

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
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**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

September 12, 2016

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In the Matter of  
FTO Realty Trust

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OADR Docket No. WET-2015-024  
Tewksbury, MA

**RECOMMENDED FINAL DECISION**

FTO Realty Trust (“Petitioner”) filed this appeal to challenge the Superseding Order of Conditions (“SOC”) issued by the Department’s Northeast Regional Office concerning the real property at 20 Riverview Avenue, Tewksbury, Massachusetts (“the Property”). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The Property lies adjacent to the Shawsheen River, and it contains the following wetlands resource areas: Bordering Land Subject to Flooding (“BLSF”), Riverfront Area associated with the Shawsheen River, and Bordering Vegetated Wetlands (“BVW”). See 310 CMR 10.02, 10.55, 10.57, 10.58. The Property is within the Zone AE on the preliminary FEMA Flood Insurance Rate Map, dated February 11, 2011.

The Property is presently occupied by a 640 square foot cottage built on pilings and a 100 square foot shed. FTO has proposed a project for the Property, consisting primarily of a single-family house with driveway, deck, retaining wall, some site clearing and grading, and related appurtenances (“the Project”). The house and retaining wall were proposed to be located approximately 115 feet from the bank of the river. The Project would include alterations to BLSF, Riverfront Area, and Buffer Zone to BVW. It also included filling approximately 21,504

cubic feet of BLSF for the house, with approximately 21,599 cubic feet of proposed compensatory flood storage. FTO also proposed that the house would be encircled by a 4 foot high retaining wall. See October 6, 2015 SOC denial.

DEP issued an SOC denying the Project under 310 CMR 10.57(4)(a), finding it would impede flood waters, restrict the hydraulic connection to the river, and result in flooding to nearby Riverview Avenue. See October 6, 2015 SOC denial. FTO appealed the SOC denial here, to the Office of Appeals and Dispute Resolution (“OADR”).

Shortly after the appeal was filed, I issued a scheduling order and held a Pre-Hearing Conference. The parties then commenced filing written direct and rebuttal testimony according to the schedule I established. See Pre-Hearing Conference Report and Order. DEP prepared and filed detailed written testimony addressing what it believed were multiple reasons why the Project did not comply with the Wetlands Regulations. During that period, FTO was apparently engaged in preparing and filing a new Notice of Intent for a similar project at the same location. See 310 CMR 10.02, 10.03, 10.05. FTO filed that second Notice of Intent (file no. 305-1010) on April 19, 2016, and it was received by DEP on May 3, 2016. DEP did not become aware of the second Notice of Intent until one day before DEP’s testimony was due. The second Notice of Intent included changes to the Project that were intended to bring it into compliance with the Wetlands Regulations.

*FTO’s Motion to Stay.* After filing the second Notice of Intent and shortly before FTO’s written rebuttal testimony was due it filed a motion to stay this appeal. The basis for FTO’s motion to stay was DEP’s policy titled “Wetlands Program Policy 88-3: Multiple Filings.” The Multiple Filings Policy addresses a number of issues that arise when, as here, a party like FTO files multiple Notices of Intent. Regarding FTO’s motion for a stay, when a second Notice of

Intent is filed the Multiple Filings policy provides that “all administrative action on the original appeal will be stayed while processing the new Notice of Intent.” DEP opposed the stay, arguing primarily that because the parties had expended significant resources preparing testimony on the project identified in the first Notice of Intent, FTO should have been required to file its rebuttal testimony and proceed to the adjudicatory hearing on the project identified in the first Notice of Intent. I disagreed, citing the clear language of the Multiple Filings policy and the need to avoid the unnecessary expenditure of additional resources. I therefore allowed the motion to stay and “ordered [the parties] to comply with the Multiple Filings Policy.”

***Multiple Filings Policy.*** One goal of the Multiple Filings policy is to avoid the unnecessary expenditure of scarce resources that would be required for reviewing and issuing two or more Orders of Conditions for the same project and later litigating multiple appeals. In furtherance of those goals, the Multiple Filings policy provides: “In the case of adjudicatory hearings, the applicant has 21 days from the date of issuance of the Order of Conditions to withdraw, in writing, one of the two Notices of Intent. Failure to do so will result in the applicant being required to show cause why the earlier filed Notice of Intent should not be dismissed.” DEP decisions have been faithful to this policy, stating that in the absence of a showing of good cause and the applicant’s failure to designate which Notice of Intent to pursue, the earlier Notice of Intent should be dismissed. See e.g. Matter of Sampson, Docket No. 2001-108, Recommended Final Decision (January 24, 2002), adopted by Final Decision (January 30, 2002); Matter of Costello, Trustee, William Realty Trust, Docket Nos. 92-047/048, Final Decision-Order of Dismissal (April 28, 1995).

***Second Order of Conditions.*** On July 11, 2016, the Tewksbury Conservation Commission issued an Order of Conditions approving the project outlined in the second Notice

of Intent. On July 21, 2016, DEP intervened in the second Notice of Intent proceedings, asserting that the project as presently designed did not comply with the BLSF performance standards. 310 CMR 10.05(7). Abutters to the Property also appealed the OOC, requesting that DEP issue an SOC denying the project.

Now, because more than 21 days have passed since issuance of the Order of Conditions on the second Notice of Intent, DEP requests invocation of the Multiple Filings policy for dismissal of this appeal involving the first Notice of Intent. DEP argues that the present procedural posture falls squarely within the Multiple Filings policy and numerous prior administrative decisions. It contends that it should not have to review and litigate two projects and two appeals. Thus, it concludes that FTO should choose one of the Notices of Intent to pursue or, alternatively, the first one should be dismissed.

FTO responded that it should be allowed to pursue both Notices of Intent because it has not received a Final Order of Conditions on either Notice of Intent, i.e., both are now under appeal. It adds that it has insufficient information to determine with enough precision why DEP has appealed the Order of Conditions on the second Notice of Intent. Thus, FTO argues it has an inadequate basis to choose which Notice of Intent it should pursue. Therefore, it concludes that both appeals should proceed until a Final Order of Conditions is issued.

I disagree with FTO. It has been on notice since at least when it filed its motion to stay this appeal that the Multiple Filings policy plainly requires that it choose one Notice of Intent to pursue. I also required FTO to comply with that policy as part of my prior order staying this case, but it has not done so. The time period for choosing which Notice of Intent to pursue could not be clearer—within 21 days of issuance of the Order of Conditions. There is no exception that exists to extend that time period when, for example, DEP seeks to appeal one or more

Orders of Conditions. There is also no requirement that there be a Final Order of Conditions, as FTO argues. The rationale for that could not be clearer; requiring a Final Order of Conditions would undermine the objective of conserving resources. Instead, the parties could conceivably have to litigate more than one Notice of Intent simultaneously until a Final Order of Conditions is issued in each. That is an untenable outcome that is inconsistent with the policy and judicial economy.

FTO justifiably desires to make an informed decision regarding which Notice of Intent to pursue. And it could have done that by, among other things, consulting with its experts and DEP personnel. Instead, FTO has refused to choose which Notice of Intent to pursue. It did that, citing uncertainty from its inability to make an informed decision and the lack of a Final Order of Conditions. But there is no certainty in any litigation. Because FTO has long been on notice that if it did not choose which Notice of Intent to pursue, the appeal regarding the first Notice of Intent would be dismissed, I recommend that DEP's Commissioner issue a Final Decision dismissing this appeal, the one concerning the first Notice of Intent.

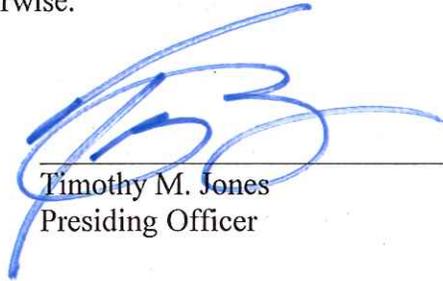
#### **NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), 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 his sole discretion, directs otherwise.

Date: 9/12/16



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Timothy M. Jones  
Presiding Officer

**SERVICE LIST**

In The Matter Of: FTO Realty Trust

Docket No. WET-2015-024 File No. 305-0982  
Tewksbury

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CONCOM  
Tewksbury Conservation  
Commission

Date: September 12, 2016

