OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 24, 2008

In the Matter of Dunfudgin, LLC

Docket No. WET-2008-012
DEP File Nos. 28-1876
Gloucester

RECOMMENDED FINAL DECISION –
DISMISSAL FOR FAILURE TO PROSECUTE

The Petitioners, a ten-citizens group with an authorized representative of Stevan Goldin ("Mr. Goldin") of 14 Hodgkins Street in Gloucester, had filed on February 8, 2008 with the Office of Appeals and Dispute Resolution ("OADR") a request for an adjudicatory hearing with regard to a Superseding Order of Conditions ("SOC") for a proposed development at 33 Emerson Avenue in Gloucester by Dunfudgin LLC (the "Applicant"). In this recommended final decision, I recommend that the Commissioner dismiss this matter for failure to prosecute.

Procedural History

On February 15, 2008, pursuant to the amended regulations at 310 CMR 10.05(7)(j) governing claims for adjudicatory hearings filed after October 31, 2007 of Reviewable Decisions under the Wetlands Protection Act, M.G.L. c. 131, §40 (the "Act"),[1] the OADR issued a Scheduling Order mandating that all parties, including the

[1] This case involves a Superseding Order of Conditions, for which a notice of claim for adjudicatory hearing was filed after October 31, 2007. This Superseding Order of Conditions is thus considered a Reviewable Decision under the Act, and is subject to the streamlined procedures and completion of hearing

Petitioners or their representative, attend a Pre-Screening Conference on Tuesday, March 4, 2008 at 10 a.m. at the Boston Office of the Department of Environmental Protection (the "Department"). The Scheduling Order also directed that the Petitioners initiate settlement discussions at least ten days prior to the Pre-Screening Conference (the "Conference"). Finally, the Scheduling Order required Petitioners to file a Pre-Screening Memorandum with OADR at least three days prior to the Conference which would, among other things, set forth the issues for resolution, the facts Petitioners intended to prove at hearing and a list of witnesses.

On February 26, 2008, I also issued an Order For a More Definite Statement asking that a complete copy of the SOC be filed by the Petitioners. See, 310 CMR 10.05(7)(j)2.b.v & vi (Notices of claim must contain "a clear and concise statement of alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00"….and "a copy of the Reviewable Decision appealed…."). The response to the Order for a More Definite Statement was due by no later than the time of the Conference on Tuesday, March 4, 2008. The Petitioner failed to attend the Conference, and the Petitioner failed to respond to the Order for a More Definite Statement as ordered.

Instead, without any prior notice to the Presiding Officer or to any other party, the Petitioner mailed a statement on Saturday, March 1, 2008, stating that he did not intend to attend the Conference and objecting to the Conference itself. This statement was not received by OADR prior to the Conference, so the Conference went ahead as originally scheduled. This resulted in all the parties having to attend the Conference without the

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under the auspices of the OADR at the Department. The Department is mandated to issue final decisions in these matters within six months of the filing of the notice of claim. See, 310 CMR 10.05(7)(j).

participation of the Petitioners. It also resulted in all other parties having to incur the expense and burden of preparing for the Conference. The Applicant, Department and Gloucester Conservation Commission's counsel informed me at the Conference that the Petitioners had failed to initiate settlement discussions as ordered. I also asked OADR's Case Administrator to telephone Mr. Goldin and ask if he was unaware of the Conference. He responded that he was aware but had no intention of attending. The Applicant filed a Motion to Dismiss the Petitioners' appeal on the grounds of failure to prosecute at the Pre-Screening Conference, which was assented to by the Department and the Gloucester Conservation Commission in a joint filing on March 6, 2008.[2]

On March 7, 2008, I issued an Order to the Petitioners to Show Cause why the appeal should not be dismissed for failure to prosecute and failure to respond to the prior Order for a More Definite Statement. A response was due by March 18, 2008, which I allowed to be combined with a response to the Applicant's Motion to Dismiss. OADR received on March 20, 2008, only a statement by Mr. Goldin objecting to the legality of the adjudicatory hearing requirement for attendance at a Pre-Screening Conference at the Department through OADR and requested an immediate transfer of the matter to the Division of Administrative Law Appeals ("DALA"). I treat this request as a motion for a transfer to DALA and deny it.

The rules governing these proceedings are clear and are in writing. A copy of the regulations governing this proceeding at 310 CMR 10.05(7)(j) was provided to Mr. Goldin in January during a prior appeal proceeding, *Matter of Cretarolo*, Docket No. WET-2007-002. Mr. Goldin was also provided a copy of the October 31, 2007

[2] Note that all other parties fully complied with the terms of the Scheduling Order, including attendance at the Conference and the requirement for Pre-Screening Memoranda.

Commissioner's Directive stating that claims for adjudicatory hearings under the new Wetlands Regulations would not be presumptively transferred to DALA.[3] In my February 26, 2008 Order for a More Definite Statement, I directed Mr. Goldin where to obtain additional copies of these rules and guidance documents if he should need them. Mr. Goldin is on notice of the rules that govern this proceeding, and he is on notice that he must participate in the Pre-Screening Conference and respond to orders from OADR. See, 310 CMR 10.05(7)(j)((7) and 310 CMR 1.01(5)(a) and 1.01(6)(j).

The Order for a More Definite Statement and the Order to Show Cause also explained the sanctions for failure to attend the Pre-Screening Conference, including the sanction of dismissal. See, 310 CMR 1.01(10). The requirements to attend conferences and the sanctions provided were also included in the general regulations that are applicable to adjudicatory proceedings both at OADR and at DALA on appeals of decisions by the Department. See, 310 CMR 1.01 et seq.

Dismissal for Failure to Prosecute is Warranted

Under 310 CMR 1.01(10), which is applicable to this adjudicatory proceeding, a Presiding Officer is authorized to impose sanctions upon parties which have conducted themselves in the same manner as have Petitioners. Specifically:

> (10) Sanctions. When a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the

[3] Prior to October 31, 2007, appeals of Reviewable Decisions under the Act were subject to a presumption in a 2004 Commissioner's Directive that they would be transferred to DALA ninety days after the filing of the notice of claim. Even under this presumption, however, the Commissioner had appointed and empowered Presiding Officers in the employ of the Department to schedule Pre-Screening Conferences, require attendance of parties and make every effort to attempt to narrow issues and resolve cases. While the purpose of these Pre-Screening Conferences was narrower, attendance was always mandatory, and these cases resulted in the informal resolution of over half of these adjudicatory claims.

requirements set forth in 310 CMR 1.01; the Presiding Officer may impose appropriate sanctions on that party. Sanctions include, without limitation:

(a) taking designated facts or issues as established against the party being sanctioned;
(b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
(c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);
(d) striking pleadings in whole or in part;
(e) dismissing the adjudicatory appeal as to some or all of the disputed issues;
(f) dismissing the party being sanctioned from the appeal; and
(g) issuing a final decision against the party being sanctioned.

In this case, the Petitioners have:

(1) failed to file their claim documents to state complete and clear claims;

(2) failed to answer an Order for a More Definite Statement giving them a chance to file a complete claim;

(3) failed to respond to the February 15th Scheduling Order by:

(a) failing to initiate settlement discussions as ordered;
(b) failing to file a Pre-Screening Memorandum; and
(c) failing to attend the Pre-Screening Conference;

(4) failed to submit issues statements and other needed preparatory materials that prejudice the other parties to this matter in preparing their defenses to Petitioners' claims; and

(5) have made clear by their conduct and statements in filings that they had an intention to delay the proceeding and avoid resolution of the issues they raised in their claim.

Petitioners intentionally decided not to attend the Pre-Screening Conference. In addition, Petitioners deliberately failed to notify OADR or the parties of that intent in a timely manner, resulting in all other parties having to incur the expense of counsel to attend, prepare for and participate in the Conference.

The ultimate sanction of dismissal is justified in this case from all of Petitioners conduct, including Petitioners' intentional refusal to participate in the Pre-Screening

Conference in a way that prejudiced and burdened all other parties to this appeal. The Pre-Screening Conference under the amended regulations at 310 CMR 10.05(7)(j) in this proceeding serves the same purpose as does the prehearing conference at DALA. The Pre-Screening Conference is the only meeting prior to hearing and its purpose of establishing issues and the order of proceedings is central to the preparation of the matter for hearing. As stated by Magistrate Rooney while recommending dismissal of a notice of claim for adjudicatory hearing for failure to attend a prehearing conference in *Matter of Robert W. McKenney*, DALA Docket No. DEP-06-549, DEP Docket No. 2006-042, 2007 DALA LEXIS 18 (Recommended Final Decision, DALA, January 23, 2007):

> The reason an unexplained failure to attend a prehearing conference has often led to dismissal can be explained by the central role such conferences play in the adjudicatory process. It is typically the only occasion on which the parties to an appeal at the Division of Administrative Law Appeals must meet before the hearing. At this conference**,** the issues to be adjudicated are decided, the witnesses identified, and a hearing schedule established.

As noted in the joint filing by the Department and the Conservation Commission, the Commissioner sanctioned a Petitioners' group, for which Mr. Goldin was the authorized representative, for similar conduct in *Matter of Cretarolo*, DEP Docket No. WET-2007-002 Recommended Final Decision (January 18, 2008), adopted by Final Decision (January 23, 2008). Therefore, Mr. Goldin is on notice of the critical importance of participation in the Pre-Screening Conference and the mandatory nature of Petitioners' obligation to attend and participate.

Most unfortunately, Petitioners deliberate failure to participate and prosecute their appeal obstructed any possibility for resolution of this matter. Petitioners' intentional failure to provide complete information about their claims resulted in prejudice to the Applicant, the Department and the Conservation Commission. These parties cannot

properly defend themselves in this matter where the Petitioners refuse to clarify their issues or provide information about their witnesses or other evidence for hearing. The filing of a Notice of Claim, followed by a deliberate failure to prosecute, also resulted in Petitioners' imposition of unnecessary legal costs and burdens upon the other parties to this matter.

Therefore, for all the reasons set forth herein, I recommend that this matter be dismissed for lack of prosecution and obstruction.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

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Laurel A. Mackay
Presiding Officer