

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

March 30, 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 ON RECONSIDERATION

INTRODUCTION

This appeal was filed by Barry Dino Viprino d/b/a Resilient Family Farms (“Mr. Viprino” or “the Petitioner”) after the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued a Superseding Determination of Applicability (“SDA”) to him 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 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.

After the Petitioner failed to file his pre-filed direct testimony (“PFT”) in support of his appeal as required by (1) the Rules for Adjudicatory Proceedings, 310 CMR 1.01; (2) the wetlands appeal regulations, 310 CMR 10.05(7)(j)3.b.; and (3) the Amended Pre-Hearing Conference Report and Order I issued on March 22, 2019, I issued an Order to Show Cause on June 11, 2020 directing the Petitioner to file a written response by June 26, 2020 demonstrating why the appeal should not be dismissed. MassDEP also moved to dismiss the appeal on that date. The Petitioner filed a response to MassDEP’s motion on June 27, 2020, but did not specifically respond to the Order to Show Cause. MassDEP renewed its Motion to Dismiss on June 28, 2020 and the Petitioner filed a response to that motion on that day.

On January 21, 2020, I issued a Recommended Final Decision (“RFD”) recommending that the appeal be dismissed due to the Petitioner’s failure to file his PFT. I made this recommendation after finding that the Petitioner failed to provide any good faith explanation for why he failed to file his PFT or request an extension of time to do so prior to the expiration of the deadline. I also noted that he failed to specifically respond to the Order to Show Cause. RFD, Note 3 at p. 3. Instead, the Petitioner stated that he had missed the deadline because he was uncertain about his ability to proceed with his project. The Department’s Commissioner issued a Final Decision adopting the RFD on January 27, 2020.

The Petitioner moved for reconsideration of the Final Decision pursuant to 310 CMR 1.01(14)(d), asserting that the decision is clearly erroneous. The Department opposes the motion. For the reasons discussed below, I recommend that the Department’s Commissioner issue a Final Decision on Reconsideration denying the Petitioner’s Motion for Reconsideration.

DISCUSSION

1. Standard of Review

A party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, at 6, adopted as Final Decision on Reconsideration (November 7, 2014), 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was “clearly erroneous.” *Id.* A Motion for Reconsideration may be summarily denied if “[it] repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments” *Id.*, at 6-7. Moreover, “reconsideration [of the Final Decision is not] justified by the [party’s] disagreement with the result reached in the Final Decision.” *Id.*, at 7.

2. Reconsideration of the Final Decision is Not Warranted

The Final Decision was based on the following findings:

- (1) The Petitioner’s PFT was due on June 7, 2019;
- (2) The Petitioner did not file his PFT by that date nor request an extension of that deadline for good cause prior to the expiration of the deadline;
- (3) The Petitioner did not specifically respond to my Order to Show Cause, and in his response to the Department’s motion to dismiss he failed to provide a good faith explanation for not filing his PFT by the established deadline or for not requesting an extension prior to that deadline’s expiration.

The Petitioner asserts in his motion for reconsideration that the finding that he never sought an extension of the time for filing his PFT is clearly erroneous because in his June 28, 2019 response to the Department's Renewed Motion to Dismiss he asked for more time to continue the case and to file testimony. He further asserts that "[he] was not voluntarily withholding filings or pre-filed testimony. [He] was waiting for a decision that was never issued or received [determining whether the case would be moot if the Petitioner did not proceed with his proposed Project]." The Department asserts that the findings in the RFD are all clearly supported by the record and "provide a sound basis for dismissing [the] appeal." The Petitioner's arguments are unavailing, and raise matters that were adequately considered in the RFD.

First, as noted above, the Petitioner did not file his PFT and did not request an extension of the filing deadline prior to its expiration. He does not dispute these findings, which were the basis for the appeal's dismissal. Rather, he argues he did request an extension in his June 28, 2019 filing. This argument fails to demonstrate that the Final Decision was clearly erroneous. The Adjudicatory Proceeding Rules are clear that a request for an extension of a deadline must be made before the deadline expires. See 310 CMR 1.01(3)(d). Here, the Petitioner waited until three weeks after his PFT was due to request more time, and did so only in response to a Motion to Dismiss. This argument was addressed in the RFD at pp. 5-7.

Second, there was no decision pending on whether the appeal would be moot if the Petitioner did not proceed with his hoop structure. Additionally, the Final Decision did not dismiss the appeal as moot. The question of mootness was discussed at the second pre-hearing conference ("PHC"), but was not proposed as an Issue for Resolution and neither the Petitioner nor MassDEP requested any ruling on that question. If the Petitioner believed some decision was pending, then he should have contacted OADR prior to the time his testimony was due.

Third, the Issues for Resolution in this appeal, which the parties discussed and agreed to at the PHC, directly addressed the question underlying the SDA, regardless of whether the Petitioner's proposed project was the hoop structure or some other commercial agricultural project.¹ The question always was whether the portion of his property where the project was proposed to be located was "land in agricultural use." The Petitioner acknowledged as much in his response to the Department's Motion to Dismiss at p. 2 ("If the presence of the [hoop structure] is required for the review to continue, then I must concede the issue is moot based on that standard. However, absent the [hoop structure] the review is not a 'purely academic proceeding' because the underlying issue of whether the area is [Land in Agricultural Use] and usable for another commercial [agricultural] purpose needs to be decided." (emphasis added).

The Petitioner was required to submit his PFT on these issues by the date set at the PHC and contained in the PHC Report and Order. As discussed in detail in the RFD at pp. 3-7, he did not file any PFT nor request an extension of the filing deadline prior to its expiration. The Petitioner's argument that he "patiently waited for a response to know the status of the case" is without merit. The status of the case should have been clear to the Petitioner at the PHC when the issues were established, and the date for the hearing and the schedule for filing testimony were set. The Petitioner's motion repeats arguments that were previously raised and matters that were adequately considered in the Final Decision, and therefore fails to establish a basis for reconsidering the Final Decision.

¹ Specifically, Issues for Resolution 1 and 2 were:

1. Whether the Property was used for the production of agricultural commodities prior to the date the Petitioner purchased the property; and
2. Whether the Petitioner's activities at the Property subsequent to his purchase constitute activities in the Buffer Zone subject to regulation pursuant to the MWPA and 310 CMR 10.00.

CONCLUSION

I find that the Petitioner has not met his “heavy burden” on this motion for reconsideration, and for the reasons discussed above, I recommend that the Department’s Commissioner issue a Final Decision on Reconsideration denying the motion.

Date: 3/30/2020



Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration 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 may be appealed 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 on Reconsideration 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

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² 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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