

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**December 7, 2017**

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In the Matter of  
White Oak Land Conservation Society

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Docket No. WET-2017-020  
MassDEP File No. 183-0642

**RECOMMENDED FINAL DECISION**

In this appeal, the Petitioner Brian Vitalis challenges a September 19, 2017 decision of the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) denying his request for a Superseding Order of Conditions (“SOC”) under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”), for lack of standing. The Petitioner had sought the SOC to challenge an Order of Conditions (“OOC”) that the Town of Holden’s Conservation Commission (“Holden CC”) had issued to the White Oak Land Conservation Society (“the Applicant”) authorizing its permanent four and one-half foot draw-down of water (“the proposed Project”) at the Eagle Lake Dam in Holden, Massachusetts. The Petitioner owns a residential condominium unit in the Mill Pond Place Condominiums, a

condominium complex located on Village Way in Holden, abutting the Eagle Lake Dam.

Petitioner's Appeal Notice Challenging Department's Denial of SOC Request, at p. 2.<sup>1</sup> The Department denied the Petitioner's SOC request for lack of standing after determining that he was not an Abutter to the proposed Project who could request an SOC from the Department pursuant to 310 CMR 10.05(7)(a)4. Department's Denial Notice (September 19, 2017), at p. 1.

Under 310 CMR 10.05(7)(a), certain parties may request an SOC from the Department to challenge a local conservation commission's OOC, including "any owner of land abutting the land on which the work is to be done" as set forth in 310 CMR 10.05(7)(a)4.<sup>2</sup> 310 CMR 10.04 defines the terms "Abutter" and "Owner of Land Abutting the Activity" as "the owner of land sharing a common boundary or corner with the site of the proposed activity in any direction, including land located directly across a street, way, creek, river, stream, brook or canal." Under another Wetlands Regulation, 310 CMR 10.05(4)(a), the project proponent, prior to the local conservation commission's public hearing the project, "[must] provide notification [of the project] to all Abutters [as] . . . shown on the most recent applicable tax list from the [local]

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<sup>1</sup> My recent internet review of the records of the Worcester South Registry of Deeds ("the Registry") indicated that the Petitioner owns Unit 34 (34 Village Way) in the Mill Pond Place Condominiums and has owned Unit 34 since March 29, 2004. See Unit Deed of Mill Pond Place Condominiums recorded in the Registry on March 30, 2004 in Book 33164, Page 20.

<sup>2</sup> The other parties under 310 CMR 10.05(7)(a) who may request an SOC from the Department are:

- (1) the applicant or proponent of the project, 310 CMR 10.05(7)(a)1;
- (2) the owner of the land on which the project is located, if the owner is not the applicant, 310 CMR 10.05(7)(a)2;
- (3) any person aggrieved by the OOC, 310 CMR 10.05(7)(a)3;
- (4) any ten residents of the city or town where the land is located, 310 CMR 10.05(7)(a)5; and
- (5) the Department, 310 CMR 10.05(7)(a)6.

municipal assessor,”<sup>3</sup> and “[n]otification [is to be made to the Abutters] by hand delivery or certified mail, return receipt requested, or by certificates of mailing.”

Here, the Applicant provided notice of the proposed Project to the Petitioner because the Holden Assessors’ Office listed him as an Abutter on a Certified List of Abutters that the Office provided to the Applicant on February 27, 2017. See Exhibit attached to Department’s Motion to Dismiss Petitioner’s Appeal (October 20, 2017). Following the Holden CC’s OOC approving the Applicant’s proposed Project, the Petitioner made his SOC request to the Department claiming status as an Abutter to the Project based on his having been listed as an Abutter on the Certified List of Abutters that the Holden Assessors’ Office had provided to the Applicant. Petitioner’s Appeal Notice Challenging Department’s Denial of SOC Request, at p. 2.<sup>4</sup> Relying on the definitions of “Abutter” and “Owner of Land Abutting the Activity” in 310 CMR 10.04 as discussed above, the Department rejected the Petitioner’s Abutter status claim after “[its] review of information available at the Holden Assessors’ Office and the Worcester South Registry of Deeds did not show that [the Petitioner was] among the owners of any abutting land.” Department’s Denial Notice (September 19, 2017), at p. 1. Id. The Department “conclude[d] that the lot of land where [the Petitioner’s] condominium [unit] is located [and abuts the Eagle Lake Dam] is owned by the Mill Pond Place Condominium Trust by virtue of [a]

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<sup>3</sup> “[A municipality’s] board of assessors is responsible for the full and fair market valuation of real and personal property for the purposes of levying the property tax [on the property to be paid by its owner].” <http://www.mass.gov/dor/docs/dls/publ/misc/town.pdf>. “As part of their duties, assessors must maintain a database on each parcel of property in the [municipality,] [and] [t]his information is typically recorded on a property record card [that] [i]nclude[s] . . . the address of the owner and/or the property, the measurements of the land and a description of any structures, including their quality and condition.” Id.

<sup>4</sup> In his SOC request, the Petitioner asserted that the Holden CC had improperly approved the proposed Project because in his view “[n]one of the [wetlands protection] interests identified in [the MWPA] would be furthered by the . . . [P]roject”; “[t]he Applicant’s claim to restore stream connectivity at the [Eagle Lake] [D]am [had] not [been] substantiated [by the Applicant]”; “[Wetlands] Area alteration thresholds would be exceeded and the related [Wetlands] Area Performance Standards appear[ed] to not be met by the proposed project”; and “the Landowner of the primary affected Wetlands (Eagle Lake) ha[d] not been identified by [the] Applicant [nor] indicated any desire to alter his Wetlands.” Petitioner’s SOC Request to Department (July 31, 2017), at pp. 1-2.

Master Deed recorded at the Worcester South Registry of Deeds[.]”<sup>5</sup> and as such, “[he was] not a person specified in 310 CMR 10.057(a)” who could request an SOC from the Department to challenge the Holden CC’s OOC approving the Applicant’s proposed Project Id.

Prior Final Decisions in administrative appeals brought by individual condominium unit owners challenging the authorization of projects under the MWPA and the Wetlands Regulations in areas abutting the condominium complex support the Department’s position here that such owners lack Abutter status under 310 CMR 10.05(7)(a)4 to challenge the projects. See In the Matter of Holly Management and Supply Co., Inc., OADR Docket No. 98-125, Final Decision (April 9, 1999), 1999 MA ENV LEXIS 712 (petitioner condominium unit owner claiming that proposed construction of additional units within the condominium complex’s common area would damage adjacent coastal bank lacked Abutter status to challenge SOC authorizing project); In the Matter of Towermarc Boxborough Limited Partnership, OADR Docket No. 99-014, Final Decision (November 3, 1999), 1999 MA ENV LEXIS 649 (petitioner owner of two condominium units in condominium complex abutting site of proposed construction of roadway lacked Abutter status to challenge SOC authorizing project); Cf In the Matter of Leonard Bearse, OADR Docket No. WET-2014-031, Recommended Final Decision on Reconsideration (June 5, 2015), 2015 MA ENV LEXIS 45 (petitioner lacked standing to challenge SOC authorizing tree removal and replacement project because petitioner’s purported property interest in right of way adjacent to project site insufficient to confer Abutter status). The rationale for an individual condominium unit owner to lack Abutter status under 310 CMR 10.05(7)(a)4 to request an SOC

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<sup>5</sup> My recent internet review of the Registry’s records indicated that the Master Deed was recorded in the Registry on September 12, 1988 in Book 11610, Page 34.

to challenge a local conservation commission's OOC was explained in Towermarc, *supra*:

[t]he interest in the condominium [complex's] common areas [abutting the area of a proposed project] which a unit owner acquires by purchasing a condominium unit [in the condominium complex] lacks such fundamental aspects of ownership as the right to exclude others or to exercise control over the property. Furthermore, any environmental harm that [the proposed] project could cause to the common area of [the condominium complex] would affect the interests of all [of] the unit owners generally, rather than any individual interest in the common areas held by the petitioner [condominium unit owner] alone. [Under the Massachusetts Condominium Statute, G.L. c. 183A, § 10(b)(4)], the right to conduct litigation against third parties based on a generalized claim of damage to the common areas is vested exclusively in the [condominium complex's governing body: the] condominium association . . . .<sup>6</sup>

Towermarc, 1999 MA ENV LEXIS 649, at 12-13; See also Holly Management, *supra*, 1999 MA ENV LEXIS, at 3-7.

While Towermarc's rationale for an individual condominium unit owner to lack Abutter status under 310 CMR 10.05(7)(a)4 is sound, the rationale is not clearly set forth in the Wetlands Regulations. Indeed, in my view, there is a conflict between 310 CMR 10.05(7)(a)4, as construed by Towermarc, and the Abutter notification requirements of 310 CMR 10.05(4)(a), as discussed above, regarding who constitutes an Abutter. Under 310 CMR 10.05(7)(a)4, as construed by Towermarc, individual condominium unit owners are not considered Abutters for purposes of SOC requests, but under 310 CMR 10.05(4)(a), local municipal assessor offices consider individual condominium unit owners as Abutters for real estate taxation purposes when certifying a list of Abutters for project proponents to provide notice of the project. This conflict is on display in this case because undisputedly, the Petitioner's name was listed on the Certified List of Abutters that the Holden Assessors' Office provided to the Applicant, but the List did not

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<sup>6</sup> Under G.L. c. 183A, § 10(b)(4)(a), the governing body of a condominium complex can be in the form of a corporation, real estate trust, or unincorporated association, and "[is responsible] for the management and regulation of the condominium [complex]." The form of the governing body is established in the Master Deed for the condominium complex recorded with the appropriate Registry of Deeds. G.L. c. 183A, § 10(b)(4)(a).

name as an Abutter, the Mill Pond Place Condominium Trust, the governing body for the Mill Pond Place Condominiums. See Exhibit attached to Department's Motion to Dismiss Petitioner's Appeal (October 20, 2017).<sup>7</sup>

Nevertheless, the Final Decision in Towermarc is precedent that I am obligated to follow in this case, and has been cited by the Department in support of its pending Motion to Dismiss the Petitioner's appeal of the Department's denial of his SOC request for lack of Abutter status and standing. I am also bound by the well established legal principle that a party's standing to pursue a claim "is not simply a procedural technicality," but rather, "is a jurisdictional prerequisite to being allowed to press the merits of any legal claim." 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, citing, Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998); R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); 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 Department filed its Motion to Dismiss on October 20, 2017. Under the Adjudicatory Proceeding Rules at 310 CMR 1.01(11)(a)1, which govern adjudication of this

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<sup>7</sup> My recent internet review of the Registry's records indicated that at all times when the proposed Project was pending for review before the Holden CC and the Department, the names of the Trustees of the Mill Pond Place Condominium Trust were on record with the Registry. See Acceptance of Trustee recorded in the Registry on November 28, 2016 in Book 56370, Page 154, and Certificate of Appointment of Trustees recorded in the Registry on July 17, 2017 in Book 57429, Page 224. When the proposed Project was pending for review before the Holden CC from April 18, 2017 to July 18, 2017, the names of the Trustees were Mark Mishenko (the entire time period), Marc Lipson (the entire time period), Dan Marinone (April 18, 2017 to June 5, 2017), and Prashant Hinge (June 5, 2017 to July 18, 2017). The names of these Trustees were also listed as individual condominium unit owners on the Certified List of Abutters that the Holden Assessors' Office provided to the Applicant. See Exhibit attached to Department's Motion to Dismiss Petitioner's Appeal (October 20, 2017).

appeal, the Petitioner's response to the Department's Motion to Dismiss was due within seven business days after the motion's filing: by Tuesday, October 31, 2017. As of this date, more than 30 days after expiration of the October 31<sup>st</sup> deadline, the Petitioner has not filed a response to the Department's Motion to Dismiss.

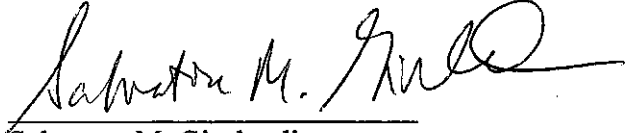
Accordingly, based on Towermarc, the jurisdictional nature of a party's standing, the Petitioner's lack of a response to the Department's Motion to Dismiss, and the Petitioner not having asserted any other ground under 310 CMR 10.05(7)(a) to request an SOC,<sup>8</sup> I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioner's appeal for lack of Abutter status and standing. I also recommend that the Commissioner direct the Department's Bureau of Water Resources ("BWR"), which oversees the Department's Wetlands and Waterways Program, to review the conflict that I identified above that exists between 310 CMR 10.05(7)(a)4, as construed by Towermarc, and the Abutter notification requirements of 310 CMR 10.05(4)(a), and propose recommendations to the Commissioner within 90 days of his

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<sup>8</sup> In making his SOC request to the Department, the Petitioner solely asserted that he was an Abutter to the proposed Project and did not assert that he was personally aggrieved by the Holden CC's issuance of the OOC approving the proposed Project pursuant to 310 CMR 10.05(7)(a)3. Petitioner's SOC Request to Department (July 31, 2017), at pp. 1-2. The Final Decision in Holly Management, *supra*, recognized that under appropriate circumstances an individual condominium unit owner may challenge a wetlands permit authorizing a project in areas abutting the condominium complex as a person aggrieved by the permit pursuant 310 CMR 10.05(7)(a)3. In Holly Management, the individual condominium unit owner asserted that he was personally aggrieved by the proposed project's authorization because "the ground floor level of his [condominium unit] [previously] flooded . . . and that the raised elevations for the proposed project threaten[ed] to increase the risk of flooding of his unit." 1999 MA ENV LEXIS 712, at 8. His personal aggrievement claim failed, however, because while he "allege[d] that the [proposed] project [would] harm the coastal bank [impacted by the proposed project], he [did] not allege that the potential harm to the coastal bank [would] in turn cause harm to his [condominium] unit," and "[w]ithout a connection between the alleged wetlands injury and damage to his property, he [did] not have standing to raise it as an aggrieved party . . . ." 1999 MA ENV LEXIS 712, at 9. For these reasons, the Petitioner here would not have been able to request an SOC from the Department as a person aggrieved by the Holden CC's issuance of the OOC approving the proposed Project pursuant to 310 CMR 10.05(7)(a)3 "[w]ithout a connection between the alleged wetlands injury and damage to his property." *Id.*

Final Decision regarding how the conflict should be resolved.

Date: 12/07/17

  
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.



## **SERVICE LIST**

**Petitioner:** Brian Vitalis  
34 Village Way  
Jefferson, MA 01522  
**e-mail:** brian01@charter.net;

**Legal Representative:** None listed in Petitioner's Appeal Notice;

**Applicant:** White Oak Land Conservation Society  
c/o Scott Morrison, President  
P.O. Box 346  
Holden, MA 01520  
**e-mail:** info@whiteoaktrust.org;

**Legal Representative:** None listed in Petitioner's Appeal Notice;

### **Local Conservation Commission:**

Town of Holden Conservation Commission  
c/o Glenda Williamson, Conservation Agent  
1196 Main Street  
Holden, MA 01520  
**e-mail:** None listed in Petitioner's Appeal Notice;

**The Department:** Denise Child, Section Chief, Wetlands Program  
MassDEP/Central Regional Office  
Bureau of Water Resources  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** Denise.Child@state.ma.us;

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Gary Dulmaine, Wetlands Analyst  
MassDEP/Central Regional Office  
Bureau of Water Resources  
627 Main Street  
Worcester, MA 01608  
**e-mail:** Gary.Dulmaine@state.ma.us;

**Legal representative:** Elizabeth Kimball, Senior Counsel  
MassDEP/ Office of General Counsel  
One Winter Street  
Boston, MA 02108  
**e-mail:** Elizabeth.Kimball@state.ma.us;

**cc:** Anne Berlin Blackman, Chief Regional Counsel  
MassDEP/Central Regional Office  
627 Main Street  
Worcester, MA 01608  
**e-mail:** Ann.Blackman@state.ma.us;

Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108.