

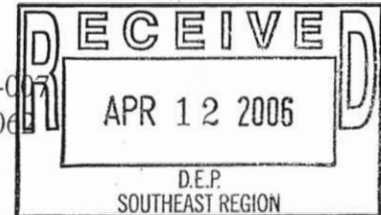
COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
133 Portland Street, Boston, Massachusetts 02114

April 11, 2006

In the Matter of

Michael P. Wyman

Docket No. 2003-007
File No. SE 66-106
Sandwich



RULING ON MOTION TO DISMISS AND

STAY ORDER

INTRODUCTION

At several stages of this wetlands permit appeal, the petitioner, Michael P. Wyman, has challenged the standing of his neighbor, Richard Zielinski, who was allowed to intervene early in the proceeding. The petitioner renewed his motion following the hearing.

According to M.G.L. c.30A, §10, intervenors are those who are substantially and specifically affected by the proceeding. Based upon the evidence presented by the intervenor at the hearing, I conclude that he has not come forward with credible evidence that he is substantially and specifically affected by the petitioner's proposal. Accordingly, I dismiss him as a party.

I also conclude that the petitioner's project is proposed on a coastal dune, a protected resource area under M.G.L. c. 131, §40, the Wetlands Protection Act. This means that the project triggers a review threshold under M.G.L. c.30, §§61-62H, the Massachusetts Environmental Policy Act. Finally, I conclude that there is sufficient evidence in the record on which to decide whether the project should be granted a wetlands permit. Accordingly, I will stay this matter to allow the petitioner time to decide whether he will initiate MEPA review.

DISCUSSION

A. Background

The petitioner, Michael P. Wyman, sought permission to construct a single family home, garage, driveway, and septic system at the end of Leonard Road in Sandwich, Massachusetts. The 0.92 acre lot lies adjacent to the Sandy Neck Area of Critical Environmental Concern. It is over 800 feet landward of Cape Cod Bay, which borders the ACEC. The petitioner's property is contiguous with a dune system in the ACEC. The elevations on the lot range from approximately 6-17 feet above mean sea level. The portion of the property below elevation 11 is land subject to coastal storm flowage. Areas of the property are well vegetated with mature scrub trees and beach grass. A small bordering vegetated wetland is present in the southwestern corner of the lot adjacent to a drainage swale that connects to cranberry bogs south of the property.

The Department of Environmental Protection denied the project a wetlands permit because Wyman failed to file an Environmental Notification Form pursuant to M.G.L. c.30, §§61-62H, the Massachusetts Environmental Policy Act (MEPA), within the time period set by the DEP's wetlands regulations. *See* 310 CMR 10.07(2). According to the MEPA regulations at 301 CMR 11.03(3)(b), an applicant must file an ENF before the DEP may grant a wetlands permit when the proposed work would alter coastal dune.

The DEP determined that the proposed work would alter a coastal dune. The petitioner disagreed and requested an adjudicatory hearing following the DEP's permit denial.

Richard Zielinski moved to intervene in the appeal. His brief request stated only that he was an "interested party" and an abutter.¹ He did not describe why intervention should be

¹ Mr. Zielinski apparently requested that the DEP issue a superseding order of conditions. A copy of his request is not in the record, however.

allowed, the relief sought, the law in support of intervention and the relief sought, or the effect of the proceeding on him. *See Matter of Eastman*, Docket No. 96-119, Rulings on Applicant's Motion to Dismiss and Gouveias' Motion to Intervene, 4 DEPR 144, 145 (September 12, 1997). Nevertheless, on June 13, 2003, shortly before the prehearing conference, Administrative Law Judge Mark L. Silverstein allowed him to intervene. ALJ Silverstein determined that since Mr. Zielinski was an abutter who had been involved in the permit proceedings before the appeal, he would allow Mr. Zielinski to intervene because "we routinely allow abutters to intervene in wetlands appeals."

The petitioner moved on August 25, 2003 to dismiss Mr. Zielinski as a party for lack of standing. He argued that Mr. Zielinski cannot be harmed by the petitioner's proposal because his property is at a higher elevation than the petitioner's. Attached to the petitioner's motion was an affidavit of wetland scientist Mario DiGregorio. He described the location of Mr. Zielinski's house and opined that Mr. Zielinski would suffer no flooding or other harm to his property as a result of the work. The petitioner also represented that a survey of Mr. Zielinski's property would be forthcoming. While a survey of his property was not filed, other documents from a surveyor were filed on September 24, 2003. This occurred after the initial deadline established for the petitioner to file his testimony. That deadline was later extended numerous times as to one of the petitioner's witnesses, with the assent of the other parties. I decided to wait until Mr. Zielinski filed his testimony before ruling on the motion to dismiss.

Following the hearing, the parties asked for time to pursue settlement discussions. Those discussions did not result in a settlement. The petitioner then renewed his motion to dismiss Mr. Zielinski as a party for lack of standing. Mr. Zielinski, through counsel, filed another

opposition.² Three exhibits were filed with the opposition: 1) an assessor's map showing Mr. Zielinski's and the petitioner's properties; 2) a statement by Mr. Zielinski opposing the motion; and 3) a letter from the coastal geologist who testified for him, Peter S. Rosen, Ph.D. regarding his testimony about the project's impacts on Mr. Zielinski. I do not give any weight to these unsworn statements submitted after the close of the evidence.

B. Whether Mr. Zielinski is substantially and specifically affected

I note at the onset of my discussion that Mr. Zielinski's evidence focuses primarily on the impacts associated with the proposed project's construction. Because the DEP denied the project based on the petitioner's failure to file an ENF as required under MEPA, the issues as framed in the prehearing conference report were limited to whether the landform was a coastal dune, whether the project would alter it, and whether the petitioner was required to file an ENF. All of the parties, however, addressed the impacts associated with the proposed project's construction; and, consequently, I consider Mr. Zielinski's evidence on this below.

1. Applicable Law

Intervention in this appeal is governed by M.G.L. c. 30A, §10. Persons who are able to intervene must be "substantially and specifically affected" by the proceeding or have the constitutional or statutory right to intervene without showing that they are substantially and specifically affected.³ *Matter of Town of Ipswich*, Docket No. 2002-109, Decision and Order on Motions to Dismiss, 12 DEPR 198 (November 2, 2005). Agencies have broad discretion to grant or deny intervention. *Tofias v. Energy Facilities Siting Bd.*, 435 Mass. 340, 757 N.E.2d 1104, 1109 (2001).

² Mr. Zielinski was *pro se* until after the hearing.

³ Mr. Zielinski does not claim a constitutional or statutory right to intervene.

Numerous prior administrative decisions have established that in order to demonstrate that one is substantially and specifically affected by a proceeding, a potential intervenor must allege: 1) a concrete injury he or she is likely to suffer as a result of the matter under appeal; 2) a nexus between the relief sought and the subject matter of the proceeding; and 3) that the relief sought would alleviate the alleged harm. *See, e.g., Matter of Krasnecky/Coastal Energy*, Docket Nos. 2003-101, 2003-102, 2003-122, Ruling on Motion to Intervene, 11 DEPR 32, 33 (March 10, 2004) (citations omitted). In addition, the interests of a potential intervenor must be within the zone of interests to be protected by the statute or regulation at issue. *Id.*⁴

When deciding whether a proposed intervenor has plead sufficient facts to show the affect of the proceeding on him, the facts set forth in his pleadings are assumed to be true. *See e.g., Matter of National Waste Management, Inc.*, Docket Nos. 2001-110/111, Ruling on Motions to Intervene (October 1, 2002). As a proceeding progresses, however, more is required. Since standing is "indispensable," at the final stage, those facts [supporting standing to sue, if controverted] must be "supported adequately by the evidence adduced at trial." *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass. App. Ct. 129, 597 N.E. 2d 48, 1992 Mass. App. LEXIS 684 (1992) quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 2136-2137 (1992). I apply this same reasoning to Mr. Zielinski's burden on standing to intervene.

2. Analysis

The petitioner's central argument is that Mr. Zielinski cannot be harmed by the petitioner's proposal because his property is at a higher elevation than the petitioner's. Mr. DiGregorio, a wetlands scientist who testified for the petitioner, confirmed this fact and testified

⁴ These requirements apply to all persons who seek to intervene in a c. 30A appeal. *Matter of Eastman*, 4 DEPR at 145. While some of the DEP's decisions from the 1980's [*Matter of Town of Falmouth*, Docket No. 81-052, Final Decision, (July 13, 1983); *Matter of Carlman*, Docket No. 87-162, Decision on Motion to Intervene (July 12, 1989)]

as well that Mr. Zielinski's property lies outside the coastal floodplain. Consequently, he stated, the project will not result in harm to the abutting property.

In his initial response, Mr. Zielinski argued that the development of Leonard Road in front of his property in order to access the petitioner's lot "may lead to increased erosion, noise, dust, and wind blown sand causing environmental harm." He asserted that the petitioner's most recent dune delineation is incorrect, and, if it were accepted, "cumulative and negative effects" in the dune's ability to move and provide protection from storms and flooding could result. These effects could "threaten" his property. In addition, he asserted that "change in land use on this dune" could cause changes in the dune's stability and in sand transport patterns that could lead to sand being deposited on his property, as well as lead to a "change in the flood boundaries or the volume of the flood basin." These changes could lead to flooding on the roadway or on his property, he maintained. Mr. Zielinski asserted that the petitioner's property floods almost every year and changes to the "floodbasin" could change infiltration patterns, which will alter groundwater elevations and flow. This impact, he asserted, "can affect the water supply on the Zielinski property as they have a shallow well." Finally, he argues that changes to the form of the dune may affect surface water runoff from the roadway, which flows to a bordering vegetated wetland in the southwest corner of the petitioner's lot.

I turn to the evidence at the hearing submitted by Mr. Zielinski to support these allegations. Peter S. Rosen, Ph.D., testified for Mr. Zielinski. He is a coastal geologist, a partner with Geo/Plan Associates, and an associate professor and chair of the Department of Earth and Environmental Sciences at Northeastern University.

allowed abutters to intervene without showing that they were substantially and specifically affected, *Eastman* and the decisions cited therein did not follow that approach.

Dr. Rosen testified that a portion of the northern section of the petitioner's lot is within the 100 year flood plain. According to Dr. Rosen, the flood zone does not connect to Cape Cod Bay, thus, it is an isolated flood basin. Coastal flooding may occur by overwash, breakthrough, or seepage. He stated that changes in sand transport and changes in land use may lead to a change in dune topography. Topographic changes could alter flood boundaries, the volume of the flood basin, or flooding patterns. A change in flood boundaries or volume could displace flood waters or change infiltration patterns, he stated, which in turn could affect Mr. Zielinski's well. Dr. Rosen acknowledged that he could not predict the extent of the change or when it might occur. He also admitted that he did not know whether Mr. Zielinski's property was within the flood plain.

Mr. Zielinski needed to come forward with credible evidence to support his allegations of injury. *Cf. Marshlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721, 660 N.E.2d 369, 1996 Mass. LEXIS 18 (1996) (Standing is question of fact for the trial judge, plaintiff in appeal of zoning board of appeals decision must put forth credible evidence to support his allegations.). He has not done so. "[C]redible evidence' has both a quantitative and a qualitative component." *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 441, 827 N.E.2d 216, 2005 Mass. App. LEXIS 426 (2005). "Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury... [and] [q]ualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the ... action. Conjecture, personal opinion, and hypothesis are therefore insufficient." *Id.* Quantitatively, Mr. Zielinski fails to provide specific factual support for his allegations. Qualitatively, his evidence fails because it is speculative.

Mr. Zielinski has not demonstrated that the petitioner's project would result in a concrete injury to him. The chain of probabilities Dr. Rosen constructs concerning changes in topography and displacement of flood waters and their consequences is too speculative to establish a likelihood of harm or actual harm to Mr. Zielinski's property. "Injuries that are speculative, remote, and indirect are insufficient to confer standing." *Ginther v. Commissioner of Insurance*, 427 Mass. 319, 323, 693 N.E. 2d 153, 157 (1998); *see also National Waste Management, Inc.*, at 5 ("Without sufficient facts to support the conclusions, these assertions are too vague and speculative to show ... injury ..."). While the project proposes some alteration of the existing topography, Dr. Rosen did not address these contour changes. Rather, he refers to topographic changes that may occur within the dune system irrespective of whether the petitioner's project is allowed. He fails to explain how the project would cause these topographic changes to take place. Nor has he provided any facts to support his theory regarding the displacement of flood waters and any resulting impact on the Mr. Zielinski's water supply.

I conclude, therefore, that Mr. Zielinski has failed to come forward with credible evidence to maintain his standing in this appeal. Accordingly, I dismiss him as a party.

C. Whether project would alter a coastal dune

According to the petitioner, a coastal dune is present on the northern (seaward) portion of the site, but not on the portion of the site where his project is proposed. The petitioner's evidence and argument that his project is not proposed on a coastal dune, and, therefore, will not alter a dune, is based largely on his position that the landform does not function as a coastal dune. Consequently, he argues, it cannot be regulated as one. The petitioner's argument is misplaced.

A coastal dune is defined as "any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control." 310 CMR 10.28 (2). In this case, the first sentence of the definition is the relevant portion because there is no dispute that the landform on the petitioner's lot is a natural feature. For the purpose, thus, of identifying whether the dune on the northern portion of the site extends further landward and includes the area where the project is proposed, I need look no further than the regulatory definition.

I conclude that the petitioner's project is proposed within a coastal dune and will alter it. I rely on the testimony of James Mahala, a coastal geologist employed by the DEP. He earned a Masters of Science degree in coastal geology from Western Washington University and has worked for the DEP for twenty years.

Mr. Mahala testified that the site contains several mounds and hills, typical of undulating dune morphology. He observed several well-defined ridges or mounds separated by troughs as one moves landward from the coastal beach. He also observed, in test pits dug at several locations throughout the site, well-sorted fine-to-medium grain-sized sands. The petitioner's septic system soil test data corroborated Mr. Mahala's observations of the surficial soils. According to Mr. Mahala, well-sorted sediments are indicative of wind blown deposits. In addition, he noted that the United States Geologic Survey map of the area classifies the site as Qd-Dune deposits. He agreed with this assessment.

Mr. Mahala also opined that the proposed project would alter the coastal dune. "Alter means to change the condition of any [resource area]." See 310 CMR 10.04. Examples of alteration referenced in the regulation include the destruction of vegetation. Excavation of the

site in order to place the pilings, the concrete slab for the proposed garage, and to bury the septic system components would result in the destruction of vegetation, according to Mr. Mahala.

Mr. DiGregorio and Thomas W. Joy, P.E. testified for the petitioner. Mr. Joy has over thirty years of experience as a civil engineer and is the founder of Coastal Engineering Co., Inc. Much of his work has concerned development in coastal areas on Cape Cod. Both Mr. Joy and Mr. DiGregorio described the site as heavily vegetated and relatively stable. Mr. DiGregorio characterized the surficial geology of the site as different from the Sandy Neck ACEC. He also described the vegetation as more indicative of upland areas than of a coastal dune. Mr. Joy considered the soils to be as likely the result of glacial deposits as wind blown deposits.

Mr. Joy and Mr. DiGregorio argued that the southwestern portion of the site did not function as a coastal dune. Mr. DiGregorio delineated the dune boundary further seaward of the work location based on his assessment of how the area functions rather than based only on its morphological characteristics. Mr. Joy relied on Mr. DiGregorio's delineation. How this landform functions, however, is not relevant to whether it is a "natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash." 310 CMR 10.28 (2).⁵

This is not to say that the question of how a resource area functions is not considered under the wetlands regulations. A coastal dune as defined at 310 CMR 10.28 (2) is presumed to be significant to the wetlands interests of storm damage prevention, flood control, and protection of wildlife habitat. 310 CMR 10.28 (1).⁶ An applicant may, however, overcome this presumption by a clear showing that the coastal dune does not "play a role" in serving these

⁵ How a landform functions is relevant if sediment is deposited artificially. See 310 CMR 10.04. As noted previously, there is no dispute that the landform here is a natural feature.

⁶ "Significant" as used here means when a resource area plays a role in the provision or protection of one or more of the wetlands interests. See 310 CMR 10.23.

interests. *Id.* The issuing authority (the Conservation Commission or the DEP) must make a written determination to that effect. 310 CMR 10.28 (1); 310 CMR 10.05 (6)(a)(1). No such determination was made in this case.

I rely on Mr. Mahala's testimony because he focused on explaining how the landform met the definition of a coastal dune. I found Mr. DiGregorio's assessment of the vegetation and topography less persuasive because he did not adequately explain the differences in vegetation and topography that he noted between the northern and southwestern portions of the site. In addition, his views about the importance of how the area functioned colored his opinions. I also found Mr. Joy's assessment of the soils on the site inconclusive and at odds with Mr. Mahala's assessment.

CONCLUSION

I conclude, therefore, that the petitioner's project is proposed on a coastal dune as defined at 310 CMR 10.28 (2) and that the work will alter the dune. The petitioner therefore, must file an ENF and complete further MEPA review if required, before the DEP may issue a wetlands permit. *See* 301 CMR 11.03 (3)(b).

As I stated above, the parties did not limit their testimony to whether the work would occur on a coastal dune and whether that work would alter it. I have concluded that there is sufficient evidence in the record for me to decide whether the project meets the performance standards applicable to work in a coastal dune and the buffer zone to a bordering vegetated wetland. I am hesitant to do so, however. A permit cannot issue until the petitioner completes MEPA review, which may result in changes to the project. Furthermore, based upon the record before me, it is not clear whether the petitioner would agree to file an ENF if a final decision adverse to him on the question of whether the project is on a coastal dune were to issue.

Therefore I am ordering the petitioner to file a statement of his intent no later than April 24, 2006.

Bonney Cashin
Bonney Cashin
Administrative Magistrate

SERVICE LIST

In the Matter of: Michael P. Wyman

Docket No. 2003-007

File No. SE 66-1062

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