

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

June 21, 2017

In the Matter of
Francis Eaton, Trustee of the
FW Eaton Qualified PR Trust

OADR Docket No. WET-2011-020
DEP File No. SE 25-3702
Falmouth, MA


RECOMMENDED FINAL DECISION

In June 2011, the Petitioner Francis Eaton, Trustee of the FW Eaton Qualified PR Trust brought this appeal 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 the Petitioner 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 affirmed the Town of Falmouth Conservation Commission’s (“the Commission”) rejection of the Petitioner’s proposed project at its property in Falmouth. The Commission rejected the proposed Project pursuant to the MWPA, the Wetlands Regulations, and the Falmouth Wetlands Protection Bylaw.

In issuing its SOC, the Department only affirmed that aspect of the Commission’s denial of the proposed Project under the MWPA and the Wetlands Regulations because the Department lacks jurisdiction to review decisions of local conservation commissions under local Wetlands Protection Bylaws and Regulations. Oyster Creek Preservation, Inc. v. Conservation

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Commission of Harwich, 449 Mass. 859, 866-67 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009); In the Matter of John Walsh and Walsh Brothers Building Co., Inc., Memorandum and Order Denying Petitioners' and Harwich Conservation Commission's Joint Motion to Proceed (September 10, 2013), 2013 MA ENV LEXIS 92, at 10; Order Granting Petitioners' Renewed Motion to Proceed (September 18, 2014); Recommended Remand Decision (April 23, 2015), 2015 MA ENV LEXIS 35; Decision Adopting Recommended Remand Decision (June 2, 2015), 2015 MA ENV LEXIS 34. Decisions of local conservation commissions approving or rejecting proposed activities in protected wetlands areas pursuant to local wetlands protection bylaws are generally appealable to the Superior Court pursuant to the Certiorari Statute, G.L. c. 249, § 4. The statute provides in relevant part that:

[a] civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court[,] [and that] . . . [s]uch action shall be commenced within sixty days next after the proceeding complained of.

Here, in accordance with the Falmouth Wetlands Protection Bylaw, the Petitioner appealed the Commission's rejection of the proposed Project under the Bylaw to Barnstable Superior Court. See Eaton v. Falmouth Conservation Commission, Barnstable Superior Court C.A. No. 1072CV00764 and Eaton v. Falmouth Conservation Commission, Barnstable Superior Court C.A. No. 1172CV00461 ("the Superior Court Local Bylaw Appeal"). As a result, on July 21, 2011, the prior Presiding Officer in this appeal of the SOC¹ stayed the proceedings in this appeal pursuant to 310 CMR 1.01(6)(h) pending resolution of the Petitioner's Superior Court

¹ The prior Presiding Officer retired from State service on June 30, 2015.

Local Bylaw Appeal.² More than four years later, on December 10, 2015, the Superior Court affirmed the Commission's rejection of the proposed Project under the Falmouth Wetlands Protection Bylaw. Orders: (1) Denying MassDEP's Motion to Dismiss Appeal; and (2) Continuing Stay of Proceedings, March 30, 2016 ("March 2016 Order"), at p. 4. The Petitioner appealed the Superior Court's judgment to the Massachusetts Appeals Court. *Id.* The Petitioner's appeal of the Superior Court's judgment prompted me to issue an Order on March 30, 2016 continuing the stay of the Petitioner's appeal of the SOC pending the Appeals Court's resolution of the Petitioner's appeal of the Superior Court judgment. *Id.*, at pp. 4-5.

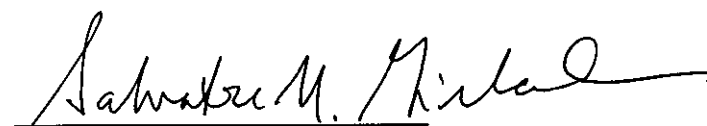
My March 30, 2016 Order also directed the Petitioner to file by May 31, 2016, and every 60 days thereafter, a Status Report with the Office of Appeals and Dispute Resolution ("OADR") reporting on the status of the Petitioner's Appeals Court appeal of the Superior Court's judgment. As of November 15, 2016, nearly six months after expiration of the May 31, 2016 deadline for the Petitioner to file its first status report, the Petitioner had not filed any Status Reports with OADR. As a result, on November 15, 2016, I issued an Order directing the Petitioner to file a Status Report with OADR by November 30, 2016 reporting on the status of the Petitioner's Appeals Court appeal of the Superior Court's judgment affirming the Commission's rejection of the proposed Project under the Falmouth Wetlands Protection Bylaw ("November 2016 Order"). My November 2016 Order informed the Petitioner that failure to file a Status Report by the November 30, 2016 deadline would result in my issuance of a Recommended Final Decision recommending that the Department's Commissioner issue a Final

² 310 CMR 1.01(6)(h) requires the stay of an administrative appeal of an SOC "when the determination or order is denied under a local wetlands bylaw and the denial is appealed to court." Under 310 CMR 1.01(5)(a)(3) and 310 CMR 1.01(5)(a)15.d, a Presiding Officer may also stay the proceedings in a wetlands permit appeal "where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause."

Decision dismissing this appeal and affirming the SOC that the Petitioner has challenged in this appeal. To date, more than six months have passed since the November 30, 2016 filing deadline and the Petitioner has failed to file a Status Report.

The Adjudicatory Proceeding Rules at 310 CMR 1.01(10) authorize the dismissal of an administrative appeal such as this one when the appellant: “[1] fails to file documents as required, [2] [fails to] respond to notices, correspondence or motions, [3] [fails to] comply with orders issued and schedules established in orders[,] [4] fails to prosecute the . . . appeal[,] [5] demonstrates an intention not to proceed [with the appeal][,] [6] demonstrates an intention to delay the [appellate] proceeding or resolution of the proceedin[g][,] or [7] fails to comply with any of the requirements of 310 CMR 1.01.” The Petitioner’s failure to file a Status Report in response to my March 30 and November 15, 2016 Orders as discussed above constitutes: (1) a failure to file documents as required, (2) failure to comply with orders issued and schedules established in orders issued by the Presiding Officer, (3) failure to prosecute this appeal, (4) an intention not to proceed with this appeal, and (5) an intention to delay resolution of this appeal. Accordingly, dismissal of the Petitioner’s appeal is appropriate under 310 CMR 1.01(10).

Date: 06/21/17



Salvatore M. Giorlandino
Chief Presiding Officer

SERVICE LIST

In The Matter Of: Francis W. Eaton, Trustee, F.W. Eaton
Qualified PR Trust

Docket No. WET-2011-020 File No. 25-3702
East Falmouth

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