COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. FAR-_____

APPEALS COURT

MIDDLESEX, ss. SITTING, 2013

No. 2012-P-0526

COALITION TO PRESERVE THE BELMONT UPLANDS, et al.,

Plaintiffs-Appellants,

v.

KENNETH KIMMELL, as he is COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Defendants-Appellees.

ON APPEAL FROM JUDGMENT
OF THE SUPERIOR COURT

APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

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Appellants

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Corporate Disclosure Statement

Pursuant to SJC Rule 1:21, the Coalition to Preserve the Belmont Uplands and Friends of Alewife Reservation hereby state that they are separate non-profit corporations under Section 501(c)(4) of the Internal Revenue Code, each organized under the laws of the Commonwealth of Massachusetts, that do not issue stocks or shares to the public and that (1) they have no parent corporation, and (2) there is no publicly held corporation with a ten percent (10%) or greater ownership share.

TABLE OF AUTHORITIES

CASES

STATUTES

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Petition for Further Appellate Review

1. Plaintiffs hereby request, pursuant to Mass. R. A. P. 27.1, leave to obtain further appellate review of the Memorandum and Order of the Appeals Court panel (Grasso, Berry, Kafker, JJ.) pursuant to Rule 1:28 issued September 9, 2013 (the "decision") holding that Plaintiffs lack standing to appeal a decision of the Commissioner of the Department of Environmental Protection (the "DEP") issued after an adjudicatory proceeding in which Plaintiffs were allowed to intervene with full party status. In so holding, the panel relied solely on its misreading of this Court's recent decision in Board of Health of Sturbridge, et al. v. Board of Health of Southbridge, 461 Mass. 548 (2012), stating that "...Sturbridge controls the outcome here." (Add.[1] C, p. 2) The panel did not comment on the merits of the case. Further Appellate Review is required because the decision is inconsistent with the well-established principles of standing for persons to appeal decisions of administrative agencies after adjudicatory proceedings in which they have been allowed to intervene as full parties. See this Court's explanation in its Sturbridge decision of the standing principles developed in Save the Bay, Inc. v. Dept. of Public

[1] References to "Add" are to the documents in the Addendum attached hereto.

Utilities, 366 Mass. 667 (1975) and its progeny. Further Appellate Review is also required because the panel rejected G. L. c. 214, § 7A as providing a jurisdictional basis for Plaintiffs' claims against the developer for threatened actions that cause damage to the environment. Such a holding is contrary to several decisions rendered by this Court holding that § 7A does provide jurisdiction for such claims against the party threatening to cause damage to the environment.

2. Prior Proceedings

This case involves a proposal to build a 299-unit housing project on the Belmont Uplands which is an environmentally significant area in the Town of Belmont, Massachusetts consisting of wetlands and floodplains with wildlife habitats for numerous species of animals and birds. The purpose of the Wetlands Protection Act, G. L. c. 131, § 40 (the "WPA"), is to protect certain wetlands interests, including prevention of flooding and pollution and protection of wildlife habitat from destructive developments, without regard to the purpose of the development. As required by the WPA, the developer here applied to the Belmont Conservation Commission for approval to alter the wetlands on the Belmont Uplands to build the project. After six months of

public hearings in which the Plaintiffs participated and experts provided evidence of the project's adverse impacts on the wetlands interests, the Commission denied the project based on detailed findings that the project would not protect wildlife habitats or prevent flooding and pollution at abutting properties where Plaintiffs live. (Add. G)

The developer appealed to the DEP Regional Office and submitted new plans based on which the Regional Office issued a Superseding Order approving the project. The Commission appealed the Regional Office's Order and requested an adjudicatory hearing in which Plaintiffs were allowed to intervene as "persons specifically and substantially affected by the proceedings." Pre-filed testimony was submitted by the experts for Plaintiffs, the Commission and the developer. The Plaintiffs' counsel extensively cross-examined the developer's experts at the four-day hearing and introduced evidence. (Add. I) However, the hearing officer's recommended decision made clear that she did not consider the cross-examination testimony elicited from the developer's experts, but based her decision solely on the unchallenged pre-filed written testimony. Based on this limited consideration of the record, the hearing officer recommended upholding the Superseding Order. Despite the hearing officer's failure to consider the entire

record of the adjudicatory hearing, the DEP Commissioner adopted the recommended decision as the agency's final decision. (Add. J)

On June 10, 2010, Plaintiffs filed a Complaint in Middlesex Superior Court under G. L. c. 30A, § 14 and G. L. c. 214, § 7A appealing the final decision of the Commissioner and seeking to enjoin construction of the project to prevent irreparable damage to the environment. (Add. E) Plaintiffs' Complaint alleged that the adjudicatory hearing was based on unlawful procedures and that the hearing officer's conclusions were not supported by findings of fact and included errors of law, which resulted in an agency decision that violates the requirements of the WPA and DEP's own Wetlands Protection Regulations and enables the developer to cause damage to the environment, including increasing flooding and pollution through stormwater and destroying wildlife habitats. The Belmont Conservation Commission filed a separate complaint appealing the DEP Commissioner's decision. The two appeals were consolidated and Plaintiffs and the Commission filed Motions for Judgment on the Pleadings. On March 22, 2011, the lower court held a hearing on the Motions and on December 12, 2011, the judge issued a Memorandum of Decision and Order (Add.

D) ruling that Plaintiffs had standing to appeal,[2] but rejecting their claims for failure to submit a transcript of the adjudicatory hearing, the testimony at which the hearing officer did not consider. Judgment entered on December 22, 2011 providing: "That the decision of May 13, 2010 by the Department of Environmental Protection be and hereby is affirmed." (Leibensperger, J.) Plaintiffs filed a notice of appeal from the decision docketed on December 20, 2011 and from the judgment on January 11, 2012. (Add. M) The appeal came on for hearing before the panel of Grasso, Berry and Kafker on January 16, 2013. A decision pursuant to Rule 1:28 was issued September 9, 2013. Plaintiffs are not seeking a Rehearing in the Appeals Court.

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[2] The lower court judge stated: "The Coalition and AP Cambridge briefly raise the issue of standing. As the case law indicates that once a party is permitted to fully participate in the administrative proceeding as an intervener, it is aggrieved by an adverse decision and entitled to seek judicial review of the decision. Thus, the Coalition has standing. See generally Sturbridge Bd. Of Health v. O'Leary, Civil Action no. 2008-1432 (Worcester Super. Ct. Feb 4, 2009) (Kern, J.) (discussing case law); cf. Healer v. Dept. of Envtl. Prot., 73 Mass. App. Ct. 714, 719 n. 6 (2009) (rejecting contention that plaintiffs lacked standing 'for the reason, if no other, that the act provides that such claims may be brought by any ten residents of the town or city in which the land at issue is located'), citing G. L. c. 131, § 40, nineteenth par [now par. 30]." (Add. D, p. 7, fn. 10)

The Superior Court judge remanded the Commission's appeal to the DEP for further proceedings to clarify the hearing officer's unclear discussion of the issue of flooding at the Plaintiffs' properties caused by increased stormwater from the project site. After proceedings on remand, the Superior Court entered judgment affirming the decision of the DEP Commissioner. (Add. M) The BCC filed a Notice of Appeal on 12/17/12. Prior to the briefing, the BCC entered its Stipulation of Dismissal of its appeal. (Add. M)

3. Statement of Facts

The development site is on the Belmont Uplands which is an environmentally significant area consisting of a unique Silver Maple Forest, wetlands and floodplains containing wildlife habitats for many diverse species of animals and birds. The Forest has been designated by the Commonwealth as a "small river flood plain forest" which, along with the vegetation on the site, serves to absorb and retain stormwaters, thereby mitigating flooding of nearby homes where individual Plaintiffs live. The Belmont Uplands and the adjoining 122-acre Alewife Brook Reservation are ecologically interconnected and comprise the largest natural resource for wildlife habitat in the Boston

area. (Pre-filed testimony of Ellen Mass, President, Friends of Alewife Reservation, A. 347)

Plaintiff Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood is a corporation organized under G. L. c. 180 consisting of members who are residents of the Town of Belmont, including the individual Plaintiffs, who live on or near Little Pond across from the Belmont Uplands on which the project site is located. The Plaintiffs enjoy views across the Little Pond of the Silver Maple Forest and the many species of birds and animals who live there. The individual Plaintiffs are physically, financially and otherwise substantially and specially adversely affected by sewage and flooding and other impacts that will be exacerbated by the subject development, as found by the Belmont Conservation Commission and Belmont Zoning Board of Appeals, the administrative agencies with expertise in these areas and knowledgeable with local conditions. Plaintiff Friends of Alewife Reservation is a non-profit organization that provides stewardship for the 122-acre State-owned Reservation, including preservation and enhancement of the wildlife existing on the Reservation and the adjoining Belmont Uplands. (Add. E, Complaint, par. 8)

Individual Plaintiffs Liu, Natoli, Pesok and Johnson all live on Oliver Road, a narrow residential

road that runs along the west side of Little Pond across from the project site at 49, 99, 57 and 105 Oliver Road respectively. The developer does not dispute the allegations as to where Plaintiffs live. (See Answer, par. 9, Add. E) The developer's Application for a Superseding Order of Conditions states: "The Comprehensive Permit [40B Permit] was appealed by a number of citizens of Belmont located in the subdivisions on the opposite side of Little Pond."[3] (A. vol. I, 445) A diagram from that appeal of the ZBA Comprehensive Permit prepared by the developer's consultant Tetra Tech Rizzo is attached herein at Add. K shows the location and distance of Plaintiffs' houses to the project site.

In considering the developer's application for a Chapter 40B Comprehensive Permit for the project, the Belmont Board of Appeals recognized that the housing project would have negative impacts on the environmental resources of the Belmont Uplands and the residential properties around Little Pond, including sewage backups in the basements of the houses where Plaintiffs live (Add. F, p. 4, par. 9; pp. 8-9, pars. 30-31) because of the inadequate capacity in the Town's sewer system in that area to accommodate the

[3] The "citizens of Belmont" who appealed the 40B Permit were the same citizens who appealed the DEP Commissioner's decision under the WPA.

increased waste water from the project. (Add. F, p. 4, par. 9; pp. 8-9, pars. 30-31) The Board of Zoning Appeals recognized that there currently are sewage problems during storm events in the Oliver Road area where individual Plaintiffs live, stating:

> "One of the gravest issues presented by the Project is the sewage it will generate in light of the existing sewage problems in the area during storm events. This issue was the subject of a great deal of discussion at the hearings...the Town sewer system in the adjacent area has adequate capacity to accept the additional flow during ordinary conditions. However, the nearby areas suffer "sewage discharge events" – backups – in severe storms. Numerous residents, particularly from Oliver Road and Frost Road, testified to backups over the past few years from personal experience. While the Applicant is not responsible for these existing problems, any worsening of the problem due to the Project would increase the exposure of the residents in nearby areas to raw sewage in their homes and pose a severe public health problem." (Add. F, p. 4)

The Conservation Commission in its decision also identified the existing sewage backups and flooding problems "on and around the site," stating:

> "There have been six recent major flood events (10-yr or greater) affecting areas on and around the site...Little River has been observed on some occasions to flow backward into Little Pond due to flooding downstream, and it is well known that substantial sections of Acorn Park Drive have been inundated."
>
> * * *
>
> "During certain storm events, Acorn Park Drive and other low lying streets become flooded with contaminated water, while residents in areas of low elevation in the three municipalities

> experience sewage rising up through plumbing fixtures in their basements. In some locations, sanitary manholes overflow onto roadways and yards and into the storm drain system that drains to Alewife Brook." (Add. G, 3)

In an effort to mitigate these adverse impacts, the Chapter 40B decision contains a Condition (No. 27b) that the developer make a good faith effort to obtain permission from the City of Cambridge to allow the project to tie into the Cambridge sewer system. (Add. F, p. 18) Such permission has not been granted. Despite these adverse environmental impacts, the Board was constrained to issue the Chapter 40B permit because the Town had not met the statutory goal for "affordable housing" (Add. F, p. 3), even though there were major pending, unresolved health and environmental issues substantially impacting the public, including Plaintiffs. Although the project gained an exemption from the Belmont Zoning By-Laws, Chapter 40B does not exempt the project from compliance with the Massachusetts WPA.

4. Points with respect to which Further Appellate Review of the Appeals Court is sought.

A major point for which Plaintiffs seek Further Appellate Review of the Appeals Court panel's decision is that the decision is inconsistent with this Court's recent decision in Board of Health of Sturbridge v. Board of Health of Southbridge, 461 Mass. 548 (2012) with respect to the right of persons who have been

allowed to intervene in an adjudicatory proceeding to seek judicial review of the agency's decision resulting from the proceeding.

This Court explained in its decision the distinction between the adjudicatory proceeding in Save the Bay, Inc. v. Department of Public. Utilities, 366 Mass 667 (1975), and the administrative proceeding in Sturbridge which was a public hearing held by the local board of health to receive information from interested persons which was not adjudicatory in nature. The Court explained as follows:

> "...some of our decisions contain language suggesting an agency's designation of a person as an intervener with the right to participate fully as a party brings with it the right to seek judicial review of the agency decision as an 'aggrieved person,'"

citing Save the Bay. This Court went on to explain:

> "However, in Save the Bay, the court was discussing intervention in an administrative agency's 'adjudicatory proceeding'" as defined in G. L. c. 30A, § 1, that is, an agency proceeding in which the rights of 'specifically named persons' are adjudicated. Under G. L. c. 30A, an agency conducting an adjudicatory proceeding may 'allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding.' G. L. c. 30A, § 10(4). As that language reflects, such a determination of intervening party status is based on individual facts establishing the 'substantial and specific' effect that the proceeding may have on the individual or entity seeking to intervene. If an agency decides that a

> particular person is 'substantially and specifically affected' by a proceeding to a degree warranting intervention as a party, it is likely the person also will be able to establish that he or she qualifies as a person 'aggrieved' for purposes of obtaining judicial review of the agency's decision." Id. at 557-558.

In contrast to the adjudicatory hearing in the case at bar and in Save the Bay, this Court made clear in Sturbridge that the public hearing before the board of health in that case was not an adjudicatory proceeding, explaining that any citizens group could acquire party status at the board of health hearing for the purpose of offering information, stating:

> "Under the department's site assignment regulations, [...] citizen groups such as the plaintiffs acquire party status automatically, at least where, as here, there are claims of damage to the environment." Id. at 558.
>
> * * *
>
> "The grant of full party status to citizen groups under [the site assignment regulation] presumably is designed to enable the board to receive relevant information about environmental impacts of proposed siting decisions from a broad array of persons. But the regulation and its purpose do not themselves entitle the plaintiffs to seek judicial review of the board's final decision as persons 'aggrieved.'" Id. at 559.

This Court's decision in Save the Bay involved an adjudicatory hearing in which the plaintiffs were allowed to participate as full parties, similar to the situation in the case at bar. However, the Appeals Court panel misapplied this Court's reasoning in the

Sturbridge case by holding that Plaintiffs lacked standing to appeal the DEP decision, by denigrating the procedure under which they had been afforded full party status in the adjudicatory proceeding that led to the decision. Because the case at bar involved a formal adjudicatory proceeding, not merely a public hearing as in Sturbridge, this Court's recent holding in Sturbridge is inapposite and ruling otherwise as the Appeals Court panel did was an error of law.

Another important point for which Plaintiffs seek Further Appellate Review is the panel's holding that G. L. c. 214, § 7A does not provide a jurisdictional basis for reviewing an agency decision. The panel's holding is inconsistent with this Court's rulings that the Superior Court has jurisdiction over claims under G. L. c. 214, § 7A against persons whose actions are causing damage to the environment. See, City of Boston v. Massachusetts Port Authority, 364 Mass. 639, 646 (1974); Cummings v. Secretary of Environmental Affairs, 402 Mass. 611, 615 (1988); Ten Persons of the Commonwealth v. Fellsway Development, LLC, 460 Mass. 366, 378 (2011); and Enos v. Secretary of Environmental Affairs, 432 Mass. 132 (2000).

5. Statement of Why Further Appellate Review is Appropriate

In its Sturbridge decision this Court left standing the rule it established in Save the Bay as to the right of persons allowed to intervene in adjudicatory proceedings to seek judicial review of an adverse agency decision as "aggrieved persons."

In the case at bar, the Presiding Officer allowed Plaintiffs to intervene in the adjudicatory proceeding by following the procedure set forth in DEP's Regulations for Adjudicatory Proceedings. 310 CMR 1.01(7) (Add. B) sets forth the procedure for "persons substantially and specifically affected by the adjudicatory proceeding to seek intervention." Plaintiffs filed a Motion to Intervene setting forth the reasons they were entitled to intervene, stating that they "live adjacent to or near the Little Pond next to which the applicant's proposed housing project would be built" at the specific addresses set forth. (Add. I, pp. 4-5) They pointed out the threat of pollution posed by building 299 housing units on land adjacent to Little Pond due to the antiquated and inadequate capacity Belmont sewer system resulting in the discharge of raw sewage onto their properties during storms. The Motion also states that the Plaintiffs are a group of more than ten residents entitled to seek action by DEP as provided in 310 CMR

10.05(7)(a)(3) and (5). 310 CMR 1.01(11)(a) provides that "within seven days after a written motion is filed...any party may file a written objection to the motion." 310 CMR 1.01(11)(a)1 further provides that: "A failure to file a timely response may result in a grant of the relief requested by the moving party." (emphasis added) Neither the developer nor DEP filed an objection. After the time for objecting passed, the Presiding Officer allowed Plaintiffs' Motion in accordance with her Order, stating:

> "As grounds for the motion they [plaintiffs] assert that they are persons or entities substantially and specifically affected by this proceeding. Motion at paras. 1-3, 5-6. The time period for the current parties to the appeal to object to the Motion to Intervene has expired. No objection has been filed, and subject to 310 CMR 1.01(11)(a) the Motion to Intervene is granted." (Add. I, 7)

Although the Presiding Officer referred to the absence of any objection to Plaintiffs' Motion, her allowance of the Motion was not automatic as the rules do not require granting the Motion even though there was no timely objection. Instead, as indicated in her Order based on the facts stated in the Motion, the Presiding Officer exercised her discretion to allow the Motion. The Plaintiffs as interveners participated in the adjudicatory hearing by submitting pre-filed testimony of experts (Amended Scheduling Order, Add. I, 25) and through their counsel's cross-examination of the

developer and DEP's witnesses on their pre-filed testimony at the hearing.

Having been allowed to intervene by the Presiding Officer under the DEP rules, as this Court explained in Sturbridge at 557-558, supra, the agency would be deemed to have determined that Plaintiffs warranted intervention which likely was sufficient to establish "aggrievement" by an adverse decision sufficient for purposes of obtaining judicial review.

The panel's decision in the case at bar dismisses as of no consequence Plaintiffs' intervention in the adjudicatory hearing, improperly ignoring the DEP's procedures, stating:

> "...Although the coalition sought to intervene on the ground that it would be 'substantially and specifically affected by the adjudicatory proceeding,' 310 CMR 1.01(7)(d), the presiding officer never made a specific finding to that effect." (Add. C, p. 3)

While the Presiding Officer may not have made a "specific finding to that effect," in her Order she referenced the required grounds for intervention set forth in Plaintiffs' Motion and, presumably based on those grounds, exercised her discretion to grant Plaintiffs' Motion, which she was not compelled to grant even though no party objected. Therefore, it was arbitrary and capricious for the Appeals Court panel to dismiss the Presiding Officer's exercise of

discretion granting Plaintiffs' Motion to Intervene.[4] Moreover, it was improper for the panel to treat all of the Plaintiffs the same, particularly the individuals living on Little Pond directly across from the project site who are most heavily impacted by the development, and dismissing all Plaintiffs as a group without regard to their proximity to the project site.

The implication of the panel's inaccurate characterization of Plaintiffs' intervention in the adjudicatory proceeding seems to be that if the Presiding Officer simply issued an order specifically finding that Plaintiffs, as alleged, were "persons or entities substantially and specifically affected by this proceeding," without referencing the failure of any existing party to object to their Motion, Plaintiffs likely would be presumed to be "aggrieved" by an adverse decision. However, this presumption is even stronger under the circumstances here where the parties to the proceeding, including the developer, declined to exercise their right to object to the

[4] Contrast the case at bar with the Court's decision in Robinson v. Department of Public Utilities, 416 Mass. 618. In holding that the judge correctly dismissed plaintiff Robinson's appeal from a DPU decision, on the ground that plaintiff was not given full party status in the DPU adjudicatory proceeding and therefore did not qualify as an aggrieved party with the right to appeal. The Court stated: "Because Robinson was not a full party to D. P. U. 89-300, he does not qualify as an aggrieved party in interest with regard to that proceeding." Id. at 618-619.

Plaintiffs' claims that they met the requirements for intervention,[5] particularly when the Appeals Court panel's decision observed "no party contests the propriety of the Coalition's intervention in the underlying DEP proceeding." (Add. C, p. 2) Nor as the lower court judge found did the developer seriously challenge the Plaintiffs' right to appeal the agency's final decision.[6]

Although Plaintiffs believed their standing to appeal was established by DEP's allowance of their Motion to Intervene and their participation in the adjudicatory proceeding, they did present evidence of their aggrievement which the panel summarily rejected, incorrectly asserting that: "The record is barren concerning where the individual members of the Coalition reside in relation to the proposed project," asserting incorrectly that: "The coalition's Superior

[5] By not objecting to the Plaintiffs' intervention in the adjudicatory hearing or their participation in the hearing, the developer waived its right to challenge the Plaintiffs status as a proper party to the proceeding. See Mass. Auto Body Assoc., Inc. v. Comm'r. of Insurance, 409 Mass. 770 (1991), in which the Court stated: "If on the other hand, the hearing was a rulemaking proceeding, the association was a party and waived its right to challenge the conduct of the hearing because it did not raise the issue before the agency. See Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n., 401 Mass. 347, 354 (1987)."

[6] See Add. D, p. 7, fn. 10, in which the lower court judge addressed the issue of standing, observing that: "The Coalition and AP Cambridge briefly raise the issue of standing." (emphasis added)

Court complaint states only that the coalition members live 'near the project site.'" (Add. C, p. 3) Plaintiffs' Complaint at pars. 7 and 9 (Add. E) alleges that the individual Plaintiffs live on Little Pond at the specific addresses set forth in par. 9. See related facts set forth in the statement of facts above at pp. 7-10. Thus, there is evidence in the record of Plaintiffs' proximity to the project site to support their status as aggrieved persons.

Additionally, the DEP Wetlands Regulations (310 CMR 10.04) provide that "owners of land" on the same waterbody as the project site have the absolute right to appeal, presumably in recognition of the fact that waterbodies are resource areas protected by the WPA that a development potentially will impact. The term "owner of land" is defined in 310 CMR 10.04 to include owners of "land located directly across a street, way, creek, river, stream, brook or canal" from the project site. (Add. B) See Friedman v. Conservation Comm'n. of Edgartown, 62 Mass. App. Ct. 539 (2004). Small ponds would seem to be in the nature of the waterbodies enumerated in the regulations. The Plaintiffs on Oliver Rd. (Adds. E and K; pp. 7-8, supra) are entitled to appeal as of right under the Regulations.

The Belmont boards and commissions with knowledge of the local conditions in the project area reported how the project would increase flooding and pollution.

(See pp. 7-8.) In ignoring these findings and the Plaintiffs' statements in their Motion to Intervene, the panel has rejected the principle established by this Court that the term "aggrieved persons" is not to be given a narrow construction and should be determined by the context of the statute which gives rise to the challenged agency action. See, Shaker Community, Inc. v. State Racing Comm'n., 346 Mass. 213, 216 (1963). The purpose of the WPA is to prevent flooding and pollution and to protect wildlife habitats from developments that will jeopardize these interests.

Furthermore, the Superior Court judge found (Add. D, p. 7, fn. 10) Plaintiffs had another independent ground of standing under the WPA, G. L. c. 131, § 40, par. 19 (now par. 30) citing Healer v. Dept. of Envtl. Prot., 73 Mass. App. Ct. 714, 719, fn. 6 (2009):

> "...rejecting contention that plaintiffs lacked standing 'for the reason, if no other, that such claims may be brought by any ten residents of the town or city in which the land at issue is located.'" (Decision, p. 7, fn. 10) citing G. L. c. 131, § 40, par. 30 (formerly par. 19).

Paragraph 19 of the WPA, now denominated par. 30, on which the Appeals Court in Healer relied, provides:

> "Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of the attorney general, the commissioner, a city or town, an owner or occupant of property which may be affected by said removal, filling, dredging or altering, or ten residents of the commonwealth

> under the provisions of section seven A of chapter two hundred and fourteen." (emphasis added)

G. L. c. 214, § 7A provides in part that "not less than ten persons domiciled within the commonwealth" may bring an action to prevent "damage to the environment" caused by violation of an environmental statute. In their Complaint, Plaintiffs invoked par. 30 of G. L. c. 131, § 40 by bringing this action under G. L. c. 214, § 7A as well as G. L. c. 30A, §14 alleging the DEP decision violated provisions of the WPA thereby allowing the developer to cause damage to the environment.

However, the panel completely ignored Healer and its reliance on G. L. c. 131, § 40, par. 30 as providing a jurisdictional basis for the appeal by ten residents of the town in which the land at issue is located following the procedures of G. L. c. 214, § 7A. In so doing, the panel specifically rejected Plaintiffs' claim that § 7A provides jurisdiction over its claims, incorrectly asserting that G. L. c. 214, § 7A "does not...create an independent avenue for the review of an agency decision." (Add. C, 3-4) The panel's conclusion is contrary to several decisions of this Court.

In City of Boston v. Massachusetts Port Authority, 364 Mass. 639, 646 (1974), an action brought under G. L. c. 214, §10A (now § 7A) challenging the decision of the Authority approving construction of a parking facility at Logan Airport, this Court explained:

> "We hold that the present bill is sufficient to invoke the jurisdiction of the Superior Court under Section 10A. The legislative intent underlying that provision is broadly stated in the title under which it was enacted: 'An Act establishing a cause of action in behalf of certain persons and political subdivisions for the purpose of protecting the natural resources and environment of the commonwealth.' St. 1971, c. 732. In submitting proposed legislation permitting environmental suits to be brought by citizens, the Governor indicated that his intention was to permit 'the citizen to join in the enforcement of the battery of anti-pollution laws we have passed in recent years.' 1971 House Doc. No. 5023."

See also, Ten Persons of the Commonwealth v. Fellsway Development, LLC, 460 Mass. 366, 378 (2011), in which plaintiffs brought an action under G. L. c. 214, § 7A challenging a decision of the Environmental Secretary regarding the inadequacy of the environmental review of a proposed project in the Middlesex Fells Reservation. The Court stated that:

> "General Laws c. 214, §7A confers subject matter jurisdiction on the Superior Court to hear claims for declaratory and injunctive relief where (1) 'ten persons domiciled within the commonwealth are joined as plaintiffs...'"

holding that the party taking action causing damage to the environment was subject to the § 7A suit, but the Secretary was not a proper party. To the same effect is Enos v. Secretary of Environmental Affairs, 432 Mass. 132 (2000), in which this Court said that Plaintiffs had standing to bring suit under c. 214, § 7A against the town to prevent construction of a facility that

allegedly did not comply with MEPA, although the Secretary would not be a proper party.

In addition to incorrectly finding that § 7A does not provide a basis for challenging agency decisions, through an action against the person causing damage to the environment, the panel incorrectly stated that the "judge's memorandum of decision treats the matter exclusively as a G. L. c. 30A matter, not a ten citizens group case under G. L. c. 214, § 7A." (Add. C, 3) The judge's Memorandum (Add. D, 7, fn. 10) plainly shows that she did not treat the matter "exclusively" as a G. L. c. 30A, § 14 case by specifically finding that Plaintiffs had standing to appeal under G. L. c. 214, § 7A, relying on the Healer case in which the Court found G. L. c. 131, § 40, par. 30 incorporates the procedures of § 7A. Further, the developer did not challenge Plaintiffs' claim of § 7A jurisdiction. Instead, in its Fifth Affirmative Defense (Add. E), the developer claimed that Plaintiffs' § 7A claim is barred for failure to give notice. Plaintiffs responded with a Motion to Amend their Complaint (Add. L) to allege that the Notice requirement had been met which the Superior Court allowed (Kern, J.). Thus, Plaintiffs have standing to raise their damage to the environment issues by their G. L. c. 214, § 7A claims against the developer as the party threatening damage to the environment in violation of the WPA.

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to grant Further Appellate Review for the purpose of clarifying the issue of standing of persons to appeal administrative decisions issued after an adjudicatory proceeding in which such persons have been allowed to intervene and participate as full parties. The conclusion of the panel in this case that Plaintiffs' status as interveners in the adjudicatory proceeding does not support their claim of aggrievement by the adverse DEP decision is contrary to the facts and past decisions of this Court and, if allowed to stand, will cause confusion in future adjudicatory proceedings before administrative agencies as to what measures persons must take in order to be assured that they have the right to seek judicial review of final adverse decisions. It is in the public interest and the interest of justice to clarify this issue. Further Appellate Review also is in the public interest to clarify the appeal rights afforded by the WPA, G. L. c. 131, § 40, par. 30 (formerly par. 19) incorporating the procedures of G. L. c. 214, § 7A. Plaintiffs submit that such reasons are substantial and affect the public interest and the interests of justice, specifically the interests of concerned citizens and their collective organizations

to protect the public environment, including its natural resources.

Respectfully Submitted
Plaintiffs-Appellants,
by their attorney

/s/ Thomas B. Bracken

Dated: September 27, 2013 Thomas B. Bracken

to protect the public environment, including its natural resources.

Respectfully Submitted
Plaintiffs-Appellants,
by their attorney

Dated: September 27, 2013 Thomas B. Bracken

Certification Pursuant to Rule 16(k) of Rules of Appellate Procedure

Comes now Thomas B. Bracken, counsel for Plaintiffs-Appellants, and certifies that the foregoing Application complies with:

> "the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers)" as well as Mass. R. A. P. 27.1.

/s/ Thomas B. Bracken

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Counsel for Plaintiffs-Appellants

Dated: September 27, 2013

Certification Pursuant to Rule 16(k) of Rules of Appellate Procedure

Comes now Thomas B. Bracken, counsel for Plaintiffs-Appellants, and certifies that the foregoing Application complies with:

> "the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers)" as well as Mass. R. A. P. 27.1.

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ADDENDUM

Map produced by AP Cambridge Partners' consultant depicting location and distance of Plaintiffs' properties (denominated Fig. 1) from project site dated 5/21/07.	K
Coalition's Motion to Amend Complaint (A. vol. I, 72) dated 8/31/10	L
Docket entries (MICV2010-2205; A. C. 2012-P-0526; A. C. 2012-J-0053; A. C. 2012-P-573)	M