

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

July 22, 2020

In the Matter of
Durga Property Holdings, Inc.

OADR Docket No. 2020-006
Lanesborough, MA

RECOMMENDED FINAL DECISION

Durga Property Holdings, Inc. (“Durga”) filed this appeal to challenge the Unilateral Administrative Order (“UAO”) issued by the Massachusetts Department of Environmental Protection (“MassDEP”) concerning Durga’s ownership of the Berkshire Mall, located at 655 Cheshire Road, Lanesborough, Massachusetts (“the Property”). The UAO alleges violations of regulations governing groundwater discharges for a wastewater treatment plant located at the Property. See 314 CMR 5.00, 314 CMR 12.00, 257 CMR 2.00.

Shortly after the appeal was filed, MassDEP filed a Motion for More Definite Statement, pursuant to 310 CMR 1.01(6)(b); that provision requires that the “notice of claim for adjudicatory appeal . . . state specifically, clearly and concisely the facts which are grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation.... A person filing a notice of claim shall include a copy of the document being appealed.” MassDEP’s motion asserted that Durga’s Notice of Claim was overly ambiguous, and did not provide reasonable notice of the grounds for the appeal and the underlying factual basis, in noncompliance with above requirements in 310 CMR 1.01(6)(b).

I allowed MassDEP's Motion for More Definite Statement. I concluded that Durga's Notice of Claim was woefully deficient, asserting nothing more than: "I would like the opportunity to appeal many things that are stated in the [UAO]" and that an alleged prior settlement agreement barred the UAO. See Ruling and Order Allowing MassDEP's Motion for More Definite Statement.

In the Ruling and Order Allowing MassDEP's Motion for More Definite Statement I stated: "By March 6, 2020, Durga Property Holdings, Inc. must file an Amended Notice of Claim that complies with 310 CMR 1.01(6)(b) and (11)(b). Failure to comply with this order and the Scheduling Order (February 14, 2020) may result in sanctions, including dismissal of this appeal." Ruling and Order Allowing MassDEP's Motion for More Definite Statement. The regulation provides that failure to file an Amended Notice of Claim "shall" result in dismissal. 310 CMR 1.01(6)(b).

On March 6, 2020, the due-date for Durga's response, Durga filed a Request for More Time, stating: "I am requesting 30 more days to acquire more evidence and facts to precisely file an amended Notice of Claim" On March 9, 2020, I partially allowed Durga's request, stating: "the Petitioner's request for more time to comply with the Ruling and Order Allowing MassDEP's Request for More Definite Statement (February 19, 2020) is partially allowed The Petitioner shall have until March 20, 2020 to comply with the order; there will be no further extensions, absent a showing of good cause."

On March 20, 2020, the due-date for Durga's response, Durga filed a Request for Continuance, which was dated March 13, 2020. Durga requested a stay and continuance of the appeal and stated that its President had to travel to Massachusetts from its home office in Ohio to gather evidence and documentation in Massachusetts but could not do that because of the

“Corona Virus State of Emergency.” Durga requested 60 more days to comply with the Order for More Definite Statement. MassDEP did not file a response to Durga’s request.

On March 31, 2020, I issued a ruling and order partially allowing Durga’s request for a continuance and more time, stating:

The Pre-Hearing Conference scheduled for April 3, 2020 is cancelled. However, the Petitioner's response to the Ruling and Order Allowing MassDEP’s Motion for More Definite Statement (February 24, 2020) is now due no later than May 8, 2020. When the Petitioner filed its appeal it was obligated to comply with all requirements to file an appeal, including having a specific, factual basis for doing so and providing that specific factual basis in its Notice of Claim. The Petitioner did not do that. Thus, the specific factual basis is something that the Petitioner should readily have at its disposal, not something that is subject to further investigation as the Petitioner suggests in its Motion to Continue. However, I recognize that COVID-19 has complicated matters for the Petitioner, and therefore I am granting a substantial extension. Nevertheless, the Petitioner's response to the Ruling and Order Allowing MassDEP’s Motion for More Definite Statement is due no later than May 8, 2020. Noncompliance with this order will result in dismissal of the appeal, absent a showing of good cause.

Following that order, there was no action by anyone in this appeal until June 23, 2020, when MassDEP filed a Motion to Dismiss. The motion requested dismissal because Durga failed to: comply with my orders and deadlines; prosecute the appeal; and file an amended Notice of Claim that complied with pleading requirements to file a specific, clear, and concise Notice of Claim that provided reasonable notice of the bases and facts for the appeal. Durga has not responded to MassDEP’s Motion to Dismiss.

Given the above circumstances, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the Petitioner’s appeal based upon Durga’s failure to: (1) oppose the motion to dismiss, (2) comply with the orders and deadlines, and (3) prosecute the appeal in accordance with the rules and orders. See 310 CMR 1.01(3)(e), 1.01(5)6, 1.01(10), 1.01(11)(b),

and 1.01(11)(d); see Matter of Tucard, LLC, Docket No. 2009-076, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010); Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

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.

Date: July 22, 2020



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Durga Property Holdings, Inc.

Docket No. 2020-006

File No. 00006770
Lanesborough

Representative

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