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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 9, 2021

In the Matter of
Stephen Arena

OADR Docket No. WET-2021-034
DEP File No. 028-2716
Gloucester, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

James and Jan Bordinaro (“Petitioners”) filed this appeal to challenge the Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued to the Applicant, Stephen Arena, concerning the real property at 128 Wheeler Street, Gloucester, Massachusetts (“the Property”). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00.

The Property is a .12 acre lot that contains an existing house, driveway, patio, multiple decks, and a permanent pile supported deck associated with a seasonal ramp and floats. It is located along the Annisquam River to the east. The Project site contains Areas Subject to Protection under the Wetlands Protection Act, including (1) Land Under the Ocean; (2) Land Containing Shellfish; (3) Rocky Intertidal Shore; (4) Coastal Bank; (5) Riverfront Area; and (6) Land Subject to Coastal Storm Flowage. See 310 CMR 10.25, 10.30, 10.34, 10.58.

The Applicant filed a Notice of Intent with the Gloucester Conservation Commission (“Commission”) in 2020 for the maintenance of an existing 6’ x 6’ pile supported deck, a 29-foot-long seasonal ramp, and bottom-anchored floats approximately 369 square feet in size (“Project”). The Commission issued an Order of Conditions (“OOC”) approving the Project and the Petitioners appealed that approval to MassDEP. MassDEP issued the SOC approving the same narrow scope of work that was proposed—maintenance of the deck, seasonal ramp, and floats. MassDEP found that these structures met the performance standards of the Wetlands Protection Regulations.

On October 1, 2021, MassDEP and the Applicant filed a Joint Motion to Dismiss this appeal (“Joint Motion”). The Joint Motion asserts that the Petitioners’ claims of error and for aggrievement focus solely on an alleged existing seawall and associated drainage structure. The motion asserted that the alleged seawall and drainage outlet were permitted by a 2005 OOC, not as part of the Project approved in the SOC, and that the wall had also subsequently received an unappealed Negative Determination of Applicability from the Commission. Joint Motion, p. 2. The Joint Motion relied upon prior MassDEP adjudicatory decisions to argue that because the Petitioners’ claims are outside the scope of what MassDEP permitted in the SOC, they are not justiciable in this appeal and the Petitioners failed to state a claim upon which relief could be granted. See e.g. Matter of Sullivan, Docket No. WET-2011-033, Recommended Final Decision (Dec. 19, 2011), adopted as Final Decision (Dec. 27, 2011).

On October 6, 2021, I held a Pre-Hearing Conference with the parties, during which the following were discussed: the Joint Motion’s arguments for dismissal; the Petitioners’ potential lack of standing as asserted in Pre-Hearing Statements; and the Petitioners’ claims that implicate

MassDEP enforcement discretion. Later that same day I issued an Order for Petitioners to Respond to Joint Motion to Dismiss and Demonstrate Standing (“Order”).

I stated in the Conference and repeated in the Order: “there is well-established, precedent concerning the issues implicated by the Joint Motion and the assertion that the Petitioners lack standing. Indeed, numerous adjudicatory decisions discuss: (1) what properly falls within the scope of an SOC appeal; (2) how a party establishes standing under circumstances similar to those here (e.g., how there is standing to challenge whether what was approved in the SOC complies with the wetlands performance standards and leads to a unique injury for the Petitioners); and (3) when matters fall in the realm of MassDEP enforcement discretion (as opposed to the present permit appeal)— over which this tribunal presently has no jurisdiction. I expect the Petitioners to address these decisions, both to the extent they do or do not support the Petitioners or are otherwise distinguishable.” Order, p. 2; see e.g. Matter of Sullivan, supra.

The Petitioners later filed their Opposition to Joint Motion to Dismiss (“Opposition”), to which MassDEP and the Applicant filed a Joint Reply to Petitioners’ Opposition to Joint Motion to Dismiss (“Reply”). The above pleadings and the administrative record offer compelling reasons why the Joint Motion should be allowed, resulting in dismissal of the appeal for Petitioners’ failure to demonstrate standing and state a claim upon which relief can be granted.

DISCUSSION

Standing. 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. 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").

The Petitioners first contend that they have standing because their property abuts the Property. As stated in the Order, however, "the provision at 310 CMR 10.05(7)(j)2. specifies who may have standing to appeal a Reviewable Decision, such as an SOC, and abutters are not included, unless, like others, they show aggrievement." Order, p. 3.

The Order also informed the Petitioners how to show aggrievement, as follows: "Person Aggrieved means 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 10.04 (Person Aggrieved).

Thus, to show standing the Petitioners must demonstrate: (1) that the project approved in the SOC might possibly adversely impact the interests of the Act; and (2) those adverse impacts would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of the Petitioners. Matter of Digital Realty Trust, Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), adopted by Final Decision (October 28, 2013); Matter of Plum Island, LLC, Docket No. WET 2019-012, Recommended Final Decision (July 25, 2019), adopted by Final Decision (August 12, 2019). The impact to the asserted right or interest must be one that the Wetlands Protection Act is designed to protect. Id.

"[A]n allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." Id. (quoting Matter of Doe, Doe Family Trust, Docket No. 97-097, Final Decision (April 15, 1998)). It is not necessary to prove the claim of particularized injury by a preponderance of the evidence. Matter of Collins, supra. "Rather, [when standing is challenged]

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." Id. (quoting Marashlian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass. 719, 721, 660 N.E.2d 369 (1996) (emphasis added)).

The Petitioners failed to meet the above standing requirements for several reasons. In short, they failed to demonstrate that the *project approved in the SOC* might possibly adversely impact the interests of the Act; and (2) those adverse impacts would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of the Petitioners. Matter of Digital Realty Trust, supra.

The scope of the SOC was limited, allowing "for the maintenance of an existing 6' x 6' pile supported deck, 29-footlong seasonal ramp, and 369 sq. ft. of bottom anchored floats." (SOC at 4). In their Opposition, the Petitioners make the conclusory statement that "[b]y allowing the float to sit directly on the Riverbed/tidal flats, instead of on supporting legs, the float's surface area will impact the plant life and/or ecosystem of whatever organisms requiring the flats to be unimpeded." (Opposition at 6).

The Petitioners make this assertion even though the SOC and the Gloucester Shellfish Constable addressed the floats' design and the SOC included conditions to avoid any potential adverse impacts on Land Under the Ocean. Indeed, SOC Special Condition 28 requires that the "seasonal bottom-anchored float(s) shall be equipped with float stops to maintain a separation from the bottom of the floats and the underlying substrate." This condition is required to remain in effect "in perpetuity."

The Petitioners fail to make any specific allegations that the SOC's conditions, including Special Condition 28, are somehow inadequate to prevent adverse effects. And perhaps more

importantly, the Petitioners only abstractly claim the floats will “impact the plant life and/or ecosystem of *whatever* organisms requiring the flats to be unimpeded.” (emphasis added)

The Petitioners also failed to meet the second element of standing: that the alleged adverse impacts would or could generate identifiable impacts on "a private right, a private property interest, or a private legal interest" of the Petitioners. There is no asserted possibility that the alleged possible impacts to “whatever” organisms are affected will somehow impact the Petitioners. Instead, the Petitioners continue to focus on matters that fall entirely outside what was approved in the SOC—the alleged seawall and a driveway drain/drainage pipe.

For all the above reasons, the Petitioners failed to demonstrate standing, the Joint Motion should be allowed, and the appeal dismissed. See Matter of Plum Island, LLC, Docket No. WET 2019-012, Recommended Final Decision (July 24, 2019), adopted by Final Decision (Aug. 12, 2019) (“it is well-settled that ‘an allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement’”); Matter of Sandra Lepore, Docket No. 2003-092, 2003-093, Recommended Final Decision (September 2, 2004), adopted by Final Decision (December 3, 2004).

Failure to State a Claim. The remainder of the Petitioners’ arguments pertain to matters that are clearly outside the scope of the SOC. The scope of the SOC was limited, allowing “for the maintenance of an existing 6’ x 6’ pile supported deck, 29-footlong seasonal ramp, and 369 sq. ft. of bottom anchored floats.” (SOC at 4). As I stated during the Conference, this is a *de novo* adjudicatory proceeding that focuses solely on what was approved in the SOC and whether that complies with the Wetlands Regulations and the Wetlands Act.

Despite the SOC’s limited scope, the balance of the Petitioners’ claims continue to focus on matters outside what was authorized in the SOC, primarily alleged historical work pertaining

to the alleged seawall and associated drainage structure. These are assertions that go to the heart of MassDEP's enforcement discretion regarding alleged prior noncompliance with the Wetlands Regulations and Wetlands Act, not what was authorized by the SOC. In a permitting proceeding, like this appeal, this tribunal has no jurisdiction relative to MassDEP's exercise of enforcement discretion. Rather, "[i]t is well settled that the exercise of enforcement discretion resides with the Department and a party may not use the Department's permitting process to compel enforcement action against another party." Matter of City of Lowell Regional Wastewater Utility, OADR Docket No. WET-2012-002, Recommended Final Decision (May 11, 2012), adopted by Final Decision (May 16, 2012) (dismissing claims that project completed prior to issuance of SOC varied from what SOC approved); see also Matter of Town of Swansea, Docket No. WET-2014-020, Recommended Final Decision (March 27, 2015), adopted by Final Decision (June 1, 2015) (holding that enforcement "cannot be achieved through permit adjudication"); For all the above reasons, the Petitioners failed to state a claim on which relief can be granted and the appeal should be dismissed. Matter of Sullivan, *supra*; Matter of Lepore, *supra*.

I recommend that MassDEP's Commissioner issue a Final Decision adopting this Recommended Final Decision and dismissing the appeal.

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: November 9, 2021



Timothy M. Jones
Presiding Officer

SERVICE LIST

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Gloucester, MA**

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DEPARTMENT

[Matter of Stephen Arena, OADR Docket No. WET-2021-034](#)
Recommended Final Decision

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