

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

January 6, 2017

In the Matter of

Ryan Development LLC

OADR Docket No. WET-2016-028
File No. SE 351-1050
Wrentham, MA

RECOMMENDED FINAL DECISION

The Petitioner in this appeal, Michael Mavrides (“the Petitioner” or “Mavrides”), challenges a Superseding Order of Resource Area Delineation (“SORAD”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Ryan Development LLC (“the Applicant”) on October 3, 2016, 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”). The Petitioner requested the SORAD after the Wrentham Conservation Commission (“Wrentham CC”) issued an Order of Resource Area Delineation (“ORAD”) to the Applicant on January 8, 2016. The Petitioner owns property at 721 Madison Street in Wrentham; the Applicant’s project site is located at 730 Madison Street.

During the course of the proceedings before the Department’s Southeast Regional Office, the Applicant revised an “existing conditions plan” to include an intermittent stream channel and a 100-foot buffer to Inland Bank that had been identified by MassDEP but not included on the

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plan approved by the Wrentham CC. Applicant's Response to Request for Additional Information, April 19, 2016. After conducting its review, the Department determined that the wetlands boundary lines for Bordering Vegetated Wetlands, Inland Bank and Land Subject to Flooding on the Applicant's site were accurate and that the stream that borders Madison Street is intermittent and not perennial. MassDEP Transmittal Letter, October 3, 2016 at 1. MassDEP based its determination on a site visit conducted on February 24, 2016, information submitted on behalf of the Applicant by its consultants, a review of MassGIS data layers and USGS StreamStats data.¹ Id.

Marvides filed his appeal of the SORAD on October 14, 2016. His Appeal Notice did not comply with the pleading requirements of 310 CMR 10.05(7)(j) relating to wetland appeals. Specifically, the Appeal Notice failed to state any facts demonstrating that Mavrides is an aggrieved person who previously participated in the permit proceedings; failed to state how "each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests" of the Wetlands Protection Act; and failed to identify the specific changes desired to the SORAD. I ordered Mavrides, who is representing himself *pro se*, to file a More Definite Statement or an Amended Appeal Notice by November 7, 2016, and advised him that I might dismiss the appeal or take other appropriate action authorized by 310 CMR 1.01(10)² if he

¹ StreamStats is a Web application that incorporates a Geographic Information System (GIS) to provide users with access to an assortment of analytical tools that are useful for a variety of water-resources planning and management purposes, and for engineering and design purposes. <http://water.usgs.gov/osw/streamstats/>

² 310 CMR 1.01(10) authorizes a Presiding Officer to take appropriate action against a party who fails to comply with the Presiding Officer's directives, including, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;

did not comply. His response was timely filed. He did not, however, file a Pre-Hearing Statement, as required by the Scheduling Order for this appeal. Rather than dismiss the appeal, I convened the parties for the scheduled Pre-Hearing Conference on November 14, 2016 in the Department's Southeast Regional Office.

In their Pre-Hearing Statements filed prior to the Conference, both the Department and the Applicant moved to dismiss the appeal on two grounds: lack of standing and failure to state a claim for which relief can be granted. They asserted that Mavrides failed to plead facts demonstrating that he is a person aggrieved, and failed to state "specifically, clearly and concisely the facts which are grounds for the appeal" as required by 310 CMR 1.01(6)(b). At the conference, after addressing the Petitioner's failure to comply with the Scheduling Order,³ I

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- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
 - (d) striking the party's pleadings in whole or in part;
 - (e) dismissing the appeal as to some or all of the disputed issues;
 - (f) dismissing the party being sanctioned from the appeal; and
 - (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

³ Mavrides offered no excuse for failing to comply with the Scheduling Order, stating only that he "thought [he] had done what was required" by filing his response to the Order to Show Cause. While *pro se* litigants may be afforded some leeway, they are still required to comply with orders issued by a Presiding Officer of OADR. In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same).

asked him directly how he was aggrieved by the issuance of the SORAD. He could not say, admitting that he was not aggrieved. Nonetheless, I instructed him to file any objection to the Motions to Dismiss no later than November 23, 2016. His response was postmarked on November 23, 2016, and received by OADR on November 28, 2016. The Department and the Applicant moved for Leave to File a Reply, which I allowed on December 2, 2016.

Two issues are presented by the Motions to Dismiss:

1. Whether Mavrides has standing to appeal the SORAD as an “aggrieved person”?
2. Whether Mavrides has stated a claim for which relief can be granted in this appeal?

In order to spare the parties the expense and effort of litigating the merits of the case, I address both of these issues now, rather than as part of the adjudicatory hearing scheduled for March 2, 2017. Based on the applicable law as discussed below, I find that Mavrides lacks standing to appeal the Department’s decision and has failed to plead sufficient facts to state a claim on which relief can be granted. Therefore, I recommend that the Department’s Commissioner issue a Final Decision granting the Motions to Dismiss and affirming the SORAD.

DISCUSSION

Applicable Law

Standard of Review. In deciding a Motion to Dismiss, I assume that all of the facts alleged in the Appeal Notice are true. 310 CMR 1.01(11)(d)(2). I include within my review the allegations contained within the Petitioner’s response to the Order to Show Cause.

The pleading requirements applicable to this appeal are set forth in 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j). 310 CMR 1.01(6)(b) requires that every Notice of Claim (Appeal

Notice) state “specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation.” 310

CMR 10.05(7)(j) sets forth the “additional information” required in a wetlands Appeal Notice.

Those requirements include but are not limited to the following:

1. Demonstration of participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)3.a. and sufficient written facts to demonstrate status as a person aggrieved. 310 CMR 10.05(7)(j).
2. A clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision. 310 CMR 10.05(7)(j)v.

Aggrievement. Abutters do not have automatic standing to appeal the Department’s SORAD to the Office of Appeals and Dispute Resolution (“OADR”). 310 CMR 10.05(7)(a) provides an abutter to a project site with a right to appeal a Conservation Commission’s decision on an ORAD to the Department regardless of whether that person is aggrieved. 310 CMR 10.05(7)(j), however, does not provide abutters an automatic right to appeal a SORAD. Among those with a right to appeal the SORAD to the Department are aggrieved persons who previously participated in the permit proceedings. 310 CMR 10.05(7)(j)2.a. An aggrieved person must demonstrate in the Appeal Notice “participation in previous proceedings, in accordance with 310 CMR 10.05(7)(j)3.a. and sufficient written facts to demonstrate status as a person aggrieved.” 310 CMR 10.05(7)(2)b.iii (emphasis added). 310 CMR 10.04 defines “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 M.G.L. c. 131, § 40. Such

person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

To reiterate, 310 CMR 10.05(7)(j)2.b.iii requires an aggrieved person filing an appeal to include in the Appeal Notice “sufficient written facts to demonstrate status as a person aggrieved.” An appeal notice that does not contain sufficient written facts to demonstrate aggrievement may be dismissed. 310 CMR 10.05(7)(j)2.c.; see also 310 CMR 1.01(6)(b), which authorizes the Presiding Officer to dismiss an appeal for failure to meet the pleading requirements. While Mavrides does not have to prove injury he must, at a minimum, “set forth evidence demonstrating a possibility that the injury alleged could result from the allowed activity.” Matter of Gordon, Docket No. WET-2009-048, Recommended Final Decision, (March 3, 2010), adopted by Final Decision (March 5, 2010); see also Matter of Town of Andover, OADR Docket Nos. WET-2011-036 & 039, Recommended Final Decision, 2012 MA ENV LEXIS 25, (January 12, 2012), adopted by Final Decision, 2012 MA ENV LEXIS 24 (January 19, 2012); Matter of Norman Rankow, OADR Docket No. WET-2012-029, Recommended Final Decision, 2013 MA ENV LEXIS 45 August 6, 2013), adopted by Final Decision, 2013 MA ENV LEXIS 79 (August 12, 2013). In this case, Mavrides must articulate an injury to him that possibly could result from the SORAD.

Stating a Claim for Relief. As noted above, 310 CMR 1.01(6)(b) requires that every Notice of Claim state “specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation.” In this case, 310 CMR 10.05(7)(2)b.v. requires that the Appeal Notice state the alleged errors in the SORAD and how each error is inconsistent with the wetlands regulations and does not contribute to the protection of the interests of the MWPA. The regulation further requires that the Petitioner

identify the statutory and regulatory provisions alleged to have been violated. Finally, the Petitioner must identify what relief he seeks, including specific changes to the SORAD.

The Petitioner's Claims. The Order to Show Cause required Mavrides to correct the pleading deficiencies in his Appeal Notice by filing a More Definite Statement or an Amended Appeal Notice that contained facts consistent with the requirements of 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j). I review the Petitioner's filings below.

A. The Appeal Notice

In his Appeal Notice, Mr. Mavrides asserts four claims:

1. That the Wrentham Conservation Commission's "approval of the ANRAD has not been corrected; they left out one stream."

2. A claim relating to streams on the Applicant's property, as follows:

There are three streams in question. One was changed from perineal [SIC] to Intermittant [SIC] with data that was done under drought conditions. The first stream was missing from the ANRAD, the second Stream was somehow changes [SIC] from perineal [SIC] to Intermittant [SIC] despite the USGS Map labeling it as Perineal [SIC], the third stream in the rear of the property that originates in the State Forest and feeds Turnpike Lake which feeds Lake Mirimachie was not mentioned.

3. A claim that he should be able to "review the review" done by the Department and his disappointment with what he saw when he reviewed the file in the Southeast Regional Office.

4. A claim that his appeal should be based on his two letters "and the DEP information based on granting the SORAD." (No additional information regarding those letters is provided.

B. Response to Order to Show Cause

In response to the Order to Show Cause Mavrides provided the following objections to the SORAD:

1. He objected to changing the designation of one of three streams on the Applicant's property from perennial to intermittent. "I feel the stream flows though [sic] the year except in the case of a drought. Furthermore if samples are taken downstream of the standpipe they may not conform to the criteria of changing its designation."
2. He is not "comfortable" with the piping of a stream closest to Madison Street and "in comparing the site plan for the development of this site 4/22, 1982."
3. A stream on the site is "a contributing factor to Turnpike Lake which is Plainvilles [sic] water supply some of the water goes to Lake Mirimachie which feeds Attleboro's water supply and a new well for Plainville."
4. He is concerned with the site's sewage disposal plan.
5. His sisters were not notified as abutters to the site.
6. He has other information from various sources (but he does not identify this information).

The Motions to Dismiss

The Motions to Dismiss and the arguments in support of them are contained within the Applicant's and the Department's Pre-Hearing Statements and Joint Reply to the Petitioner's objection to the motions. The Applicant and the Department argue that the Petitioner has failed to provide any meaningful written facts to support an allegation that he will suffer an injury in fact different in kind or magnitude from that suffered by the general public and which is within

the scope of interests identified in the MWPA. They argue further that the Petitioner provides no facts and cites no law regarding his claims about the streams, but rather expresses only that he “feels” a stream flows throughout the year. They argue that there are no facts in the record to support any claim of aggrievement. They further argue that the only facts set forth by Mavrides are that he is an abutter and that he is a citizen of the Commonwealth, and neither is sufficient without more to support a claim that he is a person aggrieved under 310 CMR 10.04. They point out that the wetlands regulations could have provided standing to abutters but they do not. See 310 CMR 10.05(7)(j)2. Significantly, they argue, the wetlands regulations distinguish between requests for SORADS and requests for appeals of SORADS, with the former appealable by an abutter who may not be aggrieved, but the latter requiring a Petitioner to provide evidence of an injury different in kind or magnitude from the general public. A mere statement that a person is an abutter does not suffice to demonstrate aggrievement. Neither is the Petitioner distinguishable from the general public as a citizen of the Commonwealth. As the Department and the Applicant argue, the wetlands regulations are clear that the injury must be different in kind or magnitude from an injury to the general public. Finally, the Department and the Applicant argue that the Petitioner’s claim of injury – that “[d]epending on the zone of influence it [sic] may have an adverse effect on my property” is conclusory and mere speculation, and therefore insufficient to show that Mavrides is aggrieved. “Other than stating that he is an abutter and a citizen of the Commonwealth, Petitioner provides *no* facts to support his claim that he is a person aggrieved. In fact, he does not even suggest *anywhere* in his pleadings *what that injury could be*. Joint Reply at 5.

The Petitioner's Objection to the Motions to Dismiss

Mavrides addressed each aspect of the Motions to Dismiss in his objection. He argues that he is aggrieved as an abutter and as a citizen of the Commonwealth. As an abutter, he argues that “getting the Stream Designation and the resource area depicted on the plans have not been done subject to the SORED [sic].” He further states that “[d]epending on the zone of influence [the stream] may have a [sic] adverse affect on my property.” He mentions other resource delineations that were previously done for the same property, but does not provide any specific factual support to show how he will suffer a particular injury as a result of the SORAD. His argument as a “citizen of the Commonwealth” is premised on a generalized obligation of all citizens to protect the rivers and streams and water supply. In conclusion, Mavrides states “The problem with stating my injury is that until the SORAD is adjudicated and correction to the plan made, I don’t really know fully the possible effects. If this appeal is thrown out for lack of a valid aggrieved status I will never know until it is too late what my damages are.” Petitioner’s Response to Motions to Dismiss at 2, ¶ C.

As for stating a claim upon which relief can be granted, Mavrides states simply that he does not feel that the three streams on the property have been properly shown and designated. He makes a further statement that “the resource area has not been shown on the ANRAD or corrected on the appeal which became the SORAD” but he does not specify what that resource area is. He reiterates his claim regarding the stream designation change from perennial to intermittent, but does not provide any specific facts to support either that the stream had been previously designated as perennial or why the current designation is wrong.

ANALYSIS

1. The Petitioner does not have standing as an aggrieved person.

The Appeal Notice is devoid of facts supporting a claim of aggrievement. Likewise, the response to the Order to Show Cause contains no such facts. In neither pleading does Mavrides state any facts demonstrating how he “may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, § 40.” 310 CMR 10.04. In the response to the Order to Show cause, he objects to the designation of a stream as intermittent, stating “I feel the stream flows thought [sic] the year except in the case of a drought.” He also contends that “[he] is not comfortable with the piping” of another stream. He also raises claims relating to water supply and a sewage disposal plan, not relevant to a SORAD, but does not state any facts demonstrating a particularized injury that he may suffer as a result of the SORAD. In his objection to the Motions to Dismiss, he asserts two claims of aggrievement: that he is a direct abutter and that he is a citizen of the Commonwealth. In support of his claim as an abutter, he states that his property “may be” adversely affected if the plans do not depict the streams and resource areas but he does not state how they may be adversely affected, i.e. he does not articulate any injury. His conclusion that he will suffer an injury different than the general public is not supported by any facts. It is mere speculation. As a citizen of the Commonwealth, Mavrides asserts that “[w]e all have a [sic] obligation the [sic] protect our rivers and streams and water supply’s [sic] which is part of the wetlands protection act and the rivers act. We also have a [sic] obligation to make sure the ANRAD guidelines are followed to protect our wetlands and streams.” *Id.* at 1-2. While this is an admirable sentiment, the claim does not set forth facts showing how Mavrides is aggrieved. The Applicant and the Department make persuasive arguments. I find that Mavrides

has failed to meet the minimum requirements to demonstrate standing to bring this appeal as an aggrieved person. He has failed to allege any injury that could result from the SORAD. I note that as discussed in detail above, he has had multiple opportunities to do so. By his own admission at the Pre-Hearing Conference, he cannot state how he is aggrieved by the SORAD. Because he lacks standing, I recommend that his appeal be dismissed.

2. The Petitioner has failed to state a claim for which relief can be granted.

The Department and the Applicant argue in their Motions to Dismiss that the Notice of Claim and the Petitioner's response to the Order to Show Cause do not meet the requirements of the Regulations governing adjudicatory proceedings at 310 CMR 1.01 because they do not state "specifically, clearly and concisely the facts which are grounds for the appeal" and do not reference the statutory or regulatory provisions alleged to have been violated. Department's Pre-Hearing Statement at 4; Applicant's Pre-Hearing Statement at 4. I agree with the Applicant and the Department that the Petitioner has failed to state a claim. The Petitioner's pleadings lack facts meeting the requirements of 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(2)b.v. There are no citations to statutory or regulatory provisions that may have been violated. Even taking all of the allegations as true, I find that the Petitioner has failed to state a claim upon which relief can be granted. He has not alleged clearly and concisely the facts showing error in the SORAD, nor any facts supporting a claim that the SORAD is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests of the MWPA. His claims relating to water supply and a sewage disposal plan; a desire to "review the review"; and potential claims of his sisters are either not relevant to his appeal of a SORAD or not supported by sufficient facts to state a claim for which this forum can provide a remedy. Despite the directive to file a More Definite Statement or Amended Appeal Notice that corrected the errors in the original Appeal Notice, the

Petitioner's claims remain "so vague or ambiguous that [they] do not provide adequate notice of the issues to be addressed and the relief sought." 310 CMR 1.10(11)(b). See also In the Matter of City of Pittsfield Airport Commission, Docket No. 2010-041, Recommended Final Decision, 2010 MA ENV LEXIS 89, August 11, 2010, adopted by Final Decision, 2010 MA ENV LEXIS 31, August 19, 2010. Because the Petitioner has failed to state a claim for which relief can be granted, I recommend that his appeal be dismissed.

CONCLUSION

I recommend that the Department's Commissioner issue a Final Decision granting the Motions to Dismiss and affirming the SORAD.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

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

Date: 1/6/2017



Jane A Rothchild
Presiding Officer

SERVICE LIST

IN THE MATTER OF:

**ROBERT WALKER, RYAN DEVELOPMENT
LLC**

Docket No. WET-2016-028

Wrentham

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Matter of Ryan Development LLC
OADR Docket No. WET-2016-028
Recommended Final Decision

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