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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 2, 2019

In the Matter of
Diamond Development Realty Trust

OADR Docket No. WET-2018-016
DEP File No. SE 68-2707

Scituate, MA

RECOMMENDED FINAL DECISION

I. INTRODUCTION

This is an appeal of a wetlands Superseding Order of Conditions (“SOC”) issued by the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) on October 9, 2018 to Diamond Development Realty Trust (“the Applicant”), 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 single family house project at 53 Border Street in Scituate (“the Property”) The Petitioners, James Spelman and Lynne Maloney, own an abutting property. They are representing themselves *pro se*. They challenge the SOC, claiming that the boundaries of Coastal Bank and Bordering Vegetated Wetlands (“BVW”) at the project site were not properly delineated. They seek to have the SOC vacated and the Order of Conditions (“OOC”) issued by the Scituate Conservation Commission (“SCC”) approving the

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project rescinded. Notice of Claim at pp. 1-2. The Applicant and the Department have moved to dismiss the appeal. The Applicant moves to dismiss based on the Petitioners' alleged lack of standing as "persons aggrieved". The Department moves to dismiss based on the Petitioners' alleged failure to meet their burden of going forward and their failure to sustain their case. The Petitioners filed a statement in opposition to the Applicant's motion but they did not file a response to the Department's motion.

After reviewing the parties' pleadings, submissions, and the record in the appeal, I have determined that the Petitioners have failed to sustain their burden of going forward on the issues for adjudication in the appeal. They have not supported any of their claims with credible evidence from a competent source. As a result, and as discussed below, I recommend that the Department's commissioner issue a Final Decision that (1) dismisses the Petitioners' appeal and (2) renders the SOC final.

II. BACKGROUND

The Applicant's proposed project is planned for residential property located at 53 Border Street in Scituate ("the Property"). Wetland Resource Areas at the property include BVW, Coastal Bank and Land Subject to Coastal Storm Flowage. The Applicant filed a Notice of Intent ("NOI") for the project with the SCC on January 16, 2018, proposing to demolish the existing house and appurtenances on the property and replace them with a new single family house and appurtenances. The authorized work will occur in the 100-foot Buffer Zone to Coastal Bank and BVW. OOC, Findings and Special Conditions, at p. 1 of 7; NOI, Project Description, ¶¶ 1-2. The Applicant's environmental consultant confirmed the accuracy of an earlier BVW delineation determined by another consultant. A topographic survey was conducted for the Applicant by Coastal Advisory Services, and the top of coastal bank was delineated in accordance with both

the Scituate Wetlands by-law and the Department's Coastal Bank delineation policy, DWW 91-1. Id. See Top of Coastal Bank Delineation, January 9, 2018.

The public hearing on the NOI closed on April 23, 2018. The SCC issued an Order of Conditions ("OOC") on May 11, 2018, approving with conditions the Applicant's project under the Scituate Wetlands by-law and the MWPA. The Petitioners were active participants before the SCC, offering comments on the proposed project at each of the SCC's public hearings. The Petitioners timely filed a request for an SOC with the Department. They did not appeal the by-law decision to Superior Court.

The Department reviewed the project and viewed the project site. It determined that the Property is significant to the MWPA statutory interests of public or private water supply, groundwater supply, storm damage prevention, flood control, prevention of pollution, protection of fisheries, and wildlife habitat. SOC Cover Letter at 1. The Department also determined that the project will not adversely affect the stability of the Coastal Bank or impair the BVW. The Department determined that the project as conditioned adequately protects the interests of the MWPA. Id. The Department also determined that the delineations of the coastal bank and BVW on a plan revised to August 22, 2018 (the Plan of Record) were accurate.¹ The Department issued the SOC approving the project on October 9, 2018. This appeal followed.

¹ As noted in the SOC cover letter, the plan of record presented to the SCC "illustrates a top of coastal bank delineation based on a combination of the DEP Coastal Bank Policy 92-1 and the Scituate Wetlands Protection Regulation definition of Coastal Bank." The Scituate Wetlands by-law includes a factor to account for sea level rise. The Department regulates projects on or within 100 feet of a coastal bank based strictly on delineations determined in accordance with the Coastal Bank Policy. Therefore, during the SOC review process, the Applicant revised the plan of record to depict a top of Coastal Bank based solely on the DEP Coastal Bank Policy 92-1, and submitted that plan to the Department. See Notice of Intent Plan for 53 Border Street, Situate, Mass., December 7, 2017, revised to 8/22/18. Based on the revised plan; correspondence from Coastal Advisory Services to the Applicant explaining the revision; and its own observations at the Property, the Department determined that the delineation of top of Coastal Bank was accurate.

The Petitioners' appeal challenges the accuracy of the Coastal Bank and BVW delineations.² They allege that inconsistent and inaccurate information was provided by the Applicant to the SCC. Appeal Notice at 2. They assert that the plans underlying the Plan of Record were altered and misrepresented without explanation, and they do not believe credible evidence supports the delineation. Id. at 3.

I conducted a pre-hearing conference with the parties on November 27, 2018, during which the parties and I discussed the proposed project and the Petitioners' claims regarding the SOC. It was clear at the time that many of the Petitioners' complaints related to the approval under the local by-law, from which the Petitioners did not take an appeal. It was explained to the Petitioners that as a single-family house project, the project is exempt from the state stormwater management standards. See 310 CMR 10.06(6)(l).³ The Department questioned whether the Petitioners had standing to appeal as "persons aggrieved", because the Notice of Claim did not clearly allege sufficient facts to show how the Petitioners were aggrieved by the SOC. The nature of aggrievement was explained and I provided the parties with the legal standard that applies in a wetlands case. I explained to Mr. Spelman that the Petitioners' appeal might be susceptible to a motion to dismiss, which the Applicant stated he intended to file. I also advised Mr. Spelman that the Petitioners would need to support any claim of aggrievement with credible evidence from a competent witness.

I also explained that as the parties challenging the Department's SOC, the Petitioners would have the burden of producing credible evidence from a competent source in support of

² At the pre-hearing conference conducted on November 27, 2018, Mr. Spelman stated that the Petitioners would no longer contest the delineation of the top of Coastal Bank pursuant to the state policy and they agreed it was correct.

³ The proposed project is subject to stormwater standards in the Scituate wetlands by-law, but as noted, the Petitioners did not challenge the by-law determination in an appeal to Superior Court.

their claim that the BVW delineation was inaccurate. These discussions were memorialized in the Pre-hearing Conference Report and Order that I issued to the parties dated November 28, 2018, at pp. 4-6. The Petitioners identified a potential expert witness in their pre-hearing statement, a Dr. Peter Rosen, but by the time of the pre-hearing conference they had not confirmed his willingness or availability to testify on their behalf. I required them to identify their experts by December 4, 2018. By email on that date, Mr. Spelman stated “This is simply to confirm that we remain comfortable with the witness list previously submitted regarding this matter.”⁴

III. ISSUES FOR RESOLUTION IN THE APPEAL

At the conference, the parties and I agreed that the issues to be resolved at the adjudicatory hearing scheduled for February 28, 2019⁵ would be the following:

1. Do the Petitioners have standing to appeal as “persons aggrieved”, as defined in 310 CMR 10.04?⁶
2. Does the plan of record accurately delineate the extent of BVW pursuant to 310 CMR 10.55(2)?

IV. PROCEDURAL HISTORY

A. The Applicant’s Motion to Dismiss and the Petitioners’ Response

⁴ Prior to the pre-hearing conference, Mr. Spelman submitted a supplemental list of witnesses, whom he identified as “the principals with whom we are in dispute.” See Email message from James Spelman to Bridget Munster, November 21, 2018, 9:48 AM. Some, but not all, of those same witnesses were listed by the Applicant in his pre-hearing statement.

⁵ I suspended the hearing schedule as of January 25, 2019 pending a decision on the Motions to Dismiss.

⁶ The Wetlands Regulations at 310 CMR 10.04, define a “person aggrieved” as:

any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [Wetlands Protection Act]. . . .

The Applicant filed his Motion to Dismiss on December 7, 2018, arguing that the Petitioners lacked standing to appeal because they are not “persons aggrieved.” He argued that in their Notice of Claim, the Petitioners make no claim that they are aggrieved by the SOC, nor state facts demonstrating that the SOC will cause them any unique injury. Applicant’s Motion to Dismiss at II.1. He asserts that the appeal is devoid of any document, plan or photograph in support of the Petitioners’ claims of factual error. By email dated December 13, 2018, the Department stated its concurrence with the motion.

The Petitioners filed their response to the motion on December 21, 2018, though pursuant to 310 CMR 1.01(11)(a)1., it was due on December 18, 2018.^{7, 8} The Petitioners asserted that there were stormwater impacts from the project that would impact their property, and the project “may divert drainage in adverse ways.” The response also included excerpts from a report submitted to the SCC by Lucas Environmental Consulting, the SCC’s peer review consultant. These excerpts concerned planned clearing and grading at the Property and clearing of vegetation within the 50-foot buffer zone [pursuant to the local wetlands by-law] to Coastal Bank. The Petitioners further asserted that they “believe the injury...that holds [them] apart from the general public...and allows [them] to claim to be persons aggrieved, is no more apparent that in the insistent, wearing devotion [they] alone have maintained as vigilant witnesses through this

⁷ Because there are sufficient reasons for dismissing the appeal for the reasons set forth in the Motions to Dismiss, I decline to impose any sanction for the Petitioners’ failure to comply with the rules governing timely filing of a response to the Applicant’s Motion to Dismiss. Although a party’s pro se status in an appeal accords the party some leniency from the litigation rules, the party is not excused from complying with those rules because “[litigation] rules bind a pro se litigant as they bind other litigants.” In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same).

⁸ The Petitioners’ response consisted of an email dated December 21, 2018 that was not specifically identified as an objection to the Motion to Dismiss, but which I consider to be their objection.

hearing process.” They expressed a sincere concern for the neighborhood they love and where they have lived from 36 years, and for the “fragile tidal estuary which is [their] backyard.”

B. The Petitioners’ Pre-Trial Testimony

On January 4, 2019, in accordance with the schedule for filing pre-filed testimony set forth in the Pre-hearing Conference Report and Order, the Petitioners submitted an email to the Department’s Office of Appeals and Dispute Resolution (“OADR”) captioned “Pre-trial testimony.” The submission is neither signed nor sworn, though it does state at unnumbered paragraph 7 that the statements are “under the pains and penalty of perjury.” The submission contains the following assertions:

- It is the Petitioners’ conviction that the delineations of Coastal Bank and BVW are inaccurate and not supported by the data that have been presented;
- The Petitioners have requested field data for the BVW delineation and none has been produced to them; they presume the regulations require that the Applicant submit this data with his NOI, and the Applicant has not provided verifiable data; the Petitioners presume no field data sheets exist;
- The final site plan [Plan of Record] “shows a delineation of the [BVW] that turns abruptly at flag WF 1-1 and then almost doubles back on itself through flags WF 1-2 and 1-3;
- The existing delineation defies logic; it “demands proper scrutiny and proper documentation”.

The Petitioners’ Pre-Trial testimony indicated that it was submitted by James H. Spelman and Lynne A. Maloney. As noted above, it was not signed and not properly sworn. The Petitioners did not submit testimony from any expert witness in support of their claims.

C. The Department's Motion to Dismiss for Failure to Sustain a Direct Case

On January 24, 2019, the Department moved to dismiss the appeal on the grounds that the Petitioners failed to meet their burden of going forward on either of the issues for resolution. The Department asserted that the Petitioners' January 4, 2019 submission fails to present credible evidence from a competent source sufficient to meet their burden of going forward, for the following reasons. First, the testimony is unsworn and contains no expert testimony. Second, the pre-trial testimony fails to address the issue of aggrievement at all. The Department notes that while the Petitioners' response to the Applicant's Motion to Dismiss may contain sufficient facts to survive a motion to dismiss for failure to state a claim pursuant to 310 CMR 10.05(7)(j)2.v., it is insufficient to meet the burden of going forward. "Mr. Spelman is not an environmental engineer; his opinions are not 'credible evidence from a competent source' in support of his claim of aggrievement, in contravention of 310 CMR 10.05(7)(j)3.c.ii." Department's Motion to Dismiss at p. 5. Finally, the Petitioners failed to submit credible evidence from a competent source to support their claim that the BVW delineation is inaccurate. Merely stating that the data are insufficient to support the BVW delineation without providing data or testimony to support a different delineation does not meet the Petitioners' burden of going forward. *Id.* at pp. 6-7. As noted above, the Petitioners did not respond to the Department's Motion to Dismiss.

V. DISCUSSION

A. The Petitioners Have Failed to Meet their Burden of Going Forward on Either of the Issues for Resolution and Their Appeal Should be Dismissed.

1. The Petitioners' Burden of Proof

In this *de novo* appeal challenging MassDEP's determinations in the SOC, the Petitioners had the burden of going forward by presenting credible evidence from a competent source in

support of their claims that they are aggrieved and that the BVW delineation is incorrect. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). Specifically, the Petitioners were required to present "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted).

2. The Petitioners have not presented evidence demonstrating that they are "persons aggrieved"

The wetlands regulations define a "person aggrieved" as "any person who because of an act or failure to act by the issuing authority may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in [Wetlands Protection Act]. . . ." 310 CMR 10.04. I agree with the Department that the Petitioners have stated sufficient facts to overcome a motion to dismiss for failure to state a claim, insofar they have alleged damage to their property resulting from the proposed project. However, they have not substantiated that claim with credible evidence from a

competent source. Neither the Petitioners' response to the Applicant's motion nor their Pre-trial Testimony contains evidence to support this claim. Neither Mr. Spelman nor Dr. Maloney presented any factual foundation from which I could conclude that their statements constitute credible evidence from a competent source. For instance, in their response to the Applicant's Motion to Dismiss, the Petitioners assert that "it is hard to imagine that stormwater drainage patterns will not be altered." This is mere speculation, unsupported by any facts. The testimony does not meet the standards of 310 CMR 10.05(7)(j)3.c.ii because it does not establish the legal and factual basis for the Petitioners' claim, and does not constitute "credible evidence from a competent source...including any relevant expert report(s), plan(s) or photograph(s)." Therefore, I find that the Petitioners have failed to meet their burden of going forward on the issue of aggrievement.

3. The Petitioners have not presented evidence demonstrating that the Plan of Record inaccurately delineates the extent of BVW at the Property.

For the same reasons, the Petitioners have not sustained their burden of going forward on their claim that the BVW delineation is incorrect. The essence of the Petitioners' claim is that the BVW delineation is incorrect because it differs from a previous delineation and is not supported by sufficient data. It was incumbent upon the Petitioners to support their claim with credible evidence from a competent source, that is, some evidence that could support a conclusion that the delineation is inaccurate. They state that it is not their burden to prove the line. This is incorrect as a matter of law. In an appeal challenging the Department's permitting decision, the regulations require the Petitioners to produce some credible evidence in support of their claims. See 310 CMR 10.05(7)(j)3.b. ("The Petitioner has the burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence.") They have not done

so. There is no evidence that either Mr. Spelman or Dr. Maloney has the requisite qualifications to opine on this issue. Merely stating that “the existing line defies logic” is not credible evidence, particularly where no evidence is presented from a competent source to support this assertion and explain why the existing line defies logic. Absent this, I find that the Petitioners have not met their burden of going forward on the question of the BVW delineation.

4. The Petitioners’ Appeal Should be Dismissed

A petitioner challenging the Department’s SOC has the burden of presenting evidence that could support a reversal of the Department’s determination. Matter of Elizabeth Haddad, Docket No. 98-028, Ruling on Motion for Directed Decision and Motion to Dismiss, 6 DEPR 13 (January 8, 1999). Failure to present such evidence can subject a petitioner to dismissal for failure to sustain his case. Id.; see also Matter of Cormier Construction, Docket No. 93-071, Final Decision, 1 DEPR 159 (June 30, 1994). In this case, the Petitioners’ Pre-trial testimony does not meet their burden of proof, for the following reasons. First, as noted above, the testimony is neither signed nor sworn. Second, neither Petitioner has presented any credentials or information demonstrating that he or she has the requisite expertise, experience or education to render an opinion on the issues for resolution. Therefore, neither Mr. Spelman nor Dr. Maloney can be considered a competent source. Third, the Pre-trial testimony does not provide specific, factual support for each of the claims made, but rather presents personal opinion, conjecture and speculation. As a result, I do not consider this testimony credible because it is not the type of evidence on which a reasonable person could rely to conclude that the Petitioners’ claims have merit. I conclude that the Petitioners have failed to meet their burden of going forward, and have failed to sustain their direct case.

CONCLUSION

For the foregoing reasons, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal and making the SOC final.

Date: 4/2/2019

A handwritten signature in black ink, appearing to read "Jane A. Rothchild", written over a horizontal line.

Jane A Rothchild
Presiding Officer

SERVICE LIST

IN THE MATTER OF:

Diamond Development Realty Trust

Docket No. WET-2018-016

Scituate

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In the Matter of Diamond Development Realty Trust

OADR Docket No. WET-2018-016

Recommended Final Decision

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