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

April 12, 2010

In the Matter of Carol Henderson	Docket No. 2009-059 UAO-NE-09-6W-009 Salisbury

RECOMMENDED FINAL DECISION

This appeal concerns property at 61 Atlantic Avenue in Salisbury, Massachusetts (the "Property") owned by Carol Henderson (the "Petitioner"). Although developed, the area of Salisbury where the Property is located is a barrier beach, land regulated by the Massachusetts Department of Environmental Protection (the "Department") under the Wetlands Protection Act. M.G.L. c. 131, § 40. The Department issued a Unilateral Administrative Order (the "UAO") to the Petitioner after observing work that included enclosing the pier foundation of the two family residential structure on the Property. This work followed the issuance of an Order of Conditions to construct the pier foundation, without the enclosure of the ground floor, on February 13, 2004, and this permit expired on or about February 13, 2007. The UAO was issued after an attempt to resolve this situation, and is intended to bring the Petitioner into compliance by requiring restoration of the site. The Petitioner filed an appeal of the UAO claiming primarily that the regulations at 310 CMR 10.00 are unauthorized and therefore do not apply, but also that the enclosure of the ground level is not an alteration requiring a permit, the construction

was authorized by a building permit, and the site is not within jurisdiction because it does not directly border the ocean. The Petitioner requested that the UAO be vacated.

The Petitioner filed a Motion for Summary Decision prior to the Pre-Hearing Conference, claiming that the Department's Commissioner lacked authority to promulgate regulations under M.G.L. c. 131, § 40 because "Commissioner" is defined in M.G.L. c. 131, § 1 as the "commissioner of fisheries, wildlife, and environmental law enforcement." The Department filed an Opposition and Cross-Motion for Summary Decision, claiming that the work conducted at the property was subject to the Wetlands Protection Act, M.G.L. c. 131, § 40, and duly promulgated regulations. I concluded that the Department's Commissioner is duly authorized to promulgate regulations and otherwise to implement the provisions of the Wetlands Protection Act, M.G.L. c. 131, § 40.

STANDARD OF REVIEW

310 CMR 1.01(11)(f) allows any party to an administrative appeal to file a motion for summary decision. Summary decision is appropriate where the party seeking summary decision can "demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." 310 CMR 1.01(11)(f). At the Pre-Screening/Pre-Hearing Conference (the "Conference") that I conducted in this matter, the Parties agreed that there were no relevant disputed issues of material fact and the issue the Petitioner sought to pursue in this appeal could be resolved on summary decision. A ruling granting or denying summary decision must be made on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Id. The Petitioner filed a Motion for Summary Decision prior to

the Conference, and the Department filed an Opposition and Cross-Motion. After the Conference held on January 19, 2010, I allowed the Parties to file responses to the motions if either Party chose to do so. Both the Department and the Petitioner filed responses, and the Petitioner filed an additional response to the Department's opposition. I concluded there are no material facts in dispute.

THE AUTHORITY OF THE DEPARTMENT'S COMMISSIONER UNDER M.G.L. c. 131 § 40

The Wetlands Protection Act states that "[r]ules and regulations shall be promulgated by the commissioner to effectuate the purposes of this section." M.G.L. c. 131, § 40, ¶ 31. The Petitioner points to the definition of "commissioner" in M.G.L. c. 131, § 1, as "the commissioner of fisheries, wildlife and environmental law enforcement." Accordingly, the Petitioner argues that the commissioner of the Department of Fisheries, Wildlife and Environmental Law Enforcement is authorized to promulgate wetlands regulations rather than the commissioner of the Department of Environmental Protection. Thus, the Petitioner claims that the regulations promulgated by the commissioner of the Department of Environmental Protection are unauthorized and the Department may not require the Petitioner to comply with them.

The Petitioner is quite correct that "commissioner" is defined as the commissioner of fisheries, wildlife and environmental law enforcement in M.G.L. c. 131, § 1, which provides the definitions for the chapter. However, the definitions are introduced by this clause: "[i]n this chapter, *unless the context otherwise requires,* the following words shall have the following meaning. . . . ." M.G.L. c. 131, § 1 (emphasis added). Within the context of M.G.L. c. 131, § 40, it is quite clear that references to the commissioner are to the commissioner of the Department of Environmental Protection. Further, where the

references related to implementation of the Act are to the Department of Environmental Protection, the commissioner of the Department is vested with the authority to act on the Department's behalf. In the context of M.G.L. c. 131, § 40, the context clearly shows that the references to the commissioner are to the commissioner of the Department of Environmental Protection.[1]

There are various references in M.G.L. c. 131, § 40 to the "department of environmental protection," to the "department of environmental protection, in a manner to be determined by the commissioner of environmental protection," and to "the department of environmental protection, hereinafter called the department." There are no references to the commissioner of fisheries, wildlife and environmental law enforcement or to the department of fisheries, wildlife and environmental law enforcement. Under the plain language of the Wetlands Protection Act, the commissioner of fisheries, wildlife and environmental law enforcement lacks authority to implement any provisions of the Act, so that it would be anomalous indeed to vest in that individual the authority to promulgate the implementing regulations. *See* Town of Lexington v. Town of Bedford, 378 Mass. 562, 570 (1979) ("A literal construction of statutory language will not be adopted when such a construction will lead to an absurd and unreasonable conclusion and the language to be construed 'is fairly susceptible to a construction that would lead to a logical and sensible result.' " citing Bell v. Treasurer of Cambridge, 310 Mass. 484, 489 (1941)).

[1] The departments within the Office of the Secretary of Energy and Environmental Affairs are identified in M.G.L. c. 21A, § 7. The functions, officers, and duties of these departments are described in M.G.L. c. 21A, § 8. In 2007 amendments, the reference to the Department of Fish and Game was added and the reference to the Department of Fisheries, Wildlife and Environmental Law Enforcement was deleted in the first paragraph of M.G.L. c. 21A, § 7. The Massachusetts General Laws do not capitalize the names of departments and the title "commissioner" that are typically capitalized in Department final decisions when they refer to specific Departments or Commissioners.

Prior administrative decisions have been appealed to court, where regulations promulgated by the commissioner of the Department of Environmental Protection have been applied. *See, e.g.*, DiCicco v. Department of Environmental Protection, 64 Mass. App. Ct. 423 (2005). I note that M.G.L. c. 131, § 40, in the same paragraph that gives authority to the "commissioner" to promulgate regulations, also gives authority to the "commissioner," among others, to issue enforcement orders directing compliance with the Act including orders to restore property to its original condition. M.G.L. c. 131, § 40, ¶ 31. *See* id. While the issue raised by the Petitioner has not, to my knowledge, been raised in an administrative appeal, a facial attack on the regulation cannot be decided by a hearing officer, it must be brought in court. Nonetheless, I provide a statement of reasons on this issue for the Commissioner of the Department of Environmental Protection's consideration as required under M.G.L. c. 30A.

I conclude that the reference to the "commissioner" in M.G.L. c. 131, § 40, ¶ 31 is to the commissioner of the Department of Environmental Protection, not the commissioner of the Department of Fish, Wildlife and Environmental Law Enforcement (now the Department of Fish and Game). Accordingly, the commissioner of the Department of Environmental Protection has full authority to promulgate and implement regulations under the Wetlands Protection Act. Accordingly, I recommend that the Commissioner issue a Final Decision in this appeal affirming the UAO issued by the Department.

In the appeal, the Petitioner also raised other legal issues related to jurisdiction, claiming that the Act applies only to undeveloped resource areas, that "alter" means "to cause to be different" which does not include construction activity legally permitted by

the building inspector, that construction of buildings is not subject to the Act, and that the site does not contain jurisdictional resource areas, and to the conduct of the Department's enforcement, claiming that Department staff violated a right to privacy by taking photographs of the house. Although these questions were not raised in the Petitioner's motion, I address each of these issues.

ADDITIONAL ISSUES RAISED BY THE PETITIONER

Jurisdictional Issues

The Wetlands Protection Act, M.G.L. c. 131 § 40, and its implementing regulations, 310 CMR 10.00, establish jurisdiction, procedures, and standards for projects affecting wetlands. M.G.L. c. 131, § 40 applies to land or a portion thereof, if it is an Area Subject to Protection, or resource area, as defined in 310 CMR 10.02(1). 310 CMR 10.05(3)(b)2. M.G.L. c. 131, § 40 applies to the work, or a portion thereof, if it is an Activity Subject to Regulation, as defined in 310 CMR 10.02(2). 310 CMR 10.05(3)(b)2.

Any activity proposed or undertaken within a resource area that will alter that area is subject to jurisdiction and requires the filing of an NOI. 310 CMR 10.02(2)(a).

The term "work," as used in 310 CMR 10.05(4)(a), is defined in 310 CMR 10.04 as meaning the same as "activity." "Activity" is defined in that section as

> "any form of draining, dumping, dredging, damming, discharging, excavating, filling or grading; the erection, reconstruction or expansion of any buildings or structures; the driving of pilings; the construction or improvement of roads and other ways; the changing of run-off characteristics; the intercepting or diverging of ground or surface water; the installation of drainage, sewage and water systems; the discharging of pollutants; the destruction of plant life; and any other changing of the physical characteristics of land." 310 CMR 10.04.

"Alter" means "to change the condition" of a resource area, and includes "changing pre-existing drainage characteristics" and changing the "physical, biological or chemical characteristics of the receiving water." 310 CMR 10.04 Alter.

The performance standard for work on a barrier beach at 310 CMR 10.29(3) refers to the standards for beaches and coastal dunes. The most relevant performance standard for purposes of this appeal is that "[a]ny alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune" by affecting the ability of waves to remove sand from the dune, disturbing vegetative cover so as to destabilize the dune, causing modification to the dune form that increases the potential for storm damage, interfering with landward or lateral movement of the dune, causing removal of sand from the dune artificially or interfering with bird nesting habitat. 310 CMR 10.28(3). Because the performance standard specifically refers to a "structure on" a dune, the Petitioner's view that construction to enclose the ground level of a house does not constitute an alteration is incorrect. Nor is there an exclusion for construction activity legally permitted by the building inspector. Applicants must obtain all necessary permits, and nothing in the regulations suggests that a building permit may substitute for a wetlands permit. *See* Order of Conditions, General Condition 3.

The Petitioner does not contest that the area where the Property is located has been designated as a barrier beach, and is so defined under the regulations, but instead stated that the property does not directly border the beach or the ocean. The barrier beach resource area includes all land between the coastal beach and another body of fresh, brackish or saline water that separates it from the mainland. 310 CMR 10.29(2). This

resource area does not respect property boundaries, and is not necessarily limited to properties that are directly adjacent to the beach and ocean. For example, the entirety of Plum Island is a barrier beach.

The Petitioner also claimed that the Wetlands Protection Act only governs undeveloped resource areas. Nothing in the Act suggest that wetlands that have been altered by human activity in the past are no longer resource areas, and the regulations indicate to the contrary. The regulations governing work on dunes contain a provision for circumstances where a building already exists on a dune. *See* 310 CMR 10.28(4). The Petitioner mistakenly relied on a letter written by former Department Commissioner Daniel Greenbaum in 1993, in support of the proposition that construction of buildings on barrier beaches does not require the filing of a Notice of Intent. The letter clearly stated that the listed activities, including the construction of buildings, *should* be included in a Notice of Intent. *See* Re: Wetlands Act Review for Activities on Barrier Beaches, signed by Daniel S. Greenbaum, June 30, 1993. The guidance clearly stated that all buildings on barrier beaches must be constructed on pilings to allow the movement of sand and sediments due to wave and wind action. *Recommended Conditions for Activities on Barrier Beaches*, Department of Environmental Protection, June 1993 at p. 6.

The Department has long regulated work on barrier beaches, including developed sites, only a few of which have been appealed to administrative hearings. In Matter of Kelly, the project was on a barrier beach and dune, but behind a primary dune and involved replacement of an existing foundation with a pile-supported residence; although the applicant had proposed the area beneath the house be used for parking, based upon a finding that sand would naturally be deposited there and need to be removed, the final

order contained a condition that prohibited parking under the house. Matter of Robert D. and Rose Marie Kelly, Docket No. 82-42, Final Decision (October 7, 1983). Matter of Dunn involved the denial of a superseding order and ultimately a variance to an applicant proposing a new pile-supported house and septic system on a primary dune and barrier beach adjacent to an existing house. Matter of Dunn, Docket No. 89-072, Final Decision (July 17, 1996). Matter of Stanley involved work on a coastal dune and barrier beach; the project was to replace three buildings, one on a foundation, with a single smaller structure on piles without a septic system. Matter of Deborah M. Stanley and Donald D. Stanley, Docket No. 99-033, Final Decision (March 27, 2001). More recently, the Department prohibited the construction of a house on pilings on Plum Island, a barrier island, at a site that had been developed in the past. Matter of Stephen D. Peabody, Docket No. 2002-053, Final Decision (January 25, 2006). The expectation underlying the UAO that work on barrier beaches is subject to the Wetlands Protection Act is consistent with past practice.

Photographs of Petitioner's House and the Expectation of Privacy

The Petitioner in the appeal raised the issue of the propriety of the Department's photographs of the house. The Department's staff witness Ronald Stelline stated in an affidavit that he conducted a site inspection from Atlantic Avenue, a public way, and a nearby public beach. Attached to the Department's opposition and cross-motion for summary decision were photographs of the Petitioner's house. The Petitioner argued that the use of these photographs as evidence violates his rights to privacy afforded by the Massachusetts and U.S. Constitutions. I conclude that both the Department's taking and submittal of these photographs were proper.

The Wetlands Protection Act specifically states that "the commissioner of environmental protection and his agents and employees may enter upon privately owned land for the purpose of performing their duties under this section." M.G.L. c. 131, § 40, ¶ 17. However, protections against unreasonable searches and seizures apply to administrative searches under the authority of the Wetlands Protection Act. *See* Commonwealth v. John Grant & Sons Co., 403 Mass. 151, 160-161 (1988). These protections arise when a "search" occurs, in the constitutional sense, under the Fourth and Fourteenth amendments to the U.S. Constitution and Article 14 of the Massachusetts Declaration of Rights, which means that the Petitioner must have a reasonable expectation of privacy. *See* Commonwealth v. Montanez, 410 Mass. 290, 301 (1991).

The Department staff who conducted the inspection viewed the property from public areas and took photographs from public areas. The photographs show only the exterior of the house that could be seen by anyone looking in the direction of the house from those public areas. Therefore, the inspection and photographs are not a "search" of the Petitioner's property. Viewing the property of another from a public place is not a violation of the property owner's Constitutional rights. Taking photographs of the property of another from a public place is also not a violation of the Constitutional rights of the property owner. The photographs show only the exterior of the house. The Department must be prepared to make an affirmative case in support of an enforcement action, and the photographs are appropriately limited to document conditions at the site.

CONCLUSION

For the reasons stated, I conclude that the Petitioner's Motion for Summary Decision should be denied and the Department's Cross-Motion should be granted. After

reviewing the additional claims raised in the Petitioner's appeal but not specifically identified for adjudication, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's UAO issued to the Petitioner.

_____

Pamela D. Harvey
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the 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)(e), 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 her sole discretion, directs otherwise.