

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE MASSACHUSETTS TRIAL COURT

SUFFOLK, ss.

C.A. No. 2184CV 2606 F

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|------------------------------|---|
| _____ |) |
| RICHARD COREY, Trustee of |) |
| TWENTY-ONE COMMERCIAL WHARF |) |
| NOMINEE TRUST, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| MASSACHUSETTS DEPARTMENT |) |
| OF ENVIRONMENTAL PROTECTION, |) |
| NANTUCKET ISLANDS LAND BANK, |) |
| and NANTUCKET CONSERVATION |) |
| COMMISSION, |) |
| |) |
| Defendants. |) |
| _____ |) |

COMPLAINT

SUFFOLK SUPERIOR COURT
 CIVIL CLERK'S OFFICE
 2022 NOV 15 P 2:54
 MICHAEL JOSEPH DONOVAN
 CLERK / MAGISTRATE

Plaintiff Richard Corey, as Trustee of Twenty-One Commercial Wharf Nominee Trust ("Corey"), appeals under G.L. c. 30A from a Final Decision of Martin Suuberg, as Commissioner of the Massachusetts Department of Environmental Protection, issued on October 17, 2022 (the "Final Decision"). The Final Decision authorizes the conversion of a small, essentially abandoned solid-fill wharf into a public marina featuring a 140-foot long, commercial-scale wooden pier that will provide dockage for numerous large motor boats and will be open 24 hours a day, all within 60 feet of Corey's seasonal residence. As the undisputed facts establish, the Final Decision prejudices Corey's substantial rights and is in excess of statutory authority, is based in part on an error of law, is arbitrary and capricious, and is

unwarranted given the facts found on the record. Corey also seeks, under G.L. c. 231A, related declaratory relief.

Background

“Petrel’s Landing” is a small, historic solid-fill wharf adjacent to Nantucket Harbor. Nantucket Islands Land Bank (the “Land Bank”), as owner of Petrel’s Landing, seeks to entirely reconstruct and increase the height of that wharf to create a new facility for the public to dock boats. Corey owns, and has owned for many years, property that is approximately 60 feet across the water from the wharf. The wharf’s construction was never licensed by the Commonwealth or approved under the Wetlands Protection Act, even though it was constructed in its present form after the Act was amended in 1972 to protect coastal wetlands. What the Land Bank is proposing is to convert this open space parcel on Nantucket Harbor into a commercial wharf with a granite bulkhead, vehicular access and parking, and a 140’ long commercial-scale pier able to accommodate large motor boats. This is not to provide public access to the harbor (the Land Bank’s deed requires the area to be open to the public), but to increase access for members of the public who are private boat owners—an already well-served population on Nantucket. The Final Decision amounts to a bending of the regulations to accommodate the proposed use by the Land Bank. No private landowner would receive this type of deferential treatment, nor would MassDEP willfully look the other way in adopting the Land Bank’s baseless position that Petrel’s Landing is covered by previous approvals concerning adjacent land in order to obviate the need for a comprehensive review of the Land Bank’s current proposal.

Jurisdiction and Venue

1. Venue is proper and the Court has jurisdiction to hear this appeal of a final decision of a Massachusetts agency in an adjudicatory proceeding pursuant to G.L. c. 30A, § 14 and because this Court has the power to issue declaratory judgments under G.L. c. 231A, § 1.

Parties

2. Richard Corey, as Trustee of Twenty-One Commercial Wharf Nominee Trust (“Corey”), was the petitioner to the Massachusetts Department of Environmental Protection Office of Appeals and Dispute Resolution (“MassDEP OADR”) of a wetlands permit issued by The Massachusetts Department of Environmental Protection.

3. The Massachusetts Department of Environmental Protection (“MassDEP”) is the agency of the Commonwealth of Massachusetts that issued the subject wetlands permit and upheld the same on appeal in issuing the Final Decision.

4. The Nantucket Islands Land Bank is the owner of the parcel of property in question and the applicant who obtained the wetlands permit.

5. The Nantucket Conservation Commission is the local authority that granted a wetlands permit to the Nantucket Islands Land Bank, which was appealed to MassDEP by Corey.

Facts

Procedural Background

6. Corey appealed to MassDEP from an order of conditions issued by the Nantucket Conservation Commission under the Massachusetts Wetlands Protection Act (G.L. 131, § 40)

(the “Wetlands Act”) and regulations promulgated pursuant to that law (310 CMR 10.00 et seq.) (the “Wetlands Regulations”).

7. The order of conditions (DEP File No. SE 48-2885) (the “OOC”) allows the construction on land owned by the Land Bank of a commercial wharf without an act of the Massachusetts Legislature or a license from MassDEP and without compliance with the Wetlands Regulations.

8. The OOC was upheld by MassDEP (OOC as upheld attached as Exhibit A).

9. Corey appealed the OOC to MassDEP OADR.

10. MassDEP again upheld the issuance of the OOC in the Final Decision (Final Decision and Recommended Final Decision attached as Exhibit B).

11. Corey as petitioner is aggrieved by the Final Decision.

Property Description

12. According to the narrative endorsed in the Final Decision, the OOC “involves reconstruction and rehabilitation of a solid fill wharf for the purpose of improving public access to Nantucket Harbor.” Exhibit B, p. 5. The solid fill wharf is known as Petrel’s Landing.

13. The OOC allows conversion of an undeveloped open space parcel, intermittently used over the last few decades by the community for events and small watercraft rentals, into a commercial wharf with a granite bulkhead, vehicular access and parking, and a 140’ long commercial-scale pier able to accommodate large motor boats.

14. Commercial Wharf, upon which Corey owns a house, is adjacent to Petrel’s Landing and has a pile-supported dock, duly licensed by MassDEP (License Plan Number 9449).

15. The Wetlands Act was amended in 1972 to protect coastal banks and require approval of any alteration of a coastal bank (Chapter 784 of the Acts of 1972).

16. Petrel's Landing did not exist in its present form in 1973; rather, the solid fill wharf was constructed in 1973-1974.¹ See aerial photographs attached as Exhibit C.

17. A solid fill wharf had existed prior to 1973 but it eroded away. See Exhibit C.²

18. Petrel's Landing was constructed in its present form after the 1972 amendments to the Wetlands Act that extended protection to coastal banks and other coastal wetlands. See Exhibit C.

19. Petrel's Landing was constructed in its present form without an order of conditions or other approval from the Nantucket Conservation Commission or MassDEP.

Improper Findings

20. Pursuant to G.L. c. 91 et seq ("Chapter 91"), MassDEP oversees the licensing of wharves, piers, and other structures located on tidelands that provide access to waterways.

21. Only the Massachusetts Legislature or an agency to which it has properly delegated authority can authorize the installation of a solid fill wharf.

22. The Massachusetts Legislature has designated MassDEP as the agency charged with responsibility for protecting public trust rights in tidelands through the Chapter 91 licensing program.

23. MassDEP is the sole arm of the state with authority to license the use of tidelands under Chapter 91, and in that capacity has an interest in increasing public access to waterways.

24. The solid fill wharf known as Petrel's Landing has never been licensed by MassDEP under Chapter 91.

25. The Final Decision endorses a finding that Petrel's Landing was covered by a Chapter 91 license issued for adjacent land based on certain Land Court documents.

¹ Newspaper articles are in the record that discuss improvements to Petrel's Landing in 1973 and 1974 with cranes and heavy construction equipment.

² Newspaper articles in the record mention how the land was previously washed away before the wharf was constructed in its present shape and form, and the aerial photographs show the area as a small line of stones largely underwater.

26. The Land Court has no authority to determine whether an improvement is licensed under Chapter 91.

27. The narrative endorsed in the Final Decision notes that there were plans to reconstruct Petrel's Landing in the 1970's but fails to mention that the reconstruction in fact occurred and occurred without approval under the Wetlands Act.

28. The OOC allows yet another reconstruction and an expansion of an unlicensed (under Chapter 91) and previously unapproved (under the Wetlands Regulations) solid fill wharf.

Erosion and Sedimentation

29. Petrel's Landing has continued to erode away. See Exhibit C.

30. There are coastal beaches immediately adjacent to Petrel's Landing. See Exhibit C.

31. The findings endorsed in the Final Decision are that the coastal bank did not supply sediment to coastal beaches, even though both sides' experts agreed that at least some sediment has flowed from the coastal bank, and this is true even for the most limited definition of coastal bank endorsed in the Final Decision.

32. The findings endorsed in the Final Decision do not comport with the Wetland Regulations.

33. The Wetlands regulations at 310 CMR 10.30 provide an all-or-nothing proposition with respect to sediment, where any coastal bank that "supplies sediment" is governed by 310 CMR 10.30 (3)-(5), and any vertical barrier is governed by 310 CMR 10.30 (6)-(8), with an exception for a vertical barrier that "supplies sediment" found in 310 CMR 10.30 (7).

34. When a coastal bank "supplies sediment," no bulkheads, revetments, seawalls, groins, or other coastal engineering structures may be permitted. See 310 CMR 10.30 (3) and (7).

35. A review of the aerial photographs demonstrates that limiting sediment supply from Petrel's Landing has a significant and negative impact over time on the adjacent coastal beach.

36. Contrary to the findings endorsed in the Final Decision, the improvements allowed by the OOC are designed to further limit sediment supply from the coastal bank and will have a negative impact on the adjacent coastal beach.

New Coastal Engineering Structure

37. The Land Bank's proposed improvements are a new coastal engineering structure, which is not allowed where the coastal bank supplies sediment.

38. The findings endorsed in the Final Decision are clear that the goal of the improvements is to increase the height of the wharf in order to prevent storm damage to the wharf from waves.

39. These findings endorsed in the Final Decision necessarily lead to the conclusion that the proposal is a new "Coastal Engineering Structure" under the Wetlands Regulations.

40. 310 CMR 10.23 defines "Coastal Engineering Structure" among other things as "any breakwater, bulkhead, groin, jetty, revetment, seawall, weir, riprap or any other structure that is designed to alter wave, tidal or sediment transport processes in order to protect inland or upland structures from the effects of such processes."

41. Petrel's Landing was extensively repaired and rebuilt in 1973-1974 after almost completely eroding away. See Exhibit C.

42. The findings endorsed in the Final Decision that a Coastal Engineering Structure is only "new" if it is built on a "virgin" or "pristine" coastline is found nowhere in the Wetlands

Act or Wetlands Regulations. These findings are premised on the position taken by MassDEP that any manmade wharf is not a coastal bank.

43. The position that any manmade wharf is not a coastal bank is inconsistent with the OOC upheld by MassDEP, which found that Petrel's Landing is a coastal bank (an inconsistency noted in the findings endorsed in the Final Decision), and inconsistent with the findings endorsed in the Final Decision that there is a coastal bank on Petrel's Landing.

44. The language of 310 CMR 10.30(7), which states that a "vertical buffer" that does not "supply sediment" can have a coastal engineering structure, contradicts the position that any manmade wharf is not a coastal bank.

45. If manmade structures were excluded from the definition of coastal bank in the Wetlands Regulations, almost none of the Massachusetts coastline would qualify as a "vertical buffer" that does not "supply sediment", and it would be unreasonable to have regulations dedicated to this de minimis area of the coastal bank.

46. The position that the Land Bank's proposal will not result in a new coastal engineering structure is contradicted by the fact that Petrel's landing is not licensed under Chapter 91 and that Petrel's Landing was completely rebuilt after the Wetlands Act applied to it but was never approved under that statute; therefore that the wharf structure that is Petrel's Landing was never approved by MassDEP prior to the issuance of the OOC.

Count I
(G.L. c. 30A, § 14)

47. Corey reasserts paragraphs 1 through 44 as if set forth in their entirety here.

48. The position adopted in the Final Decision that Petrel's Landing is the subject of a prior waterways license is in excess of MassDEP's statutory authority and the requirements of Chapter 91.

49. The determination that some sediment is supplied by the coastal bank and yet a new coastal engineering structure is allowed is directly contradicted by the plain language of the Wetlands Regulations, and therefore arbitrary, capricious, and based on an error of law.

50. The determination that some sediment is supplied by the coastal bank and yet the adjacent coastal beach is not benefitted is unwarranted given the facts on the record.

51. Wherefore Corey is entitled to a judgment of this Court that the Final Decision must be set aside or modified by the Court because it has prejudiced Corey's substantial rights and is in excess of statutory authority, based in part on an error of law, arbitrary and capricious, and unwarranted given the facts found on the record.

Count II
(G.L. c. 231A, § 1)

Declaratory Judgment Regarding MassDEP Statutory Duties

52. Corey reasserts paragraphs 1 through 49 as if set forth in their entirety here.

53. An actual controversy exists between Corey and MassDEP regarding whether Petrel's Landing is covered by a Chapter 91 license.

54. MassDEP is the sole authority with the power to license solid fill wharves and other structures in harbors as granted by the Massachusetts Legislature.

55. MassDEP cannot avoid its duty to protect the interests of the Commonwealth of Massachusetts under Chapter 91.

56. By adopting the findings in the Final Decision that Petrel's Landing was properly licensed, not on its own authority but by reference to certain recorded documents, MassDEP has acted in excess of its statutory duties under Chapter 91 and the regulations adopted thereunder.

57. Wherefore, Corey is entitled to a declaratory judgment that MassDEP's determination that Petrel's Landing is subject to a previously-issued waterways license is erroneous.

Prayer for Relief

WHEREFORE Corey prays that this honorable court will:

- (a) find that the Final Decision has prejudiced Corey's substantial rights and is in excess of statutory authority, is based in part on an error of law, is arbitrary and capricious, and is unwarranted given the facts found on the record;
- (b) set aside or modify the Final Decision;
- (c) declare that MassDEP acted in excess of its statutory authority in determining that Petrel's landing is subject to a waterways license;
- (d) grant Corey his attorney's fees and costs in prosecuting this appeal; and
- (e) grant such further relief as the Court deems appropriate in the interests of justice.

[Signature Page Follows]

Respectfully Submitted,

RICHARD COREY, as TRUSTEE of
TWENTY-ONE COMMERCIAL WHARF
NOMINEE TRUST

By his attorneys,

/s/ Joel Quick

Donald R. Pinto, Jr., BBO No. 548421

dpinto@pierceatwood.com

Daniel J. Bailey, BBO No. 552612

dbailey@pierceatwood.com

Joel Quick, BBO No. 694265

jquick@pierceatwood.com

Pierce Atwood LLP

100 Summer Street

Boston, Massachusetts 02110

(617) 488-8100

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