

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 18, 2022

In the Matter of
181 Coleridge Street, LLC

OADR Docket No. 2021-024¹
Waterways License Application
No: W18-5344-N
East Boston, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Matthew K. Barison (“the Petitioner”) challenges a Draft Waterways License (“the c. 91 License”) that the Boston Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued on September 13, 2021 to 181 Coleridge Street, LLC (“the Applicant”) pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 (“Chapter 91” or “c. 91”), and the Waterways Regulations at 310 CMR 9.00. The Applicant seeks to construct and maintain a 9-unit, 2-story residential building with ground floor public and private parking, public open space, and a publicly accessible waterfront walkway (“Harborwalk”) at 181-183 Coleridge Street in East Boston. 8,413 square feet of the 9,313 square foot building are jurisdictional filled private tidelands. The Petitioner resides on Coleridge

¹ This appeal is consolidated with Docket No. 2021-027, brought by Petitioner Christopher Newsome. That appeal has been reported as settled and the Office of Appeals and Dispute Resolution is awaiting confirmation from MassDEP that the settlement complies with M.G.L. c 91 and 310 MR 9.00.



Street, approximately 1/10th of a mile from the project site. The Petitioner had the burden of proffering direct evidence in support of his claims. He failed to do so and he failed to comply with both the Pre-hearing Conference Report and Order (“PHC Report & Order”) and an Order to Show Cause (“Order”). As a result, and as more fully discussed below, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the appeal.

BACKGROUND

On September 20, 2021, MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) received the Petitioner’s appeal of the c. 91 license. After a second related appeal was filed by Christopher Newsome, I consolidated the appeals and conducted a pre-hearing conference with the parties. During the pre-hearing conference the Petitioner was advised of his obligation to file testimony in support of his claims according to the schedule that was established and discussed with the parties. The Petitioner was also advised of the consequences for failing to comply with the schedule, including potential dismissal of the appeal. Pursuant to the PHC Report & Order that I issued on December 13, 2021, the Petitioner was required to file his pre-filed direct testimony (“PFT”) in support of his claims by January 28, 2022. See PHC Report & Order at p. 10.

The Petitioner did not file his PFT by the deadline or at any time thereafter, nor did he request an extension of the deadline for good cause prior to its expiration. As the party with the burden of proof in this appeal, it was incumbent upon the Petitioner to present evidence relevant to the issues that would be resolved in an adjudicatory hearing scheduled for March 25, 2022. These issues included: (1) whether the Petitioner has standing to bring this appeal; (2) whether the proposed Harborwalk satisfies the Proper Public Purpose requirement under 310 CMR

9.31(2)(b); and (3) whether the proposed public parking facility complies with the requirements of 310 CMR 9.51(3)(b).

On January 31, 2022 I issued an Order to Show Cause ("Order") to the Petitioner requiring him to show cause, no later than February 7, 2022, why the appeal should not be dismissed because of his failure to file his PFT. The Petitioner did not file a response to the Order by that deadline. In response to an electronic mail message from the Applicant's counsel on the evening of January 7, 2022 requesting that the appeal be dismissed, the Petitioner on that same evening filed a set of three photographs, without any explanation.

DISCUSSION

There are numerous reasons to dismiss this appeal. An appeal may be dismissed when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10) and (11)(d)1; see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

Additionally, 310 CMR 1.01(3)(e) provides that "[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case." See also Matter of Tucard, LLC, OADR Docket No. 2009-076, 2010 MA ENV LEXIS 211, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010).

Finally, under 310 CMR 1.01(12)(f), a party's "[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner." In the Matter of Ross and Marilyn Wescott, OADR Docket No. 2006-154, Recommended Final Decision (December 8, 2014), adopted as Final Decision (December 22, 2014), 21 DEPR 150, 151 (2014); In the Matter of Autobody Solvent Recovery Corp., OADR Docket No. 2013-046, Recommended Final Decision (May 29, 2014), 2014 MA ENV LEXIS 39, at 8, adopted as Final Decision (June 2, 2014), 2014 MA ENV LEXIS 41; In the Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 19, adopted as Final Decision (April 2, 2013), 2013 MA ENV LEXIS 26. "[A] petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." Id., citing In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 310 CMR 1.01(10) a party's failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for "failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01." Wescott, *supra*, 21 DEPR at 151; Autobody, *supra*, 2014 MA ENV LEXIS 39, at 8-9.

Under 310 CMR 1.01(10), "[w]hen 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 requirements set forth in 310 CMR 1.01 . . .", the Presiding Officer may impose

appropriate sanctions on that party...”, including the sanction of dismissal. See 310 CMR 1.01(10)(e) &(f). The regulation further authorizes the Presiding Officer to recommend that a Final Decision be issued against the party being sanctioned. 310 CMR 1.01(10)(g).

As noted above, the parties were advised at the pre-hearing conference and in the PHC Report & Order of the possible consequences for failing to file any required materials in accordance with the schedule, including the potential for sanctions pursuant to 310 CMR 1.01. See Pre-hearing Conference Report and Order at pp. 9-10, note 6.² Of particular importance was the Petitioner’s obligation to present evidence demonstrating that he has standing to appeal as an “aggrieved person” within the meaning of 310 CMR 9.02 and 310 CMR 9.17. To demonstrate standing as an aggrieved person, the Petitioner was obligated to present evidence that he may suffer (1) an injury in fact; (2) that is different in kind or magnitude from that suffered by the general public and (3) within the scope of public interests protected by M.G.L. c. 91. 310 CMR 9.02; Higgins v. Department of Environmental Protection, 64 Mass. App. Ct 754, 756 (2005); Matter of Intell Boston Harbor, LLC, Docket No. 2003-047, Recommended Final Decision

² Those possible sanctions under 310 CMR 1.01(10) 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 requirements of 310 CMR 1.01(4);
- (d) striking the party’s pleadings in whole or in part;
- (e) dismissing the 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.

(August 27, 2003), adopted by Final Decision (September 8, 2003). Evidence on this issue was particularly important where the Petitioner asserted standing to appeal as “a member of the surrounding community” and such claim to standing appeared tenuous, at best, based on the existing administrative record.

The Petitioner’s failure to file any evidence in support of his claims alone is fatal to his appeal. His failure to comply with the orders and the deadlines therein provides further basis for the sanction of dismissal. Therefore, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the Petitioner’s appeal for failing to file direct evidence in support of his claims; failing to comply with the PHC Report & Order; failing to comply with the Order to Show Cause; and failing to prosecute his appeal. 310 CMR 1.01(5); 310 CMR 1.01(10); 310 CMR 1.01(12)(f).

Date: 2/18/2022



Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his consideration. 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.

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.

SERVICE LIST

IN THE MATTER OF:

181 COLERIDGE STREET, LLC

Docket No. 2021-024

File No. W18-5344-N

REPRESENTATIVE

PARTY

Matthew K. Barison, Esq.
124 Coleridge Street
East Boston, MA 02128
matt@barisonlaw.com

PETITIONER

Richard A. Nylen, Esq.
Lynch, DeSimone & Nylen, LLP
10 Post Office Square, Suite 970N
Boston, MA 02109
rnylen@ldnllp.com

APPLICANT
181 Coleridge Street, LLC

David Bragg, Senior Counsel
MassDEP Office of General Counsel
One Winter Street
Boston, MA 02108
David.Bragg@mass.gov

DEPARTMENT

Cc.
Daniel Padien, Section Chief
Waterways Regulation Program
MassDEP-Boston
One Winter Street
Boston, MA 02108
Daniel.Padien@mass.gov

DEPARTMENT

Frank Taormina, Regional Planner
Waterways Regulation Program
MassDEP-Boston
One Winter Street
Boston, MA 02108
Frank.Taormina@mass.gov

DEPARTMENT

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
Leslie.Defilippis@mass.gov

DEPARTMENT

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Recommended Final Decision

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