



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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Commissioner

June 18, 2019

In the Matter of
Christopher N. Colby

OADR Docket No. WET-2016-012
DEP File No. SDA
Attleboro, MA

FINAL DECISION

The Petitioner Christopher N. Colby filed this appeal challenging a Superseding Determination of Applicability (“SDA”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioner on June 14, 2016, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SDA concerned the Petitioner’s proposed construction of a single-family home, garage, driveway, septic system, utilities, and grading and landscaping (“the proposed Project”) on a less than one-half (1/2) acre (20,159 square foot) lot located at 46 Berwick Road (Lot 1) in Attleboro, Massachusetts (“the proposed Project Site”). The proposed Project Site directly abuts Berwick Road, a paved public way in Attleboro, which in turn abuts Mechanics Pond that is surrounded by extensive residential real estate development that has taken place over the past decade or more on Berwick Road and the adjoining streets of Landers Road and

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Mechanic Street. This extensive residential real estate development, which was approved by the Attleboro Conservation Commission (“ACC”) without objection from the Department, includes moderate to large sized single-family homes and at least two multi-unit residential (condominium) developments well within 200 feet of Mechanics Pond, with certain structures located as near as approximately 25 feet from the shoreline. This is in contrast to the proposed Project Site, which as noted above, is separated from Mechanics Pond by a paved public way.

The Department’s SDA here affirmed the ACC’s earlier Determination of Applicability (“DA”) that the proposed Project Site is located within Riverfront Area of the Ten Mile River, and, as a result, the Petitioner was required to obtain an Order of Conditions (“OOC”) from the ACC authorizing the proposed Project pursuant to the MWPA and the Wetlands Regulations.

The Chief Presiding Officer conducted an evidentiary Adjudicatory Hearing (“Hearing”) to resolve the Petitioner’s appeal of the Department’s SDA.¹ At the Hearing, all of the parties, except the ACC, presented witnesses and documentary evidence in support of their respective positions in the case. Additionally, all of the parties were represented by legal counsel. The witnesses were cross-examined under oath on sworn Pre-filed Testimony (“PFT”) that they had filed prior to the Hearing in support of the parties’ respective positions in the case. The Hearing also included the Chief Presiding Officer conducting a view of the proposed Project Site and surrounding area (“the Site Visit”) with the parties and their respective legal counsel and wetlands experts pursuant to 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j) to assist the Chief

¹ The Hearing took place after the proceedings in the appeal were stayed for a significant period of time to allow the parties to attempt resolution of the appeal by settlement. The Hearing went forward after the parties were unable to reach a settlement of the appeal.

Presiding Officer in “[his] understanding of the evidence that ha[d] been . . . presented” by the parties in the appeal.

Based on a preponderance of the expert testimony and documentary evidence presented by the parties at the Hearing, including the observations he made during the Site Visit, on October 12, 2018, the Chief Presiding Officer issued a Recommended Remand Decision (“RRD”) recommending that I issue an interlocutory Decision affirming the Department’s finding that the proposed Project Site is located within Riverfront Area, but remanding the matter to the Department for a determination of whether the proposed Project Site was significant to furthering any of the MWPA’s eight statutory interests given the extensive residential real estate development that had taken place in the vicinity of Mechanics Pond and the proposed Project Site during the past decade or more with the ACC’s approval and without objection from the Department in Orders of Condition issued by the ACC that did not state the developments were located in Riverfront Area. On October 26, 2018, I issued an interlocutory Decision adopting the RRD.

Following the issuance of my interlocutory Decision adopting the RRD, the Petitioner contacted his wetlands experts, who based on their an initial review of the proposed Project and a sketch plan prepared in 2016, opined that the proposed Project might be approved by the ACC and the Department as a “Limited Project” pursuant to the MWPA and the Wetlands Regulations at 310 CMR 10.53(3)(e).² To allow the Petitioner to explore this possibility, on November 8, 2018, the parties filed a Joint Motion to Stay Proceedings in the appeal, which the Chief Presiding Officer allowed on November 9, 2018. The proceedings in the appeal have remained

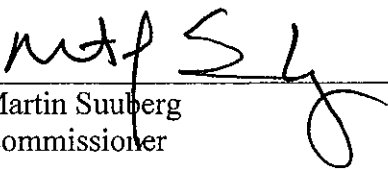
² 310 CMR 10.53(3)(e) authorizes “[t]he construction and maintenance of a new roadway or driveway of minimum legal and practical width acceptable to the [local] planning board, where reasonable alternative means of access from a public way to an upland area of the same owner is unavailable”

stayed since that time to allow the Petitioner to pursue the “Limited Project” option with the ACC and the Department, which, as discussed below, was a successful pursuit.

After the Chief Presiding Officer issued the Stay Order, the Petitioner provided a plan to the ACC and the Department for their review depicting the proposed Project as a Limited Project. The ACC and the Department reviewed the plan, and provided comments to the Petitioner. In response, the Petitioner further revised the plan accordingly. Counsel for the ACC and the Department then notified the Petitioner, informally, that the proposed Project, as depicted on the further revised plan, might be approved as a Limited Project. The Petitioner then submitted a Notice of Intent (“NOI”) with the ACC seeking approval of the proposed Project as a Limited Project. On March 20, 2019, the ACC held a public hearing on the Petitioner’s NOI. At the close of the hearing, the ACC voted to issue an Order of Conditions (“OOC”) approving the proposed Project as a Limited Project. On March 26, 2019, the ACC issued the written OOC to the Petitioner. No individual or entity made a timely request thereafter to the Department requesting a Superseding Order of Conditions (“SOC”) overturning the ACC. As a result, the OOC approving the proposed Project as a Limited Project became final and the Petitioner recorded the OOC with the local Registry of Deeds.

As a result of the proposed Project having been approved as a Limited Project, the Petitioner, with the ACC’s and the Department’s assent, has withdrawn his appeal of the SDA. The Petitioner’s withdrawal of the appeal, with the ACC’s and the Department’s assent, constitutes a waiver by all parties to any further administrative review before the Department as

well as appeal to court of the SDA. Accordingly, I issue this Final Decision dismissing this appeal.



Martin Suuberg
Commissioner

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