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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 16, 2018

In the Matter of
Richard Roper and
Crabtree Development, LLC

OADR Docket No. WET-2015-009
DEP File No. 100-0337
Ayer, MA


RECOMMENDED FINAL DECISION

INTRODUCTION

In May 2015, the Petitioners Michael Anuta and Jean Hoffman-Anuta filed this appeal challenging the April 17, 2015 decision of the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”), denying their request for a Superseding Order of Conditions (“SOC”) pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). Petitioners’ Appeal Notice, at p. 1. The Petitioners had requested the SOC seeking to revoke the recording of an Order of Conditions issued by the Town of Ayer’s Conservation Commission (“ACC”), dated both October 28, 2010 and November 18, 2010, that Richard Roper and Crabtree Development, LLC (collectively “the Applicant” or “Roper”) had recorded on September 26, 2014 with the Middlesex South Registry of Deeds (“the Registry”) against the Petitioners’ then real property at 187 Old Farm Way in Ayer (“the

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Property”). Id.; Order of Conditions Recorded in the Registry on September 26, 2014 in Book 64286, Page 449. At the time of the recording, the Petitioners had owned the Property since September 19, 2011 when they purchased it from Roper. Quitclaim Deed Recorded in the Registry on September 19, 2011 in Book 57463, Page 540. However, during the pendency of this appeal, the Petitioners sold the Property to another party in September 2016. As a result, the Petitioners ceased to have standing to challenge the propriety of: (1) Roper’s September 2014 recording of the Order of Conditions against the Property; and (2) the Department’s April 2015 decision denying the Petitioners’ SOC request on the ground that it was untimely. Accordingly, I recommend that the Department’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal of the Department’s denial of their SOC request for lack of standing.

BACKGROUND

While the actual date on which the ACC issued the Order of Conditions is open to question, because, as noted above, the Order has two dates (October 28, 2010 and November 18, 2010), it is undisputed that the Order was written by the ACC prior to the Petitioners’ purchase of the Property from Roper in September 2011 and authorized Roper’s construction of a single family home on the Property within the 100 foot Buffer Zone of a Bordering Vegetated Wetlands area. Under 310 CMR 10.05(6)(g), Roper was required to record the Order of Conditions with the Registry prior to building the home on the Property. This regulation provides that:

[p]rior to the commencement of any work permitted or required by the [Order of Conditions], . . . the Order . . . shall be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. . . . If work is undertaken without the applicant first recording the Order, the issuing authority may issue an Enforcement Order . . . or may itself record the Order of Conditions.

The proper recording of an Order of Conditions authorizing work on real property

constitutes a land use restriction on the property that will be deemed satisfied upon the local Conservation Commission's issuance of a Certificate of Compliance pursuant to 310 CMR 10.05(9), certifying that the work has been satisfactorily completed. See Lyon v. Duffy, 77 Mass. App. Ct. 860, 866 (2010).¹ Under 310 CMR 10.05(6)(j), the “[f]ailure to comply with conditions stated in the Order [of Conditions] and with all related statutes and *other regulatory measures* shall be deemed cause to revoke or modify the Order of Conditions.” (emphasis supplied). This includes the failure of an applicant of an Order of Conditions to comply with the recording requirement of 310 CMR 10.05(6)(g) as discussed above. Additionally, Orders of Condition are valid for three years from the date of the Order's issuance, unless they are extended by the local Conservation Commission. 310 CMR 10.05(6)(d); 310 CMR 10.05(8)(a). Under 310 CMR 10.05(8)(a), a local Conservation Commission “may extend an Order [of

¹ 310 CMR 10.05(9) provides in relevant part as follows:

(a) Upon completion of the work described in [the] . . . Order of Conditions, . . . the applicant shall request in writing the issuance of a Certificate of Compliance stating that the work [authorized by the Order of Conditions] has been satisfactorily completed. . . .

(b) Prior to the issuance of a Certificate of Compliance, a site inspection shall be made by the issuing authority, in the presence of the applicant or the applicant's agent. . . .

(c) If the issuing authority determines, after review and inspection, that the work has not been done in compliance with the Order [of Conditions], it may refuse to issue a Certificate of Compliance. Such refusal shall be issued within 21 days of receipt of a request for a Certificate of Compliance, shall be in writing and shall specify the reasons for denial.

(d) If a project has been completed in accordance with plans stamped by a registered professional engineer, architect, landscape architect or land surveyor, a written statement by such a professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists from the plans approved in the Order shall accompany the request for a Certificate of Compliance.

(e) If the final order contains conditions which continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which, if any, of such conditions shall continue. The Certificate shall also specify to what portions of the work it applies, if it does not apply to all the work regulated by the Order.

(f) The Certificate of Compliance shall be recorded in the Land Court or Registry of Deeds, whichever is appropriate. Certification of recording shall be sent to the issuing authority on the form at the end of [Department] Form 8. Upon failure of the applicant to so record, the issuing authority may do so.

Conditions] for one or more periods of up to three years each,” and “[a] request for an extension [must] be made to the [local Conservation Commission] at least 30 days prior to expiration of the Order.” Once an Order of Conditions has expired, however, “[it] cannot be revived or reinstated.” In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision on Reconsideration (June 30, 2016), 2016 MA ENV LEXIS 33, at 8, adopted as Final Decision on Reconsideration (July 14, 2016), 2016 MA ENV LEXIS 34.

Here, the recording requirement of 310 CMR 10.05(6)(g) was clearly set forth on p. 12 of the ACC’s Order of Conditions to Roper. Also clearly set forth in General Condition No. 1 on p. 5 of the Order of Conditions were the consequences under 310 CMR 10.05(6)(j) that could befall Roper if the latter “fail[ed] to comply with all conditions stated [in the Order], and with all related statutes and *other regulatory measures*,” specifically revocation or modification of the Order. (emphasis supplied).

Undisputedly, Roper violated 310 CMR 10.05(6)(g) by failing to record the Order of Conditions with the Registry prior to building the home on the Property. Also undisputedly, Roper: (1) still had not recorded the Order as of September 19, 2011, when Roper sold the Property (with the built home) to the Petitioners; and (2) recorded the Order on September 26, 2014 at the behest of the ACC and without the Petitioners’ permission, more than three years after the Petitioners had purchased the Property.

The Petitioners filed their SOC request with the Department on October 2, 2014 seeking to revoke Roper’s recording of the Order of Conditions against the Property on the ground that it was in violation of the MWPA and the Wetlands Regulations. Although not clearly articulated as such, the Petitioners’ SOC request raised the following legal issues under the MWPA and the

Wetlands Regulations for resolution:

- (1) Whether the ACC had issued a valid Order of Conditions to Roper for recording against the Property;
- (2) Whether a purchaser of real property is bound by an Order of Conditions that: (a) was not recorded prior to the purchaser's acquisition of the property; (b) the purchaser had no notice of prior to acquiring the property; and (c) was recorded after the purchaser's acquisition of the property without the purchaser's permission; and
- (3) Whether a local Conservation Commission may authorize the recording of an Order of Conditions without prior notice to and without the consent of the owner of the real property subject to the Order, where the applicant of the Order and the owner are different parties?²

On April 17, 2015, the Department denied the Petitioners' SOC request as untimely pursuant to 310 CMR 10.05(1) and 10.05(7)(c) which require a party aggrieved by an Order of Conditions to make an SOC request to the Department within 10 business days after the local Conservation Commission's issuance of the Order. Department's SOC Denial Decision. The Department determined that the Petitioners' SOC request was untimely because the ACC had issued the Order of Conditions on November 18, 2010 (although the Order had a second date of October 28, 2010 as noted above) and the Petitioners had made their SOC request nearly four years later on October 2, 2014. *Id.* The Department also denied the Petitioners' SOC request as untimely because, in the Department's view, the ACC's action on August 28, 2014 to provide the Applicant with a new signature page to the Order of Conditions so that Order could be recorded with the Registry did not change the Order's original issuance date. *Id.*

In denying the Petitioners' SOC request as untimely pursuant to 310 CMR 10.05(1) and 10.05(7)(c), the Department acknowledged that in August 2014 "[i]t was brought to the [ACC's]

² On this issue, it is important to note that under 310 CMR 10.05(4)(a):

[i]f the applicant is not a landowner of the Project Locus, the applicant shall obtain written permission from a landowner(s) prior to filing a Notice of Intent for proposed work

attention that the Order of Conditions had not yet been recorded and that [Roper] could not locate the original Order . . . signed by the [ACC's] members to be recorded.” Department’s SOC Denial Decision. The Department also stated that in August 2014 the Registry would not record the Order without a new signature page signed by the ACC’s members, and as a result, “[o]n August 28, 2014, the [ACC] provided [the Applicant with] a new signature page to a copy of the Order of Conditions so that the document was in recordable format acceptable to the Registry” Department’s SOC Denial Decision. The new signature page was undated and had the words “Reissuing Original OOC” hand-written on top of the page. See page between pp. 11 and 12 of Order of Conditions Recorded in the Registry on September 26, 2014 in Book 64286, Page 449. “OOO” is the acronym for “Order of Conditions.”

In denying the Petitioners’ SOC request, the Department did not state how Roper’s failure to record the Order “[had been] brought to the [ACC’s] attention” in August 2014 given that, according to the Department’s SOC Denial Decision, the ACC had issued the Order nearly four years earlier, on November 18, 2010, and that 310 CMR 10.05(6)(g) required the Applicant to record the Order prior to building the home on the Property that had been authorized by the Order. The Department also did not address that Roper no longer owned the Property in August 2014 (having sold it to the Petitioners nearly three years earlier on September 19, 2011) and that Roper recorded the Order on September 26, 2014 at the ACC’s behest, without the Petitioners’ consent. See 310 CMR 10.05(4)(a) (“If the applicant is not a landowner of the Project Locus, the applicant shall obtain written permission from a landowner(s) prior to filing a Notice of Intent for proposed work”). The Department also did not address the Petitioners’ contentions that they were unaware of the Order of the Conditions when they purchased the Property on September 19, 2011; that they first learned of the Order in August 2014; and that Roper’s

recording of the Order of Conditions on September 26, 2014 came about as a result of hearings that the ACC conducted with the Applicant on of August 14 and 28, 2014, without the Petitioners present because they had no prior notice of the Hearings. Petitioners' Appeal Notice, at pp. 1-2; Petitioners' September 28, 2015 Brief, pp. 2-4, 9.

On September 8, 2016, during the pendency of this appeal, the Petitioners sold the Property to Lesley Slade ("Slade") for \$485,500.00. See Copy of Quitclaim Deed, dated September 8, 2018 and recorded on September 9, 2018 in the Registry in Book 67988, pages 337-39. As discussed in the next section below, the Petitioners' sale of the Property caused them to cease having standing to pursue this appeal challenging the propriety of: (1) Roper's September 2014 recording of the Order of Conditions against the Property; and (2) the Department's April 2015 decision denying the Petitioners' SOC request on the ground that it was untimely.

DISCUSSION

Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Webster Ventures, LLC, OADR Docket No. 2015-014 ("Webster Ventures II"), Recommended Final Decision (June 3, 2016), 2016 MA ENV LEXIS 27, at 19-20, adopted as Final Decision (June 15, 2016), 2016 MA ENV LEXIS 32; In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 18-19, adopted as Final Decision (April 18, 2017), 2017 MA ENV LEXIS 28. Rather, it "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) ("[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance");

see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”).

Here, to maintain their appeal of the Department’s denial of their SOC request (which seeks review of the propriety of Roper’s September 2014 recording of the Order of Conditions against the Property), the Petitioners must demonstrate that they are aggrieved by the Department’s denial. See 310 CMR 10.05(7)(j)2(a) (“*[a]ny . . . aggrieved person*, if previously a participant in the permit proceedings . . . may request [OADR] review of a[n] [SOC] by filing an Appeal Notice” (emphasis supplied). The Wetlands Regulations at 310 CMR 10.04, define a “person aggrieved” as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [MWPA]. . . .

“A ‘person aggrieved’ as that term is used in the MWPA must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.’” Webster Ventures I, 2015 MA ENV LEXIS 14, at 15; Vacirca, 2017 MA ENV LEXIS 22, at 28-29; In the Matter of Ronald and Lois Enos, OADR Docket No. 2012-019, Recommended Final Decision (February 22, 2013), 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision (March 22, 2013), 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009),

adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

“To show standing, [however,] a party need not prove by a preponderance of the evidence [at the evidentiary Adjudicatory Hearing in the appeal] that his or her claim of particularized injury is true.” Webster Ventures I, 2015 MA ENV LEXIS 14, at 16; Vacirca, 2017 MA ENV LEXIS 22, at 29-30; In the Matter of Edward C. Gordon and 129 Racing Beach Trust, OADR Docket No. WET-2009-048, Recommended Final Decision (March 3, 2010), 2010 MA ENV LEXIS 114, at 10, adopted as Final Decision (March 5, 2010), 2010 MA ENV LEXIS 13, citing, Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Enos, 2013 MA ENV LEXIS 21, at 16-17; Rankow, 2013 MA ENV LEXIS 45, at 27-28. As the Massachusetts Appeals Court explained in Butler:

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441; Webster Ventures I, 2015 MA ENV LEXIS 14, at 16-17; Vacirca, 2017 MA ENV LEXIS 22, at 30-31; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would

result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 28-29; compare Standerwick, 447 Mass. at 37 (plaintiffs' case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury").

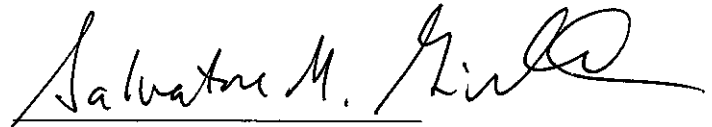
To summarize, in order to demonstrate that they have standing as "aggrieved persons" to challenge the propriety of the Department's denial of their SOC request (and Roper's recording of the Order of Conditions against the Property), the Petitioners are required to put forth a minimum quantum of credible evidence supporting their claim that the Department's denial would or might cause them to suffer an injury in fact, which would be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interests protected by the MWPA and the Wetlands Regulations. 310 CMR 10.04; Webster Ventures I, 2015 MA ENV LEXIS 14, at 17-18; Vacirca, 2017 MA ENV LEXIS 22, at 31-32; Gordon, 2010 MA ENV LEXIS 114, at 11 and cases cited; Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, 2013 MA ENV LEXIS 45, at 29. The Petitioners have no reasonable expectation of meeting this minimal evidentiary threshold to demonstrate standing because they ceased owning the Property in September 2016, when they sold the Property to Slade. Put another way, when the Petitioners sold the Property, they no longer had "a plausible claim of a definite violation *of a private right, a private property interest, or a private legal interest*. . . . that the [MWPA and the Wetlands Regulations are] . . . intend[ed] to protect" arising from: (1) Roper's September 2014 recording of the Order of Conditions against the Property; and (2) the Department's April 2015 decision denying the Petitioners' SOC request on the ground that it was untimely. Webster Ventures I, 2015 MA ENV LEXIS 14, at 15 (emphasis supplied). Indeed, the Petitioners were able to transfer the Property to Slade in September 2016

for a significant sum of \$485,500.00 notwithstanding Roper's September 2014 recording of the Order of Conditions against the Property.

CONCLUSION

For the foregoing reasons, I recommend that the Commissioner issue a Final Decision dismissing the Petitioners' appeal of the Department's denial of their SOC request for lack of standing.

Date: 08/16/18


Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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