

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 23, 2024

In the Matter of
CCF Quannapowitt Property
Company, LLC

OADR Docket Number: WET-2024-002
DEP File No. NE 313-0608
Wakefield, Massachusetts

RECOMMENDED FINAL DECISION

Dennis M. Cloherty ("Petitioner"), has filed this appeal with the Office of Appeals and Dispute Resolution ("OADR")¹ of the Massachusetts Department of Environmental Protection ("Department") challenging the dismissal of his Request for a Superseding Order of Conditions relative to an Order of Conditions issued by the Wakefield Conservation Commission ("Commission") to perform work at 200-400 Quannapowitt Parkway, Wakefield. The Department's Northeast Regional Office ("NERO") dismissed the Petitioner's request because it determined that the Petitioner's request for Department action under 310 CMR 10.05(7)(c) was untimely. The Petitioner (timely) appealed that request to OADR.

I. Facts and Procedural History.

In August 2021, CCF Quannapowitt Property Company, LLC ("Applicant"), filed a Notice of Intent ("NOI") with the Commission seeking approval of the Applicant's project

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. A detailed description of OADR is set forth in Addendum No. 1, below.

(“Project”). See Letter from NERO to Petitioner (Nov. 28, 2023). The Petitioner has not provided a copy of the Notice of Intent, and it was not produced with the Department’s Basic Documents.² The Commission issued an Order of Conditions (“OOC”) on August 1, 2022, approving the Project. Id.

On November 20, 2023, the Petitioner submitted to NERO a document titled “Notice of Appeal,” which NERO interpreted as a request to issue a Superseding Order of Conditions. Id. On November 28, 2023, NERO dismissed the request because it was “approximately fifteen (15) months” past the appeal period deadline date. Id.

On December 1, 2023, the Petitioner submitted a “Request for an Adjudicatory Hearing” regarding the Project. Appeal Notice, p. 1. That document was submitted directly to NERO. OADR received the Appeal Notice around January 11, 2024.

On January 24, 2024, I issued an order stating as follows:

Even though the Petitioner is pro se (meaning not represented by an attorney), he 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). 310 CMR 1.01(6)(b) states, in relevant part, “[a] notice of claim for adjudicatory appeal shall 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. The Department may provide forms to be used for a notice of a claim for an adjudicatory appeal, and where provided, the form shall be used.” The Petitioner’s “Notice of Appeal” dated November 19, 2023, and “Request for an Adjudicatory Hearing” dated December 1, 2023, do not state the facts that are grounds for the appeal nor the relief

² “Basic Documents” are those documents in the official file of the Department program that was involved in the decision, order, or determination that is on appeal. Basic Documents generally include (1) all submissions used by the Department in reaching the decision, order, or determination and (2) all documents constituting the Department’s decision, order, or determination. Basic Documents do not include internal deliberations of the Department. The Department’s Basic Documents are admissible and probative as “the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” G.L. c. 30A, § 11(2); 310 CMR 1.01(8)(a); see also Mass. Guide Evid. 201(b)(2).

sought. The Petitioner is ordered to submit a more definite statement and the required form. In particular, as part of his more definite statement, the Petitioner must describe the facts that impart standing under 310 CMR 10.05(7)(a) and provide the Adjudicatory Hearing Fee Transmittal Form. The more definite statement is due February 8, 2024.

The Petitioner submitted his More Definite Statement on February 8, 2024.

On February 9, 2024, I issued an Order to Show Cause stating the following:

Given that the timeliness of a request for department action is jurisdictional, and there is a fundamental question of whether the Petitioner timely filed the request for department action, a show cause order is appropriate. The Petitioner is therefore given until **February 23, 2024**, to explain why this case should not be dismissed for failure to timely file a request for department action within ten business days under 310 CMR 10.05(7)(c).

Order to Show Cause, p. 6 (Feb. 9, 2024). The Petitioner submitted his response in several E-mails between February 17 and 20, 2024.

II. Applicable Standards.

After a 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). That request must be submitted “within ten days of the issuance of the Order... which is being appealed.” 310 CMR 10.05(7)(c).³ The 10-day deadline to request Departmental action under 310 CMR 10.05(7)(c) is jurisdictional, meaning that the Department lacks jurisdiction “to issue a superseding order or, consequently, to entertain a subsequent adjudicatory appeal” if the request is untimely. Matter of Worcester School Dept.,

³ 310 CMR 10.05(1) specifies that this ten-day deadline is “computed using business days only.”

Docket No. 99-164, Decision and Order on Motions to Dismiss and to Strike (Jan. 26, 2000), 2000 MA ENV LEXIS 57, *5, and cases cited.

As noted, the 10 business day deadline to request Departmental action under 310 CMR 10.05(7)(c) is jurisdictional. It is axiomatic that OADR may not rule on a matter over which it does not have jurisdiction. See, e.g., Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. Ct. 623, 625-26 (1980) (the Department does not have jurisdiction to adjudicate disputes over title to real property). A Presiding Officer may (and indeed must) “on the Presiding Officer’s own initiative... dismiss appeals for... lack of jurisdiction.” 310 CMR 1.01(5)(a)2; see also 310 CMR 1.01(11)(d) (motion to dismiss may be filed for lack of jurisdiction); Matter of Boyajian, OADR Docket No. WET-2010-030, Recommended Final Decision, 2011 MA ENV LEXIS 50 (February 23, 2011), adopted by Final Decision, 2011 MA ENV LEXIS 48 (March 9, 2011).

The Presiding Officer may determine whether there is a jurisdictional defect by issuing an order to show cause. 310 CMR 1.01(6)(d); see also, e.g., Matter of Ana Duarte, OADR Docket No. 2022-015, Recommended Final Decision (Mar. 27, 2023), 2023 MA ENV LEXIS 25, *1, Adopted as Final Decision (Jun. 27, 2023), 2023 MA ENV LEXIS 27; Matter of Emile Tayeh, Jr., OADR Docket No. WET-2019-016, Recommended Final Decision (Jun. 8, 2020), 2020 MA ENV LEXIS 63, *2-*3, Adopted as Final Decision (Jun. 22, 2020), 2020 MA ENV LEXIS 66 (dismissing for failure to file appeal of Superseding Order of Conditions timely).

III. Whether OADR has jurisdiction over the matter.

While the Petitioner filed his Appeal Notice timely, his request for Department action was untimely, and therefore OADR lacks jurisdiction over this matter.⁴ On August 2021, the Applicant filed its NOI, and the Commission issued the OOC on August 1, 2022, approving the Project. Id. Under 310 CMR 10.05(7)(c), a request for Department action, here an SOC, was due 10 business days later, August 15, 2022. However, the Petitioner did not submit his request for Department action until November 23, 2023, which was 479 calendar days (or 327 business days) after the OOC was issued.

The Petitioner makes four arguments in his response. First, he argues that "what Appeal was dismissed in the November 14, 2023 letter from DEP was 71 Whittier Road in Wakefield." Response to Order to Show Cause, p. 1. This is not relevant because this Order to Show Cause is focused on the November 20, 2023, letter from the Department.

Second, the Petitioner states that " Ms[.] Davis, who is no longer employed by Wakefield, withheld information from the conservation committee, seemingly acting as their agent[.]" Id. This statement is not part of the Petitioner's More Definite Statement, and it is unclear what information was allegedly withheld.⁵ Even if information was withheld from the Committee, it is unclear what impact that would have on the Department's determination that the deadline was not met.

Third, he argues that G.L. c. 30, § 62H, permits him to submit his request for agency action late if "a court determines that an agency or person proposing a project has knowingly

⁴ It is unclear whether the Petitioner has standing to appeal under 310 CMR 10.05(7)(j)2.a.; the Petitioner did not allege facts regarding his standing. I do not address this question because I conclude that I lack jurisdiction over the matter.

⁵ It appears to be referring to an E-mail from Ms. Davis dated December 9, 2021, where she declined to forward information to the Commission members until the first week of January 2022. There is no indication that those documents were not forwarded at that time.

conceal a material fact or knowingly submitted false information in any form or report required under” G.L. c. 30, §§ 62 – 62H. The Petitioner alleges that “[t]he Secretary [of the Executive Office of Energy and Environmental Affairs] is REQUIRED to make a determination if a MEPA or EIR is needed. The fact that the Secretary was never notified of the project in an area of critical environmental concern, a multi-river estuary/marshes indicates to me that no approval would be given.” Response to Order to Show Cause, p. 2 (emphasis in original).

G.L. c. 30, § 62H, applies to Environmental Impact Reports ("EIR") under the Massachusetts Environmental Policy Act ("MEPA")⁶, *not* appeals to OADR. In this case, it was the Commission charged with determining whether MEPA review is required as part of its process, not the Department. See 301 CMR 11.12(2)(a). More fundamentally, "challenges to a project's status under MEPA... cannot be decided in a Department appeal." Matter of IKEA Property, Inc., OADR Docket No. DEP-04-669, Ruling on Motion to Dismiss (Mar. 10, 2005), 2005 MA ENV LEXIS 6, *5-*6, Adopted as Final Decision (Apr. 27, 2010), 2010 MA ENV LEXIS 153 (waterways appeal cannot be used to challenge MEPA determination); Matter of Weiss Farm Apartments, LLC, OADR Docket No. WET-2016-015, Recommended Final Decision (Aug. 18, 2017), 2017 MA ENV LEXIS 66, *55 n. 13, Adopted as Final Decision (Sep.

⁶ "'MEPA' is the acronym for the Massachusetts Environmental Policy Act, G. L. c. 30, § § 61-62H. MEPA and the MEPA Regulations at 301 CMR 11.00 establish a process to ensure that State permitting agencies such as the Department have adequate information on which to base their permitting decisions, and that environmental impacts of the project are avoided or minimized. Pursuant to MEPA, a project proponent requiring a permit from a State agency files an environmental notification form (ENF) with the [EEA] Secretary, who determines whether the project meets the review threshold requiring an . . . Environmental Impact Report ('EIR'). If so, and after submission of a final environmental impact report (FEIR) and opportunity for review by the public, the EEA Secretary certifies whether the FEIR has complied with MEPA. A Certification by the EEA Secretary that the FEIR complies with MEPA does not constitute final approval or disapproval of a particular project, which ultimately is left to various permitting agencies. The Certification also does not mean that a proposed project meets applicable permitting standards. Instead, it only means that the project's proponent has adequately described the environmental impacts and addressed mitigation" as required by MEPA. The permitting agency retains its authority to fulfill its statutory and regulatory obligations in permitting or reviewing the Project that is subject to MEPA review." Matter of Brockton Power Co., LLC, OADR Docket No. 2011-025 and 026, Recommended Final Decision (Jul. 29, 2016), 2016 MA ENV LEXIS 66, *143 n. 44, Adopted in Part as Final Decision (Mar. 13, 2017), 2017 MA ENV LEXIS 21 (cleaned up).

26, 2017), 2017 MA ENV LEXIS 65 ("as a general matter, challenges to a project's status under MEPA ... cannot be decided in a Department appeal"). Moreover, it appears that the Petitioner sent a request to EEA requesting an EIR on February 2, 2022. It appears that EEA took no action. This forum has no authority to change that decision.

Lastly, regarding his failure to timely file his request for Department action, the Petitioner argues:

If I had been notified of the close of the hearing I would have replied in a timely manner. It appears that a Conservation agent that may be no longer employed by the Town of Wakefield may have been sending wrong information to the Secretary and withholding other information. Despite my best efforts I was not able to access the Order of Conditions until February 12, 2024.

Id. at p. 5. The Petitioner does not detail what those efforts were.

310 CMR 10.05(7)(c) requires that a "request for a Superseding Order or Determination shall be made in writing and shall be sent by certified mail or hand delivered within ten days of issuance of the Order, Determination or Notification which is being appealed." By its plain language, the deadline is measured from the date of the issuance of the Order of Conditions, not the date that the Petitioner received notice of the Order of Conditions. The provisions of 310 CMR 10.05(7) do not give a Presiding Officer (or the Department) the authority to extend or otherwise ignore that deadline. Cf. 310 CMR 1.01(3)(d) ("the Presiding Officer shall have the discretion, for good cause shown and in accordance with any directive or standing order, to extend any time limit contained in 310 CMR 1.01."). Even taking the Petitioner's allegations of willful concealment as true, I have found no case that permits tolling the deadline under those circumstances. The Petitioner's arguments do not ameliorate his failure to timely file his request for Department action.

IV. Conclusion.

The Petitioner filed his request for Department action 479 days after the expiration of the deadline. I therefore have no jurisdiction to consider his appeal, and I recommend that the Commissioner issue a Final Decision dismissing this appeal.



Date: February 23, 2024

Patrick M. Groulx
Presiding Officer

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her 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 may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

SERVICE LIST

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