

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

July 2, 2024

In the Matter of Aspen Properties,
LLC

OADR Docket Number: WET-2024-014
DEP File No. SE 269-1050
Raynham, Massachusetts

RECOMMENDED FINAL DECISION

The Petitioner, Diane Tavares, has filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")¹ challenging the Department of Environmental Protection ("Department") Southeast Regional Office's ("SERO") issuance of a Superseding Order of Conditions ("SOC") dated April 23, 2024, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00, *et seq.* The SOC allows the construction of a single-family dwelling, utilities, grading work, and landscaping.

I. Procedural History.

On April 23, 2024, the Department issued a SOC allowing the Applicant to perform the requested work. The Petitioner filed her Appeal Notice on April 27, 2024, which stated, in full:

Dear Sir or Madame:

¹ OADR is an independent quasi-judicial office in the Department which is responsible for advising its Commissioner in resolving all administrative appeals of Department Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

After the site meeting on 3/7/2024, in which the Conservation Commission, Aspen's engineer, and Mr. Tallman was present and observed a foot of water draining on to my property nothing has been done. Northeast Engineers have not researched the culvert that goes through these properties. Northing shows on their plot plan.

I am not sure if the Conservation Commission, the planning dept. and the building dept. knew, but I have been told by my site contractor, the street dept. manager and an employee of the water dept. that the town has allowed two drains on Williams St. One to drain the water on Williams due to the high water table in this area and another for a resident on Williams St. that has complained about the excess water draining onto his property to drain into this culvert. I was on Williams St 4/25/24 and you can see a stream of water draining into this property.

Anyone receiving this appeal does not want a foot of water in their back yard every time it rains. I have yet been able to mow my land. My back yard continues to flood. My rights to use and enjoy my yard are being violated. I will continue to appeal this until something is done by the water dept. sewer dept. or storm water dept. and Aspens Properties.

If something is not done, I will seek legal advice and my own solution.

I am sure I can get several home owners to supply you with more information.

Thank You

Dianne Tavares

Appeal Notice, p. 2 (April 27, 2024).

On May 14, 2024, I issued and order stating as follows:

Parties: Under 310 CMR 10.05(7)(j)b.v., an Appeal Notice must include “a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision.” The Petitioner’s Appeal Notice does not include this clear and concise statement, nor does the Appeal Notice describe the basis of the Petitioner’s standing to appeal under 310 CMR 10.05(7)(j)2.a. Pursuant to my

authority under 310 CMR 1.01(5)(a)15.d., the Petitioner is ordered to provide a more definite statement by May 28, 2024.

On May 20, 2024, the Petitioner filed a response that included only a Word document version of her April 27, 2024, Appeal Notice. She provided no additional information.

On May 28, 2024, the Applicant filed a Renewed Motion to Dismiss contending:

The Petitioner's initial Appeal Notice as well as her Response to the Presiding Officer's Order for More Definite Statement fail to identify the performance standards under the Act with which the proposed project purportedly fails to comply and fail to identify any basis for any allegation that the DEP erred in issuing the SOC approval. The Petitioner additionally has failed to state what relief is sought.

Renewed Motion to Dismiss, p. 2 (May 28, 2024). I issued an order the same day stating

"Parties: a response to the Motion to Dismiss is due on or before June 7, 2024."

OADR did not receive a response to the Motion to Dismiss. Accordingly, on June 10, 2024, I issued the following order:

Parties: on May 15, 2024, I issued an order for the Petitioner to submit a more definite statement that included "a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision." 310 CMR 10.05(7)(j)b.v. The Petitioner submitted a copy of her Appeal Notice but no additional detail. On May 28, 2024, I entered an order that a response to the Applicant's Motion to Dismiss was due June 7, 2024. To date, no opposition has been received. I am therefore ordering the Petitioner to show cause why this matter should not be dismissed. If the Petitioner does not file a response by June 17, 2024, including a conforming more definite statement, I will issue a Recommended Final Decision recommending that the Commissioner issue a Final Order dismissing the matter.

On June 11, 2024, the Petitioner sent an E-mail to OADR stating the following:

Good Morning Mr. Patrick Groulx, Presiding Officer

Attached is my response to Aspens Properties building proposal.

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I don't believe that Aspens Properties have done any investigating who could be draining into the wetlands on their property.

This is noted in the Superseding Order that no one can drain their property into this culvert.

All I want is for this issue to be resolved. I can not go out to my back yard as of today, without sinking into the mud.

Dianne Tavares

The Petitioner submitted an additional E-mail on June 16, 2024, stating:

FYI

I met with the contractor that built the house on the corner of Williams Ave, directly across the street from where Aspen Properties propose to building their single family.

DEP told contractor and owners that they were not to cut grass, weeds and any growth in this area around their property due to wet lands. If you look at the property the grass and weeds have never been cut and you can not see house from road.

This reinforces the problem the Raynham Street Department had with the high water table in this area, and preceded to drain into the culvert that runs through Aspens's Property.

I have a hard time reconciling that Aspen Properties are allowed to build directly across the street in this area. If the home owner can not remove the grass, weeds and whatever growth that is there due to wetland, why is the DEP and the town allowing Aspen Properties to build.

Dianne Tavares

No other response was received.

II. Analysis.

The MWPA protects several categories of wetland resources ("Areas Subject to Protection"),² and those protections are implemented by the Wetlands Regulations at 310 CMR

² The MWPA pertains to "any bank, riverfront area, freshwater wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding...." G.L. 131, § 40; see also 310 CMR 10.02(1).

§ 10.00, *et seq.* The regulations restrict most activities that will "remove, fill, dredge or alter" Areas Subject to Protection.³ 310 CMR 10.02(2)(a). The regulations also restrict activities within defined "buffer zones"⁴ that "will alter an Area Subject to Protection." 310 CMR 10.02(2)(b).

If an entity wishes to perform regulated activities in an Area Subject to Protection or a buffer zone, it must first file a Notice of Intent with the local conservation commission. See 310 CMR 10.05(4). The Department issues a file number for the notice of intent, which indicates only that the notice meets the "minimum submittal requirements contained in the General Instructions." 310 CMR 10.05(4)(c).

If the conservation commission determines that the activities proposed will affect an area significant to one or more of the interests identified in the MWPA, then the conservation commission must issue an Order of Conditions. 310 CMR 10.06(a)2. The Order of Conditions must:

impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40 and the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

310 CMR 10.05(6)(b).

After the conservation commission issues an Order of Conditions, the applicant; the owner, if not the applicant; any person aggrieved by the Order of Conditions; any owner of land abutting the land on which the work is to be done; any ten residents of the city or town where the land is located; or the Department may request that the Department issue a Superseding Order of Conditions. 310 CMR 10.05(7)(a) and (b). Generally, after reviewing

³ "Areas Subject to Protection" are also referred to as "Resource Areas." See 310 CMR 10.02.

⁴ A "buffer zone" is defined as "that area of land extending one hundred (100) feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a)."

the Notice of Intent, the Order, any informal meeting or site inspection, and any other additional plans, information, or documentation submitted under 310 CMR 10.05(7)(f) or (g), the Department shall issue a Superseding Order for the protection of the interests identified in M.G.L. c. 131, § 40. The Superseding Order shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 and stormwater standards set forth at 301 CMR 10.05(6)(k) for the protection of those interests. The Superseding Order shall prohibit any work or any portions thereof that cannot be conditioned to protect such interests. The Department may issue a Superseding Order which affirms the Order issued by the conservation commission.

310 CMR 10.01(7)(i). Following the issuance of a Superseding Order of Conditions, an "applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review" of the Superseding Order of Conditions by OADR. 310 CMR 10.05(7)(j)2.a.

A. Pleading Standard for Notices of Appeal.

An appeal is commenced by filing an Appeal Notice. 310 CMR 10.05(7)(j)2.a. 310 CMR 1.01(6)(b) requires that an Appeal Notice "state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation." When an Appeal Notice does not meet the requirements of 310 CMR 1.01 and other applicable regulations, 310 CMR 1.01(6)(b) allows the Presiding Officer to "dismiss the appeal or require a more definite statement." In the event the Petitioner fails to file a more definite statement within the required time, the appeal "shall be dismissed." Id.

The Wetlands Regulations also require that an Appeal Notice include specific information, 310 CMR 10.05(7)(j)2.b., including:

a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the

Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision. The Petitioner's Notice of Appeal does not comply with the regulations.

310 CMR 10.05(7)(j)2.b.v. If the Appeal Notice does not contain this required information, then the appeal may be dismissed. 310 CMR 10.05(7)(j)2.c.

B. The Petitioner's Appeal Notice does not meet the requirements of 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j)2.b.v.

The Petitioner submitted three filings to OADR⁵ that set forth her position in this matter: the Appeal Notice, the June 11 E-mail, and the June 16 E-mail. These three documents, taken together, fail to provide "a clear and concise statement of the alleged errors contained in the Reviewable Decision[,] how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], and the relief sought, including specific changes desired in the Reviewable Decision." 310 CMR 10.05(7)(j)2.b.5.

Even though the Petitioner is *pro se*, she is nevertheless required to comply with the applicable procedural rules. Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 MA ENV LEXIS 16, at *8-9, adopted as Final Decision (February 19, 2020), 2020 MA ENV LEXIS 12; Lawless v. Bd. of Registration in Pharm., 466 Mass. 1010, 1011 n. 3 (2013). "Although [her] pro se status in the appeal accords [her] some leniency from these litigation rules, [she is] not excused from complying with them." Barstow, 2020 MA ENV LEXIS 12 at *8-9. Despite having been given multiple opportunities, the Petitioner has failed to fix the deficiencies in her Appeal Notice.

⁵ The Petitioner's filing of May 20, 2024, did not include any information other than the already-filed Appeal Notice.

III. Conclusion.

The Petitioner's Appeal Notice and other filings fail to comply with the rules for filing an appeal. For the foregoing reasons, I recommend that the Commissioner issue a Final Order dismissing this matter for failure to comply with 310 CMR 10.05(7)(j)2.b.



Patrick M. Groulx
Presiding Officer

Date: July 2, 2024

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