately. July 23, 2009 Hearing, Ex. 5c.

42 Inhabitants of the Town Petitioned MassHighway On December 30, 2008

On December 30, 2008 more than 25 inhabitants of the Town timely appealed the Town's actions to MassHighway under G. L. c. 85, s. 3. July 23, 2009 Hearing, Ex. 6.

MassHighway Held a Public Hearing On July 23, 2009

MassHighway held a second public hearing on July 23, 2009. Anyone was welcome to speak. I ruled that the rules governing adjudicatory hearings under Chapter 30A, the state Administrative Procedure Act, did not apply. The hearing was not conducted as a trial—witnesses were not sworn and cross-examination was not permitted. Written questions were submitted to me and I posed them.

The hearing was conducted to elicit facts through documents and testimony. The principal witness testifying for the petitioners was Ms. Kathy Allard. In favor of the Oceanside Drive name were two witnesses, Mrs. Rose Sauvageau and selectwoman Brenda Eckstrom. Also testifying was Sgt. Peter Murphy, the 9-1-1 dispatch coordinator.

At the conclusion of the public hearing, the Town and the petitioners, on November 12, 2009, submitted post hearing memoranda. See Appendix C.

PART IV: DISCUSSSION

INTRODUCTION

In 2008, the selectmen and the residents remained in deep conflict as a result of neighborhood disputes and litigation. See supra, at 4. The controversy over the name "Oceanside Drive" is not about whether the Traditional Name is more appropriate than its proposed replacement; rather, for both sides, the naming controversy is a proxy: Mr. Sauvageau and his family want the name Oceanside Drive to honor Mr. Tenaglia's "Oceanside Pizza"; the 100 plus people who vigorously oppose want "Wankinquoah Avenue" named and numbered as it was on June 1, 1998. Id.

On December 2, 2008 the selectmen voted to change the name of Wankinquoah Avenue to Oceanside Drive for a second time; and, on December 5, 2008, implemented —without MassHighway approval—the official use of the new street name.

THE TOWN CONTRAVENED THE STATUTE AND ACTED UNLAWFULLY

1. The Town Implemented the Name Change Without MassHighway Approval

There is no doubt that the Town acted in its official capacity to implement the use of the "new" street name, Oceanside Drive, without the required MassHighway approval. Its conduct repeatedly (and continually) violated the Statute.

The Town unlawfully acted to implement the name Oceanside Drive without MassHighway approval in 2006, 2007 and 2008 (collectively, "Initial Implementation").[31]

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[31] (1) In October, 2006 the Town erected an official Oceanside Drive street sign, well before it held the first public meeting to change the name of Wankinquoah Avenue; (2) in November, 2007, during the time MassHighway was considering whether to approve the new name, the Town changed the addresses on its assessing and treasury records of taxable parcels from Wankinquoah Avenue to Oceanside Drive; (3) on May 29, 2008, just before MassHighway disapproved the name Oceanside Drive, on June 2, 2008, the Town Administrator ordered the 9-1-1 dispatcher to change its records forthwith to Oceanside Drive in

After the selectmen's meeting on December 2, 2008, the Town unlawfully implemented the disapproved name, Oceanside Drive, and continued to unlawfully implement the disapproved name (collectively, "Second Implementation").[32]

The Town admits that it prematurely implemented the new name. On November 12, 2009 the Town wrote,

> The Town does not contest that it acted to implement the changes following the [December 2, 2008] Decision, nor does the Town contest that it did so following the 2006-2007 proceedings. Appendix C (Town Memorandum at 3).

2. Giving 'Effect' to the Name Oceanside Drive Without MassHighway Approval Violated the Statute and Was Unlawful

Both Initial and Second Implementation of the name Oceanside Drive violated the Statute and were unlawful. Upon the filing of a petition, the Statute prohibits a name change from taking "effect" "unless" MassHighway shall approve.

The Statute consists of three sentences.[33] The first sentence[34] establishes "a right of appeal" from "such action"—viz. the action by which a Traditional Name "is

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place of Wankinquoah Avenue (north-south segment); (4) after MassHighway's June 2, 2008 decision disapproving the name Oceanside Drive, the Town ignored the state's disapproval under the Statute and acted as if MassHighway had officially approved—not disapproved—the name Oceanside Drive (it did not remove the 2006 Oceanside Drive street sign; it did not contravene the May 29, order to the Town's 9-1-1 dispatcher; it did not restore the name Wankinquoah Avenue in Town records).

[32] (1) On December 5, 2008 the selectmen notified Town departments, public utilities and the U.S. Postal Service that the Town had changed the name of Wankinquoah to Oceanside Drive; (2) upon the petition of 42 Town inhabitants to MassHighway on December 30, 2008, the Town failed to obey the Statute and did not restore in use the name "Wankinquoah Avenue" but continued to give "effect" to the new name.

[33] The intent of the Legislature is to be understood in light of the Statute as a whole. See Pereira v. New England LNG Co., 364 Mass. 109, 115 (1973). In understanding its language you must give effect to all the Statute's provisions, so that none will be rendered superfluous; you may not ignore a statute's purpose or the mischief it seeks to cure. See Devaney v. Watertown, 13 Mass. App. Ct. 927, 928 (1982).

changed." The second sentence[35] describes when the right of appeal "shall be taken," who may exercise it, and proscribes the relief—viz. "the reversal of such action."

The third sentence[36] instructs MassHighway to "forthwith" "file" with the Town clerk a notice of the filing of the petition at MassHighway "and upon the filing of such petition" to "give" a "public hearing" after notice, "and unless the department shall approve of such change, the same shall be of no effect."

The words "such change," in harmony with the phrase "such action," refer to the naming action of a local official. The act of naming has to be done before a "right of appeal" by petition may be "taken"; the petition itself may only "request[] the reversal" of "such [naming] action," which does not take "effect" unless MassHighway approves.

The words "upon the filing of such petition," read in concert with the phrase "and unless [MassHighway] shall approve such change, the same shall be of no effect," suspends the "effect" of the local decision and the implementation of a new name until MassHighway "shall approve of such change." The phrase "upon the filing of such petition" defines the moment when the suspension of legal "effect" begins. The suspension lasts until MassHighway has exercised its statutory judgment.

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[34] "When the name of any public way, place or section, or of any public park, is changed by the board or officer having jurisdiction thereof, if the name changed has been in use for twenty-five years or more, there shall be a right of appeal from such action to [MassHighway]." G. L. c. 85, s. 3.

[35] "Said appeal shall be taken within thirty days after such change, and shall be by petition of at least twenty-five inhabitants of the town in which such change has been made, requesting reversal of such action." Id.

[36] "Notice of the filing of such petition shall forthwith be filed by [MassHighway] in the office of the clerk of the town in which the change has been made, and upon the filing of such petition, a public hearing shall be given by said department, after such public notice as it shall determine, and unless the department shall approve of such change, the same shall be of no effect." Id.

If a town acts to give the name change legal “effect” during the 30 day period, the legal “effect” of a new name ceases when the “right of appeal” is established “upon the filing of the petition.” During the time MassHighway has the local name change under review, the naming action of the local official remains valid even though its implementation is suspended. If MassHighway approves the name change, the suspension ends and the name change goes into “effect.” If MassHighway does not approve, the change never takes “effect” and the Traditional Name remains in force.

If a town could lawfully implement a name change before MassHighway approves a new name, a principal purpose of the Statute is defeated—the meaningful “right of appeal” the Legislature granted to 25 petitioners seeking MassHighway’s oversight. Premature implementation also defeats state oversight because it would require MassHighway to “unwind” or “roll back” a name change already in “effect.” No language in the Statute authorizes the implementation of a name change before MassHighway “shall approve of such change.” Accordingly, the Town’s Initial and Second Implementation violated the Statute and are unlawful.

The Statute does not provide for judicial review of MassHighway’s decision. See supra at 8 n.11. Judicial review does not inhere because MassHighway’s discretionary decision to approve is legislative in nature and final. Id.

3. The Town’s Arguments Are Without Merit

The Town’s legal arguments have no basis in law. It argues that, under the Statute, the implementation of the name Oceanside Drive is valid “unless and until”

honored.[42] That so many are opposed and so few are in favor, is, without more, a compelling reason to not approve the name change.

2. <u>There Are Three Principal Proponents for the Name Change</u>

Five people advocate the name Oceanside Drive: Selectman Bruce Sauvageau, [43] his wife, Rose Sauvageau,[44] her father Ciro Tenaglia, and two others.[45] Rose Sauvageau initiated the idea to change the north-south segment of Wankinquoah Avenue to "Oceanside Drive" at a planning board meeting in August, 2006, to commemorate her father's former pizza business. See Appendix A (Sgt. Murphy letter of 1/22/07).

The proponents advance only two reasons for the name Oceanside Drive: (1) to honor Mr. Tenaglia's "Oceanside Pizza" and (2) to rectify the "confusion" that might arise on a 9-1-1 call because of "two" streets with different spellings, "known as" "Wankinquoah" and "Wankinco," which are pronounced identically. See Rose Sauvageau's statement July 23, 2009 Hearing, Ex. 13(a) ("The point is the street names

[42] At the December 2, 2008 meeting of the selectmen, one selectwoman observed that there was once a single continuous path "near the water" that joined Swifts Beach with Ware and Cromesset. The apparent encroachment of Buzzard's Bay broke the single path into three distinct sections, which led to the elimination of "Wanquinquoah Avenue" and "Wankinco Road" as duplicate or near duplicate street names by the planning board in 2006. The word "Wankinquoah" is traditional within the Town.

[43] Bruce Sauvageau, a selectman in 2007 and 2008, voted to implement the name Oceanside Drive on March 16, 2007. He was in office when the Town twice implemented the name Oceanside Drive without MassHighway's approval. Mr. Sauvageau was a selectman in 2003 when the Town took by eminent domain Barbara Haupt's 5.35 acre parcel in Swifts Beach. Mr. Sauvageau's father-in-law, Mr. Tenaglia owns land next to Ms. Haupt, he at 25 Wankinquoah Ave (see Appendix A (Order)), she at 23 Wankinquoah Avenue (see July 23, 2009 Hearing, Ex. 12).

[44] Rose Sauvageau testified before the Town planning board in August, 2006 in favor of the name Oceanside Drive. She also testified before the selectmen on December 2, 2008 after selectmen Sauvageau absented himself.

[45] Mr. Tenaglia and two others testified in favor at the November 23, 2007 public hearing.

should be different to alleviate this confusion especially when emergency vehicles are dispatched to the area.”).

Honoring a private business, “Oceanside Pizza,” is no reason to replace a Traditional Name of local historic importance overwhelmingly supported by Town residents. The name “Oceanside Drive” has no historic or positive public importance. The public interest lies in retaining the name “Wankinquoah Avenue.”

MassHighway will rectify any potential “confusion” in 9-1-1 dispatch that may now exist by not approving the name change from Wankinquoah Avenue (north-south) to Oceanside Drive. Disapproval of the name “Oceanside Drive” would “reverse” the name change and reinstate the de jure name Wankinquoah Avenue as a continuous street with two segments, sequentially numbered since 1998. That configuration actually in place from 1998 through 2006 complied with 9-1-1 regulations and enabled timely emergency dispatch.

THE SELECTMEN’S DECISION IN 2008 WAS BASED ON “FICTIONAL FACTS”

“Wankinquoah Avenue” (so spelled) Is One Continuous Street with Two Segments

The selectmen voted on December 2, 2008 on the feigned basis that there “then” existed “two” streets, “Wankinquoah Avenue” and “Wankinco Avenue.” “Two” streets, so described, did not exist in fact or in law on December 2, 2008 because the selectmen had eliminated the “two” names and variant spellings on June 1, 1998.[46]

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[46] The Town cites two dubious sources in support. First, the 1987 assessor’s map 50-A which spells the east-west segment of “Wankinquoah Avenue” incorrectly as “Wankinco Avenue”; and, second, the misspelled street sign, “Wankinco Avenue,” just to the west of the intersection with Swifts Beach Road. The 1987 assessor’s map predated the selectmen’s order of June 1, 1998; the incorrectly spelled street sign, erected at an unknown date by the maintenance department, did not change the official name or spelling of “Wankinquoah Avenue.”

As a matter of law, as the petitioners correctly assert, on December 2, 2008 there was one street, “Wankinquoah Avenue,” spelled as such—a continuous public way with two segments with houses sequentially numbered. The name and numbering had not lawfully changed since June 1, 1998 because MassHighway never approved the new name Oceanside Drive. The selectmen ignored MassHighway’s June 2, 2008 disapproval of their March 16, 2007 name change, as well as their own order of June 1, 1998, when they repeatedly recited on December 2, 2008 that there “then” existed “two” streets with the same pronunciation but with different spellings.

As a matter of fact, the names of the “two” streets “then” existing were “Oceanside Drive” (the de facto name of north-south segment re-named on March 16, 2007 and unlawfully implemented without MassHighway approval) and “Wankinquoah Avenue” (east-west segment existing in law and fact by order of the selectmen on June 1, 1998). The selectmen ignored both these realities when they acted, on December 2, 2008, for a second time, to change the name of the north-south segment of Wankinquoah Avenue to Oceanside Drive.

There is no doubt that, before 1998, the names “Wankinco Avenue” (north-south segment) and “Wankinquoah Avenue” (east-west segment) had existed and had caused confusion. See Appendix A (July 22, 1996 memo). But there is also no doubt that the confusion ended on June 1, 1998, when the selectmen ordered the uniform name and spelling of “Wankinquoah Avenue” for the entire street and sequentially re-numbered the houses.

The Town and the public, from 1998 through 2006, used the "Wankinquoah Avenue" spelling. See supra at 25 n.24 (ubiquitous use of "Wankinquoah Avenue"; "Wankinco Avenue" ceased to be used). The selectmen ignored both the legal and factual realities when they voted on December 2, 2008.[47]

MassHighway is entitled to rely on the selectmen's 1998 order to establish the correct legal name and spelling existing on December 2, 2008. It need not credit the "fictional facts" recited by the selectmen, which were "derived" from the uncorrected spelling errors on a 1987 assessor's map and street sign of unknown date.[48] Because the selectmen's vote on December 2, 2008 (and undated record vote) relied on demonstrably "fictional facts," the naming action should not be approved.

[47] At the December 2, 2008 hearing, Sgt. Murphy reiterated his testimony of 2007 and 2008 that "Wankinco Avenue" only existed as a "paper street" on a map; that "Wankinquoah Avenue" was a built street for its entire length; that its houses had been sequentially numbered in compliance with 9-1-1 regulations. See 560 C.M.R. 2.00 (3). He testified that all the confusion and "public safety" issues began when the Town erected the Oceanside Drive sign in October, 2006 and, consequently, an ambulance failed to immediately find #3 Wankinquoah Avenue on December 23, 2006. See Appendix A (Murphy letter). Sgt. Murphy has personal and professional knowledge of correct street names and their spellings. He has personal knowledge about the confusion that the Town caused in 2006 and thereafter. Even before the planning board eliminated two duplicate streets named "Wankinquoah" on August 28, 2006 (off Cromesset, off Ware), Sgt. Murphy had organized the Town's E 9-1-1 system to eliminate ambiguity that might confuse a 9-1-1 dispatch to three inhabited streets known variously as "Wankinquoah," "Wanquinquoah," or "Wankinko," all pronounced in the same way. He did that by training dispatchers answering a 9-1-1 call from a /wan-KINK-oh/ address to immediately ask whether the caller was located in Swifts Beach, Cromesett or Ware. After June 1, 1998, a call from Swifts Beach could generate no confusion (even if a street sign was misspelled) because all houses were sequentially numbered on "Wankinquoah Avenue," spelled as such. Sgt. Murphy's testimony is corroborated. See July 23, 2009 Hearing Ex. 15.

[48] The incorrectly spelled "Wankinco Avenue" street sign, fabricated by the maintenance department, did not lawfully change the name of a street any more than did the erection of the "Oceanside Drive" sign in 2006. The maintenance department could produce no documentation that showed who ordered the erection of the Oceanside Drive sign. See Appendix B (Report at 4-5). It is unknown who ordered the erection of the misspelled street sign, "Wankinco Avenue," or when.

DISAPPROVAL OF OCEANSIDE DRIVE WILL ELIMINATE THE RISK OF 911 DISPATCH DELAY

1. Disapproval of "Oceanside Drive" Will Restore "Wankinquoah Avenue"

MassHighway's decision should diminish the potential of delayed 9-1-1 response. If MassHighway does not approve the name Oceanside Drive, the naming action of the Town will be "reversed" and the name "Wankinquoah Avenue" restored by operation of law. See supra at 34 n.37. Disapproving the name Oceanside Drive will restore the name Wankinquoah Avenue (and the street numbering scheme) to what existed on June 1, 1998. Disapproval of Oceanside Drive, and restoring the house numbering, all but eliminates any potential risk of delayed 9-1-1 response. The configuration of Wankinquoah Avenue as it existed after June 1, 1998 complied with 9-1-1 requirements. No incidents of 9-1-1 dispatch delay are known between 1998 and 2006 (when the Oceanside Drive sign was erected).

2. Approval of the Name Oceanside Drive Will Reward Wrongful Conduct

Any potential confusion to 9-1-1 dispatch that now exists was caused solely by the Town itself, starting with erection of the Oceanside Drive street sign in 2006. On December 23, 2006, a 9-1-1 call was delayed due to confusion about where #3 Wankinquoah Avenue was located. See Appendix A (Murphy 1/22/07 letter). The potential for 9-1-1 delay was compounded on March 16, 2007 when the selectmen eliminated the existing sequential numbering of houses on Wankinquoah Avenue and implemented the new street, Oceanside Drive, without MassHighway approval.[49] See

[49] Some residents, believing that the name change had no "effect" because MassHighway had not approved, apparently refused to change their house number or signage. See Appendix C (Town Memorandum at 9-10: "confusion attributable to residents and owners not complying with the street

July 23, 2009 Hearing, Ex. 20 (March 16, 2007 memorandum of old and new street names and numbers). Both actions increased the risk of delayed response to a 9-1-1 call, since, from 1998 to 2006, a responder could readily find an address by just following the sequentially numbered houses to the address from which a call originated.

All existing potential sources of 9-1-1 dispatch delay are attributable to the unlawful conduct of the selectmen themselves, who twice unlawfully implemented the name Oceanside Drive without the approval of MassHighway (the Initial and Second Implementation).

The Town argues that MassHighway should approve the new name Oceanside Drive despite its repeated unlawful acts because public safety requires it. However, the vote on December 2, 2008 changing the name of the north-south segment of Wankinquoah Avenue to Oceanside Drive (and the official implementation of the name two days later) was demonstrably based on facts that did not exist—and had not existed for more than a decade. MassHighway need not defer to the Town's fictional version of the facts when the actual facts are plain to see.

The state should not reward the Town's improper conduct. "Deeply rooted in our jurisprudence" is the "maxim that no man may take advantage of his own wrong." Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 232 (1959). For MassHighway to approve the name "Oceanside Drive" in the circumstances presented here would challenge the maxim and reward the Town's wrongful conduct.

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name changes . . . [which] stems from the inconsistent implementation of the street name change by some residents and owners.").

The Town's unlawful actions were designed to defeat the petitioners' rights and MassHighway's statutory approval authority. The Town willfully ignored the Statute, a law of general application that precludes officials from renaming Traditional Streets without MassHighway's affirmative approval. The Town's argument that it acted lawfully is wholly unsupported and plainly without merit.

It would be against equity and good conscience to allow the Town to justify the necessity of a name change under its public safety rationale when the potentially confusing conditions it purported to correct on December 2, 2008 existed solely because of the Town's own unlawful conduct. MassHighway should not approve the name Oceanside Drive in these circumstances. To do so would reward unlawful conduct, defeat the petitioners' rights and frustrate the purpose of the Statute.

APPROVING "OCEANSIDE DRIVE" IS CONTRARY TO THE PUBLIC INTEREST

1. The Traditional Name Should Not Be Replaced

MassHighway should decline to involve itself in the Town's political disputes. It should find that retaining the Traditional Name is in the public interest. While the multiple disputes underlying the name change controversy may explain why the petitioners tenaciously insist on retaining the historic name and resist the name "Oceanside Drive," the critical point is that there exists no reason in the public interest to justify changing the name of Wankinquoah Avenue.

Approving the name "Oceanside Drive" serves no public purpose. It is not required in the name of 'public safety,' because timely 9-1-1 dispatch is assured if the name change is disapproved. MassHighway should not ratify the Town's conduct in

2007 and 2008. To approve the name Oceanside Drive would compound the selectmen's unlawful conduct in twice implementing the name Oceanside Drive without MassHighway's approval. Retaining Wankinquoah Avenue—with its traditional associations—supports the legislative policy of the Statute and fulfills its purpose.

2. Approving the Name Oceanside Drive Creates a Precedent

MassHighway should not create a precedent that permits a local body to immediately implement the change of a Traditional Name when doing so would reward a local body that ignored MassHighway's statutory approval authority.

PART IV: RECOMMENDATION

COMPELLING REASONS SUPPORT THE DISAPPROVAL OF 'OCEANSIDE DRIVE'

MassHighway should disapprove the name "Oceanside Drive," for these reasons:

1. The Town, in direct contravention of the Statute, twice implemented the name change without the required prior approval of MassHighway; the Town, in 2008, ignored MassHighway's disapproval of the name change.

2. 131 signatures on two petitions to MassHighway seek to retain the Traditional Name, Wankinquoah Avenue; only one family of three (and two others) support the change to Oceanside Drive.

3. The selectmen re-named Wankinquoah Avenue in 2008 based on the incorrect facts that there were "two" streets "then known" as "Wankinco Avenue" and "Wankinquoah Avenue"; in law, there was only one street, "Wankinquoah Avenue"; in fact, the selectmen ignored that one segment was then "known as" Oceanside Drive and that "Wankinco Avenue" did not exist in law or in fact.

4. 9-1-1 dispatch does not require the change of "Wankinquoah Avenue" to "Oceanside Drive." Disapproval of the name Oceanside Drive will restore the name Wankinquoah Avenue and the house numbering existing on June 1, 1998. There is no reason to change a Traditional Name based on

the risk of 9-1-1 dispatch delay when the potential for such delayed response was caused solely by the Town's unlawful behavior.

5. The name Wankinquoah Avenue should remain in force because the impetus for the name change is part of a series of political, legal and public fights that have nothing to do with whether Wankinquoah Avenue is an appropriate Traditional Name.

6. Where the reason to change Wankinquoah Avenue to Oceanside Drive is to honor "Oceanside Pizza," the name of a private business, now defunct, the public interest requires that MassHighway act to preserve the Traditional Name, "Wankinquoah Avenue," which has historic significance in the Town and enjoys wide public support.

APPENDIX E-1

DECISIONS/RULINGS

MassUCP Adjudicatory Board Appeals

MASSCHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

IN THE MATTER OF PT CORPORATION

The PT Corporation (PTC), a Disadvantaged Business Enterprise (DBE) certified as such in 2000 by the State Office of Minority and Women Business Assistance (SOMWBA), challenges the April 26, 2005 decision of SOMWBA pursuant to 49 CFR 26.87(b) that there is reasonable cause to believe that PTC is ineligible for DBE certification because it violated regulations governing firm "control" and "independence."[1] The Massachusetts Unified Certification Program Adjudicatory Board (Board), a body established by the Secretary of Transportation (Secretary), hears challenges to SOMWBA's decisions in decertification matters. The Board heard PTC's case on November 14, 2005 but left the record open until January 31, 2006 to receive additional evidence.

The Board finds that SOMWBA failed to prove by substantial evidence that PTC is not eligible for DBE certification. Accordingly, PTC's challenge is ALLOWED.

SOMWBA ACTION AND NOTICE TO PTC

On April 26, 2005 SOMWBA, acting under the authority of 49 CFR 26.87(b), issued a "show cause notice" (Notice) to PTC that "SOMWBA has determined that there is reasonable cause to believe [PTC] is ineligible for DBE certification."[2] SOMWBA's

[1] The grounds for a decision to "remove eligibility" from PTC may only be based on one of the five specified criteria set forth in 49 CFR 26.87(f)(1) through (5).

[2] In relevant part, 49 CFR 26.87(b) provides: "If, based on … other information that comes to your attention, [SOMWBA] determine[s] that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting

Notice referenced evidence in the record on which it based its reasons to decertify PTC, namely (1) an April 29, 2003 letter from Mr. Frank Suszynski, acting project manager of the Massachusetts Highway Department (MHD) to John Pastore, project manager for Modern Continental Construction (MCC) (Suszynski Letter) and (2) the "determination" of its "assigned certification specialist" that PTC subcontracting practices "violates the regulatory certification criteria of [DBE firm] control." More specifically, the Notice stated that PTC "was not using its own workforce and equipment and instead was subcontracting work to [an]other demolition contractor(s) in contravention of DBE regulations [sic]." It also stated that its "assigned certification specialist determined that PTC continues to subcontract more than 80% (approximately 96%) of the total project [sic]."[3] The Notice informed PTC of its rights to challenge SOMWBA's show cause finding to the Board. See 49 CFR 26.87(d).

BACKGROUND

In October 1999, PTC applied for DBE certification from SOMWBA under 49 CFR 26.87, characterizing its business (among other things) as "demolition, excavation and site work and equipment rental." SOMWBA certified PTC as a DBE in January 2000. Thereafter, PTC requested leave to add "interior and exterior demolition" to its business description, which amendment SOMWBA approved in January 2001.

In 2004, during an annual administrative review, SOMWBA became aware of the Suszynski Letter dated April 29, 2003. Notice, p. 1. In addition, SOMWBA's

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forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based."

[3] The Notice recited that "such practices" of PTC violated two regulations, namely (1) "the regulatory certification criteria of control since the socially and economically disadvantaged principal has no control over the workforce and daily operations carried out by a different entity"; and (2) "the independence criterion," all in purported violation of the requirements of 49 CFR 26.71.

certification specialist (after a review of Schedule 1120S to PTC's 2003 federal income tax return) determined that 96% of PTC's "total project" was subcontracted to others. Notice, p. 1; SOMWBA Submission, Exs. E & F.

HEARING OF NOVEMBER 14, 2005

The Board conducted a hearing on November 14, 2005. The hearing was necessarily focused on SOMWBA's assertion that PTC had violated regulations pertaining to "control" and "independence," as alleged in SOMWBA's 2005 Notice. See 49 CFR 26.87(d).

The notice of hearing sent to the parties stated the requirement that copies of documents and a list of witnesses should be submitted five days in advance of the hearing date. See 801 CMR 1.02, 1.03. Accordingly, on November 8, 2005 PTC filed with the Board and served on SOMWBA the documentary evidence on which it would rely.[4] SOMWBA submitted nothing.

On the morning of November 14, 2005 SOMWBA served PTC with a copy of the submission to the Board, which consisted of a brief arguing for decertification and six exhibits attaching various documents (SOMWBA Submission).[5]

The brief in the SOMWBA Submission raised five new legal reasons why PTC should be decertified.[6] PTC timely objected to the SOMWBA Submission as contrary to

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[4] Among other things PTC submitted copies of its subcontract agreement with Walsh Northeast (2004) and Barletta Heavy Division (2003); its agreement with local union #379 (2003); its purchase-order rental agreements for heavy equipment for its demolition work (2001-2002); certain installment sales purchase agreements for heavy equipment (2002); "Equipment [rental] rates with union operators" from North American Site Development, Inc. (2002); invoices showing heavy equipment rental in those years; (2002-2003); its subcontract agreements with Jay Cashman (2002) and Modern Continental (2003) and Barletta Heavy Division (2003).

[5] Of significance here are three exhibits: Ex. D, the Suszynski Letter; Ex. E, Schedule 1120S to PTC's 2003 federal income tax return; and Ex. F, the April 26, 2005 Notice.

49 CFR 26.87(b) because (1) Schedule 1120S had not been referred to in the Notice and had not been submitted 5 days prior to the hearing and (2) the five new "reasons" for decertification had not been set forth in the Notice.

The Board took PTC's objections under advisement. It allowed Schedule 1120S in evidence, but left the record open until January 31, 2006 so that (1) PTC could submit rebuttal evidence and argument concerning SOMWBA's allegations based on Schedule 1120S and (2) both parties could identify and submit any relevant federal regulations addressing "equipment rental" or DBE subcontracting restrictions.

On January 31, 2006 PTC timely filed its post hearing rebuttal evidence, argument and supporting materials (PTC Supplemental Submission).[7] On February 6, 2006 SOMWBA moved the Board for leave to late-file an attached one page response to PTC's "post-hearing submission." PTC timely objected to that submission as (1) beyond the scope of the Board's November 14, 2005 order and (2) prejudicial to PTC.

DISCUSSION

A. Did SOMWBA comply with the notice requirement in 49 CFR 26.87?

Federal regulations govern the contents of the Notice that SOMWBA was required to give PTC. The regulation provides

> If, based on … other information that comes to your attention, [SOMWBA] determine[s] that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons

[6] Specifically, (1) "change in [PTC's] circumstances since certification … that render [it] unable to meet the eligibility standards"; (2) "information not available to SOMWBA at the time the firm was certified"; (3) information that was concealed or misrepresented" by PTC; (4) "failure to cooperate" with SOMWBA; and (5) "failure to meet DBE certification criteria under 49 CFR 26.71."

[7] PTC's Supplemental Submission consisted of (1) a brief responding to the Board's request for citation of regulations by governing "subcontracting" [see 49 CFR 26.71(m)]; (2) copies of 18 "Charter Agreements" entered into by PTC and MRP Site Development on January 1, 2003 for specified "equipment and operators"; and (3) PTC's federal tax returns for 1999, 2000, 2001, 2002 and 2003, including work papers.

> for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based." 49 CFR 26.87(b).

SOMWBA's April 26, 2005 Notice states two reasons for decertification: (1) violation of the regulatory criterion of "control" because PTC allegedly "has no control over the workface and daily operations carried out by a different entity"; and (2) violation of the "independence criterion." The Notice stated that PTC "was subcontracting work to another demolition contractor in contravention of DBE regulations."

With respect to the five additional "reasons" for decertification SOMWBA first raised in its November 14, 2005 brief, the Board finds that none was properly set forth in the Notice. PTC timely objected to the attempt to expand the scope of the hearing. The Board sustains PTC's objections on the substantial ground that SOMWBA ignored the requirements of 49 CFR 26.87(b).

B. <u>Did SOMWBA Prove By Substantial Evidence That PTC (1) Did Not "Control" daily operations or (2) violated the "Independence" Requirement for DBE's?</u>

SOMWBA bears "the burden of proving by a preponderance of the evidence that [PTC] does not meet the certification standards" in 49 CFR Part 26. See 49 CFR 26.87(d)(1). SOMWBA's only evidence to support its contention that PTC violated the "control" and "independence" criteria in the federal regulations is found in two documents: the Suszynski Letter and Schedule 1120S. The Board finds that SOMWBA did not meet its burden of proof.

SOMWBA asserts that PTC violated the "control" and "independence" requirements 49 CRF 26.71. The essence of its argument is that, because PTC "subcontracted" much of its demolition work through equipment rental, it necessarily failed to control the firm's operations. In SOMWBA's words

> Section 26.71 in essence requires DBE firms' [principals] to control the DBE certified firm by making independent decisions concerning the firm's *daily operations*, management and policy making. [Emphasis in original.]
>
> Excessive subcontracting impairs the control requirement of the federal regulations and is inconsistent with the purpose behind the certification program in general, which is to enable [] owners to achieve an economically viable business status.

PTC responds by asserting that its principals always controlled its demolition business, both in policy and operations. PTC asserts that what SOMWBA characterizes as "excessive subcontracting" in 2003 was merely the ordinary business practice of leasing heavy equipment with operators, a practice made necessary when increased demand for demolition work required expensive heavy equipment PTC did not own.[8] PTC contends that no federal regulation restricted its practice of leasing heavy equipment with operators, which is standard practice in the demolition industry. PTC points out that 49 CFR 26.71, which applies to a certifying agency such as SOMWBA, expressly allows equipment rental.

> [A certification body] must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm. 49 CFR 26.71(m).

First, SOMWBA offers the Suszynski Letter to prove "MHD's finding that PTC was not using its own workforce and equipment, and instead was subcontracting work to [an]other demolition contractor(s) in contravention of DBE regulations [sic]." Notice, p.

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[8] The record shows that PTC had purchased various pieces of heavy equipment for demolition work at an aggregate price of $2,933,716. See PTC Submission, Ex. 5.

1. But the Suszynski Letter contains no such "finding." Nor does the letter assert that a particular PTC action contravened a particular DBE regulation. The subject of Mr. Suszynski's letter was whether general contractor Modern Continental Construction (MCC) would be allowed in 2003 a "credit" for its next monthly "DBE performance plan" when PTC did not submit certain documents that Mr. Suszynski believed to exist.[9] Mr. Suszynski did not testify at the hearing, hence the statements made in his letter are hearsay. It is this hearsay evidence on which SOMWBA relies as the principal basis to decertify PTC.[10] The Board finds the Suszynski Letter to be of limited probative value and also finds that no statements contained in the letter constitute substantial evidence that PTC unlawfully subcontracted work to "other demolition contractors" or that PTC failed to control the daily operations of its firm. See New Boston Garden Corporation v. Board of Assessors of Boston, 383 Mass. 456 (1981).

Second, SOMWBA relies on Schedule 1120S to show that PTC was engaged in "excessive subcontracting" in 2003. In the words of the Notice, "PTC continues to subcontract more than 80% (approximately 96%) of the total project." Notice, p. 1. Schedule 1120S to PTC's 2003 federal tax return shows that PTC stated $12,454,073 as the total cost of goods sold, of which total "subcontractor" expense was stated as $12,017,847. However, as PTC rebuttal evidence demonstrates, the total for "subcontractor" expense actually reflected "the costs of subcontracting and equipment

[9] Mr. Suszynski challenges the ability of MCC to "credit" PTC work for MCC's monthly DBE "performance plan"; it advises MCC that, because "no actual" PTC subcontracting agreements had been provided and because other, unnamed demolition subcontractors have "usage rates" "much greater" than PTC's, MHD had "no other choice but to discount the credit [for DBE firms] that [MCC] had shown to date"; it then directed MCC to propose other [DBE] participation on its next DBE performance plan.

[10] For example, the letter states "On April 23, 2003 payroll records were transmitted to MassHighway indicating that the usage rates of other demolition subcontractors is much greater than that described in PT Corporation's March 24, 2003 correspondence." No payrolls records or usage rates of "other demolition subcontractors" were offered at the hearing.

rental [with operators]." PTC Supplemental Submission p. 7 (original emphasis). PTC explains that its accountant combined those two business costs starting with its 2002 tax return. PTC argues that this accounting change amply explains the seemingly high proportion of subcontract expense. The Board agrees. The Board finds that Schedule 1120S only constitutes probative evidence of PTC's tax accounting practices. Whether standing alone or viewed in combination with the Suszynski Letter, nothing in Schedule 1120S proves that PTC failed to control its daily operations or that its independence had been compromised. See New Boston Garden Corporation v. Board of Assessors of Boston, supra.

PTC's evidence explained its practice of leasing heavy equipment with operators. Its subcontracts, price lists and invoices show that it rented equipment with operators. PTC demonstrated that equipment rental was a normal business practice in the demolition industry. Indeed, SOMWBA's 2000 certification of PTC expressly permitted it to engage in the business of "equipment rental." The Board finds PTC leased specialized heavy equipment with operators when increased business demanded it or when it made no economic sense for PTC to buy such expensive, specialized equipment.

PTC's equipment leasing practices were in full compliance with 49 CFR 26.71(m) in any event. That regulation specifically anticipates that a DBE may choose to lease needed equipment instead of buying it. Significantly, 49 CFR 26.71(m) expressly prohibits a certifying body such as SOMWBA to determine "that a firm is not controlled by [a DBE] solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of

the firm." The record shows that renting needed equipment was a "normal industry practice" in demolition work. The record contains no evidence that PTC's equipment rental involved any compromising relationship with the lessor or anyone else.

Viewed as a whole the Board finds the record does not support SOMWBA's contention that PTC did not control day to day operations of its firm or that its independence was compromised. In a proceeding brought by SOMWBA on the theory that PTC did not control its daily operations because it "was subcontracting work to []other demolition contractors," SOMWBA offered no demolition subcontract or testimony of anyone knowledgeable about PTC's daily operations. When considered in light of PTC evidence that explained when and why PTC rented equipment with operators, the two documents SOMWBA offered do not support a finding that PTC did not control its firm. SOMWBA failed to meet its burden of proof. SOMWBA did not prove by a preponderance of the evidence that PTC did not meet DBE eligibility standards of 49 CFR Part 26.

CONCLUSION

The Board concludes that SOMWBA showed no cause to decertify PTC.

For the Board:[11]

___________________	___________________
Stephen H. Clark	Kenrick W. Clifton

Dated: October 20, 2006

[11] Christina Thirkell was a member when the Board deliberated and decided this matter, but had left state employment before this decision was filed. Miguel Fernandes recused himself from participation in this matter before the November 14, 2005 hearing.

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

TO: Reginald Nunnally, Executive Director
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Boston, MA 02108

In the Matter of Woodchuck's Building & Home Center (MUCP# 2012-003)

NOTICE OF FINAL AGENCY DECISION

Notice is hereby given pursuant to 49 C.F.R. § 26.87(g) and G.L. c. 30A, § 11(8) of the Final Agency Decision (Decision) of the Massachusetts Unified Certification Program Adjudicatory Board in the above-captioned matter. The parties have been notified by mail dated April 5, 2013 or by in hand delivery.

As of the issuance of this Decision, in accordance with 49 C.F.R. § 26.87(i)(2), Woodchuck's Building & Home Center's (Woodchucks) eligibility to be certified as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 is removed. This Decision authorizes and directs the Supplier Diversity Office to remove Woodchucks from its DBE registry. (**Alternative language:** This Decision authorizes and directs the Supplier Diversity Office to give full effect to this decision.)

The reasons for this Decision, and reference to the evidence in the record in support, are set forth in the Decision by the Board dated April 5, 2013 and attached hereto.

Woodchucks is hereby notified that it may appeal the Decision within 90 days of the date of this Notice to the United States Department of Transportation (USDOT) in accordance with 49 C.F.R. § 26.89. The Decision remains in effect and Woodchucks certification will remain removed, during the pendency of an appeal to USDOT.

Any appeal shall be sent to the following address:

Department of Transportation
Office of Civil Rights
1200 New Jersey Avenue, SE.
Washington, DC 20590

Dated: April 5, 2013

The Adjudicatory Board
Stephen H. Clark
Kenrick W. Clifton

By: ____________________________
Lisa Harol, Secretary
Tel: (857) 368-9495

Cc: Richard A. Davey, MassDOT Secretary & CEO
Rachel Rollins, Esq., MassDOT General Counsel
Paige Scott Reed, Esq., MassDOT MBTA Deputy General Counsel
Eddie J. Jenkins, MassDOT & MBTA Chief Diversity & Civil Rights Officer

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM ADJUDICATORY BOARD

IN THE MATTER OF WOODCHUCK'S BUILDING & HOME CENTER

INTRODUCTION

Robert Dickerson d/b/a Woodchuck's Building & Home Center (Woodchucks or Mr. Dickerson), a Disadvantaged Business Enterprise (DBE) certified by the Supplier Diversity Office (SDO), a division of the Operational Services Division (OSD)[1] sought a hearing to review SDO's determination on June 8, 2012 that Woodchucks was no longer eligible to remain a DBE under 49 C.F.R. Part 26 (Determination Letter). See OSD Ex. #1.

The Determination Letter stated that Woodchucks failed to notify SDO in writing (1) that Mr. Dickerson had been indicted on May 31, 2011 (Indictment) for conspiracy to defraud the United States (Conspiracy); and (2) that Mr. Dickerson had been suspended by the Federal Aviation Administration (FAA) from entering into federally-assisted contracts. SDO found these facts reason to believe that Woodchucks was no longer eligible to remain certified as a DBE under 49 C.F.R. Part 26. See 49 C.F.R. § 26.87.

On September 20, 2012 Mr. Dickerson entered into an agreement with the United States Attorney to plead guilty to the Conspiracy and admitted to the facts of the Indictment.[2] See Woodchucks Ex. #1, Tab *O*.

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[1] SDO, formerly the State Office of Minority and Women Business Assistance (SOMWBA), is within the OSD and part of the Executive Office of Administration and Finance of the Commonwealth of Massachusetts.

[2] The Indictment charged "It was the purpose of the conspiracy for the defendants and their co-conspirators to unjustly enrich themselves by fraudulently using Woodchucks as a DBE on [Massachusetts Port Authority Residential Sound Insulation Program] contracts knowing that Woodchucks would not perform any work on those contracts." The Indictment further charged "[U.S. Window] counted Woodchucks

The Massachusetts Unified Certification Program Adjudicatory Board (Board) held a hearing, pursuant to 49 C.F.R. § 26.87(d), on February 22, 2013. The Board finds, after hearing witnesses and reviewing this record, that overwhelming evidence supports SDO's determination that Woodchucks is no longer eligible to remain a DBE.

The Board concludes that SDO's determination of Woodchucks' ineligibility is supported by substantial evidence on this record. The Board confirms SDO's determination.

BACKGROUND

Woodchucks was certified as a DBE in March of 1986. See Woodchucks Ex. #1 (cover letter). From 1999 through 2009, Woodchucks was a DBE subcontractor to U.S. Window and Door Construction Co., Inc. (U.S. Window), a general contractor to the Massachusetts Port Authority (Massport) performing work on Massport's Residential Sound Insulation Program (RSIP) funded in part by the United States Department of Transportation (USDOT). See Board Ex. #4. The RSIP retrofits residential structures with sound insulating windows and doors to mitigate noise emanating from Logan Airport. Id.

On January 15, 2010, the FAA notified Massport that the federal government was investigating Massport's "[DBE] issues associated with the [RSIP]."[3] Thereafter a

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towards its DBE goal, thereby undermining the DBE program and withholding work slotted for legitimate DBEs." See United States v. Robert Dickerson, Dennis Degrazia, and David Hebert (Conspiracy to Defraud the United States under 18 U.S.C. § 371) Criminal No. 11-10213. The Board takes administrative notice of the one count Indictment. See Board Ex. #4.

[3] "As you are aware, there is an ongoing investigation of [the DBE issues associated with the RSIP] that involves the U.S. Attorney's Office and the Office of the Inspector General (OIG). At this time, we want to inform you that the FAA must temporarily suspend making payments under the one open RSIP grant … pending further review by our own FAA legal office…. In addition, prior to FAA reinstating drawdown ability, we want to be convinced that Massport has instituted new policies and procedures to ensure that the

federal grand jury was convened. Mr. Dickerson was invited to testify on February 15, 2011. See Woodchucks Ex. #2. He declined. Mr. Dickerson Testimony; Woodchucks Ex. #1 (cover letter). On May 31, 2011 the grand jury returned the Indictment. The FAA suspended Mr. Dickerson on July 22, 2011. See OSD Ex. #4.

On February 16, 2012 Woodchucks sent SDO an affidavit in which Mr. Dickerson swore "…there have been no material changes in the information provided with [Woodchucks'] application for certification, except for any changes about which I have provided written [affidavit] notice to SDO pursuant to 49 C.F.R. § 26.83(i)." See OSD Ex. #6 (No Change Affidavit).

On September 21, 2012 Mr. Dickerson pled guilty to the Conspiracy. See OSD Ex. #4. On December 18, 2012 Mr. Dickerson was sentenced to 30 days incarceration, three years supervised release, a $10,000 fine, 200 hours of community service and a $100 special assessment. See Woodchucks Ex. #1, Tab P.

At the sentencing hearing, Judge Young addressed Mr. Dickerson:

> …[The DBE] program is designed to facilitate equal opportunity of people of all backgrounds into the workforce…. And the real crime here, and it is a crime, and you, of all people, should have known it, you made a scam out of that. So now when people look at this they look at a scam, at a way to pay lip service to the appropriate and desirable social end without actually accomplishing its goal. See Woodchucks Ex. #1, Tab P.

Mr. Dickerson responded, "I understand that my conduct was wrong. Words cannot express the extent of my remorse." Id.

DBE problems that have occurred in the past do not occur again in the future…." See Woodchucks Ex. #1, Tab E.

180.855. The Board denies the motion because the plain language of 49 C.F.R. § 26.87(d)(1) provides otherwise and because 2 C.F.R. Part 180 does not control the procedure in a 49 C.F.R. § 26.87(d) hearing.[8]

SDO's sole witness was Reginald Nunnally, its Executive Director. Mr. Nunnally testified that SDO initiated this ineligibility proceeding when it learned that the FAA had suspended Woodchucks.

SDO contends that the record before the Board supports its determination that Woodchucks is no longer eligible to remain certified because: (1) Mr. Dickerson's guilty plea to the Conspiracy establishes a "a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program" under 49 C.F.R. § 26.73(a)(2); (2) Woodchucks failed to provide SDO with the affidavit notice of changed circumstances required by 49 C.F.R. § 26.83(i); and (3) Woodchucks' failure to notify SDO under 49 C.F.R. § 26.83(i) constituted a failure to cooperate under 49 C.F.R. § 26.109(c).

Woodchucks' sole witness was Antonietta "Zamy" Silva, an SDO certification specialist in 2011. Ms. Silva testified that during a site visit in April, 2011 Mr. Dickerson told her he had received a letter dated February 3, 2011 from the United States District Attorney inviting him to testify before a grand jury. Mr. Dickerson gave Ms. Silva a

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[8] Before the hearing SDO moved for summary decision under 801 C.M.R. § 1.02(7)(c) on the principal ground that Mr. Dickerson's guilty plea to the Conspiracy exhibited a pattern of conduct to evade or subvert the intent of the DBE program. See OSD Ex. #2. 49 C.F.R. Part 26 does not contain a provision allowing the government to submit a case seeking summary decision on documentary evidence alone. Compare 49 C.F.R. § 26.87(d)(3) (DBE may obtain review in lieu of hearing based on documents alone). However, Part 26 does contain a requirement that a DBE determined "ineligible" has the right to an informal hearing. See 49 C.F.R. § 26.87(d). On February 15, 2013, seven days before the hearing, SDO filed an amended motion asking that Woodchucks be debarred from the DBE program pursuant to 2 C.F.R. Part 180. Woodchucks, a pro se, made no response to either motion. It is unnecessary for the Board to decide whether the Massachusetts procedure under 801 C.M.R. § 1.02(7)(c) permitting summary decision controls the substantive federal requirement of a hearing under 49 C.F.R. § 26.87(d) in this case because the result reached renders the question moot.

The record shows without doubt that over a period of years Mr. Dickerson enriched himself by holding out Woodchucks as a DBE subcontractor that performed a commercially useful function for a general contractor when he knew that Woodchucks did not perform any such work. See Board Ex. #4; OSD Ex. #3.

Substantial evidence on the record[11] supports a ruling that Woodchucks both attempted to "evade" and "subvert" the intent of the DBE program and in fact did so. Id. The Board concludes that SDO correctly relied on 49 C.F.R. § 26.73(a)(2) to determine that Woodchucks was no longer eligible to remain a DBE.

Change in Circumstances Affidavit – 49 C.F.R. § 26.83(i)

Woodchucks did not notify SDO "in writing" on February 16, 2012 of any material change of information on file when it submitted the No Change Affidavit. Specifically, Woodchucks did not disclose that it had been suspended by the FAA.[12] See OSD Ex. #6. A suspension by a federal agency qualifies as a material change to information on file in a firm's application. See 49 C.F.R. § 26.83(i); 49 C.F.R. Part 26, App. F. When Mr. Dickerson submitted the No Change Affidavit, as required by 49 C.F.R. § 26.83(j) as a condition of retaining Woodchucks' DBE status, he falsely stated under oath that there had been no material change to Woodchucks' application.

The fact that Mr. Dickerson told Ms. Silva that he was invited to testify before a grand jury did not fulfill Woodchucks' legal obligation under 49 C.F.R. § 26.83(i).

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[11] Each of SDO's factual findings in its Determination Letter (and each finding of the Board) must be supported by substantial evidence on the record. See New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) ("substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion … [taking] into account whatever in the record fairly detracts from its weight"); DKW Construction, Inc., infra p. 6 (recipient supported determination with substantial evidence).

[12] Section 1(B) of SDO's application requires an applicant to state whether it or any of its owners had ever been suspended by any state or local agency or federal entity. 49 C.F.R. Part 26, App. F. Unaccountably, SDO did not include Woodchucks' application in the record.

Section 1(B) of the application does not ask an applicant whether it is being investigated; it asks whether it has been suspended or debarred. See 49 C.F.R. Part 26, App. F. There is no doubt that the FAA suspended Mr. Dickerson. See OSD Ex. #4.

The failure to disclose a material change in circumstances under 49 C.F.R. § 26.83(i) constitutes a failure to cooperate with SDO under 49 C.F.R. § 109(c) as a matter of law. See 49 C.F.R. § 26.83(i)(3). The Board rules that Woodchucks failed to cooperate with SDO when Mr. Dickerson did not disclose his suspension.

Mr. Dickerson's argument that the Board should consider mitigating factors set forth in 2 C.F.R. § 180.860 is unavailing. The authority to implement 2 C.F.R. Part 180 is conferred solely on federal officials.[13] SDO and the Board do not have authority under 49 C.F.R. Part 26 to impose debarment or consider mitigating factors.

CONCLUSION

The Board concludes that SDO's determination is supported by substantial evidence on this record and that SDO correctly determined that Woodchucks and Mr. Dickerson are ineligible to remain certified as a DBE under 49 C.F.R. Part 26.

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Stephen H. Clark

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Kenrick W. Clifton

Dated: April 5, 2013

[13] "[Part 180] provides Office of Management and Budget (OMB) guidance for Federal agencies on the governmentwide debarment and suspension system for nonprocurement programs and activities." 2 C.F.R. §180.5. Only federal agencies may debar under 2 C.F.R. Part 180.