

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

January 21, 2020

In the Matter of
Barry Dino Viprino d/b/a
Resilient Family Farms

OADR Docket No. WET-2017-018
Superseding Determination of Applicability

Harwich, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this wetlands appeal, Barry Dino Viprino d/b/a Resilient Family Farms (“Mr. Viprino” or “the Petitioner”), challenges a Superseding Determination of Applicability (“SDA”) that the Massachusetts Department of Environmental Protection’s Southeast Regional Office (“the Department”) issued to the Petitioner on September 12, 2017 pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SDA determined that the Petitioner was required to obtain authorization pursuant to the MWPA and the Wetlands Regulations for his proposed project at his property in Harwich, specifically, his construction of a “Hoop Structure” (aquaponics integrated high-tunnel) within the Buffer Zone to Bordering Vegetated Wetlands (“BVW”). The SDA affirmed a Positive Determination of Applicability issued on or about February 28, 2017 by the Harwich Conservation Commission (“the Commission”). The SDA further determined that the land where the Hoop Structure was proposed to be located was not

“land in agricultural use” within the meaning of 310 CMR 10.04 (Agriculture) and that Mr. Viprino had not presented evidence of use of the land for producing or raising commodities.

Mr. Viprino disputed the determination that the proposed location of the Hoop Structure had not been in agricultural use within the past five years. See Notice of Claim at 1. It was Mr. Viprino’s position that his farm operations fit within the regulatory definition of “agriculture”. See Notice of Claim at 2. He also asserted that the prior owner of the property engaged in commercial breeding and sales of horses for a period between 2010 and 2012. The Petitioner seeks a decision: (1) overturning the Positive SDA; (2) finding that the Petitioner’s and the prior owner’s land use constitute “agricultural use”; and (3) determining that the area for the proposed Hoop Structure constitutes “Land in Agricultural Use” exempt from the MWPA. See Petitioner’s Pre-hearing Statement at 2.

The Department moved to dismiss the appeal after the Petitioner failed to file his pre-filed testimony (“PFT”) in accordance with the schedule established at the pre-hearing conference (“the Conference”) that I conducted with the parties on March 12, 2019. For the reasons discussed below, I recommend that the Department’s Commissioner issue a Final Decision that (1) dismisses the appeal and (2) affirms the SDA.

BACKGROUND

I conducted two pre-hearing conferences with the parties, on November 15, 2017 and March 12, 2019.¹ The appeal was stayed after the first Conference to afford the parties additional time for settlement discussions. On February 4, 2019 I lifted the stay at the Petitioner’s request and scheduled the second Conference. During both Conferences I explained that the Petitioner

¹ The Petitioner filed his appeal *pro se* but was represented by counsel at the first Conference. Just prior to the second Conference the Petitioner’s counsel withdrew his appearance. Counsel stated that successor counsel had been retained but would not be able to attend the Conference. Mr. Viprino confirmed prior to the second Conference that he would attend without counsel and wanted to proceed.

had the burden of going forward and was required to put forth credible evidence in support of his claims. Both the Pre-hearing Conference Report and Order dated November 27, 2017 and the Amended Pre-hearing Conference Report and Order dated March 22, 2019 reiterated these requirements. The Amended Pre-hearing Conference Report and Order also set forth the schedule for filing PFT² that had been discussed with, and agreed to by, the parties at the Conference.

The Petitioner was required to file his PFT by June 7, 2019. See Amended Pre-hearing Conference Report and Order at p. 10. He did not file his PFT nor did he request an extension of that deadline for good cause prior to its expiration. On June 11, 2019 I issued an order to the Petitioner directing him to show cause why this appeal should not be dismissed for his failure to file PFT as required. That same day, the Department moved to dismiss for the same reason.

Responding to the Department's motion, the Petitioner offered no explanation for his failure to file testimony.³ Instead, he asserted that the evidence necessary to prove agricultural use on the portion of his property that was the subject of the SDA was in the possession of, and had been withheld by, the Town of Harwich. The Department renewed its motion on June 28, 2019 ("the Renewed Motion"). Responding to the Petitioner's assertions about the Town of Harwich, the Department noted that it was the Petitioner's responsibility to document his claim of prior agricultural use of the subject area, not the Town's, and further, the Petitioner failed to

² 310 CMR 1.01(12)(f) authorizes the Presiding Officer to order the parties to an appeal to file in advance of the adjudicatory hearing "the full written text of the testimony of their witnesses on direct examination, including all exhibits to be offered in evidence." It is the general practice of the Presiding Officers in the Department's Office of Appeals and Dispute Resolution ("OADR") to order that direct and rebuttal testimony be pre-filed by all parties to the appeal

³ The Petitioner did not specifically respond to the Order to Show Cause.

provide a reason for why the appeal should not be dismissed. Department's Renewed Motion to Dismiss at p. 2.

The Petitioner filed a response to the Renewed Motion on June 28, 2019. Describing some financial difficulties, he stated that he missed the filing deadline because he was not certain that he would be able to proceed with his project, and it was not until June 26, 2019 that he determined that he could not. He conceded that as a result of this determination the appeal may be moot, but he contended that the issue of agricultural use should still be decided because there could be other permissible uses of the property. Petitioner's Response to Department's Renewed Motion to Dismiss at p. 2. The Petitioner made numerous claims about the behavior of the Town of Harwich but did not provide a good faith explanation for why he neither filed his PFT by the deadline nor requested an extension of time. The date of the Petitioner's June 28, 2019 response to the Renewed Motion was almost three weeks after his PFT was due, and as noted above, the Petitioner never requested an extension of the deadline.

DISCUSSION

A. Standard of Review

A party to an appeal "may move to dismiss where another party fails to file documents as required... [or] for lack of standing [or for] lack of jurisdiction." 310 CMR 1.01(11)(d)1. 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); Matter of Edwin Mroz, Docket No. 2017-021, Recommended Final Decision (June 7, 2019), adopted by Final Decision (June 18, 2019).

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).

B. The Petitioner's Failure to File Testimony Warrants Dismissal.

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. Indeed, "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), the Presiding Officer may "issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner." *Id.* At the Conferences and in the Conference Reports & Orders, the parties were advised 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 p. 10, note 6.⁴ It was the Petitioner's burden to put forth some evidence in support of his claim by the deadline established at the Conference. *See* 310 CMR 10.05(7)(j)3.b. (Petitioner has burden of going forward pursuant to 310 CMR 10.03(2)⁵ and

⁴ 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.

⁵ 310 CMR 10.03(2) states that "[t]he burden of going forward means having to produce at least some credible evidence from a competent source in support of the position taken. This burden shall be upon the person contesting

proving his case by a preponderance of the evidence). He failed to do so. Stating that the Town had the evidence does not constitute good cause where the Petitioner had the burden of production, and he put forth no evidence in support of his claims. Also, if he was having difficulties, he could have moved to extend the deadline or to stay the appeal. He did neither. Failure to file pre-filed testimony constitutes fatal non-compliance with the rules and orders and warrants dismissal of the appeal.

CONCLUSION

For the reasons discussed above, I recommend that the Department's Commissioner issue a Final Decision that: (1) dismisses the appeal for the reasons stated above and (2) affirms the SDA.

Date: 1/21/2020



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 Interlocutory 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.

the Department's position when the Department has been requested to hold an adjudicatory hearing. In the event that under the provisions of 310 CMR 10.03 two or more persons have the burden of going forward, said burden may be placed on all or any number of them, in the discretion of the hearing officer."

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⁶ It is unclear if Attorney Bowers represents the Petitioner. The Petitioner was instructed by email dated March 22, 2019 to have Mr. Bowers file an appearance if he was intending to represent the Petitioner. No appearance has been filed.

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