

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 1, 2023

**In the Matter of
David Kindred c/o The Morin Cameron Group
66 Elm Street
Danvers, MA 01923**

**OADR Docket No. WET-2022-023
DEP File #242-1882
MassDEP-NERO
North Andover, MA**

RECOMMENDED FINAL DECISION

Michelle Saracusa (“Petitioner”) filed this appeal with the Massachusetts Department of Environmental Protection’s Office of Appeals and Dispute Resolution (“OADR”) challenging the denial of a request for a Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection Northeast Regional Office (“MassDEP” or the “Department”). The Petitioner sought the SOC to challenge the Order of Conditions issued by the North Andover Conservation Commission (“Commission”) to David Kindred, c/o The Morin Cameron Group, (“the Applicant”).

The Petitioner contends that she and three other persons own Lorraine Avenue to the midpoint of the road. The Applicant agrees with this fact and asserts that his signature alone is sufficient to file a Notice of Intent (“NOI”) under the Wetlands Regulations. MassDEP agrees. MassDEP submits that there is no genuine issue of material fact because the Petitioner does not deny that the Applicant is a property owner; only that she is also a property owner and did not sign the NOI. The Applicant moved to Dismiss for Lack of Jurisdiction and the Department moved for Summary Decision; both motions were opposed by the Petitioner. After reviewing the administrative record, the motions, and the

oppositions, I conclude that (1) the Petitioner has failed to demonstrate that there is a genuine issue of material fact relative to her claim that her signature is required on a NOI under 310 CMR 10.05(4)(a), and (2) the Department does not have jurisdiction to hear her claim that her lack of signature on the NOI violates the North Andover Wetlands Bylaw. Therefore, I recommend that the Department's Commissioner issue a Final Decision granting summary decision affirming the Department's denial of the Petitioner's request for a SOC.

I. BACKGROUND

A. The Proposed Project

The proposed Project concerns paving Lorraine Avenue, a private gravel roadway located in North Andover, Massachusetts. Lorraine Avenue services the properties numbered 10, 14, and 15 Lorraine Avenue, as well as the Petitioner's property at 210 Andover Street, and provides access the side and rear portion of her property.¹ The properties abutting Lorraine Avenue have a fee interest in the way pursuant to G.L. c. 183, § 58.² It is not disputed that each of the four owners of the referenced properties have an ownership interest in the private roadway.³ Three of the owners signed the NOI and the Petitioner did not.

B. Procedural Background

The Applicant filed the NOI on April 6, 2022, and the Petitioner opposed the proposed

¹ The four property owners are: Timothy Breen & Shelby Hutchins (#10 Lorraine Ave.), Brenda & David Kindred (#14 Lorraine Ave.), Lindsay & Ryan Connolly (#15 Lorraine Ave.), and Michelle Saracusa Revocable Trust—2014 (210 Andover St.). NOI, at 1.

² G.L. c. 183, § 58 provides: "Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line."

³ See MassDEP's Motion for Summary Decision; Applicant David Kindred's Motion to Dismiss for Lack of Jurisdiction; Notice of Appeal.

Project, arguing that the NOI could not be filed without her signature as one of the property owners. The North Andover Conservation Commission (“Commission”) issued the OOC approving the proposed Project.⁴ The Petitioner submitted a timely request to MassDEP for an SOC on June 24, 2022 overturning the OOC. MassDEP denied the Petitioner’s request for an SOC on August 26, 2022, and the Petitioner filed a timely appeal with OADR on September 8, 2022.

In accordance with my authority as the Presiding Officer in the appeal, I issued a Scheduling Order to the Parties on December 1, 2022 directing them to confer to discuss the possibility of settlement of this appeal and their amenability to mediation or other forms of alternative dispute resolution and to report on the results of that discussion. The Parties were directed to file, by December 20, 2022, a Joint Status Report with OADR informing me of the status of their settlement negotiations. If settlement negotiations reached an impasse and would not go forward, the Parties were to file with their Joint Status Report a Joint Proposed Appeal Resolution Schedule. See Scheduling Order, in ¶¶ 2-6.

A Joint Status Report filed by two of the Parties, the Petitioner and MassDEP, did not satisfy the Scheduling Order and I directed the Parties to confer and file a Joint Status Report and stayed the appeal adjudication timeline pending the Parties’ submittal.⁵ The Parties filed a Joint Status Report on December 28, 2022, representing that they conferred and that settlement negotiations had reached an impasse. They proposed issues for adjudication in the appeal, identified witnesses, and proposed an

⁴ The Commission initially declined to accept the NOI without the Petitioner’s signature, but after the other property owners stated that they would obtain a court order requiring the Commission to accept the NOI, the Commission issued an Order of Conditions approving the project on June 24, 2022. Notice of Claim, pages 37-38; MassDEP Mtn. for Summ. Decision, page 2.

⁵ Among other deficiencies, the Joint Status Report did not include the Applicant and the NACC, both of whom are automatic parties pursuant to 310 CMR 10.05(7)(j)2.f.

appeal resolution schedule. The proposed schedule included dates for motions to dismiss or for summary decision and dates for oppositions to be filed.

The Joint Status Report identified one issue for adjudication related to the MWPA and Wetlands Regulations as follows:

Issue: Was the Department correct to dismiss the Petitioner's appeal of the Commission's Order of Conditions ("OOC") where the Notice of Intent ("NOI") at issue did not include the Petitioner's signature as an owner of the property of the project and the Petitioner thus alleges that the OOC violated the NOI requirements in the Wetlands Protection Act, G.L. c. 131, sec. 40, and the Wetlands Regulations, 310 CMR 10.05(4)(a).

A second issue for adjudication was identified, stated separately by the Petitioner and the Department, related to the Commission's implementation of the North Andover Bylaw. Subsequently, the Applicant filed a Motion to Dismiss for Lack of Jurisdiction and MassDEP filed a Motion for Summary Decision, and the Petitioner filed Oppositions to both Motions. Upon review of the Motions and Oppositions, I determined that dismissal of the Petitioner's appeal is appropriate and informed the Parties that as a result, the Pre-Hearing Conference scheduled for February 14, 2023, was cancelled and that I would include my reasoning in a Recommended Final Decision.

II. DISCUSSION

A. Standard of Review

1. **Dismissal**: A party to an appeal "may move to dismiss where another party fails to file documents as required . . . [or] for lack of standing [or for] lack of jurisdiction." 310 CMR 1.01(11)(d)1. As well, a party may move to dismiss an appeal "for failure to state a claim upon which relief can be granted." 310 CMR 1.01(11)(d)2. "In deciding the motion, the Presiding Officer shall assume all the facts alleged in the notice of claim to be true. Such assumption shall not apply to conclusions of law." Id. An appeal may also be dismissed when "a party fails to file documents as required . . . comply with orders issued and schedules established in orders or otherwise fails to

prosecute the adjudicatory appeal . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR

1.01” 310 CMR 1.01(10) and (11)(d)1; see In the Matter of Vineyard Wind, LLC, OADR Docket No. WET-2019-026, Recommended Final Decision (January 9, 2020), 2020 MA ENV LEXIS 47, *16-*17, adopted by Final Decision (January 15, 2020), 2020 MA ENV LEXIS 43; In the Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); In the Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000), 2000 MA ENV LEXIS 64, *11; In the Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

2. **Summary Decision**: The Department’s Rules for Adjudicatory Proceedings provide that summary decision may issue where there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. 310 CMR 10.05(4)(a). See, e.g., Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-2009-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowes Home Centers, Inc., *supra* (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)). A party may move for summary decision on any of the issues that are the subject of the adjudicatory appeal. 310 CMR 1.01(11)(f). Summary decision is appropriate where the party seeking summary decision can “demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law.” Id. “A party opposing the motion may not rest upon the mere allegations or denials of said party’s pleadings but must respond . . . setting forth specific facts showing there is a genuine issue for hearing on the merits.” Id.

B. The Regulations at 310 CMR 10.05(4)(a) do not require the signature of all property owners on a Notice of Intent.

The Wetlands Regulations at 310 CMR 10.05(4)(a) provide that “[a]ny person who proposes to do work that will remove, fill, dredge or alter any Area Subject to Protection under M.G.L. c. 131 § 40 shall file a Notice of Intent If the applicant is not a landowner of the Project Locus, the applicant shall obtain written permission from a landowner(s) prior to filing a Notice of Intent for proposed work” (Emphasis supplied.) The Petitioner argues that this regulation requires written permission from all landowners, whereas the Applicant and the Department argue that it requires permission from only one. I agree with the Applicant and MassDEP that the regulatory language requires the written permission of only one landowner. The use of the singular indefinite article “a” before “landowner(s)” implies that permission is required from only a single landowner. See, e.g., Cronin v. Zoning Board of Appeals, Appeals Court, Docket No. 09-P-2326, 2011 Mass. App. Unpub. LEXIS 521, *5 (April 21, 2011) (the use of “a” in a bylaw stating that frontage is “measured along a street right-of-way” indicates that frontage is measured along a single street). Further, an easement holder is a “landowner” for purposes of 310 CMR 10.05(4)(a) and an easement holder’s permission satisfies the regulation even without the property owner’s permission.⁶

It is agreed by all Parties that G.L. c. 183, § 58 applies to all four property owners, meaning that they each own Lorraine Avenue to the midpoint of the way.⁷ Furthermore, “when a grantor conveys land bounded on a street or way . . . the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way” Murphy v.

⁶ The Petitioner misreads the prior decisions in In the Matter of John Sloan, asserting that they stand for the proposition that a landowner must have a “written easement” under 310 CMR 10.05(4)(a). An interlocutory ruling in that appeal concluded that the “written” permission of the property owner is implemented through the property owner’s signature on the NOI. See In the Matter of John Sloan, DALA Docket No. DEP-06-864, Ruling on Motions for Summary Decision. See also In the Matter John Sloan, DEP Docket No. 2006-096, Final Decision (October 16, 2007) (“Sloan”) (“the term landowner used in 310 CMR 10.05(4)(a) includes owners of property rights such as easements”).

⁷ See Applicant David Kindred’s Motion to Dismiss for Lack of Jurisdiction, page 1; Petitioner’s Response to Applicant Motion to Dismiss for Lack of Jurisdiction, page 3; Notice of Claim, page 2; DEP Mtn. for Summ. Decision, page 2.

Mart Realty of Brockton, Inc., 348 Mass. 675, 677 (1965) (holding that a deed conveying property abutting a proposed street gave the grantees an easement to use the entire length of street). See also McGovern v. McGovern, 77 Mass. App. Ct. 688, 694 (2010) (noting that G.L. c. 183, § 58 codifies the common law rule that “[t]he fee to the center ‘carries with it the right to use the way along its entire length’”). Consequently, each property owner holds an easement to use the entirety of the way.

Although property disputes may arise during the permitting process, the Department has a long-standing practice of leaving property disputes for the courts to resolve. See Tindley v. DEQE, 10 Mass. App. Ct. 623, 626-27 (1980) (affirming that the Department’s role is not to adjudicate private property rights, but to determine whether the Applicant asserted a colorable claim of right sufficient to carry out the proposed work). For purposes of accepting a NOI, a local conservation commission or the Department need only look for a “colorable claim of title.” Id. See also In the Matter of Town of Brewster, OADR Docket No. WET-2012-006, Recommended Final Decision (August 10, 2012), 2012 MA ENV LEXIS 97, *31 n.20, adopted as Final Decision (August 16, 2012), 2012 MA ENV LEXIS 99 (to establish standing, must demonstrate a colorable claim of title to real property, citing Tindley); In the Matter of Michael Gleason, OADR Docket No. WET-2017-019, Recommended Final Decision (December 4, 2019), 2019 MA ENV LEXIS 151, *11-*12, adopted as Final Decision (January 7, 2020), 2020 MA ENV LEXIS 65 (MassDEP does not resolve property ownership disputes, but rather determines whether applicant has colorable claim of title); In the Matter of John Sloan, DEP Docket No. 06-864, Ruling on Motions for Summary Decision (March 7, 2007) (“It is not appropriate, nor is it within the MassDEP’s authority, to rule on ownership issues.”); In the Matter of John Donovan, Jr., Trustee, Seagate Realty Trust, Docket No. 2000-016, Final Decision (September 21, 2000), 2000 MA ENV LEXIS 97, *8 (applicant must present a colorable claim to the property in question for review of Chapter 91 license application; at no point will MassDEP intrude upon the prerogative of the court and entertain the merits of a property dispute). MassDEP’s review confirms that there is a relevant property interest sufficient to provide “colorable claim of title” and leaves further consideration of that title to the

superior court.

In sum, the Applicant's easement interest in Lorraine Avenue is sufficient to demonstrate "colorable claim of title." Further, as a property owner of Lorraine Avenue, with an easement that extends for the length of the way, his signature alone is sufficient for purposes of filing a NOI pursuant to 310 CMR 10.05(4)(a). No further review of the Applicant's property interest is needed, or appropriate in this forum.⁸ In sum, the Petitioner has not shown that there is no genuine issue as to any material fact and the Department is entitled to a decision in its favor as a matter of law.

C. The Department does not have jurisdiction over the Commission's implementation of the North Andover Bylaw.

The Petitioner contends that the Commission erred in its implementation of the North Andover Bylaw.⁹ However, the Department does not have jurisdiction over a local authority's determination which is exclusively based on an ordinance or bylaw that is stricter than state law. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 718 (2009). Even when a local authority makes a determination based on both local law and state law, however, "[the Department] has jurisdiction to review it and supersede that portion of the commission's decision that is based on State law." (Emphasis supplied.) Parkview Electronics Trust v. Conservation Commission, 88 Mass. App. Ct. 833, 837 (2016). Thus, the Department never has jurisdiction to review any determination made by a local authority with respect to a local bylaw. To the extent, however, that a local bylaw replicates or incorporates a state law or regulation, the Department could adjudicate a claim brought under that state law. In this proceeding, the only state law or regulation that the Petitioner invokes is 310 CMR 10.05(4)(a), which has already been discussed. In sum, the Department does not have jurisdiction to

⁸ "The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights." OOC, Special Condition 2; See also SOC denial cover letter which states that, "MassDEP has no legal authority to resolve landownership disputes."

⁹ The Petitioner cites North Andover Wetlands Protection Bylaws Chapter 190, specifically sections 190-2 (Jurisdiction) and 190-4 (Application).

adjudicate the Petitioner's claims under the local bylaws. Accordingly, I recommend that MassDEP's Commissioner issue a Final Decision granting the Applicant's Motion to Dismiss with respect to the Petitioner's claim that the North Andover Wetlands Bylaws were violated.

There is no genuine issue of material fact that the requirements of 310 CMR 10.05(4)(a) are satisfied, and the Applicant is entitled to a decision in his favor as a matter of law. Accordingly, the Applicant's Motion to Dismiss should be granted.

III. Conclusion

For the foregoing reasons, I conclude that (1) the Petitioner has failed to demonstrate that there is a genuine issue of material fact relative to her claim that her signature is required on a NOI under 310 CMR 10.05(4)(a), and (2) the Department does not have jurisdiction to hear her claim that her lack of signature on the NOI violated the North Andover Wetlands Bylaws. I recommend that the Department's Commissioner issue a Final Decision granting summary decision affirming the Department's dismissal of the Petitioner's request for a SOC.

Date: September 1, 2023



Margaret R. Stolfa
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 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 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.

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