NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2184CV00991

CITY OF QUINCY & another[1]
vs.

MASSACHUSETTS DEPARTMENT
OF ENVIRONMENTAL PROTECTION & another[2]

MEMORANDUM OF DECISION AND ORDER
ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The City of Quincy (Quincy) and the Quincy Conservation Commission (QCC together Plaintiffs) seek judicial review pursuant to G. L. c. 30A, § 14 of a Final Decision issued by the Massachusetts Department of Environmental Protection (MassDEP) approving two Superseding Orders of Conditions (SOCs) related to the City of Boston Public Works Department's (Boston) proposed plan to reconstruct the Long Island Bridge between Moon Island in Quincy Bay and Long Island in Boston, Massachusetts (Project). The SOCs were issued pursuant to the Wetlands Protection Act, G. L. c. 131, § 40 (Act), after MassDEP concluded that the project as proposed, and the conditions imposed, would protect the purposes of the Act.

Plaintiffs have filed a Motion for Judgment on the Pleadings. MassDEP and Boston oppose Plaintiffs' Motion and filed Cross-Motions for Judgment on the Pleadings. After hearing and review, and for the reasons stated below, Plaintiffs' Motion for Judgment on the Pleadings is **DENIED**; MassDEP's Motion for Judgment on

[1] Quincy Conservation Commission
[2] City of Boston Public Works Department

the Pleadings is **ALLOWED**; and Boston's Motion for Judgment on the Pleadings is **ALLOWED**.

BACKGROUND

I. The Wetlands Protection Act

The Wetlands Protection Act (Act), G. L. c. 131, § 40, "was created to protect wetlands from destructive intrusion." Healer v. Department of Env't Prot., 73 Mass. App. Ct. 714, 716 (2009), citing Southern New England Conference Assn. of Seventh–Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 706 (1986). MassDEP promulgated regulations to implement the Act. See 310 Code Mass. Regs., §§ 10.00, et seq.(Wetlands Regulations). The Act and the Wetlands Regulations establish "a comprehensive scheme of administrative action and remedies with local authorities, i.e., conservation commissions, making the initial review" of proposed construction and other projects. Id. at 717. However, MassDEP retains "the right to the final say on project applications" under the Act via its review process and may "impose such conditions as will contribute to the protection of the interests described in [the Act]." Id. at 717. Any order issued by MassDEP supersedes orders issued by local conservation commissions and all work must be done in accordance with the MassDEP order. Id.

The Wetlands Regulations define those wetlands protected by the Act, including, as relevant here, the ocean, banks, beaches, dunes and marshes, land under those areas, and land within a 100-foot buffer zone of those areas. 310 Code Mass. Regs. § 10.02(1)(a)(b). Any activities that will "remove, fill, dredge or alter" those areas are subject to the Act and its regulations. 310 Code Mass. Regs. § 10.02(2). Any person or entity seeking so to alter those protected areas must file a Notice of Intent with a local conservation commission for approval, 310 Code Mass. Regs., § 10.05(4), and show "that the proposed work within a resource area will contribute to the protection of the

interests identified in [the Act] by complying with the general performance standards established by [the regulations] for that area." 310 Code Mass. Regs. § 10.03(1)(a)(2).

II. Factual Background

The following is taken from the Administrative Record and pleadings filed in this case with some facts reserved for discussion below. In 1950, a bridge was built between Moon Island and Long Island (Bridge). The Bridge consisted of fifteen concrete and granite block piers, thirteen of which were planted in the bottom of Boston Harbor and two in the tidelands of the two islands. The block piers supported a steel superstructure, which itself supported a roadway for vehicle access to Long Island. The City of Boston owns both Moon Island and Long Island. Moon Island Road connects Moon Island and Quincy.

In 2014, Boston closed the Bridge for public safety reasons and, in 2015, demolished the superstructure. The substructure and original piers remained intact. In 2018, in response to the escalating opioid crisis, Boston announced plans to rebuild the Bridge to allow access to the existing public health campus on Long Island. Boston intends to restore the health facilities on Long Island to provide short and long-term care and treatment, transitional housing, and workforce training to persons suffering from substance abuse disorder.

Although there are other cases pending concerning Boston's plan to rebuild the Bridge, relevant here, are two Notices of Intent (NOI) filed with the Boston Conservation Commission (BCC) and the Quincy Conservation Commission (QCC) for approval of the Project under the Act. In April 2018, Boston filed an NOI with the BCC (Boston NOI) and, in May 2018, Boston filed an NOI with the Quincy QCC (Quincy NOI). Boston also submitted the Quincy NOI pursuant to the City of Quincy Wetlands Protection Ordinance 1987-401 (Ordinance).

According to both NOIs, "[t]he [P]roject includes placing new bridge spans on top of the existing piers, improving the existing stormwater system, and removing Pier

15." Further, "[t]he new superstructure will have generally the same vertical, lateral, and horizontal dimensions as the prior bridge superstructure, and will feature elements that will improve the Stormwater performance of the bridge compared to the conditions associated with the original superstructure." The Project contemplates improvements to the existing piers, including, as necessary, masonry repairs and repointing. Finally, the Project as noticed, will improve the access roads at the bridge abutments on both islands.

Based on the Project as proposed, the permanent impacts to resource areas protected by the Act will be confined to 537 and 126 square feet of Coastal Bank buffer zones on the Long Island and Moon Island bridge abutments, respectively, caused by roadway construction and lighting improvements. The Project as noticed will not permanently impact Land Under the Ocean because the necessary repairs to the granite piers will be performed using a "limpet" system.[3]

The BCC held public hearings. On June 6, 2018 it issued an Approval Order of Conditions (Boston OOC). The QCC held public hearings on June 6, August 1, and September 5, 2018 and, on September 25, 2018, issued a Denial Order of Conditions (Quincy Denial OOC).

Quincy's consulting engineers reviewed the Quincy NOI and expressed concerns that the condition of the piers had not properly been assessed by a structural engineer, identified needed repairs to the Moon Island access road, and asked for additional information, including (i) details about how pier defects would be addressed, (ii) copies of test results on the piers' concrete for Alkali Silica Reaction (ASR) deterioration,[4] (iii) information on pier modifications to address the seismic design code, and (iv) an alternative analysis of transportation by ferry service. Quincy's consultants discussed

[3] A limpet system uses nets and screening attached to each pier to permit repairs but the system does not attach to or impact the ocean floor.

[4] ASR causes degradation to concrete exposed to seawater.

the anticipated need for additional repairs to the piers under the water line which would require the use of cofferdams[5] – not contemplated by Boston as part of the Project – which would increase the impacts to Land Under the Ocean (LUO). Quincy's consulting engineers also advised the QCC that the Bridge deck height did not adequately address sea level rise. The QCC also considered a report on the Bridge authored by David Gress, Ph.D. (Dr. Gress) who concluded that additional concrete testing was necessary to assess ASR and the effects of freezing and thawing (FT) on the concrete piers and who opined that the concrete within the piers is not "suitable for reuse to support a new bridge for a design life of 75 years."

Boston responded informing the QCC that repair work to existing piers was not within the QCC's purview and that Boston and its engineers had concluded that pier work could be performed using limpets rather than cofferdams, which would not impact LUO. Further, if problems with the piers arose such that additional or different restoration was necessary, site work would cease, and Boston would seek a new OOC. Finally, Boston responded that it had performed substantial testing on the piers and that test results on the piers' concrete cores showed that ASR had "not contributed to the structural deterioration of the concrete."

The QCC found that the proposed work could not be conditioned to meet the performance standards set forth in the Wetlands Regulations and that the information submitted was "not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act." The QCC concluded that Boston had not satisfied its burden of production and proof under the Act or the Ordinance because it had not fully quantified impacts to LUO and wetlands or "propose[d] sufficient mitigation to meet performance standards" from the repair and

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[5] A cofferdam is a "watertight enclosure from which water is pumped to expose the bottom of a body of water and permit construction (as of a pier)." https://www.merriam-webster.com/dictionary/cofferdam (last visited Dec. 29, 2021).

replacement of some or all the concrete piers. The QCC concluded that "the concrete in the piers shows ASR, FT and chloride deterioration and degradation, such that some or all of the piers need extensive repairs and/or replacement work and the use of coffer dams." The QCC also concluded that Boston did not design the bridge deck height to comply with Boston's Climate Change Consensus Project and did not provide sufficient mitigation measures to protect resource areas including measures to protect water quality.

With respect to Boston's assurance that, if concrete deterioration of the piers was more significant below the water line than Boston and its engineers anticipated, Boston would return to the QCC with a new NOI, the QCC stated, "While a reopener for future problems may be acceptable to another Commission, this Commission rejects that approach in favor of making a decision now based on reliable information." The QCC offered to continue the hearing for additional concrete testing, Boston objected. The QCC concluded: "No work shall be performed on this Project."

Boston appealed the Quincy Denial OOC to MassDEP's Northeast Regional Office seeking a Superseding Order of Conditions. Quincy appealed the Boston OOC to MassDEP's Northeast Regional Office seeking a Denial Superseding Order of Conditions.

On June 6, 2019, MassDEP issued two Superseding Orders of Condition approving the Project in both jurisdictions – Boston and Quincy (Boston SOC and Quincy SOC and together SOCs). MassDEP found that the project as proposed together with the conditions imposed would protect the purposes of the Act. MassDEP approved the Project based on the information and plans submitted and on the condition that all work would conform with the NOIs. The SOCs required Boston to file a new NOI before making any substantial change to the plans submitted to and approved by MassDEP.

III. The Decision

Quincy filed a request for an adjudicatory hearing regarding the Boston SOC and Quincy and the QCC filed a request for an adjudicatory hearing on the Quincy SOC. MassDEP's Office of Appeals and Dispute Resolution (OADR) consolidated both requests into one proceeding.[6]

Boston moved to dismiss Quincy's and the QCC's notices of claim for adjudicatory appeal arguing that Quincy lacked standing to challenge the Boston SOC and that Quincy and the QCC had failed to state claims for relief in connection with both SOCs because they had not referenced a specific statutory or regulatory provision violated by the issuance of the SOCs. MassDEP moved to dismiss on the same grounds.

On March 17, 2021, the Presiding Officer issued a Recommended Final Decision allowing the motions to dismiss based on Quincy's lack of standing and for failure to state a claim with respect to both OOCs. MassDEP adopted the Recommended Final Decision as its Final Decision on March 31, 2021.

With respect to Quincy's standing to appeal the Boston SOC, MassDEP concluded that Quincy had failed to "demonstrate aggrievement within the scope of the Wetlands Act and Wetlands Regulation and that Quincy's allegations are vague and based upon speculation and conjecture." In particular, Quincy alleged only that it would be "injured in fact by [Boston's] understated impacts to wetland resources and wetlands interests from work to repair or replace concrete piers damaged by ASR and

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[6] The QCC also denied the NOI under the Ordinance. MassDEP lacks authority to review that denial. Boston filed a separate appeal related to the denial under the Ordinance before the Superior Court. The proceeding before the OADR concerning the Quincy SOC was stayed pending the outcome of the Superior Court case concerning the Ordinance. Boston prevailed in its appeal to the Superior Court of the Quincy Denial OOC based on the Ordinance and Boston and MassDEP filed with OADR a Motion to Proceed with the appeal related to the Quincy SOC under the Act, which the Presiding Officer allowed. The decision to vacate the stay is not before me.

Freeze-Thaw conditions adjacent to Quincy Bay." The Presiding Officer concluded that Quincy's theory regarding the alleged harm it would suffer was "flawed because the alleged 'work or repair' that will purportedly result in injury to Quincy is not derived from the construction methodology in the NOI that Boston filed for the Project." In other words, the Presiding Officer concluded that Quincy's feared outcome – the need for more substantial work to the piers underneath the waterline using cofferdams which would impact LUO and ultimately impact Quincy's beaches and marshes – was speculative and "hypothetical."

The Presiding Officer also concluded that Quincy's allegations of standing were insufficient because the land under Quincy Bay is "Commonwealth Tidelands pursuant to MGL c. 91 and thus there is no standing to Quincy for these purported LUO impacts because they are outside of Quincy's own Property." The Presiding Officer concluded as well that Quincy had not established an ownership interest in Wollaston Beach which MassDEP asserted was owned by the Massachusetts Department of Conservation and Recreation. With respect to other Quincy owned marshes or beaches, the concluding officer found that Quincy had not proffered any factual basis to conclude that any contaminated sediments from the construction as proposed would reach Quincy's beaches or marshlands. Finally, the Presiding Officer found the general and special conditions in the SOCs sufficient to address any alleged harm.[7]

The Presiding Officer next addressed whether Quincy failed to state a claim in connection with the Boston SOC and / or the Quincy SOC. Applying the Mass. R. Civ. P. 12(b) standards, and taking all well-pleaded factual allegations as true, the Presiding Officer concluded that Quincy (and the QCC) had not stated claims for relief. Recognizing that Quincy has substantial concerns about how the Project would

[7] The Presiding Officer concluded that the QCC had standing in connection with the Quincy SOC pursuant to 310 Code Mass. Regs. § 10.05(7)(b).

proceed, the Presiding Officer nonetheless concluded that those concerns do not arise to a claim under the Act or its Regulations. Rather, they "constitute generalized grievances that Quincy would prefer that the project be completed different and that the project might not transpire as Boston has forecasted." In connection with Quincy's claim that some of the proposed roadwork on Moon Island Road is in the vicinity of wetlands resource areas, the Presiding Officer concluded that Quincy had not specifically alleged adverse impacts on those areas.

Finally, the Presiding Officer rejected the contention that the SOC improperly approved the proposed stormwater treatment system for a "redevelopment project" rather than a new construction. The Presiding Officer found that the Project "is clearly a redevelopment project because it involves the maintenance and improvement of existing roadways."

DISCUSSION

I. Chapter 30A Standard of Review

In reviewing MassDEP's decision pursuant to G. L. c. 30A, § 14, I must apply a deferential standard and may reverse only if the decision is based on an error of law, unsupported by substantial evidence, or is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G. L. c. 30A, § 14(7); Energy Express, Inc. v. Department of Pub. Utils., 477 Mass. 571, 575 (2017). Quincy and the QCC bear the burden to demonstrate the invalidity of MassDEP's decision. Energy Express, Inc., 477 Mass. at 574; Forman v. Director of the Office of Medicaid, 79 Mass. App. Ct. 218, 221 (2011).

In conducting this deferential review, I must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). I may not conduct a trial de novo nor may I "displace an administrative board's choice between two fairly conflicting views," even

if I "would justifiably have made a different choice had the matter been before" me de novo. Zoning Board of Appeals of Wellesley v. Housing Appeals Commission, 385 Mass. 651, 657 (1982), quoting Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971). See also Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 739 n.3 (2000) (agency's selection between conflicting evidentiary views will not be disturbed as long as selection was reasonable); Cepulonis v. Commissioner of Corr., 15 Mass. App. Ct. 292, 295 (1983) (court "may not displace [the hearing officer's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before [it] de novo."), quoting Labor Relations Commn. v. University Hosp., Inc., 359 Mass. 516, 521 (1971).

II. Analysis

Plaintiffs make five arguments. First, that the Presiding Officer's decision that Quincy did not have standing to appeal the Boston SOC was arbitrary and capricious. Second, that the conclusion that Plaintiffs had failed to state claims for relief with respect to both SOCs was an error of law. Third, that that the decision to dismiss the proceeding without granting Quincy an opportunity to conduct discovery was an abuse of discretion. Fourth, that MassDEP's failure to consider the impact of sea level rise on the Project and proposed Bridge was legal error. Fifth, that the determination that the Project constituted a "redevelopment" under the Act was arbitrary and capricious. I address each in turn.

A. Standing

Plaintiffs argue that it is illogical, and therefore arbitrary, for MassDEP to conclude that the QCC has standing regarding the Quincy SOC but that Quincy lacks standing to appeal the Boston SOC.[8] I disagree.

[8] Plaintiffs do not challenge MassDEP's conclusion that the land under Quincy Bay is Commonwealth Tidelands or that Quincy does not own Wollaston Beach.

"A decision is arbitrary or capricious such that it constitutes an abuse of discretion where it 'lacks any rational explanation that reasonable persons might support.'" Frawley v. Police Com'r of Cambridge, 473 Mass. 716, 729 (2016), quoting Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 6 (2002). The Wetlands Regulations define a person aggrieved as "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 Code Mass. Regs § 10.04. The Wetlands Regulations require that "[s]uch person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved." M.G.L. c. 131, § 40. The requirement that to have standing a party must show an actual injury different in kind than that of the general public is settled, long-standing, well known. See G. L. c. 30A, § 14; Board of Health of Sturbridge v. Board of Health of Southbridge, 461 Mass. 548, 557 (2012) ("In order to maintain an action for review [under c. 30A, § 14], a party must be aggrieved in a 'legal sense' and show that 'substantial rights' have been 'prejudiced.' "), quoting Group Ins. Comm'n v. Labor Relations Comm'n, 381 Mass. 199, 202–203 (1980), quoting in turn Duato v. Commissioner of Pub. Welfare, 359 Mass. 635, 637–638, (1971). Further, the injury must be within the scope of the statute or regulatory scheme. See Indeck Maine Energy, LLC, v. Commissioner of Energy Resources, 454 Mass 511, 517 (2009) (plaintiff must "allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.") citing Massachusetts Ass'n of Indep. Ins. Agents & Brokers v. Commissioner of Ins., 373 Mass. 290, 293 (1977), and cases cited therein.

MassDEP determined that Quincy had not alleged an injury in fact to itself or its property from the Boston SOC. Rather, Quincy alleged only hypothetical harm that might occur were Boston forced to alter the construction methodology proposed in the NOIs. MassDEP did not err in concluding that those potential injuries were speculative.

(Rec. Final Dec. at 15) ("Quincy believes that the Project will not proceed as planned, and instead *may* result in disturbance to the ocean floor, which *may* have contaminated sediment, which *may* eventually float to the identified Quincy beaches and *may* be of sufficient quantity and composition to adversely affect Wetlands' interest for those beaches.) (emphasis in original). Based on my review of the record, the Presiding Officer did not err in concluding that Quincy's fears that Boson had insufficiently investigated the condition of the piers such that pier restoration would not proceed as proposed in the NOIs and that Quincy's wetlands would be harmed as a result was too conjectural and speculative for Quincy to qualify as a person aggrieved. That conclusion also was consistent with MassDEP's decisions on the issue of standing to which I give substantial deference. Ten Local Citizen Grp. v. New England Wind, LLC, 457 Mass. 222, 228 (2010) (courts "ordinarily accord an agency's interpretation of its own regulation[s] considerable deference."), quoting Warcewicz v. Department of Envtl. Protection, 410 Mass. 548, 550 (1991).[9]

Having determined that the Presiding Officer's conclusion that Quincy lacked standing to challenge the Boston SOC was not error, I must consider whether it was arbitrary to also conclude that the QCC had standing with respect to the Quincy SOC. It was not. The Presiding Officer relied on the Wetlands Regulation that grants a conservation commission standing in appeals when the commission's underlying order of conditions is at issue. Thus, the QCC had standing in connection with the Quincy SOC pursuant to 310 Code Mass. Regs. 10.05(7)(b). The Presiding Officer did not

[9] Nor did MassDEP err in determining that the general and special conditions in the SOCs obviated Quincy's speculative concerns. Indeed, one special condition requires that, if Boston's proposed construction methodology needed to be adjusted during construction, Boston must either file a new NOI or seek a determination from MassDEP whether a new NOI would be necessary.

"address the arguments relating to whether Quincy has standing as an aggrieved party or as an abutter." (Rec. Final Dec. at 22, n. 10).

Thus, there was no contradiction between the differing standing conclusions. Plaintiffs argue that this "split decision" was arbitrary and capricious because the Project is a single project with no distinction between the work that will be performed in Quincy and the work that will be performed in Boston – all of which will impact Quincy's jurisdictional waters. But the Presiding Officer did not conclude that any aspect of the Project as noticed and approved in the SOCs would impact Quincy or Quincy's jurisdictional waters. He concluded that Quincy's claimed injury to itself or its property was speculative, but that, under the Wetlands Regulations, the QCC had standing in connection with the Quincy SOC. That conclusion is both rational and reasonable and not, therefore, arbitrary, or capricious.

B. Failure to State Claims for Relief

An appeal of a wetlands determination requires an appeal notice that contains a "clear and concise statement of the alleged errors contained in [the SOCs] and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [Act] . . . ." 310 Code Mass. Regs. 10.05(7)(j)2.b.v. The Presiding Officer concluded that Quincy had not stated a claim cognizable under the Act or Wetlands Regulation. Instead, he concluded that Quincy's claim was premised on a "general theory of perceived harm that is derived from Quincy's preference as to how the project should be constructed, not upon the actual project specifications."

Quincy argues here that the Presiding Officer's conclusion was error because Quincy made serious allegations about "the potential impact the project will have on critical wetland resource areas" and Boston failed to provide sufficient information to "support a finding that the piers were structurally sound, or that [Boston] has a sufficient plan for rehabilitating the piers that will not cause detrimental impacts to

wetlands resource areas." Plaintiffs argues that the piers' concrete was more damaged by ASR and FT than identified in the NOIs, and, therefore, Boston's proposed limpet system will not work. According to the Plaintiffs, Boston will be forced to use cofferdams to complete the project which will result in additional temporary or permanent impacts to LUO. Put elsewise, Quincy argues that the Project minimizes wetlands impacts at the expense of sound design, which will rebound to the detriment of critical wetlands when the Project's construction methodology changes, as it must.

For their part, MassDEP and Boston argue that the Presiding Officer correctly concluded that a claim premised on a theory of construction that differs significantly from the methodology proposed in an NOI does not state a claim for relief under the Act or the Wetlands Regulations. I agree. First, the Act does not prohibit all "development in wetlands areas; it creates a procedure requiring the department to condition activities in certain areas so as to protect the act's statutory mandate." Ten Local Citizen Grp., 457 Mass. at 224. Second, the Act regulates "proposed activit[ies]" and requires the filing of written notice of a party's "intention . . . including such plans as may be necessary to describe such proposed activity and its effect on the environment[.]" G. L. c. 131, § 40 (first para). The Act does not regulate all possible activities in a wetlands resource area. The Wetlands Regulations likewise require the filing of a notice of intent for "[a]ny activity *proposed or undertaken* within an area specified in 310 CMR 10.02(1), which will remove, fill, dredge or alter that area, is subject to Regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent[.]" 310 Code Mass. Regs. § and 10.02(2)(a) (emphasis added). Thus, MassDEP has no authority to regulate or review projects or activities that are neither intended nor proposed to be undertaken and that are not contained in an NOI. Fourth, MassDEP had before it information regarding Boston's investigation into the condition of the piers and was entitled to rely on that information in issuing the SOCs. It is not for me to

decide that MassDEP should have relied instead on the information regarding the condition of the piers that Plaintiffs proffered.

Quincy fears that the Project will encounter construction obstacles. Plaintiffs have not, however, identified how the Project as proposed by Boston and as approved in the SOCs would violate the Act or Wetlands Regulations. Cofferdams are not contemplated in the NOIs as part of the Project. And MassDEP did not approve a project involving cofferdams. There was no legal error in the Presiding Officer's conclusion that Plaintiffs had not stated claims for relief in connection with the appeal of either SOC. I also discern no error in the Presiding Officer's conclusion that Quincy's concerns about the need to improve Moon Island Road do not state a claim for relief. The Project does not intend or envisage repairs to Moon Island Road other than the 126 square feet of Coastal Bank buffer zones on the Moon Island bridge abutment.

C. Dismissal Without Discovery

Plaintiffs argue next that the Final Decision was an abuse of discretion because the Presiding Officer did not permit Quincy to conduct discovery[10] or require Boston to undertake additional investigation of the condition of the concrete piers. Plaintiffs argue that the refusal to allow that discovery was particularly egregious because Boston had refused to conduct additional investigation requested by the QCC.

I agree with Boston and MassDEP that there was no abuse of discretion. First, as discussed above, regulatory review under the Act is limited to proposed projects and not possible activity. Second, Plaintiffs sought discovery to establish (or eliminate) their fears regarding the structural soundness or lack thereof of the concrete in the piers. In other words, Plaintiffs wanted assurances regarding the soundness of the Project as proposed. The question before MassDEP, however, was whether Boston's proposed

[10] Quincy sought permission to conduct additional coring of the piers below the mean low water line.

Project could be conditioned to comply with the Act and the Wetlands Regulation. Not whether Boston had proposed the safest or longest-lasting Bridge design. Also, as discussed, MassDEP had before it information regarding the condition of the piers and substructure and was entitled to credit the conclusions that Boston's engineers had reached and not the concerns raised by Quincy's engineers and consultants. Finally, "agencies have broad discretion over procedural matters before them." Zachs v. Department of Pub. Util., 406 Mass. 217, 227 (1989). "A reviewing court should 'defer to an agency's procedural rulings[.]'" Commercial Wharf E. Condo. Ass'n v. Department of Env't Prot., 93 Mass. App. Ct. 425, 433–34 (2018), quoting Brockton Power Co. v. Energy Facilities Siting Bd., 469 Mass. 215, 219 (2014).

It was not an abuse of discretion for the Presiding Officer to conclude that no discovery was necessary or appropriate to decide the motions to dismiss brought by Boston and MassDEP. Further, I agree that, once the Presiding Officer found in favor of Boston and MassDEP on their motions to dismiss, the requested discovery became moot.

D. Failure to Consider Impact of Sea Level Rise

Plaintiffs argue next that the Presiding Officer erred in failing to consider sea level rise. The Presiding Officer concluded that the claim relating to the impact of sea level rise was not based upon "an enforceable legal foundation" and thus did not state a claim upon which relief could be granted. Plaintiffs conceded at oral argument that existing Wetlands Regulations are not consistent with purported upcoming changes to the Act or the Regulations concerning sea level rise and that MassDEP does not enforce the City of Boston's Climate Consensus Project. There was no error.[11]

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[11] I again commend counsel's candor. Although the Rules of Professional Conduct require that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer," Mass. R. Prof. C. 3.3(a)(1), lawyers are often tempted (or

E. Whether Project Constituted a Redevelopment

Finally, Plaintiffs challenge the determination that the Project constitutes a redevelopment project as arbitrary and capricious. That determination impacted MassDEP's approval of the Project's stormwater management system because the Wetlands Regulations do not require a redevelopment project to meet all of the stormwater management standards. See 310 Code Mass. Regs. § 10,05(6)(k)7. For purposes of stormwater management, and as relevant here, the Wetlands Regulations define a redevelopment project as "maintenance and improvement of existing roadways including widening less than a single lane, adding shoulders, correcting substandard intersections, improving existing drainage systems and repaving[.]" 310 Code Mass. Regs. § 10.04.

The Presiding Officer found that the Project was "clearly a redevelopment project because it involves the maintenance and improvement of existing roadways." (Rec. Final Dec. at 25). That conclusion was based on both the improvement of the roadways leading to the bridge abutments as well as his conclusion that the Project contemplates improvement to the Bridge substructure with a new superstructure.

I agree with MassDEP that the Presiding Officer's conclusion that the construction of the new Bridge roadway was a redevelopment project was not unreasonable. Quincy argues that the construction of "two full traffic lanes and associated new infrastructure is significantly more than mere maintenance and improvement" under the Regulations and that that there is no roadway to "redevelop" because there has been no bridge since 2015. I agree with MassDEP's analogy, that the removal of the superstructure and retention of the substructure on which Boston plans to build a new roadway is akin to the removal of asphalt and the retention of an

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encouraged) to creatively gloss over legal impediments to their arguments. But one of the linchpins ensuring the integrity of our system of justice is the duty of candor to the tribunal.

unpaved way for future repaving. In both cases the substructure exists, and a new superstructure, or road, must be built. It does not matter that the bridge was torn down many years ago as there is no time limit in the Wetlands Regulation for repaving work to be conducted for the project to no longer be considered a "redevelopment."

And, even if I disagreed, I may only "disturb an agency's interpretation of its own regulation if the 'interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.'" TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 17 (2000), quoting Brookline v. Commissioner of the Dep't of Envtl. Quality Eng'g, 398 Mass. 404, 414 (1986). Plaintiffs have not established that it was patently unreasonable for the Presiding Officer to conclude that the Project fit within the regulatory definition of a redevelopment project.

CONCLUSION

It is quite evident that Plaintiffs have grave concerns about the Project and would like additional investigation and assurances. In the context of this chapter 30A appeal of MassDEP Decision, however, Plaintiffs have not satisfied their burden of establishing that it was based on an error of law, was arbitrary or capricious, or constituted an abuse of discretion.

ORDER

For the foregoing reasons, Plaintiffs' Motion for Judgment on the Pleadings is **DENIED**; the Massachusetts Department of Environmental Protection's Cross-Motion for Judgment on the Pleadings is **ALLOWED**; and the City of Boston Public Works Department's Cross-Motion for Judgment on the Pleadings is **ALLOWED**.

Debra A. Squires-Lee
Justice of the Superior Court

December 30, 2021