

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

February 8, 2017

In the Matter of
Brown Builders, Inc.

OADR Docket No. WET-2016-032
Bridgewater, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Leo and Ellen Crowley (“the Petitioners”) challenge the Superseding Order of Conditions (“SOC”) issued by the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) to Brown Builders, Inc. (“the Applicant”) 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 Applicant proposes to build a single-family house on property he owns at Lot 1, 370 Spruce Street in Bridgewater. Request for SOC, June 22, 2016. The Petitioners own property at 350 Spruce Street (Lot 3), abutting the project site. On January 19, 2017, the Department moved to stay or dismiss the Petitioner’s appeal on the grounds that the Applicant’s project was denied under the Bridgewater wetlands bylaw and the record is unclear as to whether such denial was appealed to Superior Court. MassDEP argues that if such denial was appealed to Superior Court, then 310 CMR 1.01(6)(h) mandates that I stay the administrative appeal; if the denial was not appealed to Superior Court, then the bylaw denial is final, compliance with General Condition #3 of the SOC is foreclosed, and this case should be dismissed as moot.

General Condition #3, applicable to all SOC's issued by the Department, requires the Applicant to comply with the local bylaw. Because the Bridgewater Conservation Commission ("BCC") denied the Applicant a permit, construction cannot proceed because the Applicant cannot comply with the local bylaw.

On January 25, 2017, I conducted a teleconference with the parties to discuss the case in light of the Department's motion, and in lieu of the Pre-hearing Conference scheduled for the next day. The Petitioners and the Department were represented by counsel; Brown Builders, Inc. was represented by Donald Brown, Jr., *pro se*. During the conference Mr. Brown acknowledged that he did not appeal the BCC's denial of the project under the local bylaw to Superior Court. He believed this appeal to the Department was all that was required to challenge the Conservation Commission's denial of his project. I explained that the Department does not have jurisdiction over the bylaw denial, and directed him to Section F on page 11 of the Denial Order of Conditions where this is clearly stated. Mr. Brown stated that he understood that he could file a new Notice of Intent and begin the process anew.

In light of the Applicant's failure to appeal the bylaw denial to Superior Court, I recommend that the Department's Commissioner issue a Final Decision vacating the Superseding Order of Conditions and dismissing this appeal as moot.

BACKGROUND

The Applicant filed a Notice of Intent ("NOI") with the Bridgewater Conservation Commission ("the Commission") on March 8, 2016 for a project involving construction of a single family home, a septic system, a driveway, a wetlands replication area and associated grading and drainage work. The planned driveway traverses the length of the Petitioners' property. The Commission held a hearing on the NOI on April 12, 2016; the Commission closed

the public hearing on May 24, 2016 and voted to deny the project. The written denial was issued on June 14, 2016. The BCC denied the project under both the MWPA and the Town of Bridgewater Wetland Bylaws.

The Applicant requested a Superseding Order of Conditions from MassDEP by filing its request with the Southeast Regional Office on June 24, 2016. The Applicant did not file an appeal of the bylaw denial in Superior Court. After its review, the Department issued the SOC approving the project, subject to General and Special Conditions. One of those conditions, General Condition No. 3, contained in every SOC, states “This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.” As noted above at p. 1, the Petitioners appealed the SOC to the Office of Appeals and Dispute Resolution on December 16, 2016. In their appeal, the Petitioners seek a Final SOC denying the project on the grounds that the Applicant submitted incomplete and inaccurate plans that violate 310 CMR 10.08(1)(d) and the WPA. They also allege a violation of 310 CMR 10.05(4)(a) because a portion of the project occurs on their property and the Applicant did not obtain their written consent prior to filing the NOI. The Petitioners assert that they participated in the hearing process before the BCC, raising concerns that the project plan submitted with the NOI did not accurately depict the existing conditions at the property and contained other errors. The Applicant submitted a revised plan, which, according to the Petitioners, was still inaccurate.

DISCUSSION

310 CMR 1.01(5)(a)2 and 310 CMR 1.01(5)(a)15.f.iii of the Rules for Adjudicatory Proceedings authorize the Presiding Officer to issue a Recommended Final Decision for dismissal of an appeal where the underlying claim is moot. “When a permit is denied under a

local bylaw and has not been appealed to court, the case before the Department should be dismissed.” Matter of Linda Nyren, Docket Nos. 2002-159, 2002-161, 2002-163, Final Decision (June 14, 2004); see also Matter of Joseph Silva, Docket Nos. WET-2008-002, WET-2008-003, Recommended Final Decision (May 23, 2008)(a bylaw denial is final if not appealed to court, and the applicant cannot comply with Condition No. 3 of the state permit), adopted by Final Decision (June 20, 2008); Matter of Craig Campbell, Docket No. 007-099, Recommended Final Decision (April 2, 2010)(final bylaw denial is a failure to obtain the local permit; without the local permit the applicant cannot comply with a superseding order of conditions), adopted by Final Decision (May 13, 2008); Matter of John Walsh and Walsh Brothers Building Co., Inc., Memorandum and Order Denying Petitioners’ and Harwich Conservation Commission’s Joint Motion to Proceed (September 10, 2013), 2013 MA ENV LEXIS 92, at 10-12; Order Granting Petitioners’ Renewed Motion to Proceed (September 18, 2014); Recommended Remand Decision (April 23, 2015), 2015 MA ENV LEXIS 35; Decision Adopting Recommended Remand Decision (June 2, 2015), 2015 MA ENV LEXIS 34.

As noted above, there is no dispute that the Applicant’s project was denied under the local wetlands bylaw and the denial was not appealed to court. The Applicant has admitted these facts. Therefore, the Applicant cannot comply with the SOC. The project, therefore, cannot proceed. As a result, the Petitioner’s claims are moot, and thus, the SOC should be vacated and the case should be dismissed. I recommend that the Department’s Commissioner issue a Final Decision vacating the SOC and dismissing the appeal as moot.

Date: 2/8/2017



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 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.

SERVICE LIST

In The Matter Of:

Brown Builders, Inc.

Docket No. WET-2016-032

**File No. SE 116-1362
Bridgewater**

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