Standing to Appeal Administrative Decisions in Massachusetts: A Game of Bait and Switch?

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I. Introduction

Courts, commenters, and advocates express diverging views about the appropriate degree of stringency courts should apply when assessing the standing of plaintiffs asserting environmental interests. Regardless of where one stands on this issue, however, it should be uncontroversial that the rules governing access to the courts should be clear and understandable for all parties. Unfortunately, for people intervening in administrative proceedings in Massachusetts who then want to challenge those decisions in court, this is far from the case.

Instead, as a result of the interaction among the statutes and regulations governing intervention in administrative hearings, those governing judicial review in the courts, and judicial decisions interpreting both types of provisions, intervenors are faced with what amounts to a judicial game of bait and switch. In the administrative proceeding, they may be granted intervention under a lenient standard only to find that when they seek judicial review, the court holds them to a higher standard to establish standing and—what is worse—does not allow them to submit evidence to satisfy this higher standard. By analyzing a pair of state appellate court decisions, this article explains this problematic state of affairs. It then concludes with recommendations, ranging from practice tips to help litigants find their way through this maze to regulatory and statutory fixes to improve the fairness, efficiency, and transparency of these processes.

II. Two Judicial Decisions Highlight Confusions Regarding Standing to Challenge Administrative Actions in Massachusetts

Under a variety of statutory schemes, it is common for either a local or state agency in Massachusetts to have the authority to decide whether to grant a permit or other approval to a private developer or project proponent. Typically, the agency will conduct an administrative review process during which third parties (such as concerned residents) can intervene as parties. Following the agency's decision to grant or deny the permit, the applicant or intervenors may seek to appeal the decision in court.

Under the Massachusetts Administrative Procedure Act ("Massachusetts APA"), there are two ways that individuals concerned about the environmental effects of an agency's decision can intervene in an administrative proceeding. First, they can introduce evidence that they may be harmed by the outcome of the proceeding.[1] Second, they can establish themselves as a ten-citizen group in a proceeding involving potential "damage to the environment."[2]

Just as there are two bases for intervention in an administrative proceeding, there are also two ways to establish standing in the Massachusetts courts. First, they can introduce evidence that they will be "aggrieved" by the decision.[3] Second, they can establish themselves as a ten-citizen group for purposes of an appeal.[4] The first mechanism is the traditional one, analogous to the approaches found in other types of litigation in Massachusetts, in other states, and in federal

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[1] MASS. GEN. LAWS ch. 30A, § 10 (1978) (providing that agencies may "allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party" in an adjudicatory proceeding).

[2] *Id.* § 10A (2006).

[3] *Id.* § 14 (2015).

[4] *Id.* § 10A (2006). As I will discuss below, this mechanism is available only for appeals of administrative decisions reached in adjudicatory proceedings, not in other kinds of administrative hearings.

courts.[5] The second, the ten-citizen mechanism, was a novel form of standing introduced in Massachusetts in the 1970s,[6] and was intended to make it easier for environmental interests to establish their standing.[7] Under this approach, a group of at least ten people can intervene in an administrative adjudicatory proceeding in which "damage to the environment" is at issue and can appeal the outcome of that proceeding in court.[8]

Unfortunately, the interaction of these two forms of standing at the administrative and judicial stages of a case has produced needless confusion and can, as a result, serve as a barrier to court access. These problems are exemplified by two decisions in which Massachusetts courts have ruled on intervenors' attempts to appeal the outcome of administrative proceedings.

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[5] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) ("to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."); Brantley v. Hampden Div. of Prob. & Fam. Ct. Dep't, 929 N.E.2d 272, 279 (Mass. 2010) ("It is a general rule that, in order to have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury.") (citations and internal quotation marks omitted); John Dimanno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639, 657 (2008) (noting that, despite differences between federal and state approaches to standing, many "states maintain some form of injury-based standing as a threshold test of justiciability").

[6] MASS. GEN. LAWS ch. 30A, § 10A was enacted in 1971. 1971 Mass. Acts c. 732, § 2. Intervention under this provision is limited to addressing issues related to damage to the environment and the potential elimination or reduction of that damage. In the same 1971 bill, the legislature also created a cause of action that allows a ten-person group to sue to prevent "damage to the environment." *Id.* § 1 (codified at MASS. GEN. LAWS ch. 214, § 7A (1981)).

[7] *See* Michael Kenney, *New Law Allows Citizens to Sue against Pollution*, BOSTON GLOBE, Sept. 8, 1971.

[8] MASS. GEN. LAWS ch. 30A, § 10A (2006).

A. *Board of Health of Sturbridge v. Board of Health of Southbridge*

The first case is *Board of Health of Sturbridge v. Board of Health of Southbridge*,[9] a 2012 decision of the Massachusetts Supreme Judicial Court ("SJC"). In 2008, a company operating a landfill and associated processing facility in Southbridge applied to the local board of health for permission to make changes to its operations. In the language of the Massachusetts Solid Waste Act, the company was asking for a "minor modification" to its existing "site assignment," which allowed it to operate the facilities at that location.[10]

Pursuant to the procedures required under the Act,[11] the Southbridge Board of Health held a public hearing on the application. Residents of Southbridge and nearby towns moved to be admitted as intervenors in the proceeding, organizing themselves as 28 ten-citizen groups for that purpose. They did so by submitting identical forms which they titled "Registration of 10-Citizen Group," each of which contained the following statement:

> STATEMENT OF HOW REGISTRANTS ARE SUBSTANTIALLY & SPECIFICALLY AFFECTED:
>
> We, the undersigned residents of Southbridge, Sturbridge, and Charlton, with good cause hereby register to be a Party and petition to be a Ten Citizen Group Intervener in the above-described proceeding and to be represented by the Authorized Representative named above.[12] We live in the vicinity of the Southbridge Landfill and are substantially and specifically affected by the expansion of the landfill and its conversion from construction and demolition (C

[9] 962 N.E.2d 734 (Mass. 2012).

[10] *Id.* at 736.

[11] MASS. GEN. LAWS ch. 111, § 150A (2011).

[12] The plaintiffs' counsel is named as the Authorized Representative on each form.

> & D) to municipal solid waste (MSW) because it will: (a) cause an increase of noxious and foul smelling gases affecting residential areas for miles[;] (b) increase truck traffic on highways and side streets that emit strong odors, contaminated water and windblown litter causing a danger to public health & safety; (c) cause inevitable drinking water contamination[;] (d) devalue area homes. We make this statement under the pains and penalty of perjury.[13]

Pursuant to the Department of Environmental Protection's ("DEP") site assignment regulations, a hearing officer "shall" allow "[p]ersons whom the Hearing Officer determines are *specifically and substantively affected* by the hearing" to intervene.[14] Furthermore, under the regulations, a ten-citizen group "*shall be considered to be specifically and substantively affected* by the hearing and shall be eligible to register as a Party."[15]

As a result of the interaction of these two clauses, a hearing officer *must* grant intervention to any qualifying ten-citizen group, without needing to make any individualized finding that the intervenors are actually affected by the proposal. Under the site assignment regulations, the requirements for qualifying as a ten-citizen group are merely clerical, involving the registration as a group, providing the names and addresses of the registrants, asserting their status as a ten-citizen group, and naming an authorized representative.[16] In addition, the hearing officer has no discretion to deny a ten-citizen group's petition to intervene: the officer "shall"

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[13] *Sturbridge*, 962 N.E.2d at 740 n.15. As the references to the "substantially and specifically affected" standard in this statement suggest, potential intervenors can pursue both kinds of intervention simultaneously.

[14] 310 MASS. CODE REGS. 16.20(9)(a) (2022) (emphasis added).

[15] *Id.* (emphasis added). Under the regulations, "[a]ny abutter or group of abutters to the proposed facility" is also "considered to be specifically and substantively affected." *Id.*

[16] *Id.* 16.20(9)(b).

consider a ten-citizen group to be "specifically and substantively affected" and "shall" grant the petition to intervene of anyone who is "specifically and substantively affected."

Accordingly, the Southbridge hearing officer did not make any findings regarding how the members of the ten-citizen groups would be affected by the proposed modification of the landfill. Instead, the hearing officer simply allowed all of the ten-citizen groups to intervene based on the forms quoted above.

At the conclusion of the public hearing, the board granted the minor modification to the site assignment. The ten-citizen groups then appealed the decision to Superior Court, where the court upheld it on the merits, after finding that the plaintiffs had standing.[17] The plaintiffs appealed, and the SJC transferred the appeal from the Court of Appeals on its own motion. After briefing and oral argument, the SJC held that the plaintiffs lacked standing to appeal the board's decision. Under the Solid Waste Act, "[a]ny person *aggrieved*" by a Board of Health's site assignment decision may appeal that decision in court pursuant to section 14 of the Massachusetts APA, Mass. Gen. Laws 30A, § 14.[18] The SJC recognized the similarity between the "aggrieved" standard for appeals and the "substantially and specifically affected" standard for intervention in the public hearing, noting that:

> 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.[19]

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[17] 962 N.E.2d at 736.

[18] MASS. GEN. LAWS ch. 111, § 150A (2011) (emphasis added).

[19] 962 N.E.2d at 742 (emphasis added).

The problem, according to the SJC, was that the Southbridge hearing officer never determined that any of the intervenors were in fact "substantially and specifically affected." Instead, under the site assignment regulations, "citizen groups such as the plaintiffs acquire party status automatically."[20] Because the regulations provide that a ten-citizen group "shall be considered to be specifically and substantively affected," there was no occasion for the hearing officer to make any factual findings on that issue.

The court therefore looked at the administrative record to determine whether it contained evidence that "support[ed] a conclusion that any of the plaintiffs will suffer prejudice to their individual rights."[21] The only relevant evidence was the registration forms quoted above. The court found that these forms were inadequate because they did not "contain[] information describing the specific relationship of any plaintiff to the landfill—whether by physical proximity or otherwise."[22]

The court also rejected an argument raised by the Conservation Law Foundation as *amicus*: that the plaintiffs had standing to appeal under a separate provision of the Massachusetts APA (Mass. Gen. Laws ch. 30A, § 10A), which provides that a ten-citizen group "may intervene in any adjudicatory proceeding . . . in which damage to the environment . . . is or might be at issue" and that such intervention "includ[ed] specifically the right of appeal."[23] The problem here, according to the court, was that the Sturbridge Board of Health held a different kind of

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[20] *Id.* at 743.

[21] *Id.* at 744.

[22] *Id.*

[23] MASS. GEN. LAWS ch. 30A, § 10A (2006).

proceeding—not an *adjudicatory* proceeding but a *public* hearing—and therefore this provision was irrelevant.[24] Accordingly, the SJC ordered the case dismissed for lack of standing.[25]

B. *Coalition to Preserve the Belmont Uplands v. DEP*

The year after *Sturbridge*, the Court of Appeals decided *Coalition to Preserve the Belmont Uplands v. DEP*.[26] In this case, a developer submitted a Notice of Intent ("NOI") under the Wetlands Protection Act to the Belmont Conservation Commission (the "ConCom"). The developer proposed to build a 299-unit affordable housing complex on a 15.6-acre parcel of land next to Little Pond, in the Town of Belmont. The ConCom refused to issue an Order of Conditions and the developer appealed to DEP. DEP reversed the ConCom's decision, issuing a Superseding Order of Conditions in which it granted approval to the project. The ConCom filed an administrative appeal, and DEP initiated an adjudicatory proceeding.

Twelve Belmont residents and two conservation groups moved to intervene in the adjudicatory proceeding. Similar to the site assignment regulations at issue in *Sturbridge*, the DEP adjudicatory proceeding regulations provide that someone can intervene either by showing that she will be "substantially and specifically affected by the adjudicatory proceeding" or, "in any adjudicatory proceeding in which damage to the environment . . . is or might be at issue," as part of a ten-citizen group.[27] In their motion to intervene, the residents alleged that they "live[d]

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[24] 962 N.E.2d at 744 n.28. "The public hearing process is designed to permit the flexibility and informality appropriate to the board of health proceeding, while providing the board of health with procedural direction and the authority to create a record and render a decision within a limited time period which is amenable to the procedures and the standards of judicial review." 310 Mass Code Regs. 16.20(1).

[25] 962 N.E.2d at 747.

[26] No. 12-P-526, 2013 WL 4778128 (Mass. App. Ct. Sept. 9, 2013).

[27] 310 MASS. CODE REGS. 1.01(7)(d), (f). These are the standards for *intervention* in an existing appeal to DEP. To *initiate* an appeal, someone concerned about the environmental impacts of the project need show only that they have "a right to initiate an adjudicatory appeal." *Id.*

adjacent to or near the Little Pond next to which the applicant's proposed housing project would be built."[28] They also alleged that they were a ten-citizen group. Neither the developer nor DEP opposed the motion. The presiding officer granted the motion to intervene, writing:

> As grounds for the motion [the plaintiffs] assert that they are persons or entities substantially and specifically affected by this proceeding. 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.[29]

The cited provision in the DEP adjudicatory proceeding rules provides that "[a] failure to file a timely response may result in a grant of the relief requested by the moving party."[30] At the end of the adjudicatory proceeding, the presiding officer recommended affirming the approval of the project, and the DEP Commissioner issued a final decision to that effect.[31] The plaintiffs then appealed to the Court of Appeals.

The Court of Appeals held that the plaintiffs did not have standing. It noted first that, despite *Sturbridge*'s statement, quoted above, about the similarity of the "substantially and specifically affected" and "aggrieved" standards,

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1.01(6)(a). DEP's Wetlands Protection Act regulations provide, in turn, that "any person aggrieved by a Determination or an Order," "any owner of land abutting the land on which the work is to be done," or "any ten residents of the city or town where the land is located" may appeal a ConCom's decision. 310 MASS. CODE REGS. 10.05(7)(a). However, as a practical matter, it virtually never occurs that someone appeals a decision of a ConCom to the DEP because it is insufficiently protective of the environment.

[28] Coalition to Preserve the Belmont Uplands v. Kimmell, No. 2012-P-0526 (Mass.), Application for Leave to Obtain Further Appellate Review at 14 (Sept. 27, 2013) (quoting Motion to Intervene at 4-5), https://perma.cc/UW73-XYKW.

[29] *Id.* at 15 (quoting Order on Motion at 7).

[30] 310 MASS. CODE REGS. 1.01(11)(a)(1).

[31] *Coalition to Preserve the Belmont Uplands*, 2013 WL 4778128 at *1.

> an agency's finding that a party is "substantially and specifically affected" *only makes it "likely"* that the party will be considered aggrieved for the purposes of subsequent judicial review. In other words, such a finding *does not create a per se grant of standing*.[32]

Therefore, even if the presiding officer had found that the plaintiffs were "substantially and specifically affected," that would not be dispositive in determining whether they were "aggrieved."

However, the court also concluded that the presiding officer had in fact made no finding that the plaintiffs were substantially and specifically affected. Instead, the presiding officer had granted the motion to intervene only because it was unopposed.[33] "Put another way, where the grant of intervener status is triggered purely by operation of a regulation or statute, we will not simply assume, without additional evidence, that the party has been aggrieved by the proceeding."[34]

Finally, the court indicated that after reviewing the administrative record, it could "discern no support for the proposition that the coalition was, in fact, an 'aggrieved' party."[35] Citing only the coalition's complaint, the court equated the allegation that coalition members lived "near the project site" with the plaintiffs' statements in *Sturbridge* that they lived in the "vicinity" of the landfill. It also dismissed allegations that the development would cause "increasing stormwater runoff from the project site, causing flooding of their properties,

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[32] *Id.* at *2 (emphasis added) (citation omitted).

[33] *Id.* at *3. As the court noted, "[u]nder 310 Code Mass. Regs. § 1.01(11)(a)(1), '[a] failure to file a timely response may result in a grant of the relief requested by the moving party.'" *Id.* at *3 n.8.

[34] *Id.* at *3.

[35] *Id.*

overloading the sewer system resulting in sewage backups in their basements, and loss of visual enjoyment of the Belmont Uplands ecosystem" as a "generalized list of alleged harms" based on "unspecified" claims.[36] Finally, the court rejected plaintiffs' claim that they had standing as a ten-citizen group under Mass. Gen. Laws ch. 214, § 7A because that provision does not create a means for obtaining judicial review of an agency decision and because plaintiffs had instead framed their case as one under Mass. Gen. Laws ch. 30A, § 14.

III. The Result: A Game of Bait and Switch

These cases highlight the confusion and potential for injustice created by the interaction between, on the one hand, the two distinct bases for intervening in an administrative proceeding and, on the other hand, the two different provisions governing judicial review under the Massachusetts APA. I discuss in turn several sources of these problems:

(a) the similar, but not identical, "aggrieved" and "substantially and specifically affected" standards for injury;

(b) the lack of need or incentives for intervenors to present evidence of harm at the administrative stage and for administrative hearing officers to make factual findings regarding intervenors' specific injuries, given the availability of ten-citizen intervention;

(c) judges' unwillingness to allow plaintiffs to introduce new evidence of their injuries in court; and

(d) ambiguity about when an administrative proceeding counts as an "adjudicatory hearing" or a "public hearing."

In combination, these considerations make intervention through the ten-citizen mechanism a game of bait-and-switch—in which the promise of easy intervention at the

[36] *Id.*

administrative stage makes it harder to appeal the decision—that can deprive meritorious plaintiffs of their ability to seek a remedy in court.

A. Confusion Created by the "Specifically and Substantively Affected" and "Aggrieved" Standards

The first source of confusion is the interaction between the "specifically and substantively affected" standard at the administrative stage and the "aggrieved" standard at the judicial stage. As the SJC noted in *Sturbridge*, these terms appear to describe very similar standards and therefore "it is likely" that if you satisfy one of them, you will also satisfy the other.[37] But "likely" is not "certain."[38] Yet the courts have established no principled basis for distinguishing between the two standards, or even identified which one is more stringent than the other. Given that the SJC has cautioned that "the term 'person aggrieved' should not be read narrowly,"[39] it would seem reasonable to hold that any time an individual is "substantially and specifically affected," they are also "aggrieved."

B. Disincentives to Developing a Factual Record of Harm During Administrative Proceedings

Second, the availability of the ten-citizen intervention mechanism makes it less likely that the factual record developed before the agency will include sufficient evidence of how the intervenor-plaintiffs are harmed by the proposal—even if it would not be difficult to make such a demonstration. Individuals seeking to intervene may see only that it is easier to do so as a ten-

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[37] Bd. of Health of Sturbridge v. Bd. of Health of Southbridge, 962 N.E.2d 548, 558 (Mass 2012).

[38] *See Coal. to Preserve Belmont Uplands*, No. 12-P-526, 2013 WL 4778128, at *2 ("[A]n agency's finding that a party is 'substantially and specifically affected' only makes it 'likely' that the party will be considered aggrieved for the purposes of subsequent judicial review. In other words, such a finding does not create a per se grant of standing.") (citation omitted).

[39] Marashlian v. Zoning Bd. of Appeals of Newburyport, 660 N.E.2d 369, 371–72 (Mass. 1996).

citizen group than by demonstrating individual harm, especially if they are not represented by counsel, and if they know that the hearing officer is more likely to rule on that basis.[40]

Even if potential intervenors offer evidence in support of both types of intervention, the board or administrative hearing officer has the discretion to grant intervention on either basis. Indeed, the DEP site assignment regulations effectively conflate the two standards by providing that "[f]or the purpose of the Public Hearing," a ten-citizen group "shall be considered to be specifically and substantively affected."[41] Given that it is considerably simpler to determine whether proposed intervenors have complied with the ten-citizen approach than to engage in the more fact-specific inquiry into whether the impact on them renders them "specifically and substantively affected," it is not surprising that many hearing officers, like the one in *Sturbridge*, will decide to rule on the basis of ten-citizen intervention alone.

C. Judges' Unwillingness to Allow Plaintiffs to Submit Evidence of Injury in Court

Third, the harm caused by intervenors' disincentives to submit evidence of injury in the administrative proceeding is compounded when, on judicial review, the court determines whether the plaintiffs are "aggrieved" based only on the administrative record. Thus, in *Sturbridge* the SJC considered only whether "[t]he administrative record . . . support[s] a conclusion that any of the plaintiffs will suffer prejudice to their individual rights."[42] Similarly, in *Belmont Uplands*, the Court of Appeals stated that "whether the coalition had standing to

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[40] A ten-citizen group need not be represented by an attorney. *See, e.g.*, 310 MASS. CODE REGS. 16.20(9)(b) (2022) ("If no Authorized Representative is identified in the Registration Statement the first person mentioned in the Statement as a member of the group shall be deemed the Authorized Representative of the group.").

[41] 310 MASS. CODE REGS. 16.20(9)(a) (2022).

[42] 962 N.E.2d, 734, 744 (2012).

maintain its action and invoke G.L. c. 30A review depends on an independent assessment of the administrative record."[43] In both cases, in other words, the court did not allow the plaintiffs to introduce additional evidence of aggrievement in court.

The apparent basis for this approach is Mass. Gen. Laws ch. 30A, § 14(5), which provides that "[t]he review shall be conducted by the court without a jury and shall be confined to the record, except . . . in cases of alleged irregularities in procedure before the agency." Yet, a determination of whether plaintiffs have standing is not part of the court's "review" of the agency action—it is a logically prior decision about whether the court has jurisdiction to engage in that "review" at all. Thus, federal courts, for example, allow plaintiffs to submit evidence in support of their standing when they petition for review of a decision of the Environmental Protection Agency's Environmental Appeals Board.[44] Mass. Gen. Laws ch. 30A, § 14(5) thus presents no statutory barrier to allowing plaintiffs to introduce evidence regarding their standing in court.[45]

Moreover, the SJC has indicated that the record-review rule "was not written with a focus on . . . appeal from a non-adjudicatory proceeding."[46] This provides an independent reason to allow plaintiffs to submit evidence in court to support their standing in appeals of site-assignment decisions like the one at issue in *Sturbridge*.

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[43] No, 12-P-526, 2013 WL 4778128, at *3 (Mass. App. Ct. Sept. 9, 2013).

[44] *See, e.g.*, Rio Hondo Land & Cattle Co., L.P. v. United States Env't Prot. Agency, 995 F.3d 1124, 1127 (10th Cir. 2021). In other contexts, the SJC has looked to federal court decisions to guide its interpretation of the Massachusetts APA record-review rule. *See* Douglas Env't Assocs., Inc. v. Dep't of Env't Prot., 706 N.E.2d 620, 622 (Mass. 1999).

[45] *Cf.* Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1 (2012) (arguing that appellate courts should investigate the facts relevant to their jurisdiction even if the jurisdictional issue had not been raised—and the factual record therefore not developed—before the trial court).

[46] *Douglas Env't Assocs.*, 706 N.E.2d at 622.

The failure to conduct an independent inquiry into plaintiffs' standing can lead to the rejection of suits in which the plaintiffs very likely could make the requisite showing of "aggrievement." In *Belmont Uplands*, the plaintiffs lived directly across a small pond from the location of the proposed project. Given their close proximity to the project site and their specific allegations that it would result in harms such as "increasing stormwater runoff from the project site, causing flooding of their properties, overloading the sewer system resulting in sewage backups in their basements," the plaintiffs were likely aggrieved by DEP's decision, particularly as the Massachusetts courts have repeatedly emphasized that "the term 'person aggrieved' should not be read narrowly."[47] For example, in a previous case, the SJC "assume[d] without deciding, as the judge must have, that as close neighbors of the landfill, who complained of the negative impacts of an enlarged landfill on their health and property, the plaintiffs were 'aggrieved' for purposes of G.L. c. 30, § 14."[48] The *Belmont Uplands* plaintiffs likely could have met this standard if offered the chance.[49]

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[47] Marashlian v. Zoning Bd. of Appeals of Newburyport, 660 N.E.2d 369, 371–72 (Mass. 1996).

[48] Goldberg v. Bd. of Health of Granby, 830 N.E.2d 207, 212 n.8 (2005).

[49] Another error by the Court of Appeals in the *Belmont Uplands* case was its statement that "the grant of intervener status is triggered purely by operation of a regulation or statute" in that case. 2013 WL 4778128 at *3. The relevant regulation provides that "[a] failure to file a timely response [to a motion] *may result* in a grant of the relief requested by the moving party." 310 MASS. CODE REGS. 1.01(11)(a)(1) (2022) (emphasis added). As the emphasized language indicates, the presiding officer has the discretion to decide whether to grant a motion because no timely opposition to it has been filed. *Cf.* Tofias v. Energy Facilities Siting Bd., 757 N.E.2d 1104, 1109 (Mass. 2001) ("Based on that permissive 'may,' [in Mass. Gen. Laws ch. 30A, § 10 (2022)] this court has repeatedly recognized that agencies have broad discretion to grant or deny intervention."). It seems perverse that a party's failure to oppose a motion to intervene, and the presiding officer's consequent decision not to make specific factual findings in support of granting the motion, should be turned around and used as a basis for denying intervenors access to the courts.

D. Confusion about "Public Hearings" Versus "Adjudicatory Hearings"

Fourth, the DEP site assignment regulations and the *Sturbridge* decision create unnecessary confusion about when an administrative proceeding is a public hearing or an adjudicatory hearing. As mentioned above, one of the SJC's reasons for ruling that the plaintiffs did not have standing to appeal the Board of Health's decision in that case was that judicial review as a ten-citizen group under Mass. Gen. Laws ch. 30A, § 10A, was unavailable because that provision applied only to "adjudicatory hearings," while the Board of Health's site assignment proceeding was a "public hearing."[50]

This decision is superficially perplexing, given that the Massachusetts APA defines the term "adjudicatory proceeding" to mean "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing."[51] A hearing on a Solid Waste Act site assignment application would appear to satisfy this definition, because whether an applicant receives a permit is a determination of the applicant's legal rights under a statutory provision.

Nevertheless, as the SJC observed in *Sturbridge*, DEP has adopted regulations providing that "'Public Hearings' pursuant to M.G.L. c. 30A are not 'Adjudicatory Proceedings' within the meaning of M.G.L. c. 30A, § 1."[52] Mass. Gen. Laws ch. 30A, § 1 is the definitional section of the Massachusetts APA. Section 10A of the APA allows a ten-citizen group to intervene in, and

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[50] Bd. of Health of Sturbridge v. Bd. of Health of Southbridge, 962 N.E.2d 734, 744 n.28 (Mass. 2012).

[51] MASS. GEN. LAWS ch. 30A, § 1(1) (2022).

[52] 310 MASS. CODE REGS. 16.20(1) (2022).

appeal the outcome of, "any adjudicatory proceeding."[53] Therefore, under the DEP regulations, plaintiffs cannot appeal a site assignment decision as a ten-citizen group pursuant to Mass. Gen. Laws ch. 30A, § 10A.

However, they *can* appeal as "aggrieved" persons under Mass. Gen. Laws ch. 30A, § 14. As a reminder, this provision allows appeals by "any person . . . aggrieved by a final decision of any agency in an adjudicatory proceeding." The Solid Waste Act provides that a Board of Health "decision shall be deemed to be a final decision in an adjudicatory proceeding" for the limited purposes of an appeal by "[a]ny person *aggrieved* by the decision."[54] Thus, even though both section 10A and section 14 of the Massachusetts APA use identical language (allowing appeals from an "adjudicatory hearing"), as a result of DEP's regulations, a Board of Health site assignment decision under the Solid Waste Act is subject to judicial review under only one of them.

The SJC's holding regarding the nature of the hearing in *Sturbridge* is even more confusing in light of its holding in a previous case that an administrative process named a "public hearing" can be an "adjudicatory proceeding" for purposes of the Massachusetts APA based on the characteristics of the proceeding.[55] In that case, applying the general definition of "adjudicatory proceeding" in the Massachusetts APA, the Court held that "[a]n application for a racing license is an 'adjudicatory proceeding' under § 1(1) for it is 'a proceeding before an agency in which the legal * * * privileges of specifically named persons [the applicants] are required by * * * [a] provision of the General Laws [G.L. c. 128A, § 3] to be determined after

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[53] MASS. GEN. LAWS ch. 30A, § 10A (2022).

[54] MASS. GEN. LAWS ch. 111, § 150A (emphasis added).

[55] Bay State Harness Horse Racing & Breeding Ass'n v. State Racing Comm'n, 175 N.E.2d 244, 249 (Mass. 1961).

opportunity for an agency hearing.'"[56] The underlying statute, however (Mass. Gen. Laws ch. 128A, § 3) described the hearing that the State Racing Commission held as a "public hearing."[57] If it is the substance, rather than the label, of the hearing that matters in one case, why shouldn't it also be what matters in the other?

IV. Recommendations

This situation is, at best, unnecessarily complicated and confusing and, at worst, unjust and unfair. This unfairness is particularly likely to arise in environmental justice communities and other neighborhoods where residents may not have the resources to be represented by counsel at the administrative stage of a proceeding. Fortunately, much of the harm could be eliminated by relatively simple actions available to intervenors, administrative hearing officers or presiding officers, the courts, DEP, and the legislature. This section briefly describes recommendations for each group.

A. For Intervenors and their Attorneys

Despite the pitfalls described above, intervenors and their attorneys can take a number of actions to minimize the likelihood that they find themselves unable to establish their standing to appeal an administrative decision. In particular, they can take the following actions:

- They should review the relevant statutes and regulations very carefully to determine whether they are in a public hearing or adjudicatory proceeding, and to determine what facts they need to demonstrate both to intervene at the administrative stage and to appeal the administrative decision in court.

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[56] *Id.* (alterations in original).

[57] It is described as a public hearing both in the current version of the statute and in the one in effect in 1961, when *Bay State Harness Horse Racing* was decided. *See* Mass. Acts 1959, c. 296, § 2.

- Individuals affected by a proposal that could cause environmental damage should always attempt to intervene in administrative processes both as a ten-citizen group and as individuals "substantially and specifically affected" by the proposal. They should carefully assemble detailed evidence of how they are affected by the proposal and offer it for inclusion in the administrative record, even if they are also able to intervene as a ten-citizen group.
- If the hearing officer grants intervention on the basis of ten-citizen standing alone, the intervenors should request a separate ruling on their evidence of harm, explaining that such a ruling is important for preserving their right to appeal.

B. For Administrative Hearings Officers and Presiding Officers

Relatedly, when petitioners or intervenors submit evidence demonstrating that they would be harmed by the proposed activity, administrative hearings officers should make findings of fact recognizing those injuries, even if they also conclude that the plaintiffs qualify to petition or intervene as a ten-citizen group.

C. For the Supreme Judicial Court

These proposed actions by litigants and hearing officers amount to making the best of a bad situation. By contrast, the SJC, can take steps to improve the situation.

- First, the SJC should hold that the "specifically and substantively affected" standard and the "aggrieved" standard are identical, or at least that plaintiffs who satisfy the former standard will always also satisfy the latter. This would provide greater certainty and clarity regarding the standards for intervention and standing to appeal.

- Second, the SJC should hold that courts must defer to a hearings officer's finding that a plaintiff is "specifically and substantively affected."[58] This, in combination with the previous change, would increase judicial efficiency, because courts would not need to engage in *de novo* review of the adequacy of plaintiffs' factual showing of standing on appeal.
- Third, if the hearing officer granted intervention as a ten-citizen group or otherwise failed to make a finding about how the project under review would harm the plaintiffs, courts should not reject plaintiffs' standing based only on a review of the administrative record. Instead, they should allow the plaintiffs to submit affidavits and other evidence in support of their standing in court. If the issue of standing arises for the first time on appeal, the appellate court should remand to the Superior Court for factfinding regarding plaintiffs' standing.

D. For DEP and the Legislature

Finally, DEP or the legislature could make the entire process less confusing with some minor regulatory or statutory fixes.

- First, to address the confusion created by having separate "aggrieved" and "specifically and substantially affected" standards, DEP could amend its regulations implementing the Solid Waste Act and Wetlands Protection Act to provide that people can intervene in the administrative proceeding when they are "aggrieved." DEP's regulations under both Chapter 91 and the Air Pollution Act, for example, already provide that one can request

[58] This situation is different from the one where a hearing officer in a site assignment proceeding recognizes a ten-citizen group, which then "shall be considered to be specifically and substantively affected" pursuant to DEP's regulations. 310 MASS. CODE REGS. 16.20(9)(a).

an adjudicatory hearing if one is "aggrieved," so the agency has experience with this approach.[59] The legislature could also make this change by statute.

- Second, to avoid the unfair surprise created when intervenors' standing is first challenged in court or on appeal, the legislature could provide that a board or hearing officer's finding that an intervenor has the requisite interest (under either the "specifically or substantially affected" or "aggrieved" standard) establishes either a rebuttable or conclusive presumption that the plaintiff has standing.
- Third, DEP could amend its regulations or the legislature could amend the Solid Waste Act to allow ten-citizen groups, in addition to "aggrieved persons," to appeal Board of Health site assignment decisions. Specifically, the legislature could amend the Solid Waste Act to make a board of health hearing an "adjudicatory proceeding" for purposes of Mass. Gen. Laws ch. 30A, § 10A in addition to for purposes of Mass. Gen. Laws c. 30A, § 14. DEP could achieve the same result by amending 310 Mass. Code Regs. 16.20. There is no logical reason for allowing ten-citizen groups to intervene in but not to appeal from site assignment proceedings, when the Massachusetts APA generally provides that ten-citizen groups have equal rights to intervene in adjudicatory hearings and appeal the outcomes of those hearings in court.

V. Conclusion

The rules governing intervention and standing should not be traps for the unwary. However, the current standards for appeals of site assignment decisions under the Solid Waste Act, superseding orders of conditions under the Wetlands Protection Act, and other statutes,

[59] 310 MASS. CODE REGS. 9.17(1)(b); 310 MASS. CODE REGS. 7.51(1)(g). Under these statutes, unlike under the Solid Waste Act, individuals concerned about the environmental impacts of a project commonly request adjudicatory hearings.

create unnecessary confusion and potential for injustice. Through careful attention to the details identified in this article, attorneys can help their clients avoid these pitfalls. In the longer term, the Massachusetts legislature and DEP can make minor changes to the relevant statutes and regulations (or the SJC can clarify its interpretation of the "substantially and specifically affected" standard) to would render the process more fair, transparent, and efficient.