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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 10, 2013

In the Matter of John Walsh and Walsh Brothers Building Co., Inc.	OADR Docket No. WET-2012-025 DEP File No. SE 32-2099 Harwich, MA

MEMORANDUM AND ORDER DENYING PETITIONERS' AND HARWICH CONSERVATION COMMISSION'S JOINT MOTION TO PROCEED

In this appeal, the Petitioners John Walsh and Walsh Brothers Building Co., Inc. challenge a Superseding Order of Conditions ("SOC") that the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Petitioners on October 16, 2012, under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Massachusetts Wetlands Regulations, 310 CMR 10.00 et seq. The SOC affirmed the Town of Harwich Conservation Commission's ("HCC") rejection of the Petitioners' proposed construction of a 2,139 square foot single-family home on pilings with an attached deck, septic system, and driveway ("the proposed Project") on real property located at 5 Sea Street Extension in Harwich, Massachusetts ("the Property"). Department's Transmittal Letter attached to SOC, at p. 1. The HCC rejected the proposed Project under the MWPA, and the Harwich Wetlands Protection Bylaw and the Harwich Wetlands Regulations because the proposed Project purportedly: (1) will be located within protected wetlands areas: Coastal Dune

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and Land Subject to Coastal Storm Flowage ("LSCSF"); and (2) will not satisfy the Performance Standards for work in a Coastal Dune as set forth in the Massachusetts Wetlands Regulations at 310 CMR 10.28.[1] HCC's Order of Conditions, April 23, 2012 ("OOC").

The Department's SOC only affirmed that aspect of the HCC's denial of the proposed Project under the MWPA and the Massachusetts Wetlands Regulations because the Department lacks jurisdiction to review decisions of local conservation commissions under local Wetlands Protection Bylaws and Regulations. In accordance with the Harwich Wetlands Protection Bylaw, the Petitioners appealed the HCC's denial of the proposed Project under the Bylaw to Barnstable Superior Court, where the appeal remains pending. See Walsh Brothers and Building Company, Inc., et al. v. Town of Harwich Conservation Commission, et al., Barnstable Superior Court C.A. No. BACV2012-00317-A (filed May 17, 2012) ("the Superior Court Local Bylaw Appeal").

The Petitioners contend that the Coastal Dune delineation forming the basis of both the HCC's and the Department's rejection of the proposed Project is incorrect. Petitioner's SOC Appeal Notice, at p. 4. The Petitioners contend that the correct Coastal Dune delineation is the delineation that the HCC previously accepted in approving two recent construction projects in the vicinity of the Property: (1) the HCC's March 4, 2009 approval of the construction of drainage improvements in the Sea Street Extension adjacent to the Property ("the Roadway Order"); and (2) the HCC's April 22, 2010 approval of the construction of a single-family home on 3 Sea Street Extension, which abuts the Property ("the 3 Sea Street Order"). Id. The

[1] "Performance Standards" are "th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA]." 310 CMR 10.04. The Performance Standards appear at 310 CMR 10.25 through 10.35 and 10.37, and 310 CMR 10.54 through 10.60. Id.

Petitioners contend that the plans referenced in the Roadway Order and the 3 Sea Street Order "delineate the coastal dune in substantially the same manner" and both Orders "do not find that their respective projects alter any coastal dune." Id.

The Petitioners contend that "[e]ven if the coastal dune delineation adopted by the [SOC] [is] correct," the proposed Project should nevertheless be approved under the MWPA and the Massachusetts Wetlands Regulations because the Performance Standards for work in a Coastal Dune at 310 CMR 10.28(3) do not govern the Project. Id., at p. 5. The Petitioners contend that the Performance Standards do not apply because the Coastal Dune at issue on the Property is not significant to furthering the MWPA interests of storm damage prevention, flood control, and protection of wildlife habitat "due to the prior extensive construction that has occurred within coastal dune on adjacent properties and other properties in the vicinity, and . . . site-specific conditions [on the Property]." Id.

The Adjudicatory Proceeding Rules that govern resolution of this administrative appeal, specifically 310 CMR 1.01(6)(h) provide that "the Presiding Officer shall stay administratively an appeal when an applicant is required to comply with the Massachusetts Environmental Policy Act [(MEPA)] . . . ."[2] The regulation also requires the stay of an administrative appeal of an SOC

[2] MEPA "sets forth a broad policy of environmental protection in this Commonwealth by directing '[a]ll agencies, departments, boards, commissions and authorities' to 'review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize damage to the environment.'" Allen v. Boston Redevelopment Authority, 450 Mass. 242, 245 (2007); Ten Persons of the Commonwealth v. Fellsway Development, LLC, 460 Mass. 366, 368 (2011). "[P]rivate development '[p]roject[s]' that fall within the scope of MEPA's jurisdiction [include those that] . . . require[s] the issuance of a permit by [a] [State] agency." Fellsway Development, 460 Mass. at 369, citing, G. L. c. 30, § 62. "[MEPA] establishes a process, supervised by the Secretary [of the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA")], for thorough consideration of the potential environmental impact of certain projects through preparation of draft and final environmental impact reports (EIRs) . . . ." Allen, 450 Mass. at 245-46; Fellsway Development, 460 Mass. at 368-69. "An EIR must 'contain statements describing the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences.'" Fellsway Development, 460 Mass. at 368, citing, G. L. c. 30, § 62B. "After a public comment period, the [EEA]

"when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court."[3] In accordance with these provisions, on December 11, 2012, I stayed the proceedings in this appeal, including all time lines under 310 CMR 10.05(7)(j) for resolution of this appeal, as of the date of its filing: October 30, 2012, because of the Petitioners' Superior Court Local Bylaw Appeal. Order Staying Proceedings, at pp. 1-3. I also stayed the proceedings because according to the Department, "the [proposed Project] exceeds the wetland threshold as found in the . . . [MEPA] Regulations at 301 CMR 11.03(3)(b)1.a," and, accordingly, the Petitioners would be required to submit an Environmental Notification Form ("ENF") in accordance with MEPA "and the complet[e] . . . the MEPA review process in accordance with [the Wetlands Regulations at] 310 CMR 10.07 . . . before issuing a Final Order of Conditions [under the MWPA]."[4] Department's Transmittal Letter attached to SOC, at p. 1; Department's

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Secretary issues a written certificate indicating whether the EIR 'adequately and properly complies' with the provisions of MEPA." Id., citing, G. L. c. 30, § 62C; 301 CMR § 11.08(8). "It is well settled that [the] EEA [Secretary's] approval of an [EIR] does not mean that a proposed project meets applicable permitting standards." In the Matter of Stephen D. Peabody, Final Decision on Reconsideration (December 27, 2011), 2011 MA ENV LEXIS 141, at 47-48. "Instead, it only means that the project's proponent has adequately described the environmental impacts and addressed mitigation." Id. The permitting agency "retains [its] authority to fulfill its statutory and regulatory obligations in permitting or reviewing [the] Project that is subject to MEPA review . . . ." 301 CMR 11.01(1)(b).

[3] Under 310 CMR 1.01(5)(a)(3) and 310 CMR 1.01(5)(a)15.d, a Presiding Officer may also stay the proceedings in a wetlands permit appeal "where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause."

[4] The Massachusetts Wetlands Regulations at 310 CMR 10.07 provide that "[MEPA] . . . may require an applicant [seeking an SOC from the Department under the MWPA and the Massachusetts Wetlands Regulations] to file an ENF and possibly an . . . EIR for the proposed work, prior to the Department's issuance of [the SOC]." Under the MEPA, "[o]nce [the EEA Secretary] determine[s] that a private project meets one of the triggers to MEPA jurisdiction (e.g., requires a permit or financial assistance), the Secretary then analyzes the project to determine if it meets or exceeds any of several [MEPA] 'review thresholds' enumerated at 301 Code Mass. Regs. § 11.03." Id. "There are two categories of review threshold[s]: [1] those that require the filing of an ENF and a mandatory EIR (e.g., alteration of ten or more acres of wetlands); . . . and [2] those that require the filing of an ENF, and 'other MEPA review [only] if the Secretary so requires,'" e.g., alteration of a Coastal Dune. Fellsway Development, 460 Mass. at 369-70; 301 CMR 11.03(3)(b)1.a.

November 14, 2012 Motion to Stay.

My December 2012 Stay Order stated that:

> [t]he stay shall continue until the Petitioners: (1) demonstrate compliance with MEPA; and (2) present evidence that their proposed Project has been approved under the Town of Harwich Wetlands Protection Bylaw, or some other ruling providing a basis for the Presiding Officer to lift the stay.

Order Staying Proceedings, at p. 3. Recently, the Petitioners and the HCC filed a Joint Motion to Proceed which requests that I vacate the stay order:

> for the limited purpose of . . . decid[ing] [on summary decision][5] a single issue: whether the proposed [Project] will take place within a coastal dune itself, or outside the coastal dune but within the buffer [zone] to coastal dune.

Joint Motion to Proceed, at p. 1. The Department opposes the Joint Motion to Proceed contending that the Petitioners and the HCC: (1) have failed to demonstrate that Petitioners have complied with MEPA, (2) have not presented any evidence that the Petitioners' proposed Project has been approved under the Harwich Wetlands Protection Bylaw and Harwich Wetlands Regulations, and (3) have not presented some other ruling providing a basis for the stay to be lifted. See [Department's] Opposition to Petitioners' and [Harwich] Conservation Commission's Joint Motion to Proceed; [Department's] Sur-Reply to Petitioners' and [Harwich] Conservation Commission's . . . Reply Briefs. For the reasons set forth below, I agree with the Department's

[5] A motion for summary decision under 310 CMR 1.01(11)(f) is in essence a motion for summary judgment in an administrative appeal. In the Matter of Lowe's Home Centers, Inc., OADR Docket No. WET-2009-013, Recommended Final Decision (June 19, 2009), 16 DEPR 115, 116 (2009), adopted as Final Decision (June 30, 2009), citing, Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980). See also In the Matter of SEMASS Partnership, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 MA ENV LEXIS 34, at 11-15, adopted as Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37.

position, and, accordingly, the Petitioners' Joint Motion to Proceed is denied.

DISCUSSION

The MWPA "establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements" by enacting local Wetlands Protection Bylaws. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009). As a result, an SOC issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local conservation commission denying approval of the proposed work based "on provisions of a local bylaw that are more protective than the [MWPA]." Oyster Creek, supra, 449 Mass. at 866. This deference to local regulation is supported by both General Condition No. 3 that appears in every SOC issued by the Department and the stay provision of 310 CMR 1.01(6)(h) discussed above.

General Condition No. 3 provides that the SOC "does not relieve the [applicant] . . . of ***the necessity*** of complying with all other applicable, federal, state, or ***local statutes, ordinances, bylaws, or regulations.***" (emphasis supplied). As discussed above, the stay provision of 310 CMR 1.01(6)(h) provides that "the Presiding Officer ***shall stay*** administratively any appeal of a superseding determination or order of conditions issued under M.G.L. c. 131, § 40 when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court." (emphasis supplied). Indeed, if a project is denied under a local wetlands bylaw, and "[the] denial . . . become[s] final . . . either because it is not appealed or because on appeal the denial is affirmed [by the Court], there remains no doubt that . . . [t]his forecloses [the applicant's ability to comply] with wetlands General Condition [No.] 3 and, . . . therefore, . . . the project cannot [proceed]." In the Matter of Howard Fafard, Docket Nos. 96-040, 96-044,

Final Decision (December 4, 1996), 1996 MA ENV LEXIS 122 at 6. In sum, "[a] final local wetlands bylaw denial thus makes . . . further project review under the [MWPA] and [the Wetlands] Regulations, [a] . . . futile academic exercise[e]," and as result, an administrative appeal challenging an SOC authorizing the project should be dismissed as moot in accordance with 310 CMR 1.01(5)(a)2.[6] Fafard, supra, at 7. "[The SOC] must [also] be vacated in the final decision dismissing the appeal as moot, since the final local wetlands bylaw denial establishes that the project [cannot] be built as conditioned and [cannot] comply with General Condition 3 if it were built." Id.

310 CMR 1.01(6)(h) also prescribes the terms under which a local Wetlands Bylaw stay of an administrative appeal of an SOC can be lifted: submittal of "proof of the approval [of the proposed work] under the relevant local . . . law or other ruling providing a basis for lifting the stay . . ." Here, in seeking to vacate the December 2012 Stay Order, neither the Petitioners nor the HCC have presented proof that the proposed Project has been approved under the Harwich Wetlands Protection Bylaw and the Harwich Wetlands Regulations. Nor have they presented any other ruling providing a basis for lifting the stay. All they have done is to present Stipulations that they made in a Joint Motion to Stay the Superior Court Bylaw Appeal that was approved by the First Assistant Clerk of the Barnstable Superior Court Civil Session. Joint Motion to Proceed, at pp. 3-4; Exhibit A to Joint Motion to Proceed. There is no record of a Superior Court judge having approved the Stipulations and Joint Motion to Stay. Id. The

[6] 310 CMR 1.01(5)(a)2 provides in relevant part that "[t]he Presiding Officer may, on the Presiding Officer's own initiative or on a party's motion where appropriate . . . dismiss appeals for . . . mootness, . . . or where the record discloses that the proposed project [or] activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final").

Stipulations include:

(1) that the Harwich Wetlands Protection Bylaw and the Harwich Wetlands Regulations are not more stringent than the MWPA and the Massachusetts Wetlands Regulations with respect to the definition and delineation of a Coastal Dune and the Performance Standards for work within a Coastal Dune;

(2) that "the determination of whether the Proposed Work will take place within or outside of the coastal dune is an issue for the Department to adjudicate in th[is] [administrative] appeal [of the SOC] under the [M]WPA and the [Massachusetts Wetlands [Regulations];"

(3) that "whether the prior coastal dune delineation [in the Roadway Order and the 3 Sea Street Order] is controlling is a legal issue that involves the Department's regulations and prior administrative decisions, and that the Department is in the best position to determine whether the prior delineation is binding under the circumstances";

(4) that "[i]f the Presiding Officer [in this administrative appeal of the SOC] determines that the prior delineation controls, then the Proposed Work would take place outside of the coastal dune, and th[is] . . . appeal would be moot . . . and the matter remanded to the Department's Southeast Regional Office for a determination whether to grant [an SOC] allowing the Proposed Work to go forward within the buffer zone to the coastal dune," and "[a]t the same time, the [HCC] and the Petitioners would resume the Superior Court Case to determine whether the Proposed Work complies with the Local By-law and Regulations;" and

(5) that "[t]he coastal dune delineation "must be resolved [by the Presiding Officer in order] for the parties to know . . . whether the Petitioners must file an ENF under MEPA" because "[i]f the Presiding Officer determines that the prior [Coastal Dune] delineation [in the Roadway Order and the 3 Sea Street Order] does not control such that the [proposed] work takes place within a coastal dune, then . . . [the] Petitioners must file an [ENF] under MEPA because the Proposed Work will meet the threshold set forth in 301 CMR 11.03(3)(b)(1)(a) for alteration of a coastal dune.

Joint Motion to Proceed, at pp. 3-4.

The Petitioners' and the HCC's Stipulations as set forth above are debatable in that they do not appear to reflect that the Department's review of a local conservation commission decision under the MWPA and the Massachusetts Wetlands Regulations approving or denying

proposed work in a protected wetlands area is a de novo review process, meaning that review starts anew. Also, the Massachusetts Wetlands Regulations at 310 CMR 10.07 as set forth in the margin[7] require MEPA compliance before the Department's issuance of an SOC under MWPA and the Regulations. Moreover, assuming for the sake of argument that I vacate the December 2012 Stay Order and later determine that the proposed Project will take place outside of the Coastal Dune because, as the Petitioners contend, "the prior [Coastal Dune] delineation [in the Roadway Order and the 3 Sea Street Order] controls," my determination would be "a . . . futile academic exercis[e]," Fafard, supra, because the proposed Project would still be denied under the 50 foot "no-disturb zone" of Section 1.04(3) of the Harwich Wetlands Regulations ("Section 1.04(3)"), which the Petitioners are challenging in their Superior Court Local Bylaw Appeal. Petitioners' Amended Complaint in Superior Court Local Bylaw Appeal, Counts I, II, IV, and V; Petitioners' Memorandum of Law in Support of Their Motion for Judgment on the Pleadings in Superior Court Local Bylaw Appeal ("Petitioners' Superior Court Memorandum"), at pp. 3-4, 11-13.

By their own admission as set forth in their recent Motion for Judgment on the Pleadings in the Superior Court Local Bylaw Appeal, the 50 foot "no-disturb zone" of Section 1.04(3) "establishes a 'no-disturb zone' within 50 feet of the boundary of certain wetland resources, including coastal dune" and provides that:

> [e]xcept for those [structures] being built on the footprint of an existing structure, and those deemed necessary to protect the resource, no new structures will be permitted in the no-disturb zone.

Petitioners' Superior Court Memorandum, at pp. 3-4. The Petitioners contend in Superior Court that the 50 foot "no-disturb zone" provision is invalid because the HCC purportedly lacked

[7] See footnote 4, at p. 4 above.

authority to adopt the provision under the Harwich Wetlands Protection Bylaw. Id., at pp. 11-13; Petitioners' Amended Complaint in Superior Court Local Bylaw Appeal, Counts IV and V. To sum up, it appears that unless the Superior Court invalidates the 50 foot "no-disturb" provision and its judgment is upheld on appeal, the proposed Project cannot proceed. As a consequence, the potential futility of lifting the stay in this appeal compels a denial of the Petitioners' and HCC's request to lift the stay pursuant 310 CMR 1.01(6)(h) . My determination is also consistent with the Presiding Officer's authority under 310 CMR 1.01(5)(a)3 and 310 CMR 1.01(5)(a)15.d, to stay the proceedings in an administrative appeal "where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause."

CONCLUSION

Based on the foregoing, the Petitioners' and the HCC's Joint Motion to Proceed is denied because they: (1) have failed to demonstrate that Petitioners have complied with MEPA, (2) have not presented any evidence that the Petitioners' proposed Project has been approved under the Harwich Wetlands Protection Bylaw and Harwich Wetlands Regulations, and (3) have not presented some other ruling providing a basis for the December 2012 Stay Order to be lifted.

Date: 9/10/13

Salvatore M. Giorlandino
Chief Presiding Officer

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