

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**March 9, 2020**

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In the Matter of  
Deer Hill Development, LLC

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OADR Docket Nos. WET-2015-025 &  
WET-2015-026 (Consolidated Appeals)  
DEP File No. SE-48-2610  
Foxborough, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

These consolidated wetlands permitting appeals were filed by the Town of Foxborough's Conservation Commission ("Commission") and a group of ten or more Foxborough residents ("Ten Residents Group") (collectively "the Petitioners"), challenging a Superseding Order of Conditions ("SOC") that the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to Deer Hill Development, LLC ("the Applicant") on October 8, 2015, 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 SOC approved the Applicant's proposed construction of a roadway with related drainage and grading work off East Street in Foxborough. SOC Transmittal Letter, at p. 1. The proposed Project had been denied by the Commission under the Town of Foxborough's Wetlands Protection Bylaw ("Bylaw"). As discussed below, I recommend that the



Department's Commissioner issue a Final Decision dismissing the appeals as moot and vacating the SOC because the Applicant lacks a required local permit.

### **BACKGROUND**

The Applicant filed its Notice of Intent ("NOI") with the Commission on November 6, 2014 under both the MWPA and the Bylaw. The NOI proposed to combine three lots and convert an existing single-family house lot into a 12-lot subdivision ("the proposed Project"). The proposed Project also included a bridge and roadway crossing, a subdivision roadway, and other work within wetlands resource areas. After a public hearing, the Commission voted unanimously to deny the proposed Project. On May 4, 2015 the Commission issued its denial Order of Conditions ("OOC") under both the MWPA and the Wetlands Regulations, and the Bylaw.

The Applicant filed its request for the SOC with MassDEP on May 18, 2015. The Applicant also appealed the Bylaw denial to Superior Court. MassDEP issued the SOC approving the proposed Project under the MWPA and the Wetlands Regulations on October 8, 2015. These appeals by the Commission and the Ten Residents Group were filed on October 22, 2015 and October 23, 2015, respectively, and have been stayed since November 25, 2015 pending resolution of the Superior Court appeal.

On October 16, 2017, the Superior Court issued a judgment in the Bylaw appeal, affirming the decision of the Commission to deny the Applicant's proposed Project. See Docket Entry 21, 10/16/2017, Deer Hill Development LLC vs. Town of Foxborough Conservation Commission, Superior Court (Norfolk), 1582CV00840. The Applicant did not pursue further appeal of that judgment.

On January 30, 2020, the Applicant filed a status report stating that it no longer had a contractual interest in the subject property and would not be pursuing these appeals. Counsel for the Applicant withdrew his appearance at that time. On February 10, 2020, I issued an Order to Show Cause directing the parties to show cause why the appeals should not be dismissed as moot. Copies of my Order were sent to the current owner of the subject property as well as to another person who had filed an Abbreviated Notice of Resource Area Delineation (“ANRAD”) under the Bylaw. The Department and the Commission responded to the Order by the deadline, arguing that the cases should be dismissed as moot because the Applicant cannot comply with the SOC. They both also asserted that the filing of an ANRAD by another person under the local Bylaw should not affect these appeals because an ANRAD is not an approval of the proposed Project at issue in these appeals. The Ten Residents Group did not respond, and neither the property owner nor the current applicant for the ANRAD submitted anything to OADR stating an interest in these appeals.

### **DISCUSSION**

310 CMR 1.01(5)(a)2 authorizes a Presiding Officer to dismiss appeals for mootness or “where the record discloses that the proposed project, activity has been denied by a local agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final.” Here, the Commission denied the proposed project pursuant to the Bylaw. As noted above, on appeal by the Applicant, the Superior Court affirmed the Commission’s denial and the Applicant did not pursue further appeal. The Bylaw denial is, therefore, final.

General Condition No. 3 of the SOC provides that the SOC “does not relieve the permittee...of the necessity of complying with all other applicable, federal, state, or local

statutes, ordinances, bylaws, or regulations." If a project is denied under a local Wetlands Protection Bylaw and that denial becomes final, the Applicant cannot comply with General Condition No. 3 and cannot proceed with the proposed Project. 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 Brown Builders, Docket No. WET-2016-032, Recommended Final Decision, February 8, 2017, adopted by Final Decision, February 14, 2017.

Because the Applicant was denied a local permit, and cannot comply with the SOC's General Condition 3, further review in these administrative appeals under the MWPA and the Wetlands regulations would serve no purpose and the appeals should be dismissed as moot under 310 CMR 1.01(5)(a)2. Matter of John Walsh and Walsh Building Co., Inc., Memorandum and Order Denying Petitioners' and Harwich Conservation Commission's Joint Motion to Proceed, 2013 MA ENV LEXIS 92, at 10-11 (September 10, 2013); Matter of Howard Fafard, Docket Nos. 96-040, 96044, Final Decision, 1996 MA ENV LEXIS 122 (December 4, 1996). "[The SOC] must [also] be vacated in the final decision dismissing the appeal as moot, since the final local wetlands bylaw denial establishes that the project [cannot] be built as conditioned and [cannot] comply with General Condition 3 if it were built." Fafard, 1996 MA ENV LEXIS 122 at [\*7].

## **CONCLUSION**

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

Date: 3/9/2020



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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 consideration. 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.

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**

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