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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 29, 2019

In the Matter of

Daniel and Lisa Craig

OADR Docket Nos. WET-2017-012 &
WET-2017-013
DEP File No.: SE 44-1283
Mattapoisett, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

These appeals were filed by the Buzzards Bay Coalition, Inc. (“BBC”) and the Town of Mattapoisett Conservation Commission (“MCC”) (collectively “the Petitioners”) after the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) issued a Superseding Order of Conditions (“SOC”) to Daniel and Lisa Craig (“Craig”) authorizing Craig to partially restore wetlands at their property that had been altered without a permit. The question presented is whether the SOC has been rendered moot by a final and enforceable enforcement order (“EO”) issued by the MCC prior to the Department’s issuance of the SOC. The EO requires full restoration of Craig’s property. For the reasons that follow, I have determined that the SOC is moot, and recommend that the Department’s Commissioner issue a Final Decision vacating the SOC and dismissing the appeals.

BACKGROUND

The Craigs' property is in a subdivision that was developed beginning in 2000. Pursuant to an order of conditions ("OOC") issued by the MCC on June 12, 2000, lawn size in the subdivision was restricted to 10,000 square feet per lot and a 75 foot "no disturbance" zone was established for some of the lots, including the Craigs' lot, in perpetuity. The Craigs' home was constructed in compliance with an order of conditions issued by the MCC on August 28, 2000 and amended in December 2004. Certificates of Compliance were issued for both orders of conditions.

In 2012, Craig received a negative determination of applicability from the MCC for work on their property. That work included construction of a swimming pool, concrete apron, pool perimeter fence, and outdoor cooking area in land subject to coastal storm flowage. In 2014, the MCC learned that Craig had planted lawn and other landscaping in violation of the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40 ("MWPA") and the orders of conditions issued in 2000 for development of the property. In an attempt to remedy the violations, in May, 2015, Craig filed an after-the-fact notice of intent ("NOI") proposing substantial restoration but retaining a portion of the lawn within the buffer zone. This NOI was withdrawn by Craig when Craig and the MCC failed to agree on the appropriate restoration.

Subsequently, on September 14, 2015, the MCC issued an enforcement order to Daniel Craig requiring him to fully restore the subject property to the conditions originally permitted and for which a Certificate of Compliance had been issued. Craig challenged the Enforcement Order ("EO") by filing a complaint in the nature of certiorari in Superior Court.¹ The MCC

¹ Daniel Craig v. Town of Mattapoissett Conservation Commission et al, Plymouth Superior Court, Docket No. PLCV2015-01092-A

prevailed in Superior Court,² and on appeal by Craig, the Superior Court decision was upheld by the Massachusetts Appeals Court.³ Craig's Application for Further Appellate Review ("FAR") was denied by the Supreme Judicial Court on June 29, 2018.⁴ The Appeals Court stated that pursuant to the MWPA, the MCC "was well within its authority in ordering Craig to restore the property to its original condition." Daniel Craig v. Conservation Commission of Mattapoisett & others, Docket No. 2017-P-0269, Memorandum and Order Pursuant to Rule 1:28 (May 1, 2018) at p. 5.

While the appeal of the EO was pending, Craig filed a new notice of intent with the MCC. The NOI proposed some after-the-fact restoration of the property while allowing Craig to maintain a portion of the lawn, mulch bed, play set and plantings. The MCC denied the notice of intent. Craig appealed this denial to the Department, requesting an SOC pursuant to 310 CMR 10.05(7)(b). The Department issued an SOC on May 18, 2017, approving the Craigs' proposed restoration and finding that the proposed work adequately protected the interests of the MWPA. The SOC did not require the full restoration required by the EO issued by the MCC. These appeals by the Petitioners followed. I consolidated the appeals and conducted a pre-hearing conference with all the parties in accordance with 310 CMR 10.05(7)(j)7. Thereafter, I stayed the appeals from August 4, 2017 to July 23, 2018 pending the outcome of the litigation in the courts. Because the requirement of the EO to fully restore the property conflicted with the limited

² See Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings; Defendant Mattapoisett Conservation Commission's Cross-Motion; Cross-Motion of Buzzards Bay Coalition, Inc. and Twelve Additional Citizens for Judgment on the Pleadings; and Defendant Mattapoisett Conservation Commission's Motion for Assessment of Civil Penalty and Related Relief, November 28, 2016 (Chin, J.)

³ See Daniel Craig v. Conservation Commission of Mattapoisett & others, Docket No. 2017-P-0269, Memorandum and Order Pursuant to Rule 1:28 (May 1, 2018).

⁴ FAR-26123.

restoration work authorized in the SOC, the Applicants could not proceed with the work proposed and authorized in the SOC and also comply with the requirements of the EO.

After the SJC denied Craig's application for FAR, rendering the EO final, I issued an Order directing the Craigs to show cause why the SOC should not be vacated as moot. The question has been fully briefed by the parties. The Petitioners and the Department argue that the finality of the EO renders the SOC a nullity, and the SOC should be vacated. Craig disagrees, asserting that the Department is the "ultimate authority" for implementation of the MWPA. Craig does not challenge the validity of the EO. However, they maintain that the SOC is also valid. They assert that "[w]ith two valid, but conflicting, restoration plans at the Property, the Applicants, in this matter, seek to implement the controlling Superseding Order of Conditions issued by the Department and establish its superiority in relation to the Enforcement Order's conflicting impositions." Daniel and Lisa Craig's Response to Order to Show Cause, at p. 1, n. 1. Craig asserts that the Department, not the MCC, has the "final say" over the MWPA's compliance and requirements, and the SOC controls what should be done at their property. As discussed below, I agree with the Petitioners and the Department.

DISCUSSION

I. THE DEPARTMENT LACKS JURISDICTION TO SUPERSEDE AN ENFORCEMENT ORDER

Permitting and enforcement under the MWPA are subject to separate and distinct paradigms. The Act invests local conservation commissions with independent authority to take enforcement action to remedy violations of the Act. The MWPA at ¶ 31 provides that

"[i]n addition to the other duties provided for in this section, a conservation commission and its agents, officers and employees...may issue enforcement orders directing compliance with this section and may undertake any other enforcement action authorized by law. Any person who violates the provisions of

this section may be ordered to restore property to its original condition and take other actions deemed necessary to remedy such violations.”

Similarly, the wetlands regulations at 310 CMR 10.08 authorize conservation commissions to issue enforcement orders when they have determined that an activity “is in violation of [the MWPA], 310 CMR 10.00 or a Final Order”. 310 CMR 10.08(1). It is pursuant to these authorities that the MCC issued the EO to Craig.

While the MWPA and the wetlands regulations vest the Department with the authority to review local permitting decisions, see M.G.L. c. 131, § 40, ¶ 19 and 310 CMR 10.05(7), they afford no authority to the Department over a commission’s enforcement actions.⁵ It is well established that the Department lacks jurisdiction to conduct such a review. See In the Matter of Francis Kelly, Docket No. 98-103, Final Decision – Order of Dismissal, 1998 MA ENV LEXIS 868 (September 4, 1998); Matter of the Town of Hull, Docket No. 92-118, Final Decision – Order of Dismissal (October 21, 1994). Review of the commission’s exercise of its enforcement authority is available in the courts. See TH Claims, LLC v. Town of Hingham, 84 Mass. App. Ct.

⁵ The MWPA and the wetlands regulations specify the circumstances in which a local conservation commission’s action may be appealed to the Department. The MWPA limits these circumstances to the following:

1. when the commission has failed to hold a hearing on a Notice of Intent within 21 days of the NOI’s filing;
2. when the commission has failed to issue an OOC within 21 days after holding a hearing on the NOI;
3. when the commission has failed, within 21 days of receiving a request, to make a determination in response to a Request for Determination of Applicability;
4. when the commission has issued an OOC, or a positive or negative Determination of Applicability.

M.G.L. c. 131, § 40, para. 19. The provisions of the wetlands regulations at 310 CMR 10.05(7)(b) mirror the MWPA’s statutory language. In response to a request by a person permitted by 310 CMR 10.05(7)(a) to request Departmental action, the Department is authorized to issue a Superseding Determination or a Superseding Order when a conservation commission has done one of four specified actions:

1. Issued a Determination of Applicability;
2. Issued a Notification that an area is not significant to any interest identified in the MWPA;
3. Issued an Order of Conditions or an Order of Resource Area Delineation; and
4. Failed to timely hold a public hearing or issue an Order, Determination or Notification.

310 CMR 10.05(7)(b).

1124 (December 10, 2013)(landowner aggrieved by conservation commission's enforcement order under the MWPA has an immediate right of appeal to Superior Court); In the Matter of City of Leominster; In the Matter of John Clementi, Trustee, Industrial Road Trust, Docket Nos. 98-155 and 98-156, Ruling on Motion for Reconsideration, 1999 MA ENV LEXIS 737 (February 11, 1999); see also In the Matter of Walter J. Pictrowski, Sr., et al, Final Decision and Order of Dismissal, 1995 MA ENV LEXIS 148 (June 14, 1995). Based on this independent authority of the MCC to issue an EO and exclusive review of the EO being vested in the courts, it follows that the Department's SOC can neither supplant a validly issued enforcement order nor usurp the power of the court which has upheld that order. As discussed above, the EO issued by the MCC is final, having been upheld on appeal through the courts of the Commonwealth.

It is important to note that the SOC issued by the Department is a permit. It authorizes Craig to conduct certain restoration work at the property. In other words, the SOC issued by the Department allows work to be done but it does not require it. Most significantly, the SOC does not encompass the restoration work required by the EO. The EO requires that the property be restored to the conditions originally permitted and for which a Certificate of Compliance had been issued. This is the restoration Craig is now required to implement. There is no question that if Craig performed the work authorized by the SOC they will not have complied with the EO. The SOC requires a less-extensive restoration than the EO, which requires full restoration. See Department's Reply to Craig's Response to Order to Show Cause, Affidavit of Bernadette DeBlander at para. 7("If the Craigs performed the work that was approved in the SOC and just planted the indigenous vegetation in the buffer zone area, then Craig would have to remove all of the plantings in order [to comply with the EO]"). As the Department notes in its brief, the Craigs' proposed restoration may meet wetland permitting performance standards, but the

approved restoration “does not equate with compliance with the EO.” Department’s Reply to Craig’s Response to Order to Show Cause at p. 3.

Because Craig must comply with the EO, there is no longer any purpose for the SOC; it has been rendered moot by the requirement for complete restoration in the EO. The EO mandates that Craig restore the property to the conditions originally permitted and for which a Certificate of Compliance had been issued. An SOC only supersedes a local permit; it does not and cannot supersede a local EO. Craig has provided no legal authority to support the proposition that it does. Once the work under the EO is complete, no restoration is required and any after-the-fact permit would be superfluous.

II. **THE SOC SHOULD NOT CONTROL RESTORATION OF THE PROPERTY**

Notwithstanding the Department’s lack of jurisdiction to supersede the EO, noted above, Craig argues that as a matter of policy, efficiency, and equity the restoration plan approved in the SOC should control. The gist of this argument is: (1) once the restoration is completed in compliance with the EO, Craig will file a new NOI which will propose the same placement of lawn within the buffer zone that was allowed in the SOC; (2) the proposal will be approved by either the MCC or the Department; (3) the property will be in the state set forth in the SOC under appeal here; and (4) it is impractical and unreasonable for Craig to go through all these steps to achieve the same level of restoration already approved by the Department. This argument is without merit, for the following reasons.

First, as already discussed, the Department lacks jurisdiction to invalidate the EO, particularly where multiple courts have upheld its validity. Second, as pointed out by the BBC in its brief, equitable and other considerations do not favor Craig. Craig only filed the initial NOI after clearing and filling in excess of 20,000 square feet of wetlands and buffer zone, and

withdrew that NOI when an agreement for restoration could not be reached. Only after the EO was issued and appealed to court, did Craig file the second NOI which led to the SOC.⁶ Finally, Craig can only speculate that a new NOI will result in a new permit; there is no guarantee of that outcome. For these reasons, policy considerations do not favor this result under the circumstances presented here.

CONCLUSION

For the foregoing reasons, I recommend that the Department's Commissioner issue a Final Decision vacating the SOC as moot and dismissing the appeals.

Date: 1/29/2019



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.

⁶ Filing a Notice of Intent is not necessarily the favored approach for addressing after-the-fact review of activities conducted without a permit. See Matter of Barbara Beaudry, Docket No. 2002-032, Decision on Motion for Reconsideration, 12 DEPR 75 (May 31, 2005); see also Matter of Jodi Dupras, Docket No. WET-2012-026, Recommended Final Decision, (July 2, 2013), adopted by Final Decision, 20 DEPR 84 (July 12, 2013); see also "Wetlands Enforcement Manual", November 2004 at § 8-4 (Ordering a violator to submit a restoration plan may make more sense than filing a NOI where a violator "might seize the opportunity and file a proposal to leave the fill in place.")

SERVICE LIST

IN THE MATTER OF:

DANIEL and LISA CRAIG

Docket No. WET-2017-012

MATTAPOISETT

Docket No. WET-2017-013

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Recommended Final Decision

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