NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2010-00802-B[1]

SANJOY MAHAJAN & others[2]

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION & another[3]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION TO PRESENT ADDITIONAL EVIDENCE (Docket #60), DEFENDANT BOSTON REDEVELOPMENT AUTHORITY'S RENEWED MOTION TO DISMISS (Docket #44), PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS (Docket #11), DEFENDANT DEPARTMENT OF ENVIRONMENTAL PROTECTION'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS (Docket #15) and DEFENDANT DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS (Docket #9)

Notice sent 12.23.13 SFS ESE ELtcpc DAC RSECL JASK RLQjr AB AAG mcm mts S.m (md)

This matter is before this court following the SJC's decision in *Mahajan* v. *Department of Envtl. Prot.*, 464 Mass. 604 (2013), in which the SJC determined that Article 97 did not apply to a restaurant project ("the Project") located at the end of Long Wharf that is owned by the Boston Redevelopment Authority ("BRA"). The plaintiffs' challenge to the Department of Environmental Protection's ("DEP") issuance of a G. L. c. 91, § 18 permit (the "Permit") under G. L. c. 30A, § 14 is the sole issue now before this court.

[1] The parties should note that this case, the 2010 case, is a "B" session case. Both parties have mistakenly filed documents with the "H" session, which has a 2013 case involving the same parties. To alleviate confusion and hassle, all parties should ensure that all documents relating to the 2010 case are filed with and designated the "B" session.

[2] Victor Brogna, Stephanie Hogue, David Kubiak, Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli, Robert Skole, and Patricia Thiboutot.

[3] Boston Redevelopment Authority

Presently before the court is the Plaintiffs' Motion for Judgment on the Pleadings under Mass. R. Civ. P. 12(c) and G. L. c. 30A, § 14(7) and Plaintiffs' Motion to Present Additional Evidence under G. L. c. 30A, § 14(6). Both DEP and BRA have opposed the plaintiffs' motions and DEP has a pending Cross-Motion for Judgment on the Pleadings under Mass. R. Civ. P. 12(c). BRA has submitted a Renewed Motion to Dismiss under Mass R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the plaintiffs do not have standing to challenge DEP's permitting decision under G. L. c. 30A, § 14. In addition to the administrative record, the plaintiffs have submitted eleven additional exhibits which they contend DEP should have considered during its adjudicatory hearing on the Chapter 91 permit. These additional exhibits were not before the SJC, and it does not appear that the SJC has been informed of their existence.[4] Because this court determines that the plaintiffs have standing and the additional evidence is highly relevant to the issues before this court, the plaintiffs' Motion to Present Additional Evidence must be **ALLOWED**. BRA's Renewed Motion to Dismiss is **DENIED**.[5] Because this case must be remanded to DEP for the taking of additional evidence, the remaining Cross-Motions for Judgment on the Pleadings are **DENIED** as moot.

[4] This case was argued before the SJC on November 5, 2012. On February 4, 2013, Melissa Cryan informed BRA that the map outlining the LWCF-boundary was incorrect. More than a month passed before the SJC issued its final decision on March 15, 2013 and yet it appears BRA never informed the SJC that the material it was then considering may be incorrect.

[5] DEP previously submitted a Motion to Dismiss that this court denied without prejudice on October 14, 2010. That motion was not renewed.

DISCUSSION

I. Plaintiffs' Standing to Challenge DEP's Decision under Chapter 30A

As a preliminary matter, this court must address the defendants' contention that the plaintiffs do not have standing to pursue this appeal of the DEP's decision under G. L. c. 30A, § 14. If the plaintiffs do not have standing, then this court need not reach the merits of any of the plaintiffs' arguments. See *Board of Health of Sturbridge* v. *Board of Health of Southbridge*, 461 Mass. 548, 561 (2012) ("*Sturbridge*") (complaint for judicial review of agency action must be dismissed if plaintiffs lack standing). While remanding the present case to the Superior Court, the SJC specifically noted that it had "serious doubts whether the plaintiffs can demonstrate standing to otherwise challenge the chapter 91 license [under chapter 30A]." *Mahajan* v. *Department of Envtl. Prot.*, 464 Mass. 604, 622 n.22 (2013). After a hearing on this matter, significant briefing from both parties, and a thorough examination of the administrative record, this court concludes that the plaintiffs have sufficiently demonstrated that they have standing under G. L. c. 30A, § 14.

Despite a lengthy discussion of the plaintiffs' standing in the Hearing Officer's Recommended Final Decision, the Final Decision, as issued by Commissioner Laurie Burt of the Executive Office of Energy and Environmental Affairs, states that the Commissioner "find[s] that I need not reach the standing issue because the Petitioners' challenge of the Permit fails on the merits."[6] The Final Decision notes that it does not adopt the findings regarding standing

[6] This court's review of the administrative record has revealed some peculiarities as to the proceedings before the agency. In her Recommended Final Decision, the Hearing Officer initially wrote that the petitioners were proceeding under G. L. c. 30A, § 10A, a statute that allows a group of ten citizens of the Commonwealth to intervene in an agency hearing where damage to the environment might be at issue. Under DEP's regulations, a ten-citizen group

contained within the Recommended Final Decision. Because the Final Decision does not address standing, this court cannot afford any deference to the discussion of standing contained with the Recommended Final Decision. See *Higgins* v. *Department of Envtl. Prot.*, 64 Mass. App. Ct. 754, 758 (2005) (affording deference to agency's determination that plaintiffs' alleged injury was no different than that suffered by general public).

Both sides argue that the recently decided *Sturbridge* case dictates the court's standing inquiry.[7] This court reads *Sturbridge* as requiring individuals who intervene in an administrative

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"shall have the right to an adjudicatory hearing" so long as the group's members comply with certain procedural requirements. See 310 Code Mass. Regs. § 9.17(1)(c). The regulation does not require a § 10A group to demonstrate that it has been aggrieved. *Id.*

Despite the regulation's language, the Recommended Final Decision went on to discuss whether the plaintiffs had demonstrated that they were a "person aggrieved." A separate subsection of DEP's regulations affords an adjudicatory hearing for "any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period." 310 Code Mass. Regs. § 9.17(1)(b). The Hearing Officer concluded that the plaintiffs did not have standing to pursue an adjudicatory hearing as a "person aggrieved" and did not address whether the plaintiffs had standing as a § 10A group. Because this court is unable to determine which standard DEP applied, it cannot afford the agency's interpretation any deference even if the Final Decision adopted the Hearing Officer's findings.

[7] In *Sturbridge*, a company that operates a landfill and waste processing facility applied to the Southbridge Board of Health to modify its site assignment in order to process additional waste. *Sturbridge*, 461 Mass. at 550. Several local "ten-citizen" groups requested intervener status before the public hearings began, and this status was granted pursuant to a DEP regulation that creates an automatic right of intervention for any ten-citizen group asserting harm to the environment. *Id.* at 554. See 310 Code Mass. Regs. § 16.20(9)(a),(c). After the hearing officer allowed the site assignment modification, the citizen groups sought review in the Superior Court under G. L. c. 30A, § 14. *Id.* at 549.

A Superior Court judge affirmed the decision of the town's board of health and the citizen's groups appealed. *Id.* The SJC held that the citizens groups' intervener status did not automatically provide the groups with standing to challenge the agency's decision before the Superior Court. *Id.* at 561. Specifically, the SJC noted that DEP's regulations, which provide intervener status to any ten-citizen group, "do not themselves entitle the plaintiffs to seek judicial review of the board's final decision as persons 'aggrieved.'" *Id.* at 559. See *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 324 (1998) ("Mere participation in the administrative process does not confer standing to raise a claim in the Superior Court"). Based on its

agency hearing as part of a citizens group to demonstrate that they are "persons aggrieved" before the Superior Court may review their Chapter 30A appeal. *Sturbridge*, 461 Mass. at 559. In other words, citizen groups that have acquired standing before an agency by operation of statute, not by individualized determination, must show that at least some of the individual members of the group would suffer substantial injury as a result of the agency's decision, before this court may entertain the group's Chapter 30A appeal. *Id.* This court's inquiry is therefore "have any of the [plaintiffs] shown or alleged 'substantial injury' to themselves that would result directly from the [DEP's] approval of the [Chapter 91 license]?"[8] *Id.*, and cases cited therein. Chapter 91 defines 'aggrieved' as: "any person who, because of a decision by [DEP] to grant a license or permit, 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 public interests protected by [Chapter 91]." 310 Code Mass. Regs. § 9.02.

Unlike in *Sturbridge*, here the administrative record contains numerous assertions as to how the plaintiffs' individual rights will be affected if the Permit is granted. Each plaintiff's

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conclusion that the ten-citizen groups' intervener status rested on a permissive regulation, not facts demonstrating they were an 'aggrieved' party, the SJC held that the plaintiffs' complaint under Chapter 30A must be dismissed for lack of standing. *Id.* at 564.

[8] At various points, the *Sturbridge* decision focuses on the fact that the plaintiffs intervened in a public hearing, not an adjudicatory proceeding, as DEP conducted here. *Id.* at 557-558. While this court has analyzed whether the plaintiffs meet the standard required for those participating in a public hearing, nothing in the *Sturbridge* decision explicitly abrogates standing by statute for those participating in adjudicatory hearings. *Id.* at 561, n.28. By operation of G. L. c. 30A, § 10A, once a citizens group has acquired intervener status under § 10A, they "shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceedings under the provisions of this chapter, *including specifically the right of appeal.*" G. L. c. 30A, § 10A (emphasis added).

home address is part of the record, allowing the hearing officer to determine the distance from their home to the Project locus. Cf. *Id.* at 560 (plaintiffs only demonstrated that they lived in vicinity of project). Several plaintiffs also filed affidavits discussing how the Project would impact them personally. Cf. *Id.* (plaintiffs filed identical statements alleging injury and did not "describ[e] the specific relationship of any plaintiff to the [project]"). Of particular note are several plaintiffs' allegations that opening a restaurant in what they describe as a quiet, peaceful location would prevent them from making use of the Project area as they do now.

If, as the plaintiffs suggest, the public has a clear and unequivocal right to use the Project Site as public open space, then BRA's plans to enclose that area and build a restaurant there would severely infringe on the plaintiffs' current right to use and enjoy a protected public open space.[9] Where the Additional Evidence put forth by the plaintiffs shows that the entire Project area may in fact be protected open space, then the plaintiffs should be granted standing to challenge the Permit as improvidently allowing a change in character to protected public open space. If the plaintiffs currently have a right to use, and in fact do use, the entirety of the Project site and the Permit allows this right to be restricted, then the plaintiffs must have standing to challenge the permit.[10]

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[9] Both *Higgins* v. *Department of Envtl. Prot.*, 64 Mass. App. Ct. 754 (2005) and *Hertz* v. *Executive Office of Energy & Envtl. Affairs*, 73 Mass. App. Ct. 770 (2009), cited by the defendants, involved plaintiffs who claimed loss of use and enjoyment of their private property. Here, the plaintiffs claim they will lose use of public property.

[10] Neither defendant has identified an alternative measure whereby members of the public could challenge the taking of public open space by an entity such as BRA. With no viable alternative, concerns of justice and fairness weigh heavily in the plaintiffs' favor.

II. Plaintiffs' Motion to Present Additional Evidence

The plaintiffs request that this court remand the Permit decision to DEP under G. L. c. 30A, § 14(6), which allows for additional evidence to be presented to an agency "[i]f application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency." G. L. c. 30A, § 14(6).

"Under G. L. c. 30A, § 14(6), a reviewing court may order that 'additional evidence be taken before the agency' only upon a showing that it is 'material' and that there was 'good reason' for the failure to present it in the original agency proceeding." *Benmosche* v. *Board of Reg. in Med.*, 412 Mass. 82, 88 (1992). The reviewing court may, in its discretion, set conditions for the taking of the additional evidence. G. L. c. 30A, § 14(6).

Before the court are eleven documents (the "Additional Evidence") that were not before DEP during the Chapter 91 adjudicatory hearing. The plaintiffs claim that the Additional Evidence demonstrates that the entirety of the Project locus is situated on land protected by a Land and Water Conservation Fund ("LWCF") conservation easement.[11] This court's task when confronted with a motion under G. L. c. 30A, § 14(6) is simply to evaluate whether the additional evidence is material to the issue before the agency and whether the plaintiff has put forth a good reason as to why it did not present the evidence during the original agency hearing. See *She Enterprises, Inc.* v. *State Bldg. Code Appeals Bd.*, 20 Mass. App. Ct. 271, 273 (1985) ("Section

[11] See Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 4601-4608; *Brooklyn Heights Ass'n* v. *Nat'l Park Serv.*, 777 F. Supp. 2d 424, 426-428 (2011) (discussing background of LWCF Act and fact that any changes to LWCF-protected land require National Park Service approval).

14(6) does not authorize a reviewing judge to consider extra-record evidence and make findings."). After reviewing the Additional Evidence and examining the administrative record, this court concludes that the plaintiffs have met their burden under the statute.

DEP, when presented with an application for a Chapter 91 permit involving a non-water dependent use, must make a determination that the proposed project "serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands." 310 Code Mass. Regs. § 9.31(2).[12] The Additional Evidence creates a significant question as to what rights the public has in the Project site. Simplifying the arguments, BRA contends that it owns the Project locus free and clear of any conservation easements. The plaintiffs contend that the Project locus is protected by a LWCF conservation restriction that makes the Project area protected public open space. Since a key component of DEP's analysis consists of determining whether the Project "provides greater benefit than detriment to the rights of the public in said lands," DEP must first determine what rights the public has in those lands. 310 Code Mass. Regs. § 9.31(2).

Significantly, DEP's ultimate determination that the Project provides a greater benefit than detriment to the public rests upon the evidence that is now challenged as incorrect or inaccurate. DEP's decision notes that "a portion of the project site is legally protected park land open to recreational use by the general public." In order to protect this park land, BRA made

[12] See also 310 Code Mass. Regs. § 9.00 ("**Purpose** - 310 CMR § 9.00 is promulgated by the Department to carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands, as defined in 310 CMR § 9.02. The general purposes served by 310 CMR § 9.00 are to ... (b) preserve and protect the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose").

changes to its plan in order to avoid encroaching on the protected area. DEP highlighted these changes as having "resolved the issue and satisfied [DEP's] concerns" and references an email from Melissa Cryan as demonstrative of the fact that no encroachment exists. The Additional Evidence contains a new email from Melissa Cryan explicitly rebutting her earlier determination that BRA's construction of a restaurant would not encroach on protected park land. Given DEP's attention to the question of whether or not the Project encroaches on public park land in its proper public purpose determination, this court finds that the proposed Additional Evidence is highly material to the issues before DEP.

While the significant delay between the 2009 DEP hearings and the plaintiffs' motion would normally be determinative, the strange manner in which the Additional Evidence came to light requires this court to excuse the delay in the interests of justice. The plaintiffs "good reason" for the delay is that the map contained in the Additional Evidence only came to light after a front-page Boston Globe story discussing this case. On October 10, 2012, just before the SJC heard oral arguments in this case, the Boston Globe published a feature story highlighting this dispute. One reader, Edward Rizzotto, had previously worked on the Long Wharf restoration project as federal grant manager for the LWCF. Mr. Rizzotto was under the impression that the entire end of the pier had become protected public open space and contacted colleagues who remained with the federal government to obtain a copy of the LWCF boundary map. Eventually this map made its way from a National Park Service employee to one of the plaintiffs. A plaintiff discovered the additional documents in state LWCF archives on November 15, 2012, after oral argument, and the plaintiffs contend that these materials had been in BRA's possession, yet never disclosed. Based upon these facts, this court finds that the plaintiffs have met their burden of

demonstrating a "good reason" why the Additional Evidence was not presented during the initial hearings.

DEP is required to ensure that non-water dependent projects provide a greater benefit than detriment to the public's rights in those lands. As the permitting authority, DEP, not this court, must first determine if the Project has met this standard. Where there is evidence showing that the public may have more rights in the Project area than were shown during the adjudicatory hearing, this court must vacate the permit as currently issued and remand the case to DEP for its consideration of the Additional Evidence. See *Massachusetts Ass'n of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256, 270-271 (2001) (Ireland, J., dissenting); *Northeast Metro. Reg'l Vocational Sch. Dist. Sch. Comm.* v. *Massachusetts Comm'n Against Discrimination*, 35 Mass. App. Ct. 813, 817 (1994).

ORDER

For the foregoing reasons, the Plaintiffs' Motion to Present Additional Evidence and must be **ALLOWED**. The Chapter 91 Permit is **VACATED** and this case is **REMANDED** to the Department of Environmental Protection for additional findings based upon the Department's consideration of the Plaintiffs' Additional Evidence. Defendant Boston Redevelopment Authority's Renewed Motion to Dismiss is **DENIED**.[13] The Plaintiffs' Motion for Judgment on the Pleadings and the Department of Environmental Protection's Cross-Motion for Judgment on the Pleadings are **DENIED** as moot.[14]

Elizabeth M. Fahey
Justice of the Superior Court

Dated: December 17, 2013.

Notice Sent 12.23.13 (md)

[13] As noted above, this court denied the Department of Environmental Protection's Motion to Dismiss on October 14, 2010, without prejudice to renewal following the hearing on the parties Motions for Judgment on the Pleadings. The Department did not renew its motion.

[14] This court denied the Boston Redevelopment Authority's Cross-Motion for Judgment on the Pleadings on June 10, 2011.