OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

PRE-2015
SELECTED DECISIONS/RULINGS

Volume 3
(Other Appeals)

APPENDIX OF DECISIONS/RULINGS

APPENDIX A-1

DECISIONS/RULINGS

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

MEMORANDUM OF DECISION AND ORDER ON MASSDOT'S MOTION FOR SUMMARY DECISION

INTRODUCTION

MassDOT moves for summary decision under 801 C.M.R.1.01(7)(h). It seeks ruling under 801 C.M.R. 1.01 (11) (c) that Kevin Flaherty should be debarred from public contracting as a matter of law based, among other things, on the uncontradicted evidence that he was convicted of crimes specified as grounds for debarment in G.L. c. 29, s. 29F(c)(1). For the reasons stated below, MassDOT's motion is ALLOWED as to debarment; however, an issue remains with respect to the length or term of the debarment. Accordingly, it is ORDERED that a hearing shall be held on July 15, 2010 concerning the term of the debarment and any evidence of mitigating circumstances as required by G.L. c. 29, s. 29F(g).

BACKGROUND

On June 2, 2009 Kevin Flaherty was convicted of felony larceny and the presentation of a false claim. Kevin Flaherty, a municipal employee of the city of Haverhill (City), stole paving materials owned by the City and used them in Flaherty's private construction business; as well, Flaherty presented claims to the City for new and replacement parts for a dump truck owned by Flaherty, which he used on private construction jobs.

On June 23, 2009 MassDOT, acting through its chief engineer, Mr. Frank Tramontozzi, suspended Kevin Flaherty and Flaherty Excavation and Contracting, LLC (Flaherty) from MassDOT public work, which prohibited them from working on any MassHighway construction project and terminated Flaherty's MassDOT contract for

snow and ice control for 2008-2010.[1] The suspension was made pursuant to G.L. c.29, s.29F (Debarment Statute).

Under the Debarment Statute a contractor may request a hearing to contest a suspension "not based on an indictment." G.L. c.29, s. 29F(d). The Debarment Statute provides that a suspension shall not exceed twelve months "unless a pending …judicial proceeding in which the contractor is a party may result in a conviction" of criminal offenses specified in G.L. c. 29, s.29F(c)(1), which includes "theft," "receiving stolen property," or "other offense indicating a lack of business integrity or business honesty which seriously and directly affects the contractor's present responsibility as a public contractor." Kevin Flaherty did not request a hearing to contest his June 23, 2009 suspension.

On September 15, 2009, Kevin Flaherty through counsel wrote "requesting reconsideration of this [June 23, 2009] decision." No ground for reconsideration was stated.[2] MassDOT denied the request on October 16, 2009 "since there was nothing in your letter that warrants reconsideration of the … decision…."

On February 2, 2010 Flaherty through counsel again requested reconsideration of his June 23, 2010 suspension. "Flaherty questions the legality and constitutionality of this decision, particularly as it appears to prohibit Flaherty from working for an indeterminate time period."

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[1] 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."

[2] Notwithstanding his June 23, 2009 suspension, on October 14, 2009 Flaherty performed work for MassDOT as a subcontractor with Newport Construction on Route 144 in Lawrence. According to Newport, Flaherty represented to Newport's construction superintendent that "his company had been reinstated and allowed to perform work" and that MassDOT had "received in letter form this authorization." See MassDOT Memorandum of Law in Support of Its Motion For Summary Decision p. 2.

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.

[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

[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.

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Stephen H. Clark
Administrative Law Judge
MassDOT

Dated: July 12, 2010

MEMORANDUM OF DECISION
ON KEVIN FLAHERTY'S MOTION TO DISMISS

On July 14, 2010 Flaherty moved to dismiss "the within Notice of Intent to Debar" (Notice) in this debarment proceeding under G.L. c. 29, s.29F (Debarment Statute). [1] A Notice of intent to debar prior to a debarment hearing under G.L. c.29, s.29F(e) (Subsection 29F(e)) is required by law.[2]

I deny the motion, for three reasons.

First, Flaherty shows no factual or legal basis to dismiss the Notice, which was sent by MassDOT to Flaherty on March 11, 2010. See Ex. K. Flaherty does not show that the Notice was not properly given. He does not even contend that the Notice did not meet all requirements of Subsection 29F(e). The Notice complies with Subsection 29F(e). Flaherty cites no authority and makes no reasoned argument to show why a valid notice should be dismissed.

Second, Flaherty incorrectly contends that the allegedly defective form of an entirely different notice—the June 23, 2009 suspension letter MassDOT sent to Flaherty under G.L. c. 29, s.29F(d) (Subsection 29F(d))[3] prohibiting him from performing public work—provides a reason in law to dismiss the March 11, 2010 Notice given under Subsection 29F(e). Flaherty previously argued that the June 23, 2009 suspension notice was defective in opposing MassDOT's motion for summary decision. I considered and rejected Flaherty's arguments on July 12, 2010. I found that there was no defect in the

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[1] Debarment is "an exclusion from public contracting or subcontracting for a reasonable, specified period of time commensurate with the seriousness of the offense." G.L. c.29, s.29F(a).

[2] G.L. c.29, s.29F(e) provides that no contractor may be debarred "unless" the secretary has "first informed the contractor by written notice of the proposed debarment…."). Flaherty filed its motion to dismiss on July 14, 2010 after I granted on July 12, 2010 MassDOT's motion for summary decision under 801 C.M.R. 1.01(7)(h) upon finding that Flaherty should be debarred as a matter law because Flaherty was convicted of the felonies of larceny and the presentation of a false claim. See G.L. c. 29, s.29F(c)(1).

[3] Suspension is "the temporary disqualification of a contractor who is suspected upon adequate evidence of engaging or having engaged in conduct which constitutes grounds for debarment." G.L. c.29, s.29F(a).

Subsection 29F(d) suspension notice to invalidate its legal effect. I noted that Flaherty had not shown any prejudice. See July 12, 2010 Memorandum of Decision, pages 4-6. Under the Debarment Statute, without more, an "indictment … shall constitute adequate evidence to support a suspension." Subsection 29F(d). A criminal conviction based on an indictment is *a fortiori* grounds for suspension. No alleged defect in the notice of June 23, 2010 negates the March 11, 2010 Notice or the validity of Flaherty's suspension.[4]

Third, Flaherty's attempted conflation of two subsections of the Debarment Statute that govern suspension and debarment reveals that his motion is premised on a fundamentally incorrect construction of G.L. c.29, s.29F—namely, that debarment may not proceed under Subsection 29F(e) unless a contractor has first been lawfully suspended under Subsection 29F(d). Flaherty argues, "Since the within Debarment proceeding is necessarily conditioned, upon factually and by operation of statute [sic], an earlier suspension [sic], and said suspension is illegal and unconstitutional, the Debarment proceeding cannot proceed and must be dismissed." Flaherty Motion to Dismiss, page 3. Flaherty misapprehends the Debarment Statute.

Suspension is not a precondition of debarment. Subsection 29F(d) governs suspension; Subsection 29F(e) governs debarment. While the legal grounds for suspension and debarment are identical for criminal indictments or convictions of offenses listed in G.L. c.29, s.29F(c)(1), the procedures governing temporary disqualification from public work (suspension) are wholly separate from the procedures governing exclusion for a reasonable, specified time (debarment). Compare Subsection 29F(d) with Subsection 29F(e).

[4] Any alleged defect has been rendered inconsequential. Flaherty received the Notice required by Subsection 29F(d) on March 11, 2010 and has now had a full opportunity to contest his debarment at a formal adjudicatory hearing pursuant to Chapter 30A.

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.

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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 (6thCir.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

Moving Massachusetts Forward. massDOT
Massachusetts Department of Transportation

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Scott F. Gleason, Esq.
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163 Merrimack Street
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Kevin Flaherty
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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

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,

_____

Lisa Harol, Administrator
Office of the Administrative Law Judge

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.

On June 30, 2009 Mr. Flaherty was sentenced for the two felony convictions. For felony larceny he was sentenced to two years, four months to serve with 20 months suspended. For the presentation of a false claim Flaherty was sentenced "from and after" the larceny sentence to two years probation, plus restitution and 200 hours of community service.

Mr. Flaherty began to serve his consecutive sentences on June 30, 2009. For larceny conviction he served 60 days in the county house of correction; on August 28, 2009 he was released on parole. For the false claim conviction his probationary sentence commenced on August 28, 2009 and terminates on August 28, 2011.

From at least April through October 2009 Newport Construction (Newport) was a general contractor of MassDOT. Flaherty was working as a subcontractor to Newport in April of 2009. In late June, 2009 Mr. Michael McGrath, MassDOT's Director of Construction, called Mr. Richard A. DeFelice, President of Newport, to tell him of Kevin Flaherty's convictions and MassDOT's suspension. Mr. McGrath directed that Flaherty be removed from Newport's MassDOT contracts. Newport terminated Flaherty forthwith.

On September 15, 2009, while Kevin Flaherty was on parole from prison, his lawyer wrote MassDOT asking that it reconsider its June 23, 2009 suspension of Flaherty from public work. MassDOT denied the request on October 16, 2009 "since there was nothing in your letter that warrants reconsideration of the … decision …."

Sometime in September, 2009, Flaherty approached a Newport project superintendent on a MassDOT construction project on Rte. 114 in Lawrence. Flaherty affirmatively represented that his company had been "reinstated" by MassDOT, that "he

was able to go back to work on MHD contracts" and that he had a "letter to this effect."[6] Based on Kevin Flaherty's representations, Newport hired Flaherty as a subcontractor on MassDOT's Rte. 114 project.

At the hearing Flaherty admitted

> I thought when we sent in the letter to ask for reconsideration [of the suspension], that while it was being worked out, that I would be able to [work on state construction jobs], that's why I was in hopes that it would be straightened out…while my lawyer was working them to try to rectify the situation that would allow me, while they were trying to contact each other, to allow me to work.

MassDOT never reinstated Mr. Flaherty. No "reinstatement" letter ever existed.

On October 14, 2009, while Flaherty was working as a subcontractor to Newport on its Rte. 114 contract, both MassDOT and Mr. DeFelice, President of Newport, discovered that Flaherty was on the job site. Newport asked Flaherty to show his letter authorizing "reinstatement"; Flaherty told Newport that his counsel had sent a letter to MassDOT "trying to work it out." Mr. McGrath again called Newport. The Flaherty subcontract was terminated by Newport on October 14, 2009.

DISCUSSION

Debarment is not a punishment. Its purpose is to protect the integrity of public contracting and public funds.[7] The Debarment Statute confers on the Secretary of MassDOT (Secretary) the discretion to determine the period of debarment "required to protect the integrity of the public contracting process." G.L. c. 29, s. 29F(e). The "period of debarment should be commensurate with the seriousness of the offense." G.L. c. 29,

[6] Flaherty denies Newport's account, which is set forth on MassDOT Ex. #1 (D) and (H). I find Newport's account credible.

[7] Federal debarments are "imposed only in the public interest for the Government's protection and not for purposes of punishment." FAR 9.402(b).

s.29F(a). "If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period." G.L. c.29, s.29F(e). "All mitigating facts and circumstances shall be taken into consideration" in determining the period of debarment. G.L. c. 29, s. 29F(g).

The Secretary, in determining the length of debarment, should consider (1) the seriousness of the offense; (2) whether the offense bears upon business integrity; (3) whether there has been a substantial breach of the public trust; (4) whether public funds are at risk; and (5) mitigating facts after the debarment offense. See e.g., 810 C.M.R. s. 5.05 (1-2); 48 C.F.R. s. 9.404-9.405.

Mitigating facts and circumstances include events that happened after the cause of the debarment, such as (1) the reversal of a conviction; (2) newly discovered evidence; (3) bona fide change of ownership; (4) elimination of the cause of the debarment; (5) admission of liability and restitution; (6) acts taken to ensure the offense will not recur. See e.g. 810 C.M.R. s. 5.05 (3-4); 48 C.F.R. s. 9.406-4(c)

Flaherty's conviction of two felonies--the theft of materials owned by the city for his own business and his false claim to the city to pay for parts for Flaherty's truck--are particularly serious offenses for a public contractor. Theft of public property and the unauthorized taking of public money by false claim demonstrate an utter lack of the business integrity and a risk to public funds. Both crimes, since committed by a public employee, unquestionably abuse the public trust.

What Flaherty did while suspended--June 23, 2009 to the date of debarment--is to be considered in deciding the debarment period. See G.L. c.29, s.29F(d) and (e). Flaherty deliberately led Newport to believe by material falsehoods he had been

"reinstated." Flaherty's misrepresentations were callous acts of bad faith.[8] Flaherty lied to secure an unlawful subcontract and obtain public funds. These acts constituted "willfully supplying materially false information incident to obtaining or attempting to obtain or performing any public contract or subcontract," and are independent grounds for debarment. G.L. c. 29, s.29F(c)(2)(i).

During his suspension Flaherty deliberately flaunted the Chief Engineer's authority, which undermined the integrity of the administration of public contracting. Flaherty's basis for doing so was patently untenable—that a letter from his lawyer overrode a prohibition order from MassDOT's Chief Engineer.[9] At the debarment hearing Flaherty maintained that MassDOT's suspension of June 23, 2009 was void.[10]

There are no mitigating facts or circumstances. There has been no reversal of the convictions and no change of ownership. At the hearing Flaherty adduced no mitigating facts and no change of business behavior.

Flaherty makes two legal arguments. First, Flaherty contends that, because he is a subcontractor on MassDOT projects, he will have a mere "derivative" "relationship" with general contractors. Thus, there is "minimal, if not non existent" risk to the public contracting process. A public subcontractor has no "derivative" status. Flaherty has affirmative duties as a subcontractor. See G.L. c. 29, s.29(c)(2)(i); Fordyce v. Town of

[8] Hiring Flaherty as a subcontractor placed Newport at risk of MassDOT sanction since the Debarment Statute prohibits "contract[ing] for supplies or services from a debarred or suspended subcontractor on any public contract." G.L. c.29, s.29F(h).

[9] Flaherty's lawyer's letter, dated September 15, 2009, was addressed to Commissioner Paiewonsky. It did not challenge the suspension. It advanced no change of circumstances or other reason for seeking reconsideration.

[10] Flaherty first contended that MassDOT's suspension order was void, and constituted grounds to dismiss the debarment proceeding, on March 24, 2010, nine months after his June 23, 2009 suspension. He raised his contentions not in court, but in a letter responding to MassDOT's March 15, 2010 notice of intent to debar. See Memorandum Of Decision On Kevin Flaherty's Motion To Dismiss, August 6, 2010.

Hanover, Supreme Judicial Court, 2010 Mass. LEXIS 402 (July 9, 2010) (subcontractor and contractor equally subject to debarment for identical offenses).

Second, Flaherty argues that, while other MassDOT contractors prosecuted for more egregious acts were merely suspended, Flaherty was debarred. Suspension of other contractors does not constitute a mitigating circumstance. The Debarment Statute requires the period of debarment be assessed on a case by case basis on the sound discretion of the Secretary. [11] The contractors Flaherty points to each understood the gravity of its offenses and accepted responsibility. Each executed an agreement to reform and altered its business practices. This Flaherty has not done.

CONCLUSION

The period of Flaherty's suspension is approximately 14 months (June 23, 2009 through August, 2010). His probationary criminal sentence ends August 28, 2011.

Flaherty argues that "any period of … debarment should be limited to the period of suspension" already passed—that is, once debarment is imposed, there will be no additional time. MassDOT argues that a period of three years and four months is reasonable, from June 23, 2009 through October 15, 2012.

The period of debarment should be commensurate with the seriousness of the offenses. See G.L. c.29, s.29F(a). The period of Flaherty's suspension can not be applied in its entirety to the period of his debarment due to the fact that Flaherty committed additional serious offenses while suspended. MassDOT's funds will be at risk if Flaherty were to bid or perform new public work while on probation.

[11] Formerly, G.L. c. 149, s.44C, inserted by Acts 1980, c. 579, s.55, limited debarment to five years. In 1991 G.L. c. 149, s.44C was amended through Acts 1991, c. 550, s. 2 to place all debarments under G.L. c. 29, s.29F, which does not specify time periods. Under G.L. c.29, s.29F the period of debarment is left to the discretion of the Secretary. See G.L. c. 29, s.29F(e).

The seriousness of Flaherty's crimes call for a reasonably long period of debarment. The seriousness of his non-criminal offenses while suspended, combined with the absence of mitigating circumstances, require the imposition of a longer period. An extensive period is commensurate with the seriousness of all Flaherty's offenses.

Based on substantial evidence and the record as a whole I find that the period of reasonable debarment for Flaherty required to protect the integrity of public contracting and the risk to public funds, commensurate 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.

_____

Stephen H. Clark
Administrative Law Judge
MassDOT

Dated: August 19, 2010

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

[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: _____

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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

Moving Massachusetts Forward. massDOT
Massachusetts Department of Transportation

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

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

FINAL AGENCY DECISION

In the Matter of the Applications of Capital Advertising, LLC Nos. 2011008 & 2011009 to the Massachusetts Department of Transportation, Office of Outdoor Advertising

PROCEDURAL BACKGROUND

On November 7, 2011 the Massachusetts Department of Transportation (MassDOT), acting through its Office of Outdoor Advertising (OOA) pursuant to G.L. c. 6C, §3(3), G.L. c. 93D, 711 C.M.R. §3.07 and applicable federal law, denied two permit applications of Capital Advertising, LLC (Capital) to erect a commercial billboard at a site zoned for public uses[1] adjacent to Rte. 3 in the town of Chelmsford (Site).[2] The OOA denied Capital's applications because it found (1) the Site is not of a business character; (2) two businesses were not visible from Rte. 3 and no business activity took place within 500 feet of the Site; and (3) federal law does not recognize Chelmsford's new zoning bylaw creating a "Billboard Overlay District" for outdoor advertising control purposes because the zone was created primarily to permit outdoor advertising structures.

Capital appealed the OOA decision under 711 C.M.R. §3.04(2) on November 18, 2011. On February 28, 2012 the Secretary of MassDOT designated the Administrative Law Judge to hear the appeal. Ex. B. On March 28, 2012, pursuant to G.L. c. 30A and 801 C.M.R. §1.01, the office of the Administrative Law Judge gave statutory notice of an adjudicatory hearing to the parties. On July 10, 2012 the Administrative Law Judge, with

[1] 23 U.S.C. §131(d) and G.L. c. 93D, §2 prohibit outdoor advertising visible from federal primary system highways unless located in areas which are zoned industrial or commercial under authority of law.

[2] The Site is precisely located on Capital's permit engineering plan as the "proposed highway billboard." See Ex. *O*.

representatives of the OOA and Capital, took a view of the Site as well as the surrounding area, which included a football field, a playground (tennis and basketball courts), open space, the Harrington elementary school, the Chelmsford high school (interior and exterior), two soccer fields, a track and natural areas.[3] The view also included what could be seen from a residential apartment complex area across Rte. 3 from the Site. Following the view the Administrative Law Judge, on July 11, 2012, conducted a hearing under 801 C.M.R. §§1.01 and 1.03.

Capital called as witnesses Ms. Mary Burns, a principal of Capital, and Mr. Evan Belansky, director of community development for Chelmsford. The OOA called Mr. Jason Bean, an OOA inspector, and Mr. Edward Farley, executive director of the OOA. Documents offered in evidence were stipulated admissible by the parties. There are 31 joint exhibits and 3 bench exhibits. The appendix contains an exhibit list and a marked aerial photograph from Ex. G, labeled to identify the features seen on the view.

On August 1, 2012 Capital and the OOA filed post hearing briefs. Reply briefs were filed on August 10, 2012.

FINDINGS OF FACT

Route 3 (Rte. 3)

Rte. 3 is a federal "primary system" highway so designated by the federal department of transportation pursuant to 23 U.S.C. §103(a). Farley testimony. As such, Rte. 3 – like the interstate highway system – is subject to the Federal Highway

[3] On June 11, 2012, the Massachusetts Appeals Court decided Plamondon v. Outcepts Management & Consulting LLC, 81 Mass. App. Ct. 845 (2012) (Plamondon), which held that MassDOT's regulations require the OOA to make "an evaluation of the area [where a billboard is sited] as it is viewed from the highway." See Plamondon at 853. The Appeals Court also held that the OOA is obligated to consider "the characteristics of the neighborhood" as well as "the entire composition and character of the relevant area" before determining that land is predominantly of a "business character." Id. at 854.

Beautification Act (FHBA), 23 U.S.C §131, and the regulations issued under its authority, 23 C.F.R §750.701 et seq.

The Billboard Overlay District

On April 9, 2009 the Chelmsford planning board recommended to the town meeting that it adopt a zoning bylaw creating a Billboard Overlay District (District) to allow commercial billboards in the town along Rte. 3 and I-495. Ex. N. The District was created by amending the existing sign zoning bylaw. Id. Amending an existing zoning bylaw obviated any "need [of the town] to do a comprehensive examination or rewrite of the entire zoning bylaw to incorporate and codify the desired outcome to permit billboards." [4] Belansky testimony.

On March 23, 2011, by the required two-thirds vote, the Chelmsford town meeting amended its zoning bylaw to create the District. See G.L. c. 40A, §5; Ex. N.

The District is not a circumscribed, contiguous district. It is comprised of three widely separated, non-contiguous parts, appearing as three distinct islands. Ex. R. The Site is located on one part of the District, which is shown as Lot 31-11-1 on Ex. O.[5]

The new bylaw prohibits billboards "in all zoning districts, except as allowed in the Billboard Overlay District," where no use of any kind is permitted, except billboards. Ex. N. A special permit from the planning board is required for each billboard. Id. The bylaw regulates billboards in detail (location, size, lighting). Id.

[4] As Mr. Belansky explained, "The town's interest, particularly the planning board's interest, is only to craft a zoning bylaw that meets local needs and which hopefully meets minimum OOA and federal criteria. Do I know what all those are? No. It's not the town's job to know what those are. Q. It's not the town's job to know what the federal law is? A. "No. Absolutely not…. The zoning bylaw … makes no assurance or guarantees beyond the town of Chelmsford. Nor can we."

[5] The second part is on rural town land also zoned "Public District," where I-495 intersects Rte. 3. The third part is on land adjacent to Rte. 3, variously zoned, that contains mixed uses (residential, industrial, open space). See Ex. R, AA, BB, CC.

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

through MassDOT, acting by its OOA, issues permits and enforces MassDOT regulations to comply with and implement the FHBA.

Location

The FHBA limits the locations where billboards may be placed to "areas … which are zoned industrial or commercial under authority of State law." 23 U.S.C. §131(d).

Federal regulations define commercial and industrial zones.

> Commercial and industrial zones are those districts established by the [state] zoning authorities as being most appropriate for commerce, industry, or trade, regardless of how labeled. They are commonly categorized as commercial, industrial, business, manufacturing, highway service or highway business … retail, trade, warehouse and similar classifications. 23 C.F.R. §750.703(a).

Massachusetts law mirrors federal requirements. See G.L. c. 93D, §2(d) ("No [billboard] shall be erected ... except [billboards] which are located in areas which are zoned industrial or commercial … and which have permits issued [by MassDOT through its OOA]"). Compare 23 C.F.R. §750.704. MassDOT regulations further limit where billboards may be located to areas of a "business character." See 711 C.M.R. §§3.07(3)(a) and (b).

Whether a particular parcel of land meets the definition of "commercial or industrial" depends on the actual uses of the land, not merely the stated uses under local zoning. See Alper v. State of Nevada, 96 Nev. 925, 930 (1980) (Supreme Court of Nevada) (actual land uses in commercially zoned land must be examined). Even where land has been zoned commercial or industrial, to meet the federal definition the zoning "must have independent validity" under existing uses. United Outdoor at 248. Among other factors, whether an existing use is "out of harmony with the zoned classification"

should be considered. Redpath v. Missouri Highway and Transportation Com'n, 14 S.W.3d 34, 39 (1999) (Supreme Court of Missouri). The object of examining what actually exists is to prevent "sham" commercial zoning enacted just to allow billboards. Lamar Cent. Outdoor, LCC v. State, 882 N.Y.S. 2d 743, 746 (2009) (New York Court of Appeals) (Lamar).

The land on which Capital seeks to place its billboard is not zoned commercial or industrial as defined under federal law. The Site is in an area zoned "P," or "Public District," which, by its own terms, does not allow any commercial or industrial uses. Ex. AA, BB. The actual uses in the area around the Site are not commercial or industrial as a matter of fact. The dominant characteristics of the land are open spaces and natural areas, except for the public use of schools and their facilities.

Capital argues that it is "incorrect" to "believe" that "billboards are only permitted in commercial or industrial zones." It cites the 1971 agreement between Massachusetts and the federal government (Agreement),[7] contending that "The Agreement does not state that billboards are only permitted in zoned or unzoned commercial or industrial areas, rather the rules for billboard regulation are only applicable in zoned or unzoned commercial or industrial areas." Capital reply brief.

Capital's argument is without merit. 23 U.S.C. §131(d) by express language limits the placement of billboards to land zoned commercial or industrial, as does G.L. c. 93D, §2. Capital misapprehends that statutory language, which definitively restricts the placement of billboards and requires that states assert "effective control." The Agreement Capital references does not contravene the FHBA or regulatory scheme.

[7] The Commonwealth entered into "Agreement for Carrying Out National Policy Relative to Control of Outdoor Advertising in Areas Adjacent to the National System of Interstate and Defense Highway and the Federal-Aid Primary System" under the authority of G.L. c. 93D, §7.

To grant Capital's application would violate the express language of both federal and state statutes that only permit billboards adjacent to primary system highways on land zoned commercial or industrial. See 23 U.S.C. §131(d) and G.L. c. 93D, §2(d).

Effect of Local Zoning

23 C.F.R. §750.708(b) (Subsection 708(b)) provides

> State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes. (Emphasis supplied.)

The plain meaning of Subsection 708(b) is that a local zoning action taken "primarily to permit" billboards, unless part of a "comprehensive rezoning," "is not recognized as zoning for outdoor advertising control purposes." Courts confronted with zoning actions like Chelmsford's, have uniformly held that state agencies regulating billboards should not "recognize," or give effect to, such local zoning actions. See Lamar at 744 (agency refusal to recognize zoning change merely to allow billboard not part of comprehensive zoning upheld); Eller Media at 10 (zoning action to allow billboards alongside municipal golf course not recognized).[8]

The OOA denied Capital's permit because the "sole purpose [of the District] … was to permit billboards and nothing else." Ex. D. The OOA's finding is amply supported by substantial evidence. The bylaw is designed specifically to permit commercial billboards. Ex. N ("[B]illboards … shall be prohibited in all zoning districts,

[8] See also, Alper, 96 Nev. 925 (re-zoned undeveloped desert land in a district expressly zoned commercial to allow billboards not recognized where actual commercial uses did not exist); South Dakota v. Volpe, 353 F. Supp. 335, 341 (D.S.D. 1973) (strip zoning intended to allow billboards alongside interstate highway not recognized); United Outdoor, at 248 (zoning action intended to allow billboards alongside desert highway where no commercial activities actually existed not recognized).

except as allowed in [this] Billboard Overlay District"). Mr. Belansky admitted that the bylaw was not enacted as part of a comprehensive zoning scheme. See supra at 3.

The federal regulation required that the OOA not "recognize" the District since its purpose was "primarily to "permit" billboards and its creation was not part of a comprehensive zoning scheme. Capital does not contest the applicability of Subsection 708(b). It introduced no evidence and made no argument that Subsection 708(b) does not apply. The OOA properly enforced Subsection 708(b).

State Law

Article 50 of the Amendments to the Massachusetts Constitution "confers plenary power on the Legislature to regulate and restrict outdoor advertising." Plamondon at 850. Article 50 provides: "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law." (Emphasis added.) Under Article 50 the Legislature, through Chapters 6C, 93 and 93D of the General Laws, restricts and regulates outdoor advertising, including billboards.

MassDOT[9] may issue regulations under G.L. c. 6C, §3(1) to effectively control billboards "necessary for the commonwealth to be in compliance with 23 U.S.C. §302" and 23 C.F.R. §750.705. On November 2, 2009, MassDOT issued the regulations now appearing as 711 C.M.R. 3.00 et seq.[10] The new regulations, effective November 2,

[9] MassDOT was established by St. 2009, c.25, "An Act Modernizing the Transportation Systems of the Commonwealth," which added Chapter 6C to the General Laws. Among other enumerated powers, MassDOT is authorized to "exercise any powers necessary for the commonwealth to be in compliance with 23 U.S.C. §302." G.L. c. 6C, §3(3). It may "adopt … regulations … for the … conduct of its business for the administration and enforcement of this chapter…." G.L. c. 6C, §3(1). Section 302 of 23 U.S.C. provides that "Any state desiring to avail itself of the provisions of [the FHBA] shall have a State transportation department which shall have adequate powers, and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by [23 U.S.C]…."

[10] 711 C.M.R. replaced the former OAB regulations. I take administrative notice of the official minutes of MassDOT's board which demonstrate that at the November 2, 2009 board meeting (1) counsel to

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.

Krutiak disputed that the auction proceeds of $1,298,577.50 plus $430,187.50 equaled the actual In Place Value of its property. It continued to seek additional ADLP damages. In 2000, upon the Department's payment of an additional $165,620 for property sold on day two, Krutiak and the Department resolved their dispute about ADLP damages for that property. Hence, the dispute here principally involves claimed ADLP damages for property sold on day one of the auction.

The statutory scheme sets a "cap" on the upper limit of ADLP damages Krutiak may recover. Specifically, Krutiak's ADLP damages may not exceed the cost to move its property a distance of 50 miles. *See* 760 CMR 27.09(20)(b)(1). Prior to this appeal the Department paid Krutiak a total of $595,807.50 as ADLP damages ($430,187.50 + $165,620). Accordingly, the parties agree that the "cap" on the total ADLP damages Krutiak may recover on this appeal is $462,576.62.[3] To date Krutiak's total compensation has been $1,894,385 ($1,298,577.50 [auction proceeds] + $595,807.50 [Department ADLP payments]). *See* Appendix B and Appendix C.

The heart of this appeal is the parties' dispute about the actual In Place Value of Krutiak's property sold on day one of the auction. ADLP damages can not be ascertained until In Place Value is first found. After In Place Value is determined, finding ADLP damages is merely a calculation: In Place Value minus total compensation (auction proceeds + additional payments) equals ADLP.

Krutiak's personal property sold on day one of the auction consisted of approximately 2,200 lots. Each lot falls within one of the following categories: cranes,

[3] The cost to move the Krutiak property is $1,058,384.12; ADLP damages already recovered are $595,807.50. Thus, additional ADLP damages may not exceed $462,576.62 ($1,058,384.12 - $595,807.50). See infra page 8, n. 11.

trucks, yellow iron,[4] scrap metal, tires or miscellaneous. Krutiak contends that the actual In Place Value of all lots sold on day one is $2,128,169, the pre-auction estimate of its appraiser, Mr. Beard, dated June 12, 1997. For the same property, the Department contends that the In Place Value is $1,599,685, the final estimate of its appraiser, Mr. Agabian, dated October 20, 1997.

Krutiak frames its dispute here as the "variance" of $528,484 of In Place Values for the 2,200 lots of property sold on day one. *See* "Summary Sheet" in Krutiak's March 15, 2005 post hearing submission, Tab C, attached at Appendix A.[5] The "variance," $528,484, is the difference between Krutiak's pre-auction In Place Value estimate of $2,128,169 and the Department's In Place Value estimate of $1,599,685. To date Krutiak has received $1,599,685 in total compensation for day one property. The Department contends that Krutiak is not entitled to additional ADLP damages here since it has now paid it the In Place Value of its property sold on day one, or $1,599,685. The Department argues that if ADLP damages are due they cannot exceed the "cap," or $462,576.62.

Krutiak's Summary Sheet breaks out its ADLP claim by category as follows:

Cranes	$130,125
Trucks	$142,055
Yellow Iron	$165,580
Tires	$3,940
Scrap[6]	$36,760
Misc.	$50,024
Total	$528,484

[4] "Yellow iron" describes such heavy equipment as front-end loaders, graders and excavators.

[5] The Summary Sheet contains errors. *See* infra page 7, n. 10. *Compare* the original Summary Sheet, Appendix A, *with* the Corrected Summary Sheet, Appendix B.

[6] $36,760 is Krutiak's original ADLP claim for scrap metal based on its 1997 inventory of 647 tons of scrap sold. It does not include Krutiak's "amended claim" for 774.53 tons of additional scrap. I address the original and "amended" scrap metal claims infra, pages 35 to 39.

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

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

Company (doing business as S.M.I. Company) (Pfizer) and Williams College. Pfizer owned and operated a lime quarry located directly across the street from Krutiak's principal business location. Pfizer used Krutiak's trucks and heavy equipment to mine the lime quarry and used other Krutiak equipment for road construction, earth excavating, pumping, snow plowing and the like. Krutiak also supplied heavy equipment as needed to Williams College, contractors and cities and towns in western Massachusetts. Krutiak employed at least three full time mechanics to maintain its extensive fleet of cranes, trucks and yellow iron.

Immediate delivery of parts in Adams can be problematic and the nature of Krutiak's business required it to keep its equipment in continual operation. So it was Krutiak's business practice to purchase and stock an extensive inventory of spare parts.

Once Krutiak elected not to relocate its business it was required to conduct a "*bona fide* sale to dispose of [its] personal property" before it could make an ADLP claim. *See* 760 CMR 27.09(20)(a). It chose to sell its personal property by auction. The Department cooperated with Krutiak so that Krutiak could prepare for and conduct an auction that would qualify as a *bona fide* sale.

Krutiak hired a professional auctioneer, Alex Lyon & Son (Lyon), to plan, market and sell all Krutiak's personal property at a public auction in Adams, Massachusetts. Lyon is a national firm specializing in the auction sale of heavy equipment. Lyon, with the cooperation of both Krutiak and the Department, marketed the auction sale through extensive advertising in national and regional markets. Lyon produced, printed and distributed 525 copies of a 43-page auction catalogue to potential buyers (Krutiak Ex. #2) as well as some 27,132 brochures announcing the auction (Krutiak Ex. #15). Krutiak

advertised the auction in local and regional newspapers. Lyon assembled approximately 3,432 separate lots for sale, of which approximately 2,200 are at issue here. The Department has already paid Krutiak its reasonable expenses of the auction sale.[7]

Before the sale, Krutiak cleaned and painted its equipment and put it in good order. Everything was well displayed for the inspection of bidders. For many individual pieces of equipment Krutiak provided the maintenance logs kept by its mechanics.

The Department and Krutiak each hired a professional appraiser to estimate the In Place Value of the property. Krutiak's appraisers, Mr. Beard and another, estimated the In Place Value of all property sold to be $2,379,383 ($2,128,169 [day one] + $251,214.50 [day two]). The Department's appraiser, Mr. Agabian, estimated an In Place Value of $1,728,765 for all property sold.[8]

The parties agree that the two-day auction was a *bona fide* sale under 760 CMR 27.09(20)(c). The net proceeds to Krutiak of the property sold on both days of the auction were $1,298,577.50. Krutiak then demanded $1,080,805.50 in ADLP damages, which was the difference between its pre-auction appraised In Place Value of $2,379,383.00 and the net auction proceeds of $1,298,577.50.

In 1998 the Department and Krutiak entered into negotiations to settle Krutiak's $1,080,805.50 ADLP damage claim. The Department made two payments to Krutiak. On June 18, 1998 the Department paid Krutiak $430,187.50, which represented the difference between the total auction proceeds Krutiak received ($1,298,577.50) and the

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[7] The Department approved and paid Krutiak $221,493.78 for its pre-sale expenses, including pre-auction expenses of $44,029.56 for equipment set up and $41,731.47 for advertising and printing costs, including Lyon's 43 page auction catalog, brochures and ad placements in trade publications. The $221,493.78 also included Lyon's sale commission of 10% and certain other expenses of $135,007.75.

[8] Mr. Agabian's final estimate of In Place Value was made after he reviewed his initial results in light of the prices attained at the auction. Mr. Beard did not adjust his pre-auction appraisal after the auction.

Department's final estimate of the In Place Value ($1,728,765) for all property sold on both days ($1,298,577.50 + $430,187.50 = $1,728,765).[9] The Department took the position that, upon payment of the $430,187.50 in 1998, Krutiak was no longer entitled to ADLP damages since the Department had paid Krutiak the actual In Place Value of its property, or $1,728,765.

Krutiak did not agree. It maintained that its total compensation must be measured solely by its pre-auction appraised In Place Value estimate of $2,379,383.50. Between 1998 and 2000 Krutiak continued to seek additional ADLP damages through negotiation. On August 24, 2000, the Department paid Krutiak an additional $165,620 to resolve the ADLP damage claim for property sold on day two.[10] The record includes no written settlement agreement.

The Department's two additional payments to Krutiak totaled $595,807.50 ($430,187.50 + $165,620) over and above the net auction proceeds of $1,298,577.50, bringing Krutiak's total compensation to $1,894,385 ($595,807.50 + $1,298,577.50). *See* Corrected Summary Sheet, Appendix B. On November 8, 2002, after the Department's final refusal to pay any additional ADLP damages, Krutiak filed this appeal.

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[9] Of the $430,187.50 paid, $380,955 related solely to property sold on day one and $49,232.50 related solely to the property sold on day two. *See* Appendix C, page 2.

[10] The total compensation Krutiak received for day two property exceeded its own In Place Value estimate by $43,486.50. Krutiak's In Place Value for day two property was $251,214.50. The Department's initial In Place Value estimate was $129,080. *See* Krutiak "Summary Sheet," Appendix A and Appendix C, page 2. The August 24, 2000 payment of $165,620 increased Krutiak's total compensation for day two property to $294,700 ($129,080 + $165,620). *See* Corrected Summary Sheet, Appendix B and Appendix C, page 2. Accordingly, Krutiak's total compensation for day two property exceeded its own In Place Value estimate by $43,486.50 ($294,700 - $251,214.50).

KRUTIAK'S APPEAL

Krutiak's Claim on Appeal

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.

[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* infra 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. Agabian[15] spent one day on site and accepted the inventory of Krutiak property prepared by Mr. Beard; he assessed the condition of the equipment he saw. If a piece of equipment was being used on a job he assumed it was in working condition. Mr. Agabian found no "new" equipment—most equipment was 10 years old or older. He agreed with Mr. Beard that nearly all the Krutiak equipment was in workable condition.

The Auction

Mr. Beard attended the auction; Mr. Agabian did not. Mr. Beard thought there were 150 to 200 registered bidders.[16] He knew some brokers and dealers present who typically dealt in trucks and yellow iron; he knew "no crane people." He testified that the auction sale prices were for "the wholesale value" of the used heavy equipment. He thought that some items—particularly the clamshell buckets—went for scrap value or less. Mr. Agabian considered that the auction price set the "base" for the In Place Value of an item and considered the auction price before forming his final opinions of value.

Definition of "In Place Value"

Mr. Beard testified that "in place value" was not "liquidated value" or "broker or wholesale value." He testified that In Place Value, as defined by 760 CMR 27.09(20)(e), was the price an "end user" would pay in the retail market to replace used equipment with equipment of like utility and condition.

Agabian agreed that In Place Value, as defined by 760 CMR 27.09(20)(e), was the price an end user would pay and not the broker/dealer wholesale price. Mr. Agabian

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[15] Mr. Agabian had valued machinery and equipment for forty years, particularly for bank financing and insurance purposes. He was an observer of the market, not a participant; however, Mr. Agabian was knowledgeable about the economic forces in the used heavy equipment market and governing principles of valuation. As well, he had broad experience in ad velorum appraisals for cities, towns and public agencies, including MHD.

[16] There were actually 502 registered bidders.

"couldn't agree more" with the proposition that auction value was not the same as "in place value for continued use." He testified that auction price is "generally lower" than in place value for continued use.

Mr. Agabian testified that a bid at auction might well yield a sale at a forced liquidation value. "All auctions are under the hammer, and are not 'orderly liquidation sales.' Instead, [they are] more in the nature of forced sales." "The problem with auction prices is that we don't know if a broker or dealer is buying [an item] for resale or if the end user is a contractor buying it for his own purposes."

Methods To Determine In Place Value

Mr. Beard testified that determining the "re-sale value to the end user was my approach" to find In Place Value. He first assessed the condition of each item. He then determined the wholesale asking price of an item and then increased that amount by the broker's mark up and transportation cost. Mr. Beard found the wholesale asking prices for items of equipment by looking in trade publications for ads stating asking prices and by consulting with brokers and dealers he knew. Mr. Beard's consultations with brokers were a principal source for his findings of wholesale value, but he also depended on his own experience as an auctioneer and wholesale market participant. The trade publications Mr. Beard consulted did not publish the actual sale prices of the equipment offered.[17]

[17] Mr. Beard was familiar with the types of ads in trade publications showing offering prices that Mr. Krutiak collected and attached to Krutiak Ex. #9 (a) (b) and (c) submitted at the hearing. Mr. Krutiak testified that he assembled ads with asking prices for the "same or similar" equipment that sold at auction. Mr. Beard did not testify that he relied on any of the specific ads or offering prices in the trade publications Mr. Krutiak assembled. Mr. Beard's appraisal was made as of May 17, 1997. Mr. Krutiak's ads were assembled after Mr. Beard's appraisal. Mr. Krutiak did not testify to the In Place Value of his property.

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).

The parties agree that the full measure of ADLP damages that Krutiak is entitled to under Chapter 79A is set forth in 760 CMR 27.09 (20)(b)(1) ("Amount of Property Loss Payment"), which provides

> Except as provided under 760 CMR 27.09(20)(b)(2), the net proceeds from *bona fide* sale of the property shall be deducted from the fair market value for any item of personal property for which a claim is made for a payment for direct loss of property. The remaining amount, if any, shall represent the value not recovered by the sale.
>
> 1. the amount of payment for actual direct loss of property is the lower of: the value not recovered by the sale o[r] the estimated moving expenses which would have been incurred had the personal property been moved. [] ….

The parties agree that the words "fair market value" mean In Place Value under 760 CMR 27.09(20)(e), which provides

> The fair market value of the property for continued use at its location prior to displacement shall be ascertained by an appraisal secured by either the claimant or the local agency and concurred in by the other. (Emphasis supplied.)

Legal Standard Governing The Determination of Value

The legal standard governing the decisions of the trier of fact determining value is well settled. The weight to be given to the testimony of the expert valuation witness is up to the decider of fact. Foxborough Assoc. v. Assessors of Foxborough, 385 Mass. 679, 683 (1982). The trier is not necessarily bound by expert testimony. He may accept all or any part of any expert's testimony. In the event of conflicting opinions, he "may completely discount the testimony of one expert and rely exclusively on the other." Robinson v. Contributory Retirement Appeal Board, 20 Mass. App Ct. 634, 639 (1985). He may determine which expert's testimony to accept, or which part to accept, if any. Fechtor v. Fechtor, 26 Mass. App. Ct. 859, 863 (1989). In determining actual value the

trier is not bound by any expert's dollar figure or by the range between the figures of the experts. He may reach a figure either above or below any figure set by an expert where the evidence supports his decision. Loschi v. Mass. Port Auth., 361 Mass. 714, 715-16 (1972). Even though he need not find a value testified to by any expert, the trier's determination of value must nonetheless be supported by substantial evidence. *See* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466-67 (1981).

Krutiak as claimant bears the burden to prove by a preponderance of the evidence each and every proposition it advances to support its right to damages and the amount of those damages. Sexton v. North Bridgewater, 116 Mass. 200, 207 (1874). A preponderance of the evidence means that the damages claimed "are more likely or probable than not"; or that the trier has "a firm and abiding conviction in the truth of" the claimant's case; or that there is "a balance of probability in favor of" the claimant. Stepakoff v. Kantor, 393 Mass. 836, 842-43 (1985).

Issues Disputed By the Parties

I now briefly address three contested issues: (1) whether the Krutiak auction is a 'forced liquidation sale'; (2) whether an auction sale price can be used as an indicator of In Place Value; and (3) whether the parties' expert appraisers correctly understood and applied the legal definition of "in place value for continued use at its location prior to displacement" set forth in 760 CRM 27.09(20)(1)(e).

Is an Auction Sale a Kind of Forced Liquidation Sale?

Krutiak argues that Mr. Agabian erroneously used the "forced liquidation sale" auction prices as if they resulted from open market transactions. It argues that an auction

price "bears no resemblance to a fair market transaction" since a seller is compelled to sell. Krutiak contends that In Place Value is "unrelated" to auction price.

The record does not support Krutiak's argument. Mr. Agabian did not use auction prices alone to estimate In Place Value. The record shows conclusively that Mr. Agabian did not confuse a price reached in a forced sale at auction with an arms length market transaction. Mr. Agabian consistently testified that auction prices do reflect "forced liquidation values," which generally set a "base" of In Place Value.

May Auction Prices Be Considered as a Value Indicator?

Krutiak argues that Mr. Agabian's use of the Krutiak auction prices, in part to adjust his initial appraisal results, was "arbitrary and flawed" and resulted in a "less reliable opinion of value [than that of Mr. Beard]." Krutiak Post Hearing Memorandum at page 9. The Department responds that Mr. Agabian was entitled to use auction sale results in forming his final opinion of In Place Value where auction sales showed "what the market yielded" in many cases. Department Post Hearing Memorandum at pages 4-6.

The particular circumstances of the Krutiak auction make it reasonable for Mr. Agabian to consider and rely on auction prices as an indicator of In Place Value. Krutiak had ample time to prepare its equipment for the auction, which was marketed locally and nationally. The Department spent more than $240,000 to assure a *bona fide* sale. 502 potential buyers registered to bid. Many lots of cranes, trucks and yellow iron drew bids from competing registered bidders. There is ample evidence to show that, for nearly all major items of equipment, no particular bidder dominated. In sum, the Krutiak auction, although a "forced sale," nonetheless provided pertinent information about prices actually paid by buyers of equipment of known condition—for the very equipment to be

appraised. Considering such auction prices together with other market data is entirely reasonable and appropriate, especially where auctions are an established market method to sell heavy equipment. Not considering auction results of the specific property to be appraised turns a blind eye to telling market data. The Krutiak auction results reflected market forces and prices that expert appraisers could consider.[22]

Did the Experts Correctly Apply the Legal Standard?

Krutiak argues that the Department misapprehended the legal standard of In Place Value. It says that Mr. Agabian placed such weight on the auction sale prices that he arbitrarily placed significance on the results of "forced sales" in finding In Place Value. Krutiak contends that such reliance is "contrary" to 760 CMR 27.09, which "reflects" a distinction between "market" and "auction" sales.

Mr. Agabian did not violate the legal standard. Mr. Agabian understood the difference between auction price and In Place Value and accounted for that distinction in his appraisal method. In reaching his final opinions of In Place Value, Mr. Agabian used all the data available to him. The auction sale price of Krutiak's equipment "at the displacement site" was only one indicator of In Place Value. Mr. Agabian's method ultimately yielded In Place Values for the Specified Property of cranes, trucks and yellow iron that ranged from 43% to 111% above the Krutiak auction prices, a fact that conclusively demonstrates that Mr. Agabian did not in fact translate auction prices into In Place Value. I reject Krutiak's argument that Mr. Agabian gave undue weight to the

[22] I credit the testimony of Mr. Agabian who explained the "[a]uction prices are primarily the [sales] information that you have to go by." Mr. Agabian was entitled to consider the prices paid at used equipment auctions reported in "Top Bid," even if the condition of the "like" or "similar" equipment was not known.

Krutiak auction results because it is not supported by the record. Mr. Agabian complied with legal standard set forth in 760 CMR 27.09.

The Department argues that Mr. Beard failed to determine the value of Krutiak equipment "for continued use at its location prior to displacement." 760 CMR 27.09(20)(1)(e). (Department's emphasis.) It argues that Mr. Beard valued the Krutiak property with reference to a national market of dealers and brokers—not the "isolated geographical area" of Adams--and that Mr. Beard included the cost to transport items from Adams, the "displacement" site, within his In Place Values.

Mr. Beard generally followed the requirements of 760 CMR 27.09. By consulting with heavy equipment brokers in Springfield and Chicopee before making his final estimate of value, Mr. Beard took the "location" of the "displacement" site into account. Mr. Beard admitted that he included "moving costs" within his In Place Value estimates.[23] Although including such costs appears contrary to 760 CMR 27.09(20) ("The fair market value of the property for continued use at its location prior to displacement …), the Department did not show the extent to which Mr. Beard incorporated "moving costs" into his value opinions. The record does not support a finding that Mr. Beard failed to apply the legal standard set forth in 760 CMR 27.09.

Analysis of Krutiak and MHD Appraisals

The table below summarizes the Krutiak and Department appraisals of In Place Value by property category, for both the Specified Property and the Stipulated Property.

[23] "I did consider moving costs in my valuation," Mr. Beard testified. By contrast, Mr. Agabian testified, "I was not asked to find relocation costs."

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

more. For the Specified Property of cranes the In Place Value "variance" between the parties is $79,000; for the Stipulated Property of cranes the "variance" is $51,125.

Large cranes are specialty items. Condition and OSHA certification are paramount factors affecting value, since a "decertified" crane may only be worth scrap. The Krutiak cranes were all OSHA certified and tagged; they were in working condition.

Mr. Beard testified that the cranes sold for less than the In Place Value because (1) buyers had to recertify cranes with OSHA and (2) they "cost quite a lot to move." Mr. Agabian testified that he valued the cranes with reference to prices quoted in Top Bid and other trade publications. For the 6 cranes listed as Specified Property, Mr. Agabian's final In Place Value was a 216% of the auction price of $96,500; Mr. Beard's value was 379%.

With respect to the 8 clamshell buckets, the parties vigorously dispute the Department's In Place Value of $500/bucket. Mr. Beard testified that a new clamshell bucket could cost $10,000 or more. He found the 8 buckets sold at auction to be in workable condition and estimated an In Place Value of between $3,500 and $3,800 per bucket. Mr. Agabian noted that there were four different buyers for the 8 clamshell buckets, which indicated bidder competition; they sold between $75 and $160 a piece. Mr. Agabian's final estimate of In Place Value was $500/bucket.

I find there to be no precise description of the particular buckets to be valued in lots 224A-224H. The detailed description in Mr. Beard's appraisal, which included type, make, and age of bucket, does not tie out to the specific buckets in lots 224A-224H.

After reviewing the identity of the property and the indicators of In Place Value for the Specified Property of cranes, based on the record as a whole I find the In Place

Value for each crane and clamshell bucket in dispute and record that finding below in the column captioned "ALJ In Place Value."

CRANES

Lot #	Description	Buyer #	Krutiak In Place Value	Auction Price	MHD Additional Payment	MHD In Place Value (Auction Price + Additional Payment)	Krutiak Claim ADLP Damages	ALJ In Place Value	**ALJ ADLP Damages**	% ALJ damages to Krutiak ADLP Claim
215	Grove TM425	131	38,000	26,000	7,000	33,000	5,000	33,000	**0**	
216	Lima 803	108	32,000	5,500	6,500	12,000	20,000	13,000	**1,000**	
217	Lorain 550	162	22,000	6,000	6,500	12,500	9,500	13,500	**1,000**	
219	Bucyrus Erie 38B-II	285	24,000	3,500	11,500	15,000	9,000	15,000	**0**	
220	Bucyrus Erie 38B	173	16,000	2,750	9,250	12,000	4,000	12,500	**500**	
221	Manitowoc 2000	108	18,000	3,100	8,900	12,000	6,000	12,500	**500**	
224A	Clam Shell Bkt	197	3,800	75	425	500	3,300	600	**100**	
224B	Clam Shell Bkt	253	3,500	75	425	500	3,000	600	**100**	
224C	Clam Shell Bkt	277	3,800	25	475	500	3,300	600	**100**	
224D	Clam Shell Bkt	176	3,800	75	425	500	3,300	600	**100**	
224F	Clam Shell Bkt	197	3,800	100	400	500	3,300	600	**100**	
224G	Clam Shell Bkt	277	3,800	100	400	500	3,300	600	**100**	
224H	Clam Shell Bkt	176	3,500	75	425	500	3,000	600	**100**	
2224I	Clam Shell Bkt	176	3,500	125	375	500	3,000	600	**100**	
	Total		$179,500	$47,500	$53,000	$100,500	$79,000	$104,300	**$3,800**	4.8%
	Stipulated Property		196,820	117,515	8,180	145,695	51,125		2,459	4.8%

Trucks

Krutiak Ex. 9(B) identifies 20 trucks of various types for which the parties' respective opinions of In Place Value differ by $3,000 or more. For the Specified Property of trucks, the In Place Value "variance" between the parties for the 20 listed trucks is $92,750; for the Stipulated Property of trucks, the "variance" is $49,305.

Mr. Beard estimated the In Place Value of trucks and truck related items by reference to published offering prices and conversations with dealers and brokers. The condition of the trucks offered at wholesale in trade publication ads was not known in detail; the broker dealers with whom Mr. Beard consulted did not independently assess

the condition of the Krutiak trucks. He did not consider actual sales. His In Place Value estimate was 286% of the total auction proceeds.

Mr. Agabian found that the trucks sold at auction were generally old models, many from the 1960's; he assumed them to be operational. Because of the age of the trucks Mr. Agabian did not consider the price of new equipment useful in estimating In Place Value. He noted that the appearance of the trucks had improved markedly between the time he had inspected them and the date of the auction because Krutiak had cleaned and painted them. Mr. Agabian gave consideration to the auction prices realized; his final estimate of In Place Value exceeded the auction price in each instance.

For all trucks listed Mr. Agabian estimated a total In Place Value of $123,250. The auction price for those items was $75,250. Mr. Agabian's final In Place Value was 163% of the total auction prices realized.

After reviewing the identity of the property and the indicators of In Place Value for the Specified Property of trucks, based on the record as a whole I find the In Place Value for each of the 20 specified trucks in dispute and record that finding below in the column captioned "ALJ In Place Value."

TRUCKS

Lot #	Description	Buyer #	Krutiak In Place Value	Auction Price	MHD Additional Payment	MHD In Place Value (Auction Price + Additional Payment)	Krutiak Claim ADLP Damages	ALJ In Place Value	**ALJ ADLP Damages**	% ALJ Damages to Krutiak ADLP Claim
285	Mack EM885SX	240	15,800	8,500	3,000	11,500	4,300	12,000	**500**	
286	Mack DM885SX	162	16,000	7,750	3,000	10,750	5,250	11,250	**500**	
292	Mack EM685SX	240	12,500	6,500	3,000	9,500	3,000	10,000	**500**	
295	Autoc'r DC10364	239	14,000	5,500	3,000	8,500	5,500	9,250	**750**	
296	Autocar C9064	240	15,800	4,500	3,000	7,500	8,300	8,000	**500**	
298	Autocar DC75T	276	9,400	2,000	3,000	5,000	4,400	5,500	**500**	
299	Autocar DC75T	360	9,200	1,250	3,750	5,000	4,200	5,500	**500**	
300	Autocar DC75T	147	9,200	1,350	3,650	5,000	4,200	5,500	**500**	
301	Autocar DC9364	208	9,200	1,200	3,800	5,000	4,200	5,500	**500**	
304	AutocarDC9964	208	9,600	1,500	3,500	5,000	4,600	5,500	**500**	
305	Autoc'r DC10364	170	9,800	1,550	3,450	5,000	4,800	5,500	**500**	
313	Intl 2050A	135	9,200	3,500	1,000	4,500	4,700	4,750	**250**	
314	Intl 2110A	264	8,500	1,600	1,900	3,500	5,000	3,750	**250**	
315	Intl 2110A	360	9,800	2,550	950	3,500	6,300	4,000	**500**	
321	Intl Cab	207	7,500	3,500	500	4,000	3,500	4,250	**250**	
323	Peterbilt 359	162	14,000	8,500	1,000	9,500	4,500	10,500	**1,000**	
326	Autocar T914	147	8,500	4,600	400	5,000	3,500	5,500	**500**	
330	Ford TT	240	3,500	400	100	500	3,000	500	**0**	
333	Schetzer 50 ton	360	12,000	3,500	4,000	7,500	4,500	8,000	**500**	
335	Rogers 35 ton	240	12,500	5,500	2,000	7,500	5,000	8,000	**500**	
	Total		$216,000	$75,250	$48,000	$123,250	$92,750	$101,000	**$9,500**	10.2%
	Stipulated Property		360,395	230,805	80,285	311,090	49,305		5,050	10.2%

Yellow Iron

Krutiak Ex. 9(c) identifies 16 pieces of yellow iron for which the parties' respective opinions of In Place Value differ by $3,000 or more. In the aggregate, the In Place Value "variance" between the parties for the 16 pieces of yellow iron in the Specified Property is $88,500; for the Stipulated Property the "variance" is $77,080.

Mr. Beard, a dealer in yellow iron, estimated the In Place Value of yellow iron by reference to published offering prices, conversations with dealer and brokers and his own experience. The condition of the yellow iron offered for sale in trade publications was not known; the broker dealers with whom Mr. Beard consulted did not independently

assess the condition of the Krutiak yellow iron. He did not consider actual sales data. Mr. Beard's final estimate of In Place Value was 210% of the auction price.

After the auction sale Mr. Agabian made a final estimate of In Place Value. He noted that much yellow iron was in many cases 30 years old. For each item he valued Mr. Agabian's final estimate of In Place Value was higher than the auction price. His final adjustment was made after a review of the auction price, his initial In Place Value, a review of his original sources and Mr. Beard's estimate. For the Specified Property of yellow iron Mr. Agabian's estimate of In Place Value in the aggregate was $186,000; the auction price for those items $130,550. Mr. Agabian's final In Place Value estimate was 142% of the auction price.

After reviewing the identity of property and the indicators of In Place Value of the Specified Property of yellow iron, based on the record as a whole I find the In Place Value for each of the 16 specified pieces of yellow iron in dispute and record that finding below in the column captioned "ALJ In Place Value."

YELLOW IRON

Lot #	Description	Buyer #	Krutiak Appraisal	Auction Price	MHD Additional Payments	MHD In Place Value (Auction Price + Additional Payment)	Krutiak ADLP Damage Claim	ALJ In Place Value	**ALJ ADLP Damages**	% ALJ Damages To Krutiak ADLP Claim
166	CMI AG65Grader	360	26,000	9,000	5,000	14,000	12,000	14,000	**0**	
167	A.W. 330 Grader	357	9,600	500	5,500	6,000	3,600	6,000	**0**	
168	A.W. 88H Grader	297	8,400	2,400	2,600	5,000	3,400	6,000	**1,000**	
177	CAT 988A	368	18,000	13,000	2,000	15,000	3,000	15,500	**500**	
180	CAT988A-Parts	268	5,500	1,750	750	2,500	3,000	3,000	**500**	
186	Clark Mich 125B	246	18,000	10,000	5,000	15,000	3,000	15,500	**500**	
187	Clark Mich. 125	232	14,500	7,500	2,500	10,000	4,500	11,000	**1,000**	
195	CAT 977L	240	18,000	11,250	3,750	15,000	3,000	15,500	**500**	
199	CAT D8H-blade	268	4,500	200	300	500	4,000	500	**0**	
203	Int. TD8E	111	21,500	17,000	1,500	18,500	3,000	19,500	**1,000**	
230	Kato HD 770SE-ll	110	36,000	25,000	5,000	30,000	6,000	32,000	**2,000**	
231	Assort Kato Pts	111	21,500	2,250	1,750	4,000	17,500	6,000	**2,000**	
232	Assort Kato Pts	203	18,000	300	4,700	5,000	13,000	7,000	**2,000**	
236	Koehring 1066C	360	17,500	10,500	3,500	14,000	3,500	15,000	**1,000**	
237	FMC Linkbelt LS	110	18,000	8,900	6,100	15,000	3,000	15,500	**500**	
239	Case 40EC	166	19,500	11,000	5,500	16,500	3,000	16,500	**0**	
	Total		$274,500	$130,550	55,450	$186,000	$88,500	$197,000	$**12,500**	14.1
	Stipulated Property		697,780	538,695	82,005	620,700	77,080		10,868	14.1

Tires

Krutiak claims that 164 used tires sold at auction realized $3,940 less than the In Place Value of those items.[24] Krutiak estimated an In Place Value of $13,940 (164 used tires at $85/each) and the Department estimated an In Place Value of $10,000 (164 @ $61/each). Krutiak asserts an In Place Value "variance" of $3,940. I find the In Place Value for used tires (on the average) to be $73/tire. Accordingly, the In Place Value of 164 used tires is $11,972 (164 X $73). The Department should pay Krutiak $1,968 in ADLP damages ($13,940 - $11,972).

[24] The Department does not contest the claim on the basis that the actual auction sale price of the 164 used tires was not known. The total auction price of 47 new and 164 used tires is $12,725. The parties both valued the 47 new tires at $175/each. Only the used tires are in dispute. The record does not reveal the auction price of the 164 used tires; however, I resolve the In Place Value dispute based on the record here.

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.

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.

[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.

Oceanside Drive, Wankinquoah Ave. remain the same." However, the minutes of the meeting did not precisely identify what part of Wankinco Avenue would become Oceanside Drive.[4] On September 8, 2006 the Planning Board staff sent a memorandum to Town departments listing both private ways and public ways (town approved streets) that were "unanimously voted to be changed," including "The street formerly known as Wankinco Avenue (Swifts Beach, Map 50, B1) [paper street] has been changed to Oceanside Drive." See Ex. B; Ex. E. An undated letter from the Planning Board staff addressed "To Whom It May Concern" stated "This letter serves as official documentation of a street name change…." "The street formerly known as Wankinco Avenue (Swifts Beach, Map 50, B1) [paper street] has been changed to Oceanside Drive." The name changes "are effective as of October 1, 2006." The Planning Board's decision, minutes and letter are ambiguous and caused confusion within the Town's government and among the public.

Shortly after the Planning Board's public hearing on August 28, 2006, the Town maintenance department erected a new, official Wareham street sign--"Oceanside Drive"--at the corner of the east-west block connecting Wankinco Avenue to Wankinquoah Road. See Map 50 A, Ex. C (location of street sign marked by red "X"); see also Ex. E. At the "paper street," where the Planning Board had purportedly changed the name of the Wankinco Avenue to Oceanside Drive, no street sign was erected. Ex. C. At about the same time the town street sign "Wankinquoah Avenue" disappeared. The record does not disclose who ordered the erection of the Oceanside Drive sign or who removed the

[4] Wankinquoah Avenue in Swifts Beach has and east-west portion and a north-south portion. The Town assessor spells both portions as "Wankinquoah Avenue." See e.g. map 50 (Ex. A). The Town's street signs have variant spelling: east-west portion is "Wankinco Avenue"; the north-south portion "Wankinquoah Avenue." See infra page 11 n. 12.

Wankinquoah Avenue sign. Putting up the "Oceanside Drive" sign and taking down the "Wankinquoah Avenue" sign occurred five months before the Selectmen officially acted on February 27, 2007 to change the name of Wankinquoah Avenue to Oceanside Drive.

On December 23, 2006 a resident of #3 Wankinquoah Avenue made a 911 emergency call. The Town's response—the dispatch of an ambulance and fire truck—was delayed because the drivers were at first misdirected from Wankinquoah Avenue by the new, official Town street sign reading "Oceanside Drive."

On January 9, 2007 the Chairman of the Board of Selectmen sent a memorandum—with a map attached—to the police, fire, water, maintenance, planning and emergency medical departments affirming that the name Oceanside Drive would apply only to that part of Wankinco Avenue that the Planning Board had determined was a "paper street." See Ex. C; compare with also Ex. E (overview).

> On August 28, 2006 the Wareham Planning board held a public hearing to rename the above referenced street in the Swifts Beach area. By unanimous vote, Wankinko Avenue on Map 50B-1 (running westerly from Murphy Street to Marks Cove) in the Swifts Beach neighborhood was renamed Oceanside Drive. The newly name street is highlighted in pink on the attached map.[5]
>
> Wankinquoah Avenue, running westerly from the intersect of Barnes Street, across Swifts Beach Road and then northerly to its end point highlighted in blue was "**not**" effected [sic] by the vote of the Planning Board.[6]

On January 16, 2007 the Selectmen met and discussed renaming streets in Swifts Beach. The meeting was recorded in "draft" minutes. The Selectmen did not agree on where the Planning Board intended Oceanside Drive to be; they took no action to rename any portion of Wankinco Avenue or Wankinquoah Avenue or to remove the new, official

[5] The highlighted "paper street" that was "pink" on the Selectmen's map appears as black on Ex. C.

[6] The highlighted "blue" street on the Selectmen's map also appears in blue on Ex. C.

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

public controversy over the name change "issue," which had manifestly become a matter of public notoriety.

On March 15, 2007 legal counsel to the Town advised Mr. Gricus, Director of Planning, Planning Board, that only the Board of Selectmen had the authority to change the names of streets, whether public or private ways; and that the Planning Board's role in street naming was advisory only. See Opinion of Town Counsel, March 15, 2007.

On March 16, 2007 the Selectmen sent notice to the owners of property on Wankinquoah Avenue stating that

> From Wankinquoah Avenue to Oceanside Drive – Wankinquoah Avenue on Assessors' Maps 50-B3 & 50-C1 the portion beginning at the end of Swifts Beach Road, turning left and back to the end, effective after the 30-day notice (from the date of this letter) [subject] to appeal [to MassHighway] on [sic] Monday, April 16, 2007. [See Maps 50-B3 & 50-C1 at Ex. D.] [See overview, Ex. E.]

Town departments did not change the mailing addresses from Wankinquoah Avenue to Oceanside Drive in 2006 or before the November 2, 2007 MassHighway public hearing. The Town's 911 registry continued as before. At no time in 2006 or 2007 did the Town take action remove the official "Oceanside Drive" sign, which was standing on November 2, 2007. The Town's water utility--not a Town department--did change the mailing addresses on Wankinquoah Avenue to Oceanside Drive.[7]

The MassHighway Public Hearing of November 2, 2007

On November 2, 2007 MassHighway held a public hearing at the Wareham Public Library to hear the appeal of the 89 petitioners. I conducted the hearing, which

[7] On January 8, 2008 I received a letter from Kathy Allard, a petitioner here and a resident of Wankinquoah Avenue. She attached a copy of her 4th quarter real estate tax bill from the Town (assessed as of 1/1/07). The address of her assessed property was "17 Oceanside Drive." I forwarded a copy of Ms. Allard's letter and tax bill to Ilana Quirk, Esq., Town counsel, for comment or explanation before accepting it into the record. The Town did not respond. G.L. c. 85, s.3 states that a name change "shall be of no effect" "unless [MassHighway] shall approve of such change." There is no doubt that the Town's tax bill listed Oceanside Drive as an official address before any approval was obtained from MassHighway.

was held after due public notice. Michael Delaney, District Operations Engineer, District 5, and Robert L. Gregory, Traffic Engineer, District 5, and Dorothy Fierra, also attended. Before and during the hearing all public records of the Town related to the name change issue were assembled.[8]

None of the members of the Board of Selectmen or the Planning Board appeared to testify at the public hearing. Neither board submitted a document that explained the actions taken in 2006 and 2007; neither submitted a document that set forth specific reasons why Wankinquoah Avenue should be renamed or why MassHighway should approve the name-change to Oceanside Drive.

Instead, through legal counsel, the Town offered the affidavit of Charles Gricus, the Director of Planning. Two members of the public also testified in support of the name Oceanside Drive.

Mr. Gricus's affidavit stated that the Planning Board reviewed four private ways in the Town in 2006 "for potential change due to name confusion": Wankinco, Wankinko, Wankinquoah, Wanqinquoah (all pronounced "Wan-KINK-Oh"). He stated that a member of the Historical Commission advised the Planning Office "all these name variations … create[d] a 911 issue." The names of Wankinco Ave (off Warr) and Wanquinquoah Road (off Cromesset) were in fact changed, eliminating any confusion that might arise from duplicate street names in different neighborhoods. Mr. Gricus's

[8] After the hearing all the public records MassHighway received were copied, bound and distributed to the Town's legal counsel and the petitioners.

affidavit did not state that the names Wankinco Avenue and Wankinquoah Avenue in the Swifts Beach neighborhood in fact caused a "911 issue."[9]

Two of the 89 petitioners testified to oppose the change of name from Wankinquoah Avenue to Oceanside Drive, as did the Town's 911 coordinator.

The principal reasons given by residents why the name Wankinquoah Avenue should remain as it has existed since 1928 are: (1) the mailing addresses of the residents should be "protected," as it takes considerable time (and some money) to change utility accounts, insurance policies, mail subscriptions and correspondent addresses; (2) a name change might require the reformation of deeds in some cases, which is both costly and inconvenient; (3) there was no "911 issue" that required a name change since the Town had changed duplicative "Wankinquoah" street names in two other neighborhoods; (4) there had been no reason given by anyone why the traditional name Wankinquoah Avenue should be changed at all; and (5) the only proponent of the name change was Mr. Tenaglia, the father-in-law of one of the Selectmen.

The petitioners criticized the public process the Town followed in the street renaming project. They said that residents of Swifts Beach had never received notice by mail that a name change of Wankinco Avenue or Wankinquoah Avenue would be considered by the Planning Board at its August 28, 2006 meeting; they said that the Selectmen did not mail them notice that they would consider a name change at either their January 16, 2007 or February 27, 2007 meetings.

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[9] The record of hearing reveals that on June 25, 1991 an employee in the Selectmen's office noted that Ciro Tenaglia of 7 Wankinquoah Avenue (Swifts Beach) filed a complaint that "delivery company employees" had been unable to find him "or have delivered his goods to 7 Wankinco Avenue." He was concerned that "an emergency response would be made to Wankinco Avenue instead of Wankinquoah Avenue." The employee advised Mr. Tenaglia of the procedure to get a name change through the Planning Board. He was recorded as "on record" that one of the streets should be on a list for a future name change. Mr. Tenaglia is the father-in-law of Bruce Savineau, a Selectman in 2006 and 2007.

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 **"not"** 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."

Avenue) in the Swifts Beach neighborhood in the Town.[3] You have broad discretion to decide whether to "approve" or "disapprove" the name change from Wankinquoah Avenue to Oceanside Drive. The petitioners ask that you not approve the name Oceanside Drive so that the traditional name, Wankinquoah Avenue, will continue in use as it has for eighty years.

MassHighway should disapprove the name Oceanside Drive because (1) when the Town implemented the name Oceanside Drive without the required approval of MassHighway, it acted unlawfully; (2) there is strong public support to retain the traditional name, Wankinquoah Avenue; (3) the Town, on December 2, 2008, purported to rename Wankinquoah Avenue on the basis of demonstrably incorrect facts; (4) no delay in 9-1-1 dispatch will ensue should MassHighway disapprove the name Oceanside Drive and restore Wankinquoah Avenue as was on June 1, 1998; and (5) no reason exists in the public interest to change Wankinquoah Avenue to Oceanside Drive.

PART I: THE SWIFTS BEACH NEIGHBORHOOD

Wankinquoah Avenue: 1928-2006

In 1928 the Town accepted Wankinquoah Avenue as a public way in the Swifts Beach neighborhood. The name "Wankinquoah" comes from the Wampanoag language and means "near the water." It is pronounced /wan-KINK-oh/. The name is fitting as the Avenue is just steps from Buzzard's Bay. See Appendix A (photo/map). Wankinquoah

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[2] The Massachusetts Department of Transportation's Highway Division is the successor agency to the Highway Department (MassHighway). See G. L. c. 40, s. 6C.

[3] A photo map of the Swifts Beach neighborhood is found at Appendix A (photo/map).

Avenue, which is one continuous street, has two segments: an L-shaped north-south segment and a straight east-west segment. Id. Swifts Beach Road intersects Wankinquoah Avenue 100 feet to the west of where the north-south segment makes a 90 degree turn; the east-west segment starts to the west of the intersection of Swifts Beach Road and runs westerly to Murphy Street. Id. Summer cottages and year-round homes line both segments.

To the west of Murphy Street, where Wankinquoah Avenue ends, is a dirt footpath leading to Mark's Cove on Buzzard's Bay. See Appendix A (photo/map). No sign marks it; it has no houses or structures. A barrier prevents motor vehicle access. A Town map labels the path "Wankinco Avenue." See Appendix A (map 50-B-1). Because the street exists only on paper, it is known as a "paper street."

Before 1998 there was occasional confusion about the correct spelling of "Wankinquoah Avenue"—the spelling "Wankinco" was used by some residents on the north-south segment, while the spelling "Wankinquoah" was used by those on the east-west segment. [4] The two words are pronounced identically. By 1996 the Town was discussing the need for a uniform spelling. See Appendix A (7/22/96 memo).

On June 1, 1998 the selectmen eliminated the variant spellings and ordered that both segments be spelled "Wankinquoah." [5] Appendix A (Order). They renumbered the

[4] On June 25, 1991, Ciro Tenaglia, the father of Rose Sauvageau, wife of selectman Bruce Sauvageau, complained to an employee in the selectmen's office that a "delivery company employee" had been unable to find him "or have delivered his goods to 7 Wankinco Avenue." Appendix B (Report at 10 n.9). On June 1, 1998 the selectmen re-numbered and corrected the spelling of Mr. Tenaglia's address to "21 Wankinquoah Avenue." See Appendix A (Order).

[5] The Order is marked as Ex. 32(5) in the July 23, 2009 Hearing. The selectmen's June 1, 1998 order read: "Please be advised that the Selectmen's Office has assigned the following street numbers for

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 lease, claiming default. Thereafter, Town workers allegedly dismantled part of Ms. Haupt's fence and erected three Town signs marking a portion of her land a "public way." The Town then sued Ms. Haupt in 2002 to prevent her from operating the same parking business, claiming a zoning violation; she responded that parking had been a permitted use for 50 years. See Appendix D.

In 2001, the Town's Conservation Commission denied Ms. Haupt a permit to build a two-family dwelling. The house would have obstructed water views of nearby houses, including some belonging to the Tenaglia family. See infra p. 6 n.6. Selectman Bruce Sauvageau and the "Swifts Beach Neighbors" opposed the development. On August 12, 2003 the Department of Environmental Protection overruled the Conservation Commission and issued a superseding order of conditions allowing the development. On October 27, 2003, on the recommendation of the selectmen, a special town meeting voted to "acquire" Ms. Haupt's parcel. On December 31, 2003 the Town took Ms. Haupt's parcel by eminent domain. Ms. Haupt sued the Town in federal court on August 23, 2005, claiming a bad faith taking and land damages. On April 18, 2007 a jury returned a verdict for Ms. Haupt for $1.55 million. See Appendix D.

A subsequent settlement obligated the Town to pay Ms. Haupt $1.1 million. The Town allegedly used restricted Community Preservation Act funds to pay Ms. Haupt, which prompted a suit by taxpayers. Id. A complaint was lodged against Mr. Sauvageau

at the State Ethics Commission alleging improper use of office to benefit himself and his relatives.[6] Id.

The District Attorney of Plymouth County sued the selectmen in 2008 when he discovered that minutes of the selectmen's executive sessions when the taking of Ms. Haupt's land was discussed could not be found. The suit was dismissed in September, 2008 upon acknowledgement of the violation and reconstruction of the minutes. Id.

The Swifts Beach controversies were open and notorious and the subject of newspaper articles and blog posts. The controversies became a political issue in elections for selectmen. Id. Of the five selectmen who approved the taking of Ms. Haupt's land and litigated the aftermath, none is a selectman today. Of the selectmen who voted on December 2, 2008 to change Wankinquoah Avenue to Oceanside Drive, none is now in office. [7]

PART II: G. L. c. 85, s. 3—MASSHIGHWAY'S APPROVAL AUTHORITY

The Statute provides that, if 25 inhabitants of a town file a petition with MassHighway within 30 days after a "board or officer" acts to change the name of "any public way, place or section, or of any public park" that has been in existence for 25 years or more (hereafter, "Traditional Name"), the name change "shall be of no effect"

[6] Paragraph 37 of the federal court land damage complaint states: "Sauvageau and his wife Rose (Tenaglia) Sauvageau own a residence at 188 Swifts Beach Road. In addition, several of Sauvageau's family members some of whom are members of the Swift Beach Neighbors also reside near the Premises, including, Sauvageau's mother-in-law and father-in-law, Ciro Tenaglia (9 Wankinco Avenue); Ralph and Mary Tenaglia (196 Swifts Beach Road); Umberto and Laura Tenaglia (191 Swifts Beach Road); and Aldo Tenaglia (192 Swifts Beach Road). The two-family dwelling which [Ms. Haupt] proposed to build would have obstructed all or a portion of the water views from all of the foregoing residences, as well as other members of the Swifts Beach Neighbors."

[7] Compare minutes of meeting of selectmen/sewer commission (December 2, 2008) with minutes of selectmen/sewer commission (August 13, 2013).

"unless" "approved" by MassHighway. 42 inhabitants of the Town petitioned MassHighway on December 30, 2008 to reverse the December 2, 2008 act of the selectmen changing the north-south segment of Wankinquoah Avenue to Oceanside Drive. See July 23, 2009 Hearing, Ex. 6. The Town does not contest the petition.[8]

The Legislature Delegated Its Name Change Approval Power To MassHighway

The naming of public places is a legislative power. See Part II, c. 1, art. 4 of the Constitution of the Commonwealth. The General Court delegated its power to MassHighway, upon petition, to substitute its judgment for that of a "board of officer having jurisdiction" to approve a replacement for a Traditional Name of "any public way, place or section, or of any public park" in the Commonwealth.

Upon the timely filing of a petition to MassHighway a new name ceases to have legal "effect." Only if MassHighway affirmatively approves a new name may "such change" of a Traditional Name be of "effect." [9]

MassHighway's Decision To Approve is Legislative, not Adjudicatory, in Nature

In deciding whether to approve a new name, MassHighway acts not as a judge making an adjudicatory decision, but as a state agency exercising regulatory, legislative and political oversight. See Cambridge Elec. Light Co. v. Dep't of Pub. Utilities, 363

[8] The facts required to establish the jurisdiction of MassHighway are undisputed. (1) The public way called Wankinquoah Avenue, consisting of a north-south and east-west segment, has existed "in use" in the Swifts Beach neighborhood since 1928; (2) the selectmen acted to re-name Wankinquoah Avenue, Oceanside Drive, in 2007 and 2008; (3) more than 25 inhabitants twice timely filed petitions with MassHighway; and (4) the petitioners requested the reversal of the name change.

[9] ". . . [U]nless [MassHighway] shall approve of such [name] change, the same shall be of no effect." Statute. The Statute does not authorize MassHighway to name a public way or other public place. If MassHighway does not affirmatively approve a name change, the Traditional Name continues in effect.

Mass. 474, 486 (1973) (Cambridge Electric). A decision to approve a new name of a public way is not, by its nature, an adjudicative act. MassHighway's decision is not subject to the Administrative Procedure Act, G. L. c. 30A, s. 1(1), because its decision to "approve" (or not approve) does not adjudicate "the legal rights, duties or privileges of specifically named persons" under G. L. c. 30A, s. 14. See infra p. 35 n.39.

The approval of a new name under the Statute is not "intended simply to determine the particular legal interests of specifically identified persons." Cambridge Electric, 363 Mass. at 486. MassHighway's decision does not involve "disputes about specific facts concerning particular persons, their business or property, their motives, their relations to a given transaction—so called 'adjudicative facts'—which need untangling by trial methods." Id. at 487. Accordingly, a trial type adjudication is not functionally suited to the "type of governmental judgment involved here." Id. at 488.

The Public Hearing Is Legislative In Nature

The public hearing under the Statute is legislative in nature. The oversight MassHighway exercises under the Statute is regulatory, legislative and political in nature. Its decision to approve (or not approve) a name change is final.[10] MassHighway's decision to approve (or not approve) is not subject to judicial review.[11]

[10] See Bd. of Health of Sturbridge v. Bd. of Health of Southbridge, 461 Mass. 548, 559 n.24 (2012) (Sturbridge), citing Sch. Comm. of Hudson v. Bd. of Educ., 448 Mass. 565, 577-578 (2007) ("charter school application process . . . allows [local] public to be informed and to comment on application, but final decision is legislative in nature and rests with the [state] board").

[11] Because MassHighway's decision does not affect the substantive rights of any individual, there is no "aggrieved person" with standing to seek judicial review under G. L. c. 30A. See Sturbridge, 461 Mass. at 557 n.20 (no right of judicial review because party not aggrieved in "legal sense" and no "substantial rights . . . prejudiced") (internal citation omitted).

The function of the public hearing under the Statute is to provide "informal and informational public consultation"—commonly called "public comment and scrutiny of agency action." Sierra Club v. Comm'r of Dep't of Envtl. Mgmt., 439 Mass. 738, 747-748 (2003) (Sierra Club).[12] As in Sierra Club, the Statute's function is to permit the public an opportunity to state facts and voice opinions on the suitability of a name change and so assist MassHighway in discharging its discretionary oversight function.

MassHighway's oversight impinges only on the legislative and political authority of the Town to change a Traditional Name of a public way. The Supreme Judicial Court has consistently ruled that, where the "rights, duties and privileges" of a town are only those of a public body acting in its public capacity, a required public hearing that affects its political and legislative function is not an adjudicatory hearing subject to Chapter 30A. See Reid v. Acting Comm'r of the Dep't of Community Affairs, 362 Mass. 136, 141 (1972) (Reid) ("we do not think a proceeding becomes 'adjudicatory' merely because it may affect the public, political or legislative functions of the city"); accord Town of Warren v. Hazardous Waste Facilities Site Safety Council, 392 Mass. 107, 117 (1984) (Warren) (where only rights, duties, or privileges of the town are affected and where a public hearing before a determination of the siting of waste facility relates to the public, political or legislative functions of the town, a hearing is legislative, not adjudicatory).[13]

[12] Whether the requirement for a public hearing indicates an adjudicatory or legislative hearing requires an analysis based "on the considerations of functional suitability." See Cambridge Electric, 363 Mass. at 488. The fact that a statute requires a hearing—or that the public hearing was conducted by an administrative judge—does not imply the hearing held is adjudicatory. See Sierra Club, 439 Mass. at 746.

[13] See also Sturbridge, 461 Mass. at 559 n.24 ("In other contexts, we have recognized that participation in an administrative decision-making process that is not an adjudicatory proceeding, while enabling the administrative agency to receive information from a broad range of sources, does not necessarily give the

Because the public hearing under the Statute is legislative and political, as in Reid and Warren, the Statute does not require witnesses to testify under oath or be subject to cross-examination. None of the procedural due process safeguards of an adjudication under G. L. c. 30A, s. 11, which requires a statement of "issues," "reasons" for the "decision," and a "determination" of each issue of law or fact, with "substantial evidence" to support it, is found in the Statute. Compare Cambridge Electric, 363 Mass. at 485 with G. L. c. 30A, s. 11.

The Legislative Purpose of the Statute

Because its decision is legislative and political in nature, MassHighway may "exercise of the powers and duties delegated [to a public officer] for the purpose of implementing the legislative policy. . . . " Sierra Club, 439 Mass. at 748. The legislative policy of the Commonwealth is manifest in the Statute's text. Read as a whole, the Statue's purpose is to provide a modicum of protection of the Traditional Name of "any public way . . . [and] . . . any public park," for many Traditional Names mark the heritage of the Commonwealth.[14] MassHighway implements this policy by regulating the otherwise unfettered local authority to change Traditional Names.

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participant the right to seek judicial review. . . . See also School Comm. of Hudson v. Bd. of Educ., 448 Mass. 565, 577-578 (2007) (charter school application process requires public hearing at which plaintiffs participated but that fact did not entitle them to appeal from board's decision to grant charter; process allows public to be informed and to comment on application, but final decision is legislative in nature and rests with the board").

[14] Consider "The Boston Public Garden." If the city of Boston, by ordinance, changed that name to "The Thomas M. Menino Park," petitioners subsequently appealing to MassHighway could point out that the words "public" and "garden" carry with them a significant insight into why public funds were spent to build it, as gardens in the 1840s were thought to promote the public necessities of both corporal and spiritual health. Those facts would be proper to consider in deciding whether the name "Boston Public Garden" should continue in use.

The Statute supplants the Town's local bylaw,[15] since a town bylaw must yield entirely to the dictates of a general law of statewide application on the same subject. Bloom v. City of Worcester, 363 Mass. 136, 155 (1973) (Bloom) ("Legislation which deals with a subject comprehensively, describing . . . what municipalities can and cannot do, may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.").

The Statute Contains Articulable Standards To Guide MassHighway's Discretion

The standards MassHighway applies in exercising its discretion are found in the Statute itself. In statutes providing for the exercise of broad discretion, yet lacking express standards to guide a decision, appropriate standards are inferred. In the words of the Supreme Judicial Court,

> The standards for action to carry out a declared legislative policy may be found not only in the express provisions of a statute but also in its necessary implications. The purpose, to a substantial degree, sets the standards. A detailed specification of standards is not required. The Legislature may delegate to a board or officer the working out of the details of a policy adopted by the Legislature. Mass Bay Transp. Auth. v. Boston Safe Deposit & Trust Co., 348 Mass. 538, 544 (1965) (MBTA).

An examination of the principal "purpose" and the "necessary implications" of the Statute reveal the standards MassHighway should employ. A principal purpose of the Statute is to assure statewide discretionary oversight over any public official in the Commonwealth with jurisdiction to change a Traditional Name.

[15] The Town's authority to name streets is found in Wareham By-Law Division III, Article III.

Additional purposes are revealed by necessary implication.[16] The Statute protects the existence of Traditional Names, as they can be changed only with MassHighway's approval. It creates a legal interest in a Traditional Name "upon petition" by "25 inhabitants" who exercise a "right of appeal." It vests in MassHighway legislative authority to "approve" a new name. Upon the filing of a petition, it prohibits a new name from being put in use absent MassHighway's affirmative approval ("unless the department shall approve . . . [the new name] shall be of no effect").

The discretion MassHighway exercises is expansive—it may "receive information from a broad range of sources," as is appropriate in a legislative decision. See Sturbridge, 461 Mass. at 559 n.24. In its review, MassHighway may assess information from that "broad range of sources" and may look outside the record of the public hearings. See Massachusetts State Pharmaceutical Ass'n v. Rate Setting Comm'n, 387 Mass. 122, 132 n.11 (1982) (no error in relying on evidence outside hearing record where statute does not contain requirement that decision be based on agency record).

Factors to Consider in Deciding To Approve The Change of a Traditional Name

Given its broad discretion under the Statute and the range of public, political and legislative considerations that inhere in traditional place names, MassHighway may consider multiple factors in reaching a decision. The Statute does not have one set of

[16] The principal guide to interpretation is the plain meaning of the language of the Statute itself. See Nationwide Mut. Ins. Co. v. Comm'r of Ins., 397 Mass. 416, 420 (1986).

standards to determine whether to approve the name "Oceanside Drive" and separate standards that apply to every other public way, park or place.[17]

To meet "standards for action" and to "work out the details" of legislative policy— see MBTA, 348 Mass. at 544—specific inquires are useful.

When was the Traditional Name given and what does it mean? What is the depth of public support and the reasons given for retaining the Traditional Name?

What is the impetus for a name change? What does the new name mean? What is the depth of public support for the new name?

What are the reasons given by local officials to change the Traditional Name? What public purpose is served by replacing a Traditional Name with a particular new name? What practical benefit will result by the approval of a new name?

What is the public, political and legislative context surrounding the name change? Why is it appropriate to approve (or not approve) a new name?

Where does the broad public interest lie?

PART III: SUMMARY OF EVENTS: 1998-2009

Introduction: "Wankinquoah Avenue," June 1998-December 2008

After the selectmen's June 1, 1998 order, Wankinquoah Avenue was a well-marked public way with sequentially numbered summer cottages and year round

[17] The particular factors MassHighway should consider in approving a name change will vary with circumstance, because there is more than one dominant factor that may be relevant in re-naming hundreds of public ways, places and public parks throughout the Commonwealth. In some cases, historical significance may be critical; in others, understanding the tradition carried by a name; in still others, the people, battles or significant events honored by a Traditional Name. On the other hand, MassHighway may consider whether a traditional name has become obscure or obsolete. The range of possible factors underscores why MassHighway's discretionary approval of a proposed name change is grounded in legislative considerations, and why an informational public hearing makes functional sense. See Sierra Club, 439 Mass. at 746; see also Cambridge Electric, 363 Mass. at 486.

houses lining both the north-south and east-west segments. A uniform spelling, "Wankinquoah Avenue," was in use. The scheme complied with 9-1-1 regulations.

On September 1, 2006 little had changed. The Avenue was exactly as it had been in 1998, still in compliance with updated E 9-1-1 regulations. See 560 CMR 2.00 (3) (no duplicate names; numbered houses). 9-1-1 dispatch was straightforward because the Town had eliminated duplicate (and near duplicate) street names on August 28, 2006. Testimony of Sgt. Murphy, E 9-1-1 coordinator on November 2, 2007. A "Wankinquoah Avenue" street sign marked the north-south segment; the misspelled street sign "Wankinco Avenue," erected sometime between 1998 and 2006, marked the east-west segment. Sequential house numbering on all of Wankinquoah Avenue facilitated timely 9-1-1 response because a responder can follow the numbers to the correct house.

What the Town did between September, 2006 and December, 2008, a combination of lawful and unlawful actions, created the potential of a delayed 9-1-1 response that did not exist before. After implementing the name Oceanside Drive without MassHighway approval, it renumbered the houses in 2007 and 2008, which destroyed the sequential numbering scheme for the entire street that had existed since 1998. The selectmen, on December 2, 2008, then used the possibility of a delayed response to 9-1-1 calls, which they themselves had created, as the sole reason to change Wankinquoah Avenue (north-south segment) to Oceanside Drive. The public safety "concern" justifying the name change to "Oceanside Drive" was pretextual. The true impetus to impose the name Oceanside Drive in Swifts Beach was grounded in politics, not public safety.

The Town's 2006 Street Re-Naming Project

At the beginning of 2006 the Town had many duplicate or near duplicate street names. A duplicate street name "is a street name in which the name and any associated designator is exactly the same (example: Pine Street and Pine Street; NOT Pine Street and Pine Road.)." See 560 CMR 2.00 (Appendix A) (definitions).

In early 2006, the selectmen asked the Town planning board to identify duplicate street names and re-name duplicate streets to assure E 9-1-1 emergency dispatch.[18] Among the duplicate and near duplicate street names were Wankinco Avenue (off Ware), Wankinquoah Road (off Cromesett) and Wankinquoah Avenue (in Swifts Beach). All variations were pronounced identically, /wan-KINK-oh/. The planning board eliminated Wankinco Avenue (off Ware) and Wankinquoah Road (off Cromesett). See November 2, 2007 Hearing, Ex. 31. On September 8, 2006, the planning board notified all Town departments and residents of the new street names. After September 8, 2006 there remained only one public way in the Town named "Wankinquoah Avenue," spelled as such—the one in Swifts Beach.

At a planning board meeting on August 28, 2006, Rose Sauvageau asked the board to change the name of the north-south segment Wankinquoah Avenue to Oceanside Drive. She said the name "Oceanside" harked back to "Oceanside Pizza," the name of her father Ciro Tenaglia's former restaurant. November 2, 2007 Hearing, Ex. 37

[18] 560 CMR 2.00 (3) prohibits names that are "exactly the same." "In the absence of delineated village boundaries, entire street names or at least street name designators for the duplicate streets must be changed. Unless duplicate street names exist within delineated village boundaries, the entire street name or at least street name designators for the duplicate streets must be changed. Corresponding changes must also be made to all municipal signage and written notification be given to all property owners and residents of the addresses involved." Id.

and Ex. 40. The board did not do what Rose Sauvageau asked. Instead, it changed the name of the "paper street" "Wankinco Avenue" to Oceanside Drive. See supra at 3. [19]

The Town Erected an "Oceanside Drive" Street Sign in September/October, 2006

In late September or early October, 2006, the Town purported to change the name of the north-south segment of Wankinquoah Avenue to Oceanside Drive by erecting a Town street sign, "Oceanside Drive," just to the east of the intersection of Swifts Beach Road. See Appendix A (photo/map) and July 23, 2009 Hearing, Ex. 16 (photograph). The sign marked the street that Rose Sauvageau told the planning board she wanted named Oceanside Drive. See Appendix A (photo/map). The Oceanside Drive sign was adjacent to the Haupt parcel taken by eminent domain. Id.

The official "Oceanside Drive" sign was erected more than five months before the selectmen, on January 16, 2007, first addressed changing the name Wankinquoah Avenue to Oceanside Drive. See November 2, 2007 Hearing, Ex. 37. Although a Town official must have ordered the fabrication and installation of the "Oceanside Drive" sign, the Town could not identify who that was. Although specifically asked, the Town did not produce any records of the Town maintenance department about the Oceanside Drive sign. In October, 2006 the "Wankinquoah Avenue" Town street sign marking the north-south segment of Wankinquoah Avenue disappeared.

The new Town street sign, "Oceanside Drive," created confusion almost immediately. On December 23, 2006 a resident of 3 Wankinquoah Avenue (north-south

[19] There is no doubt that the planning board changed the name of the uninhabited "paper street" appearing on map 50-B-1 as Wankinco Avenue to Oceanside Drive. The planning board minutes of the August 28, 2006 meeting are clear: "Wankinco Avenue to Oceanside Drive, Wankinquoah Avenue to remain the same." See November 2, 2007 Hearing Ex. 26, Ex. 31 and Ex. 37.

segment) called 9-1-1, but the dispatch of the ambulance and fire truck was delayed because the new Oceanside Drive street sign confused the responders. See Appendix B (Report at 5). From October 2006 to the present, the official Oceanside Drive street sign has remained where first erected.

Selectmen's Clarification Memorandum: January 9, 2007

On January 9, 2007, the chairwoman of the board of selectmen, Renee Fernandes-Abbott, distributed to Town departments a memorandum affirming that the planning board's designation of the street name Oceanside Drive on August 28, 2006 applied only to the paper street, "Wankinco Avenue." See Appendix B (Report Tab C). Attached to the memorandum was assessor's map 50-B-1 marked in color to show the location of the uninhabited "paper street" Wankinco Avenue (pink) and the inhabited public way Wankinquoah Avenue (blue). Ms. Renee Fernandes-Abbott wrote, "Wankinquoah Avenue [east-west and north-south] was '**not'** effected by the vote of the planning board." (Emphasis in original.) November 2, 2007 Hearing, Ex. 24.

In 2007 the Selectmen Changed Part of "Wanquinquoah Avenue" to "Oceanside Drive"

On January 16, 2007 the selectmen first publically discussed re-naming Wankinquoah Avenue. Selectman Bruce Sauvageau did not agree that the planning board intended to change the name of the "paper street," Wankinco Avenue, to Oceanside Drive. He opined that the planning board had inadvertently used the wrong map reference to locate "Oceanside Drive"; he asked the selectmen to correct the error.

On January 22, 2007, the E-911 dispatcher, Sgt. Murphy, wrote the selectmen calling attention to the public safety hazard created by the Oceanside Drive sign that

had delayed the ambulance and fire truck on December 23, 2006. See Appendix A (letter). He asked that the Oceanside Drive sign be taken down or the street officially re-named. Id.

On February 27, 2007 the selectmen agreed that on August 28, 2006 the planning board had changed the name of the north-south segment of Wankinquoah Avenue to Oceanside Drive, despite the specific map reference and chairperson Renee Fernandes-Abbott's representation to the contrary. Appendix B (Report at 6-9).

On March 15, 2007 legal counsel to the Town advised the planning board staff that only the selectmen had the authority to change the names of streets, whether public or private ways, and that the planning board's role was only advisory. Id.

On March 16, 2007 the Selectmen sent a notice that the name Wankinquoah Avenue (north-south segment) had been changed to Oceanside Drive. It read:

> Wankinquoah Avenue to Oceanside Drive . . . on assessors maps 50-B3 & 50-C1 . . . effective after the 30 day notice (from the date of this letter) to appeal [to MassHighway] on Monday, April 16, 2007.

The notice was sent to home owners on both segments of Wankinquoah Avenue and to Town departments and the United States Postal Service. The selectmen took no vote. No selectman gave a substantive reason why the Traditional Name, Wankinquoah Avenue, should be changed to Oceanside Drive. The only stated reason was "to end" the public controversy over the name change "issue." Id. at 7-8.

The notice showed new numbers assigned to houses on Oceanside Drive (north-south segment of Wanquinquoah Avenue) and several houses on the east-west segment of Wankinquoah Avenue (not re-named). The notice associated each "new" Oceanside

Drive house number to that house's "old" number on Wankinquoah Avenue, spelled as such. The selectmen sent the notice to all addresses on both segments of the former "Wankinquoah Avenue," spelled as such. No notice was sent to any address on "Wankinco Avenue," spelled as such, since no such inhabited street existed. See November 2, 2007 Hearing, Ex. 33.

89 Petitioners Timely Appealed To MassHighway

On April 11, 2007 89 petitioners timely appealed the name change to MassHighway. July 23, 2009 Hearing, Ex. 12.

Public Hearing of November 2, 2007

At the hearing the petitioners gave the following reasons for retaining the name Wankinquoah Avenue: (1) the residents liked the name, in use since 1928, for its historic association; (2) no reason was given by anyone why the Traditional Name, Wankinquoah Avenue, should be changed; (3) changing a mailing address is time consuming and expensive; (4) any "9-1-1 issue" due to duplicate street names had been eliminated in 2006; (5) name changes might require reformation of deeds and mortgages; and (6) five people wanted the name change, Bruce and Rose Sauvageau, Rose's father, Mr. Tenaglia, and two others. See Appendix B (Report at 10).

Report: March 10, 2008; Decision: June 2, 2008

After the public hearing, I reported, on March 10, 2008, to MassHighway. See Appendix B (Report). I recommended that it not approve the name change because, among other things, (1) the record demonstrated conclusively that there was no public

safety reason that required a name change to Oceanside Drive;[20] (2) the selectmen's actions to change Wankinquoah Avenue to Oceanside Drive took place away from public view, with no prior notice to residents or the public, (3) the Town engaged in confusing, ambiguous and ultimately prejudicial actions to the petitioners—for example, neither the planning board nor the selectmen kept accurate, contemporaneous minutes. I reported that one Town employee recorded, "This has been the most confusing street name or renaming that I could ever imagine."

MassHighway disapproved the name "Oceanside Drive" on June 2, 2008. See Appendix B (Decision). The Commissioner stated: "I have determined that there was no public safety issue to change the name of Wankinquoah Avenue."[21] Id.

The Town Gave " Oceanside Drive" Legal "Effect" Without MassHighway Approval

The Town first gave the street name "Oceanside Drive" legal effect in October, 2006 when it erected the Town street sign "Oceanside Drive," five months before the selectmen discussed the name change.

After the November 2, 2007 public hearing, but before MassHighway had made a decision, the Town acted again to give the new name "Oceanside Drive" legal "effect." While MassHighway was considering whether or not to approve the new name, the Town changed the addresses on its assessing records and tax bills from Wankinquoah

[20] Credible testimony of Sgt. Murphy, the supervisor in charge of 9-1-1 dispatch, explained why the Town's 9-1-1 system did not require changing the name Wankinquoah Avenue. He said, "The problem—and it is a safety issue—is that Oceanside Drive sign," which was "still" a possible cause of delay. Appendix B (Report at 11).

[21] The only evidence that there was a public safety issue, before August 28, 2006, was the affidavit of Mr. Gricus of the Town planning board. He testified that a member of the Historical Commission had advised the planning office that "all these name variations [relating to /wan-KINK-co/] create[d] a 911 issue." Mr. Gricus did not testify from personal knowledge that a 9-1-1 "issue" existed. See Appendix B (Report at 9).

Avenue (north-south segment) to Oceanside Drive. See July 23, 2009 Hearing, Ex. 22(a) and (b); Appendix B (Report at 8 n.7).

On May 29, 2008, four days before MassHighway issued its June 2, 2008 decision, the Town Administrator ordered the Town's E 9-1-1 dispatch coordinator to forthwith substitute Oceanside Drive for Wankinquoah Avenue (north-south segment). Sgt. Murphy testimony at Hearing of July 23, 2009. On May 29, 2008, Sgt. Murphy filled out forms documenting the official Town name change from Wankinquoah Avenue to Oceanside Drive on the Town's E 9-1-1 dispatch records. Id.; see also Hearing July 23, 2009, Ex. 28 (24 forms).

The Town took all three of these official acts to give legal "effect" to the name Oceanside Drive without MassHighway's required statutory approval.

The Town Ignored MassHighway's June 2, 2008 Decision

Following MassHighway's disapproval of the name change, the Town completely ignored the decision and acted at all times as if MassHighway had in fact approved—not disapproved—the name Oceanside Drive.

Specifically, after the June 2, 2008 disapproval, the Town (1) left in place the street sign "Oceanside Drive" and did not reinstall the "Wankinquoah Avenue" street sign; (2) continued to use the disapproved street name, Oceanside Drive, as the "location" of assessed property and mailing addresses for tax bills; (3) continued to use the disapproved name, Oceanside Drive, for its E 9-1-1 dispatch; (4) did not notify Town departments, public utilities and the Postal Service that MassHighway had disapproved the name Oceanside Drive nor order them to restore the name "Wankinquoah Avenue."

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).

"Wankinquoah Avenue"; and that "Wankinco Avenue" was the correct name and spelling of "Wankinquoah Avenue" (east-west segment).

The selectmen never acknowledged (1) that on June 1, 1998 they had definitively eliminated all such public safety "concerns" that stemmed from the variant spellings and street numbering (see Appendix A (Order))[23] and (2) that in 2007 they had implemented, without MassHighway approval, the name Oceanside Drive and renumbered the houses, thus destroying the sequential numbering system existing since 1998. See July 23, 2009 Hearing, Ex. 20 (2007 re-numbering).

In sum, the meeting proceeded as if the problem set forth in the notice had not been addressed and resolved in 1998; and as if the de facto name change to Oceanside Drive, unlawfully implemented in 2006, 2007 and 2008, had not taken place; and as if the east-west segment was "known as" "Wankinco Avenue" because of misspellings on a 1987 assessor's map and a street sign of unknown date. See ante n.23 and supra at 4.

The "facts" the selectmen assumed as true led to irrational results. For example, individual selectmen repeatedly stated as true that when first responders driving south on Swifts Beach Road arrived at the junction of "Wankinco" (right) or "Wankinquoah"

[23] The June 1, 1998 selectmen's order and notice is not ambiguous. It shows precisely which 25 street addresses then on "Wankinco Avenue" were renumbered on "Wankinquoah Avenue." See July 23, 2009 Hearing, Ex. 32(5) at 2-3; see also, November 2, 2007 Hearing, Ex. 24 (January 9, 2007 "clarification" letter of chairwoman Renee Fernandes-Abbott) and Ex. 33 (address list used by selectmen to mail notices on March 16, 2007 notifying residents that the selectmen had changed the north-south segment of "Wankinquoah Avenue" to "Oceanside Drive": every address was spelled "Wankinquoah," none spelled "Wankinco"); and July 23, 2009 Hearing, Ex. 6 and Ex. 21 (addresses recorded on two petitions to MassHighway by 89 and 42 inhabitants respectively, each listing an address on "Wankinquoah Avenue," none on "Wankinco Avenue"). These documents definitively show that on December 2, 2008 there did not exist "two" streets "known as" "Wankinquoah Avenue" and "Wankinco Avenue." It is a fact that there was no inhabited "street" in Swifts Beach then "known" as "Wankinco Avenue." The only basis after 1998 for thinking the east-west segment of Wankinquoah Avenue was still "Wankinco Avenue" are two misspellings, one on the 1987 assessor's map 50A, the other on the street sign.

(left) they would not know (and would have to guess) whether to turn right or left to find a specific house number, even though, to the left, was the actual the Oceanside Drive street sign (marking the north-south segment of Wankinquoah Avenue). Rose Sauvageau testified as if "Wankinquoah Avenue" and "Wankinco Avenue" that had existed before June 1, 1998 still existed in fact on December 2, 2008. (The "two" streets created a "huge" public safety problem, she said.) The irrefutable fact is that the selectmen had eliminated the "Wankinco Avenue" spelling a decade earlier and that spelling had not been used by the Town or residents as an official address since.[24]

The meeting disclosed that the selectmen knew they were addressing a political controversy. They did not discuss whether one street name was more appropriate than another. Selectman Joseph Andetti said, "A lot of people have said to me 'It's a shame that Bruce [Sauvageau] got to name a street' "; and another selectman said that the people who signed the petition to MassHighway in 2007 did so "because they didn't like Bruce." Selectwoman Donahue wanted it known before the vote that "I think this

[24] The spelling of the east-west section of the Avenue was at all times after June 1, 1998 "Wankinquoah Avenue," never "Wankinco Avenue." That the correct spelling of both the north-south and east-west segments was "Wankinquoah Avenue" is attested by (1) the official order laying out the street in 1928; (2) the use of that spelling by the residents on both segments on the petitions signed in 2007 and 2008 (no one listed themselves as a resident of "Wankinco Avenue"); (3) the selectmen's mailings to residents in 2007, 2008 and 2009, all addressed to houses on "Wankinquoah," none to "Wankinco"; (4) the spelling on Town tax bills, all to "Wankinquoah," none to "Wankinco" (since 1998); (5) the spelling of "Wankinquoah Avenue" used by the 9-1-1 system (until ordered by the Town administrator on May 29, 2008 to use the name Oceanside Drive (see July 23, 2009 Hearing, Ex. 28)); (6) the spelling on the Town street sign (before it disappeared in October, 2006); (7) the addresses to which the March 16, 2007 selectmen's letter (announcing the name change of the north-south segment of Wankinquoah Avenue to Oceanside Drive); and (8) the December 5, 2008 letter of the selectmen to homeowners appending a list of current addresses of property owners (none living on "Wankinco Avenue"). Per contra, in December, 2008, were the erroneous spelling on map 50A (1987) and the street sign misspelled "Wankinco" (unknown date).

[controversy] is an unfortunate waste of a lot of people's time and I do think that the whole thing is political."

> The 4-0 vote in favor was on a motion by selectwoman Donahue
>
> That to the left [east] of Swift's Beach Road remain Oceanside, to the right [west] become /Wan-KINK-co/ with whatever spelling—"Q" or "C'—Joe [Andetti]wants and renumber that street.
>
> The official record of the vote bears no resemblance to the motion voted on.

The official vote is set forth in an undated memorandum addressed "to whom it may concern" under the signature of James L. Potter, chairman. See July 23, 2009 Hearing, Ex. 5(d). The "official" vote recites, in part

> [The selectmen met] to consider changing the names of two streets which are now known as Wankinco Avenue and Wankinquoah Avenue. . . The Board noted that E-911 public safety concerns derived [sic] that two streets, located off of Swifts Beach Road, that connect with one another, and have names that are spelled differently, but are pronounced exactly the same way: Wankinco and Wankinquoah should be changed [sic].
>
> The Board discussed having one continuous road with all houses re-numbered or keeping two roads, but with pronunciations that were not similar. . . . There had not been a consensus among the members of the public for the two streets to be combined into one with either one [sic], and re-numbered, with either of the existing names [sic].
>
> Member Donahue moved and Member Eckstrom seconded that the board vote to change the names of the street [sic] so that the street starting from the top of Swifts Beach Road and turning left, formerly known as Wankinco[25], shall be named Oceanside Avenue.[26] The street starting from the top of Swifts Beach Road and turning right shall keep

[25] More than a decade earlier, in 1998, the north-south segment of the Avenue was known as "Wankinco."

[26] The actual vote taken was to confirm the name "Oceanside Drive," as on the 2006 street sign.

the Wankinquoah Avenue[27] name and be re-numbered, if necessary to comply with 911 requirements.

The "official vote" obfuscated what happened on December 2, 2008. (1) The words "formerly known as Wankinco" are misleading to a fault—in reality, "formerly" referred to the spelling in use prior to June 1, 1998; (2) the motion voted on did not say "shall be named Oceanside [Drive]"—rather, selectwoman Donahue's motion stated that the north-south segment "shall remain Oceanside Drive," the name "known" de facto since March 16, 2007;[28] (3) there were not "two street[s] which are "now known as Wankinco Avenue and Wankinquoah Avenue" [29]—rather, de jure, there was one continuous street, or, de facto, two streets, "Oceanside Drive" (north-south) and "Wankinquoah Avenue" (east west); and (4) no "public safety concerns derived that two streets [sic] . . . that connect with one another and have names that are spelled differently, but are pronounced exactly the same way. . . ."—in fact, all confusion "derived" from" "two" streets with different spellings had been eliminated in 1998, more than a decade before. The recorded vote contained plainly wrong facts. [30]

[27] At the meeting itself the selectmen recited that this segment (to the right) was called "Wankinco," the source of the confusion they purportedly sought to correct.

[28] The actual vote by the selectmen thus confirmed that they knew that the name of the north-south segment then in use was not in fact "Wankinquoah Avenue."

[29] The selectmen's own records show without doubt that the only streets "now known" at the time were Wankinquoah Avenue and Oceanside Drive—there was no "Wankinco." See July 23, 2009 Hearing, Ex. 20 (showing that before the change to Oceanside Drive on March 16, 2007 all houses on east-west and north-south segments were on "Wankinquoah Avenue") and Ex. 5(c) (showing "no. using" on December 5, 2008 as either "Oceanside Drive" or "Wankinquoah Avenue" and none "using" a "Wankinco Avenue" address).

[30] Mr. Potter's first "to whom it may concern" letter had to be withdrawn and corrected because it contained another factually incorrect statement. In his first official recitation of the vote taken, he spelled "Wankinquoah" incorrectly as "Wanquinquoah." Compare July 23, 2009 Ex. 5(d) with Ex. 31 p.5.

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]

[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"

MassHighway persuades a court to "reverse" the Town's actions. Appendix C (Town Memorandum, at 3). It says,

> The statute provides that the petition for the appeal is "requesting reversal of such action." The statute further provides that "unless the department shall approve of such change, the same shall be of no effect." Thus, the statute presumes that the local decision is the operative decision, that the decision must be reversed, and that unless MassHighway approves of the change, the change "shall be of no effect."
>
> By referring twice to the negative ("reversed" and "no effect"), the statute contemplates that the name change is in effect, but subject to being reversed. Moreover, the statute does not provide for a stay of the local decision pending the appeal. Therefore, all actions by the Town following the December 8, 2008 Decision were taken in accordance with the statute. Appendix C (Town Memorandum at 3).

The Town asserts as well that MassHighway must approve a new name unless MassHighway can show a judge that the Town's naming action was not "reasonable." The only issue under the Statute, the Town says, is whether "the [Town's] Decision itself is reasonable . . . not whether action taken under it may have been hasty." Id. at 3-4. All other considerations are "ultimately irrelevant." Id. at 3.

The Town's arguments are fundamentally flawed, for three reasons. First, the Town fails to analyze the purpose of the Statute and how its language accomplishes the Legislature's policy, "upon petition," of protecting Traditional Names.

In the words of the Supreme Judicial Court:

> None of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature. Flemmings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375 (2000) (internal citation omitted) (Flemmings).

The Town's arguments ignore what the words, phrases and sentences mean within the context of the Statute's purpose. The Town suggests no coherent meaning of the "enactment considered as a whole" based on an analysis of all its text—that is, it fails to explain how each word and phrase sensibly contributes to a consistent meaning of the whole. For example, its contention that the words "reversed" and "no effect" form a "double negative" makes no sense. Each word appears in a separate sentence (1st and 3rd), which are not grammatically linked. So, the meanings of the two separated words are not interdependent. No "double negative" exists.[37] As another example, even if the word "stay" is absent, the Statute by express language accomplishes what a "stay" would do by suspending the legal "effect" of the name change action.[38] The text incontrovertibly requires the affirmative approval of MassHighway before a local name change can "be of [legal] "effect."

Second, the Town's construction of the Statute would defeat its utility, which demonstrates its arguments are misconceived. See Simon v. Solomon, 385 Mass. 91, 100 (1982) (proper construction of a statute will not defeat its utility). The Town's arguments, if correct, would defeat the whole purpose of MassHighway's review, rendering the Statute meaningless. In the Court's words,

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[37] The Statute is not framed in "negatives." The word "reversed" merely limits the narrow relief petitioners may request—for example, they may not request that MassHighway name a pubic way with a name they prefer. Since the "right of appeal" arises only after the local decision to change a name, but before it is implemented, the word "reverse" makes sense in the correct context: If a name change is not "approved," the naming action will be "reversed" by operation of the Statute itself.

[38] As explained supra at 32 a new name prematurely put into official use ceases to have legal effect "upon the filing of the petition." The Traditional Name continues in effect "unless" MassHighway affirmatively approves a new name. Hence, the Statute by its own terms suspends the local name change during the pendency of the petitioner's appeal.

> If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results. Flemmings, 431 Mass. at 376.

No words in the Statue provide that a name change may be implemented while an appeal by petition is pending. The Statute's plain words do not provide (as the Town asserts) "the name change is in effect, but subject to being reversed." Appendix C. (Town Memorandum at 3). Such a construction negates both the utility of the petitioners "right of appeal" and MassHighway's authority to decide whether a new name "shall be of effect."

What language supports the Town's contention that MassHighway's decision to "reverse" only becomes final after a court ruling on the Town's Chapter 30A appeal (and subsequent appellate review)? The Town points to no specific language that authorizes judicial review because none exists. As a matter of law, there is no Chapter 30A appeal because MassHighway's decision is legislative, not adjudicatory, in nature.[39]

The Town's construction produces absurd results. It transforms the Statute, which unquestionably grants MassHighway the discretionary power to approve a name change, into a judicial proceeding, in which a judge—not a state agency— is ultimately

[39] The Town's suggestion that MassHighway's "approval" follows an adjudicatory hearing held under Chapter 30A is baseless. See supra at 6-9. The public hearing under the Statute is not subject to Chapter 30A, the State Administrative Procedure Act, because (1) the Statute does not, by its terms, require a Chapter 30A hearing; (2) no applicable general law, special act or regulation requires an adjudicatory hearing under Chapter 30A (compare Sturbridge, 461 Mass. at 556 with G. L. c. 85, s. 3); (3) the public hearing under the Statute is not a "proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by a provision of the General Laws to be determined after opportunity for an agency hearing" under G. L. c. 30A, s. 1(1) [defining adjudicatory hearing]; (4) the notice required for the public hearing under the Statute is entirely in MassHighway's discretion, while notice for a Chapter 30A hearing is subject to detailed requirements, such as a statement of the issues to be decided (compare G. L. c. 85, s. 3 with G. L. c. 30A, s. 11); and (5) the function of the public hearing under the Statute is not an adjudicatory, trial type hearing but one that is legislative in nature. See Cambridge Electric, 763 Mass. at 486.

to decide whether the Town's name change is "reasonable." No language exists that requires MassHighway to prove to a judge that the Town's name is not "reasonable" or must obtain an order to "roll back" a name change already in "effect." [40]

Third, the Town's interpretation is fundamentally flawed because it re-writes the Statute. Instead of the Town bearing the burden of persuading MassHighway that it should approve a new name in the public interest, the Town absurdly contends that MassHighway must prove to a judge that the Town's naming action is "unreasonable."

The Town's construction of the Statute turns its meaning upside down. The Statute's text does not say: "such [name] change" shall be in "effect" unless MassHighway obtains a court order to "reverse" the Town's re-naming and implementation of "such [name] change." [41] Compare text of Statute, supra, at 1 n.1.

3. MassHighway May Consider Facts Outside the Public Hearing Record

Because its decision to approve is legislative and regulatory in nature, MassHighway is not limited by the facts, opinions and documents presented at the hearings in reaching a decision. See Massachusetts State Pharmaceutical Ass'n, 387 Mass. at 132 n.11. This report, while based primarily on the record assembled at the two public hearings (documents, maps, photographs and the recordings of two selectmen's meetings held in February/March, 2007 and on December 2, 2008),

[40] The Town cites no authority to support its contention that MassHighway's decision is subject to judicial review under a "reasonableness standard." The Town simply conjures up the law.

[41] The Town's fundamental error is construing a general law of statewide application as subject to the Town's bylaw authorizing its selectmen to name public ways. Where the Town admittedly acted both to immediately implement a name change in 2007 before MassHighway's June 2, 2008 ruling and continued to implement the name change after MassHighway's disapproval, the Town a fortiori contends that its by-law negates a general law. Its position is contrary to law. See Bloom, 363 Mass. at 155.

accordingly contains information contained in public records, court filings, published letters and collected newspaper reports. See Appendix D.

TOWN RESIDENTS OVERWHELMINGLY SUPPORT RETAINING 'WANKINQUOAH AVENUE'

1. Some 90 Residents Want To Retain the Name "Wankinquoah Avenue"

In 2007, 89 Town inhabitants, including 8 residents of both segments of Wankinquoah Avenue, petitioned MassHighway to keep the Traditional Name; in 2008, 42 residents again petitioned, stating, "We want Wankinquoah Avenue, Swifts Beach, to remain as it has been for generations; one street (intersected by Swifts Beach Road) with houses consecutively numbered."

The principal reasons why the petitioners want to retain the name are sound: (1) the traditional name should be protected; (2) no one has given any reason why the traditional name should be changed; (3) there was no risk of 9-1-1 dispatch delay because the Town had eliminated all near duplicate /wan-KINK-co/ street names in 2006; and (4) it is expensive and aggravating for residents to change street names and addresses on utility and credit card accounts, mail subscriptions and personal correspondents. See supra at 19.

The overwhelming support of so many residents who want to retain the Traditional Name is a persuasive reason in these circumstances for MassHighway to not approve the name "Oceanside Drive." The Traditional Name, which evokes the Town's Native American connection and has widespread resonance with so many, should be

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. There Are Three Principal Proponents for the Name Change

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]

[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.

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[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

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

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.

[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:

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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.*

[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

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.

HEARING

The Determination Letter[4] informed Woodchucks of its right to an informal hearing under 49 C.F.R. § 26.87(d). See OSD Ex. #1. It also informed Woodchucks that it may "show cause" at the hearing why it should remain certified as a DBE.[5]

On June 11, 2012 Woodchucks requested a hearing. Id. On November 16, 2012, the Board notified the parties under G.L. c. 30A, § 11(1) and 801 C.M.R. §§ 1.02, 1.03 that the hearing would involve five issues.[6] See Board Ex. #1. The Board heard the matter on February 22, 2013. The parties stipulated to the admissibility of all exhibits.

At the commencement of the hearing, SDO moved the Board in the nature of a motion in limine to rule that Woodchucks had the burden of proof.[7] SDO argued that, because Mr. Dickerson had pled guilty, the burden of proof shifted to Woodchucks under the federal regulations governing the debarment of contractors. See 2 C.F.R. §§ 180.850,

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[4] An SDO determination letter issued under 49 C.F.R. § 26.87 initiates the formal procedure that may lead to an ultimate decision of ineligibility. Presumably, SDO follows best investigation practices so that before it makes any determination it has assembled substantial record evidence, including corroborating evidence, of critical facts. In its investigation SDO may give a DBE firm the opportunity to provide documents and respond to SDO's inquiries. 49 C.F.R. § 26.87 expressly requires SDO's factual determinations to be supported. Since 49 C.F.R. § 26.87 requires SDO to identify evidence, the failure to "specifically reference the evidence in the record on which each reason is based" may be grounds to find that SDO did not satisfy federal requirements. Under 49 C.F.R. § 26.87 SDO makes determinations, not recommendations.

[5] Nothing under 49 C.F.R. Part 26 uses the phrase "show cause." A statement in a determination letter that a DBE may "show cause" at a hearing held under 49 C.F.R. § 26.87(d) could be misconstrued, as the use of the phrase "show cause" typically signals who has the burden of proof. Compare post n. 7.

[6] Chapter 30A provides that the notice of an informal hearing contain a description of the legal and factual issues "involved." See G.L. c. 30A, § 11(1) ("Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument"). Accordingly each SDO determination letter should specify facts and identify legal issues. For example, because 49 C.F.R. § 26.87(f) requires that a decision to remove eligibility be based on one or more of five specified reasons, SDO should identify each reason on which its determination rests. Likewise, SDO should find all facts by reference to specific record evidence in accordance with 49 C.F.R. § 26.87. See ante n. 4.

[7] There is no doubt that, ordinarily, when a DBE seeks a hearing under 49 C.F.R. § 26.87(d) to review an SDO determination, SDO has the burden of proof at the hearing as a matter of law. 49 C.F.R. § 26.87(d)(1) provides "…[SDO bears] the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part." Compare ante n. 5.

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

[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.

copy of the letter, which she delivered to her supervisors. She was told that SDO already knew about the investigation.

Woodchucks does not contest any facts initially found by SDO or later adduced at the hearing. Instead, Woodchucks contends that, because SDO knew Mr. Dickerson was being investigated, he was not required to file a change in circumstances affidavit. Woodchucks also contends that the Board should consider the mitigating factors listed in 2 C.F.R. § 180.860 before ruling.[9]

DISCUSSION

Attempts to Subvert the Requirements of the DBE Program – 49 C.F.R. § 26.73(a)(2)

Because Mr. Dickerson admitted to the facts of the Conspiracy in the Indictment, the record establishes by clear and convincing evidence that Woodchucks "exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program" prohibited by 49 C.F.R. § 26.73(a)(2).[10] See Board Ex. #4; OSD Ex. #3. The pattern of conduct set forth in the Indictment is an appropriate fact for SDO to consider in making certification decisions. See DKW Construction, Inc. v. Missouri Regional Certification Committee, 2009 USDOT 09-0049 (DBE acting as a mere conduit to pass payments between general contractor and vendors so that the general contractor could claim DBE credit subverts the federal program).

[9] 2 C.F.R. § 180.860 lists 19 aggravating and mitigating factors to be considered in debarment proceedings. See 2 C.F.R. § 180.860 (a) through (s).

[10] 49 C.F.R. § 26.73(a) provides, "(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. (2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program."

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.

_____ _____

Stephen H. Clark 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.