

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 19, 2024

In the Matter of
Salvatore and Nancy Vigorito

OADR Docket Number: WET-2023-010
DEP File No. 028-2859
MassDEP NERO
Princeton, MA

RECOMMENDED FINAL DECISION

This is an appeal by Barbara S. Friedfertig (“Petitioner”) of a Superseding Order of Conditions (“SOC”) issued by the Department of Environmental Protection’s (“Department”) Northeast Regional Office to Salvatore Vigorito and Nancy Vigorito (“the Applicants”) on May 9, 2023, 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 SOC allows the Applicants’ proposal to build a second story on their property located at 10 Point Road, Gloucester, Massachusetts (“Project”). The SOC overturned the Order of Conditions (“OOC”) denying the project issued by the Gloucester Conservation Commission (“Commission”) on the basis that the Commission had previously issued a Certificate of Compliance certifying that earlier work on the property had conformed to a 2017 Order of Conditions.

In preparing this decision, I reviewed the briefing of the parties, pre-filed testimony, pre-filed rebuttal testimony, and all appended exhibits. After reviewing all of these materials, I

recommend that the Commissioner issue a Final Decision dismissing this matter and affirming the SOC because the Petitioner lacks standing to bring her claims.

I. Facts.

Because this matter is being decided on a motion for directed decision, I describe the facts in the light most favorable to the Petitioner. The Applicants own a property at 10 Point Road, Gloucester, Massachusetts ("Property"). SOC, p. 1 (produced with the Department's Basic Documents¹). A one-story home sits on the Property. NOI, p. 2 (produced with the Department's Basic Documents). The Petitioner's property abuts the Applicants' property. Goddard PFT, ¶ 5.² The Property includes areas of Coastal Bank, Coastal Beach, and Land Subject to Coastal Storm Flowage ("LSCSF"). Id. The Property is also located within a FEMA velocity zone.³ Id.

While this matter arises out of a SOC issued in May 2023, the facts of concern to the Petitioner begin earlier, in 2017. Id. at ¶ 6. On January 20, 2017, the Applicants filed a Notice of Intent seeking approval to remodel their home and perform work on exterior structures including the stairs, the patios, and two septic tanks. Id.; Judd PFT, ¶ 5. The work was to be performed in the buffer zone to Coastal Bank, approximately 20 feet from the Coastal Bank. Goddard PFT,

¹ "Basic Documents" are those documents in the official file of the Department program that was involved in the decision, order, or determination that is on appeal. Basic Documents generally include (1) all submissions used by the Department in reaching the decision, order, or determination and (2) all documents constituting the Department's decision, order, or determination. Basic Documents do *not* include internal deliberations of the Department. The Department's Basic Documents are admissible and probative as "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); 310 CMR 1.01(8)(a); see also Mass. Guide Evid. 201(b)(2).

² Witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT, ¶ []" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] RPFT, ¶ []." Exhibits are referred to as "[Witness] Ex. X".

³ A "velocity zone" or "V zone" is an area "where waves and fast-moving water can cause extensive damage during the base flood event. In V zones, wave heights are larger than 3 feet." Federal Emergency Management Agency, Coastal Hazards & Flood Mapping: A Visual Guide, https://www.fema.gov/sites/default/files/documents/fema_coastal-glossary.pdf (last accessed Oct. 10, 2023).

¶ 6. The work was also to take place in LSCSF in the velocity zone. Id. at ¶ 7. The Commission approved the work in an Order of Conditions ("2017 OOC").^{4,5} Id. at ¶ 6.

Work on the site was performed between 2017 and 2020. Id. at ¶ 11. While the work was being performed, the Applicants found that the roof was deteriorating and leaking. McCarthy PFT, ¶ 6. They also discovered that two of the walls were unstable. Id. at ¶ 8. In March 2018, the Applicants applied for a building permit to install a new roof, install new windows, and remodel the interior. Id. at ¶ 9. During that application process, the Gloucester Conservation Agent requested additional information, but ultimately concluded that the work was consistent with the 2017 OOC. Id. at ¶ 10.

According to the Petitioner, the work exceeded the scope of the 2017 OOC and resulted in violations of the Wetlands Regulations and the Gloucester Conservation Ordinance:

unpermitted fill and disturbance of coastal bank and Land Subject to Coastal Storm Flowage took place to the north of the existing porch to expand the lawn area on-site. Work on Coastal Bank to expand lawn was never approved by any Order of Conditions granted by the Gloucester Conservation Commission. A stone wall was built to allow the expansion of the lawn and to contain the fill material.

Goddard PFT, ¶ 12.⁶ This work purportedly "impacted a total of 148 linear feet and 382[] square feet of Coastal Bank and Land Subject to Coastal Storm Flowage." Id. at ¶ 15.

The Commission issued a Certificate of Compliance on January 24, 2020. Goddard Ex. F, p. 2. The Certificate of Compliance indicated that it was only "Partial Certification," Id., because the installation of the tanks had not yet been completed. 2022 OOC, p. 11 (produced with the Department's Basic Documents). There is no indication in the record that work continued after

⁴ This work was assigned DEP File No. 028-2506.

⁵ Although the work was to take place in LSCSF, the 2017 OOC did not indicate as such. See Goddard Ex. E, p. 4.

⁶ The Applicants contend that the stone wall predated the 2017 OOC. For the purposes of this RFD, I adopt the Petitioner's contention.

2020 or that an additional Certificate of Compliance was issued. The Petitioner contends that it was improper for the Commission to issue the Certificate of Compliance in light of the unapproved work, and that the Property remains out of compliance to this day. Goddard PFT, ¶¶ 17, 20.

On July 5, 2022, the Applicant filed with the Commission the Notice of Intent ("NOI") at issue in this matter. NOI, p. 1. The NOI sought to approve the construction of a second story on the Applicants' home. Id. at p. 2. This work would also take place in the buffer zone. Judd PFT, ¶ 11. Because the elevation of the second story of the building would be above the 31-foot elevation, the construction is not intended to take place within the velocity zone. Id. at ¶ 11. Further, no filling or grading was proposed and the Project is intended to have no impact to the Coastal Bank performance standards. Id. at ¶ 12.

On December 22, 2022, the Commission voted on the NOI, with three votes in favor, two votes opposed, and one abstention. 2022 OOC, p. 10. Because the Project did not receive a majority vote from the Commissioners, the Project was deemed denied. Id. The Commission concluded that the Applicants had failed to provide sufficient information. 2022 OOC, p. 2. The members who voted against the Project did so "based on additional work at the same location on the same structure... that was believed to not have conformed to the Plan approved with the" 2017 OOC. Id. at pp. 10-11. The members were also concerned about the "potential of the cumulative activities conducted under [the 2017 and 2022 NOIs] to result in the structure not being constructed to flood control standards, which in turn could affect building integrity and the potential for flood damages and losses experienced by the applicant and neighboring properties and resource areas." Id. at pp. 11.

In response to the Commission's denial, the Applicants sought a Superseding Order of Conditions from the Department on January 3, 2023. Lally Ex. D. The Applicants

simultaneously appealed the portion of the denial under the Gloucester Conservation Ordinance to Superior Court, Vigorito, et al, v. Gloucester Conservation Commission, et al., Essex Superior Court, Civil Action No. 2377CV00033. The Petitioner urged the Department to affirm the Commission's decision in a letter to the Department dated April 11, 2023.

In evaluating the request for a Superseding Order of Conditions, the Department held a site view on April 1, 2023. Judd PFT, ¶ 17. On May 9, 2023, the Department issued the SOC, observing that "[a]lthough the existing house is located entirely within the floodplain, the proposed second story addition is located above the floodplain elevation and will not impact the ability of the land to provide storm damage or flood control functions." SOC, p. 2.

The SOC also specifically addressed the Commission's concern about the work performed under the 2017 OOC:

In the OOC/denial, the Commission states the proposed project was denied based on their opinion that the interior work previously proposed in the home and approved under the OOC (028-2506) issued on February 14, 2017, did not conform to the plans associated with that OOC. However, upon completion of the interior work, the Applicant states they filed a Request for a Certificate of Compliance (COC) with the Commission, who issued a COC in 2020 certifying that the work was in compliance with the OOC. It is therefore, MassDEP's opinion that since the previous OOC received a COC, the Order is closed and in compliance with the Act and Regulations; therefore, the OOC/denial does not constitute a lack of information denial in accordance with 310 CMR 10.05(6)(c).

Id. The Petitioner's appeal of the SOC followed.

II. Procedural History.

The Petitioner filed her Appeal Notice of the SOC on May 23, 2023. Appeal Notice, p. 1. The Petitioner raised two claims: first, she alleges that the Department did not adequately consider the possibility that because the proposed construction would be built on top of allegedly inferior construction, flood waters could destroy the Applicant's home, and the resulting debris

would damage her property. Second, the Petitioner alleges that the Department failed to consider the effect that the Project would have on the Coastal Bank and LSCSF.

On June 9, 2023, I stayed this matter pending the outcome of the Superior Court case. See 310 CMR 1.01(6)(h).⁷ On September 20, 2023, the Applicants filed a motion to remove the stay. The Commission and the Applicants had jointly agreed to remand the denial back to the Commission, after which the Commission unanimously issued an Order of Conditions approving the project under the local ordinance.⁸ This ended the Superior Court case. On October 2, 2023, I vacated the stay and issued a scheduling order.

On October 23, 2023, the parties submitted a Joint Status Report where the parties identified the issues and disclosed their witnesses. I held a pre-hearing conference with the parties on November 9, 2023, and issued a Pre-hearing Conference Report and Order ("PHC Report") on November 14, 2023. I scheduled an adjudicatory hearing for March 5, 2024. The parties submitted pre-filed testimony and briefing in accordance with the PHC Report. On January 16, 2024, the Applicants filed with their memorandum of law a motion for directed decision. The Petitioner opposed that motion on February 29, 2024. The Petitioner's February 29, 2024, filing also included testimony from an undisclosed witness, Anthony W. Macchi. The following day, I issued an order "postponing the adjudicatory hearing to a later date pending the resolution of the motion. The Applicant and the Department may reply to the opposition to the motion for directed verdict on or before March 8, 2024." Order (Mar. 1, 2024).

⁷ "The Presiding Officer shall stay administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court."

⁸ The Applicants also noted that the Petitioner had not been permitted to intervene in the Superior Court matter.

The Department and Applicants filed replies on March 8, 2024. The Department's reply included with it a motion to strike the testimony of Anthony W. Macchi, one of the Petitioner's witnesses. The Petitioner timely opposed that motion on March 19, 2024.

III. Witnesses.

The parties have offered pre-filed testimony from the following witnesses.

A. Petitioner.

1. Scott Goddard.

Mr. Goddard is the principal of Goddard Consulting, LLC. Goddard PFT, ¶ 1. He has degrees in environmental engineering from the Massachusetts Institute of Technology and Worcester Polytechnic Institute. Id. He is a Professional Wetland Scientist, a Certified Wetland Scientist in New Hampshire, and a Massachusetts Certified Soil Evaluator. Id. He has represented numerous parties in matters before conservation commissions throughout the Commonwealth. Id. at ¶ 2. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See In the Matter of Jon L. Bryan, OADR Docket No. DEP-04-767, Recommended Final Decision (July 25, 2005), 2005 MA ENV LEXIS 50, *9; Mass. Guide Evid. 702.

2. Anthony W. Macchi.

Mr. Macchi is a registered architect in Massachusetts. Macchi PFT, ¶ 2. He has associates and bachelor's degrees from the Wentworth Institute of Technology. Id. at ¶ 3. He has experience in drawing and interpreting plans and the regulatory standards related to residential construction and design. Id. at ¶ 4. He has drafted and reviewed plan sets for clients whose properties are located within a FEMA floodplain. Id. at ¶ 5. For the reasons given in the next section, I am striking Mr. Macchi's testimony. I therefore draw no conclusion about whether he is qualified to offer expert testimony.

B. Applicants.

1. Paul Judd.

Mr. Judd is the principal owner of Gateway Consultants, Inc. and a Licensed Professional Engineer. Judd PFT, ¶ 1. He has represented numerous clients before the Gloucester Conservation Commission, the Gloucester Planning Board, and other municipal agencies on the North Shore on coastal and inland residential, commercial and industrial projects. Id. at ¶ 2. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

2. Christopher McCarthy.

Mr. McCarthy is the principal owner of McCarthy Realty Trust. McCarthy PFT, ¶ 1. He is a builder and has participated in the construction of more than 125 houses in Gloucester. Id. He offers only percipient testimony.

C. Department.

1. Kyle Lally.

Mr. Lally is employed by the Department in the Northeast Regional Office's Wetlands Program. Lally PFT, ¶ 1. He has been employed as an Environmental Analyst since 2019. Id. His duties include evaluating Notices of Intent, Orders of Conditions, Abbreviated Notices of Resource Area Delineation, 401 Water Quality Certifications, and supporting materials such as plans, soil logs, flood storage and drainage calculations. Id. at ¶ 2. He also inspects sites where work is proposed or has been conducted to delineate wetland resource area boundaries. Id. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

IV. Motion to Strike

As a preliminary matter, I address the Department's Motion to Strike the pre-filed testimony of Anthony W. Macchi because he was not declared as a witness in the Joint Status

Report. Instead, Mr. Macchi's testimony was included for the first time in the Petitioner's reply memorandum of February 29, 2024, three business days before the scheduled adjudicatory hearing.

A Presiding Officer "may establish the number of witnesses at the prehearing conference and later modify it for good cause shown, pursuant to 310 CMR 1.01(13)(f)3." 310 CMR 1.01(13)(f)2.⁹ In the Pre-hearing Conference Report and Order, I stated, "The parties' respective witnesses for the Adjudicatory Hearing should have been identified in their Pre-Hearing Statements. These witness designations may be modified only upon a *timely* showing of good cause and request for leave to modify the witness designation." (emphasis in original). Under 310 CMR 1.01(10), "When a party fails to... comply with orders issued and schedules established in orders... the Presiding Officer may impose appropriate sanctions on that party [including] prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence...."

In the parties' Joint Status Report of October 23, 2023, the Petitioner states the following under "Witnesses for Pre-filed Testimony":

1. Barbara S. Friedfertig, 10 Point Road, Gloucester, Massachusetts
2. Arnold Friedfertig, 10 Point Road, Gloucester, Massachusetts
3. Scott Goddard (Expert), Goddard Consulting, LLC, 291 Main Street, Suite 8, Northborough, Massachusetts
4. Petitioner reserves the right to call any witnesses identified by the Applicant or MassDEP and/or rebuttal witnesses.

Joint Status Report, pp. 3-4. The Petitioner only submitted pre-filed testimony from Mr. Goddard on December 15, 2023. She did not move to amend her list of witnesses prior to proffering Mr. Macchi's testimony on February 29, 2024.

⁹ This section is applicable to wetlands appeals under 310 CMR 10.05(7)(j)9.b.

Like procedural rules throughout the United States, the procedural rules for adjudicatory hearings are intended to promote the orderly presentation of evidence and avoid "trial by surprise." See Duncan v. Cessna Aircraft Co., 632 S.W.2d 375, 385 (Tex. Civ. App. 1982) ("The offer of an undisclosed expert's testimony offends the liberal policy of the federal discovery rules, which are designed to prevent trial by surprise."); In re Barnholdt, 74 B.R. 760, 763 (N.D.N.Y. 1987). An appropriate remedy when presented with an undisclosed expert witness is striking their testimony; Massachusetts "case law is replete with appellate affirmation of trial judges who have excluded expert testimony where the expert was revealed shortly before trial." Grassi Design Group, Inc. v. Bank of Am., N.A., 74 Mass. App. Ct. 456, 460 (2009); see also, e.g., Davis v. Marathon Oil Co., 528 F.2d 395, 403-04 (6th Cir. 1975) (expert undisclosed prior to trial properly excluded); Tabatchnick v. G.D. Searle & Co., 67 F.R.D. 49, 52-5 (D.N.J.1975) (undisclosed expert excluded from testifying at trial).

Here, the Petitioner did not disclose Mr. Macchi in the Joint Status Report. She then presented evidence from him without moving to add him to her witness list, instead choosing to simply disclose his testimony three business days before the scheduled adjudicatory hearing. The Petitioner's justification for proffering a new witness at the eleventh hour is that "Mr. Macchi's testimony evidence was limited to countering evidence submitted by the Applicants as required by" 310 CMR 10.05(7)(j)6.¹⁰ This ignores the limitation on witnesses authorized in 310 CMR 1.01(13)(f)3.

If the Petitioner had moved to introduce Mr. Macchi as a rebuttal witness, this would have at least given the Applicants and the Department an opportunity to respond and, if the

¹⁰ **"Rebuttal.** The Petitioner or an Intervenor aligned with the Petitioner may file and serve on all parties rebuttal evidence no later than seven days after the filing of the Direct Case by the Respondent or any Intervenor aligned with the Respondent. The rebuttal evidence shall be limited to countering evidence submitted in a Respondent's or Intervenor's Direct Case in support of the Reviewable Decision."

amendment was allowed, an opportunity to request to extend the schedule if they needed extra time to prepare. The Petitioner's approach is precisely the sort of "trial by surprise" that the adjudicatory rules are meant to avoid.

The Petitioner may point to her reservation of the "right to call any witness identified by the Applicant or MassDEP and/or rebuttal witnesses." Joint Status Report, p. 4. However, no reservation of rights can supersede the adjudicatory rules or subsequent orders. Permitting any party to do so would essentially allow parties to add unlimited witnesses at any time and undermine the orderly presentation of evidence. I therefore strike Mr. Macchi's testimony.¹¹

V. Issues for Adjudication.

The issues for adjudication in this matter are as follows:

1. Whether the Petitioner has standing to pursue her claims.
2. Whether the Department improperly relied on the 2020 Partial Certificate of Compliance in issuing the SOC.
3. Whether the Department was correct in finding that the Project as approved complies with 310 CMR 10.24(1), (2), (4)(a), and (6).

VI. Analysis.

A. The standards of review.

1. The standard for dismissal for failure to sustain a case.

Under 310 CMR 1.01(11)(e),

Upon the petitioner's submission of prefiled testimony, or at the close of its live direct testimony if not prefiled, any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue.

¹¹ Even if the testimony was not stricken, it is not relevant to my conclusion that the Petitioner lacks standing, as I address below.

As a recent Final Decision of the Department stated:

"Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues." 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 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

Matter of Valis, OADR Docket No. 2021-015, Recommended Final Decision, 2022 MA ENV LEXIS 23, *4 (Jul. 7, 2022), Adopted as Final Decision (Jul. 25, 2022), 2022 MA ENV LEXIS 22.

Directed decision is akin to a motion for directed verdict under Mass. R. Civ. P. 50(a). Accordingly, when assessing a motion for directed verdict, I review the evidence in the light most favorable to the non-movant. Enrich v. Windmere Corp., 416 Mass. 83, 84-85 (1993); see Poirier v. Plymouth, 374 Mass. 206, 212 (1978); Chase v. Roy, 363 Mass. 402, 404 (1973).

2. The burdens of proof.

As the party challenging the Department's issuance of the SOC, the Petitioner has the burden of proof in this *de novo* appeal to produce credible evidence from a competent source to support its positions. Matter of David A. Bosworth Co., Inc., OADR Docket No. WET-2015-015, Recommended Final Decision (Feb. 17, 2016), 2016 MA ENV LEXIS 12, *23-24, adopted by Final Decision (Mar. 14, 2016); see also 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.. Specifically, the Petitioner is required to present "credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has

sufficient expertise to render testimony on the technical issues on appeal." Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted). See, e.g. Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004).

3. Standard of review.

As the Presiding Officer in this appeal, my review of the Parties' evidence in support of their respective positions in the appeal is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SOC. Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (Aug. 29, 2018), 2018 MA ENV LEXIS 67, *9, adopted as Final Decision (Sep. 18, 2019), 2019 MA ENV LEXIS 93.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record [rests] within the sound discretion of the Presiding Officer...." Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, *17, adopted by Final Decision (January 17, 2019), 2019 MA ENV LEXIS 8. G.L. c. 30A, § 10, "guarantees a party certain procedural rights in adjudicatory hearings at the administrative level, before the case reaches the judicial branch." Space Bldg. Corp. v. Comm'r

of Revenue, 413 Mass. 445, 450 (1992). Among those rights is the right to a "full and fair" adjudicatory proceeding. G.L. c. 30A, § 10. Accordingly, OADR must conduct all adjudicatory proceedings in a neutral, fair, and timely manner based on the governing law and the facts of the case. Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020, Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, *9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7); see also Mass. R. Prof. C. 1.0(p) (definition of "tribunal").

Accordingly, as the Presiding Officer, I am "responsible ... for independently adjudicating [this] appeal[l] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, *16, adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6. As a corollary, it is well settled that "if during the pendency of an administrative appeal, '[the Department] becomes convinced' based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, 'that the interests of [the MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],' the Department is authorized to, and should change its position." Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 MA ENV LEXIS 106, *15, adopted by Final Decision, (October 24, 2019), 2019 MA ENV LEXIS 104. Additionally, "[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible ... for independently adjudicating [the] appeal[l] and [issuing a Recommended Final Decision] to

MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." Id. at *15-*16 (citations omitted).

4. Standing.

Under 310 CMR 10.05(7)(j)2.a., "Any applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents [group] may request review of a Reviewable Decision by filing an Appeal Notice...." Standing "is not simply a procedural technicality." Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975). 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. Comm'r of Ins., 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").

In Save the Bay, the Supreme Judicial Court emphasized the practical importance of standing:

Whether a party is properly before a tribunal to invoke its judicial powers affects the good order and efficiency with which the matter proceeds. We emphasize that the Department in these hearings was engaged in adjudicatory proceedings wherein the legal rights and duties were to be determined and that therefore appropriate limitations could properly be placed on those persons to intervene.... The multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact adherence to requirements as to standing, seriously erode the efficacy of the administrative process. We do not say that increased citizen participation is bad. On the contrary, such interest ensures full review of all issues. However, to preserve orderly administrative processes and judicial review thereof, a party must meet the legal requirements necessary to confer standing.

Save the Bay, 366 Mass. at 672.

To have standing as an "aggrieved party" in a wetlands permit appeal, one must be:

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.

310 CMR 10.05(7)(j)2.b.iii.; 310 CMR 10.04. The Appeal Notice is required to include sufficient facts to demonstrate status as a person aggrieved. 310 CMR 10.05(7)(j)2.b.iii..

To show aggrievement, a party must only set forth evidence demonstrating a possibility that the injury alleged could result from the allowed activity. Matter of Gordon, 2010 MA ENV LEXIS 114 at *10-*11; cf. Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 37 (2006) (plaintiff's case appealing zoning decision cannot consist of "unfounded speculation to support their claims of injury"). But the possibility of injury must be more than an "allegation of abstract, conjectural, or hypothetical injury." Matter of City of Boston Pub. Wks. Dept., OADR Docket Nos. WET-2019-021 and 022, Recommended Final Decision (Mar. 17, 2021), 2021 MA ENV LEXIS 12, *16, Adopted as Final Decision (Mar. 31, 2021), 2021 MA ENV LEXIS 13 (citation omitted).

For standing, it is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Gordon, Docket WET No. 2009-048, Recommended Final Decision, (Mar. 3, 2010), 2010 MA ENV LEXIS 114, *10, adopted by Final Decision (Mar. 5, 2010) 2010 MA ENV LEXIS 13. "Rather, the plaintiff must put forth credible evidence to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge." Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721 (1996); accord Butler v. City of Waltham, 63 Mass. App. Ct. 435, 440 (2005) (supporting evidence must only be credible on its face); Cent. St., LLC v. Zoning Bd. of Appeals, 69 Mass. App. Ct. 487, 493 (2007) (emphasis added; appeals court reversed trial judge's finding that there

was no standing because the plaintiff's evidence was credible on its face, regardless of whether there was other evidence that detracted from its weight).

B. The regulatory framework.

1. The Wetlands Protection Act.

The MWPA protects several categories of land and bodies of water ("Areas Subject to Protection"),¹² and those protections are implemented by the Wetlands Regulations at 310 CMR § 10.00, *et seq.* The regulations impose restrictions on most activities that will "remove, fill, dredge or alter" Areas Subject to Protection.¹³ 310 CMR 10.02(2)(a). The regulations also restrict activities within defined "buffer zones"¹⁴ that "will alter an Area Subject to Protection." 310 CMR 10.02(2)(b). "The provision for a 'buffer zone' does not appear in G. L. c. 131, § 40, and is a creation of the [D]epartment in aid of its administrative implementation of the Wetlands Protection Act." Southern New England Conference Assoc. of Seventh-Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 704 n. 3 (1986).

If a person wishes to perform regulated activities in an Area Subject to Protection or a buffer zone, the person must first file a Notice of Intent with the local conservation commission. See 310 CMR 10.05(4). The Department issues a file number for the notice of intent, which indicates only that the notice meets the "minimum submittal requirements contained in the General Instructions." 310 CMR 10.05(4)(c).

Upon receiving a Notice of Intent, the conservation commission must hold a public hearing within 21 days. 310 CMR 10.05(5)(a). Within 21 days after the close of the public

¹² The MWPA pertains to "any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding...." G.L. 131, § 40; see also 310 CMR 10.02(1).

¹³ "Areas Subject to Protection" are also referred to as "Resource Areas." See 310 CMR 10.02.

¹⁴ A "buffer zone" is defined as "that area of land extending one hundred (100) feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a)."

hearing, if the conservation commission determines that the activities proposed will remove, fill, dredge or alter an area significant to one or more of the interests identified in the MWPA, then the conservation commission must issue an Order of Conditions. 310 CMR 10.05(6)(a)2. The Order of Conditions must

impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40 and the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

310 CMR 10.05(6)(b).

After the conservation commission issues an Order of Conditions, the applicant; the owner, if not the applicant; any person aggrieved by the Order of Conditions; any owner of land abutting the land on which the work is to be done; any ten residents of the city or town where the land is located; or the Department may request that the Department issue a Superseding Order of Conditions. 310 CMR 10.05(7)(a) and (b). Generally, after reviewing

the Notice of Intent, the Order, any informal meeting or site inspection, and any other additional plans, information, or documentation submitted under 310 CMR 10.05(7)(f) or (g), the Department shall issue a Superseding Order for the protection of the interests identified in M.G.L. c. 131, § 40. The Superseding Order shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 and stormwater standards set forth at 301 CMR 10.05(6)(k) for the protection of those interests. The Superseding Order shall prohibit any work or any portions thereof that cannot be conditioned to protect such interests. The Department may issue a Superseding Order which affirms the Order issued by the conservation commission.

310 CMR 10.01(7)(i). Following the issuance of a Superseding Order of Conditions, an "applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at

least one resident was previously a participant in the permit proceeding may request review" of the Superseding Order of Conditions by OADR. 310 CMR 10.05(7)(j)2.a.

2. Coastal Banks.

A "Coastal Bank" is "the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland." 310 CMR 10.30(2). "Coastal banks are likely to be significant to storm damage prevention and flood control." 310 CMR 10.30(1). "[B]ecause of their height, [they] provide a buffer to upland areas from storm waters are significant to storm damage prevention and flood control." Id. Because of this important function, the Wetlands Regulations seek to minimize impact on "reduce its natural resistance to wind and rain erosion cause cuts and gullies in the bank, increase the risk of its collapse, increase the danger to structures at the top of the bank[,] and decrease its value as a buffer." Id.

3. Land Subject to Coastal Storm Flowage.

LSCSF is somewhat unique in that it "is a resource area identified in the statute but without any regulatory performance standards." Matter of Schindler, OADR Docket No. WET-2011-024 and 026, Recommended Final Decision (Dec. 5, 2011), 2011 MA ENV LEXIS 135, *6, Adopted as Final Decision (Dec. 27, 2011), 2011 MA ENV LEXIS 134. Nevertheless, "[f]or work on coastal beach, the project 'shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.' 310 CMR 10.27(3)."

C. The Petitioner lacks standing.

Of the categories of appellants with standing under 310 CMR 10.05(7)(j)2.a., the Petitioner potentially qualifies only as an "aggrieved person if previously a participant in the permit proceedings." She must therefore demonstrate that allowing the Project could cause her to "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 10.05(7)(j)2.b.iii. There is no dispute that she participated in the permit proceedings, as she sent a letter to the Department asking it to affirm the Commission's decision.

The main deficiency in the evidence that the Petitioner offers is that she fails to demonstrate that the work to be performed—the construction of a second story above the velocity zone—will cause her an injury in fact. Her argument instead focuses on alleged, pre-existing deficiencies in the construction of the existing first story.

Mr. Goddard's testimony expends significant energy attempting to prove that the work performed under the 2017 OOC violated the Wetlands Regulations and that the work remains out of compliance. See Goddard PFT, ¶¶ 11-20. Tellingly, however, Mr. Goddard offers no opinion that the SOC, if granted, could cause the Petitioner to suffer an injury in fact.¹⁵ He never opines on what appears to be the Petitioner's central contention: that if the second story is built, future flooding in the velocity zone will cause the new construction to fail, and the resulting debris could damage her property.

The Petitioner instead asserts that "[t]here is no scenario in which the collapse of the structure and the associated debris would not be harmful to the surrounding resource areas, including the Coastal Bank and especially the Land Subject to Coastal Storm Flowage."

Petitioner Reply, p. 5. She offers no factual support. The Petitioner argues that "it does not take an engineering degree or pre-filed testimony from a registered architect to determine as much."

Id. But it does. The analysis in each case is heavily fact-dependent, and only expert testimony

¹⁵ Even Mr. Macchi's testimony, even though it is stricken, does nothing to support the Petitioner's position. His testimony suggests that the existing building and the new construction does not comply with the Massachusetts Building Code. However, "[c]ompliance with codes or regulations administered by other governmental entities is not within the Department's jurisdiction." Matter of Reichenbach, OADR Docket No. WET-2014-001, Recommended Final Decision (Jun. 20, 2014), 2014 MA ENV LEXIS 52, *9, Adopted as Final Decision (Jun. 26, 2014), 2014 MA ENV LEXIS 55. His opinion therefore plays no part in determining whether the Department erred in issuing the SOC.

can help determine the potential impact of a proposed project on a Resource Area. See Mass. Guide Evid. 702(a) (opinion testimony is admissible if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue").

The Petitioner goes on to claim that "it does not take expert testimony to determine that the collapse of the structure at 10 Point Road and the associated debris would cause a particularized harm to the Petitioner, whose home is located 'behind' the Locus and in line with anticipated storm wave action." Id. Again, it does. Expert testimony is necessary to show that the harm to the surrounding Resource Areas will uniquely harm the Petitioner. The Petitioner cannot rest on the Department's guidance documents without an expert to apply them to the facts at hand. That analysis is entirely absent.¹⁶

This is entirely consistent with the case that the Petitioner cites. In Matter of Town of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, (Jul. 19, 1988), pp. 8-9, the Hearing Officer vacated a dismissal for lack of standing where the Petitioner provided testimony from two expert witnesses that artificial dunes constructed from discarded Christmas trees would deflect wave energy to the "section of the beach fronting [the Petitioner's] property." The Petitioner's expert here, Mr. Goddard, makes no such claims.

The Petitioner's appeal appears to be a collateral attempt to enforce the Wetlands Regulations for the alleged violations that occurred during the 2017-2020 work. However, an enforcement action "cannot be achieved through a Request for SOC or an appeal" of an SOC. Matter of Town of Swansea, Docket No. WET-2014-020, Recommended Final Decision (Mar.

¹⁶ The Petitioner argues that Mr. Macchi's pre-filed testimony "provides sufficient evidence that the second-floor addition to the existing structure at the subject property, 10 Point Road, Gloucester, Massachusetts (the 'Locus'), could adversely affect the interests of the Act, and that the same could particularly harm the Petitioner's private property and legal interests." Petitioner Reply, p. 4. While Mr. Macchi testifies that the building may collapse in a storm event, see Macchi PFT, ¶¶ 12, 14, 16, 18, he does not link that to any particular harm to the Petitioner. Moreover, Mr. Macchi is not a wetlands expert.

27, 2015), 2015 MA ENV LEXIS 31, *2, adopted by Final Decision (Jun. 1, 2015), 2015 MA LEXIS 36. This appeal is not the forum to decide whether the Department must take enforcement actions to address alleged violations at the Property; that discretion lies solely with the Department.

The Petitioner lacks standing because she has not offered evidence that demonstrates that a collapse of the second floor construction could cause damage to her property specifically. She instead relies on inferences that cannot be drawn absent expert testimony. She therefore has not demonstrated that she could suffer an injury in fact. Given that the Petitioner lacks standing, I do not address the remaining issues.

VII. Conclusion.

The Petitioner lacks standing to bring her claims. I therefore grant the motion for directed decision and recommend that the Commissioner issue a Final Decision affirming the Superseding Order of Conditions.



Date: March 19, 2024

Patrick M. Groulx
Presiding Officer

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her 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 may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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