

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

January 22, 2019

In the Matter of
Edgewood Development Company, LLC

OADR Docket No. WET-2018-006
File No. SE 272-0483, Extension Permit
Rochester, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

A group of twenty residents of the town of Rochester filed this appeal after the Southeast Regional Office of the Department of Environmental Protection (“the Department”) rejected their appeal of an extension permit issued by the Rochester Conservation Commission (“RCC”) to Edgewood Development Company, LLC (“Edgewood”). The Department rejected the appeal because an extension permit is not included among the list of conservation commission actions that are appealable to the Department pursuant to 310 CMR 10.05(7)(b).

Edgewood has moved to dismiss the appeal for lack of jurisdiction, arguing that extension permits are not appealable to the Department. The Department supports the motion. Together they argue that the Department plays no role in the issuance of extension permits by conservation commissions. They assert that the Department has previously determined as a matter of policy not to assert jurisdiction over such an appeal, citing Towermarc Boxborough Limited Partnership/Eqmarc Joint Venture, Docket No. 97-108, Final Decision, 9 DEPR 131 (September 30, 1998). These parties further contend that the Department’s decision is not a “Reviewable Decision” within the meaning of 310 CMR 10.04, and is therefore not appealable to the Office of Appeals and Dispute Resolution (“OADR”) pursuant to 310

CMR 10.05(7)(j). Edgewood argues that the RCC followed the well-defined rules for issuing an extension, and the appropriate forum to review the RCC's action is the Superior Court.

The Petitioners oppose the motion to dismiss. They assert that the Department should and does review a conservation commission's decision to extend an order of conditions, also citing Towermarc, and has exercised jurisdiction over conservation commission actions not specified in 310 CMR 10.05(7), citing Matter of Kenwood Development, Docket No. 97-022, 5 DEPR 5, Ruling and Order (January 23, 1998). They further assert that the Department has the "final word" on permitting under the MPWA and "is the entity responsible for maintaining the integrity of the Act's permitting scheme", citing to Hamilton v. Conservation Commission of Orleans, 12 Mass. App. Ct. 359, 368 (1981).

After reviewing the relevant law, I disagree with the Petitioners and recommend that the Department's Commissioner issue a Final Decision dismissing the appeal for failure to state a claim upon which relief can be granted. Neither the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40 ("MWPA") nor the Wetlands Regulations at 310 CMR 10.05(7) provides a basis for the Department to accept an appeal of a local Conservation Commission's decision to extend an Order of Conditions.

FACTUAL BACKGROUND

The relevant facts as alleged in the Petitioners' Notice of Claim, including the attached exhibits, are as follows. Edgewood filed a Notice of Intent ("NOI") with the RCC on December 2, 2010, for a project involving the construction of a bituminous concrete production plant on an undeveloped, wooded parcel of land owned by Bayside Agricultural, Inc., located at 105 King's Highway in Rochester. The NOI was filed pursuant to the MWPA and the Rochester Wetlands By-Law. A peer review of the project was performed by the RCC's peer review consultant. Based on the peer review and its own review, and after a public hearing on the NOI, the RCC issued an Order of Conditions ("OOC") approving the project on March 22, 2011, pursuant to the MWPA and the Rochester Wetlands By-Law. The RCC

found that the project as conditioned met the applicable regulations and standards. The RCC further found that all efforts had been made to avoid and minimize wetland impacts, “and that the unavoidable impacts are the minimum necessary to achieve the project purpose and are allowable under the regulation.” Notice of Claim, Exhibit H. The RCC attached 29 Special Conditions to the OOC. The OOC was valid for three years, with an expiration date of March 22, 2014. Id.

The OOC was automatically extended by virtue of the Massachusetts Legislature’s enactment of the Permit Extension Act.¹ The Permit Extension Act established an automatic four-year extension to certain permits and licenses relative to the use or development of real property during the period of August 15, 2008 through August 15, 2012. As a result, Edgewood’s wetlands permit was extended to March 22, 2018. On January 9, 2018, Edgewood timely filed a request to extend its wetlands permit pursuant to 310 CMR 10.05(8). The extension request stated that approvals by the Town of Rochester Planning Board had been the subject of a prolonged appeal that had “recently been favorably disposed.” Notice of Claim, Exhibit I. At the time that Edgewood made the extension request, it had not conducted any development or construction at the site due to the pending zoning appeal. The Petitioners submitted oral and written testimony to the RCC objecting to the extension request. They asked that the extension request be denied and that Edgewood be required to file a new Notice of Intent for its project. Notice of Claim at 3. The RCC approved the extension request on May 1, 2018, extending the OOC for three more years, to March 22, 2021. Notice of Claim, Exhibit B, WPA Form 7 – Extension Permit for Orders of Conditions, 5/1/2018.

Believing the RCC’s decision was “contrary to the requirements set forth in 310 CMR 10.05(8)(b)” and detrimental to the interests of the MWPA, the Petitioners filed an appeal with the

¹ “On August 4, 2010 the Massachusetts legislature passed an "Act Relative to Economic Development and Reorganization" that the Governor signed into law the next day. The law became effective immediately with the Governor's signature on August 5th. <https://www.mass.gov/files/documents/2018/04/17/permit-extension-act.pdf>

Department. Notice of Claim, Exhibit F. In their request, the Petitioners alleged that the RCC “failed to adhere to the criteria set forth in 310 CMR 10.05(8) and authorized an industrial development based upon an environmentally and technologically outdated OOC.” Id. at 5. The Department denied the request without addressing the merits, on the basis that an extension permit was not among the list of actions of a conservation commission appealable to the Department pursuant to 310 CMR 10.05(7)(b). Notice of Claim, Exhibit C. This appeal to OADR followed.

In their Notice of Claim the Petitioners allege that they previously participated in proceedings before the RCC and that they are aggrieved. Notice of Claim at 2-4. As noted above, the Petitioners submitted oral and written comments to the RCC. To support a claim of aggrievement, they allege that their property will be negatively impacted through the flow of stormwater and the displacement of the subject property’s surrounding wetlands. The Petitioners assert that the Order of Conditions is not adequate to protect the interests of the MWPA because the extension permit “ignored the environmental reality that conditions at the Property have changed in the intervening seven years, which has dramatically altered the environmental and ecological impacts of Edgewood’s proposed development of the Property.” The Petitioners assert that the Department’s decision to deny their appeal was based on a procedural error of law and is detrimental to the interests of the MWPA. Id. at 4. They contend that the Extension Permit is reviewable by the Department and “where the Extension Permit was erroneously issued by the Commission, the Department should have vacated the Extension Permit and required the filing of a new Notice of intent.” Id. at 4-5.

DISCUSSION

I. THE PETITIONERS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The Dismissal Standard of 310 CMR 1.01(11)(d)(1) and 11(d)(2)

310 CMR 1.01(11)(d)(1) authorizes a party to move to dismiss an administrative appeal for lack of jurisdiction. "In deciding the motion, the Presiding Officer shall assume all the facts alleged in the notice of claim [(Appeal Notice)] to be true," but "[the] assumption shall not apply to any conclusions of law" alleged in the Appeal Notice. In the Matter of Covanta Pittsfield, LLC, OADR Docket No. 2010-002, Recommended Final Decision (June 30, 2010), 2010 MA ENV LEXIS 69, at 8-9, adopted as Final Decision (July 30, 2010). This standard reflects the Rule 12(b)(6) standard applied by Massachusetts courts in civil cases when reviewing challenges to court pleadings. See Schaer v. Brandeis University, 432 Mass. 474, 477-78 (2000) ("In evaluating a rule 12 (b)(6) motion, we . . . accept [the plaintiff's] factual allegations as true[,] [but] we do not accept legal conclusions cast in the form of factual allegations"); Covanta Pittsfield, at pp. 8-9.

B. Extensions of Orders of Conditions

310 CMR 10.05(8) governs the extension of previously issued and final orders of conditions by the "issuing authority". The regulation requires that the extension request be made at least 30 days prior to the permit's expiration date and provides that the "issuing authority may extend an Order [of Conditions] for one or more periods of up to three years each, except as provided in 310 CMR 10.05(11)(f)(extensions for Test Projects)." 310 CMR 10.05(8)(a). The regulation identifies five circumstances in which a conservation commission may deny the request and order the applicant to file a new NOI:

1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;
2. where new information, not available at the time the Order was issued, has become available and indicates that the Order is not adequate to protect the interests identified in M.G.L. c. 131, § 40; or
3. where incomplete work is causing damage to the interests identified in M.G.L. c. 131, § 40;
4. where work has been done in violation of the Order or 310 CMR 10.00; or
5. where a resource area delineation or certification under 310 CMR 10.02 (2)(b)2. in an Order of Resource Delineation is no longer accurate.

The language of subsection (a), above, contemplates the possibility of multiple extensions of an OOC: “The issuing authority may extend an Order for one or more periods of up to three years each...” (Emphasis added). The Petitioners contend that when a significant amount of time has passed since the original permit was issued, the Department should be able to step in to ensure that the interests and standards of the MWPA are protected.² The language of 310 CMR 10.05(8) suggests otherwise. 310 CMR 10.05(8) contemplates the situations raised by the Petitioners and invests the issuing authority, here the RCC, with the discretion to grant or deny a request for an extension permit.

C. The Appellate Framework of the MWPA and the Wetlands Regulations

The MWPA and the wetlands regulations specify the circumstances in which a local conservation commission’s action may be appealed to the Department. The MWPA limits these circumstances to the following:

1. when the commission has failed to hold a hearing on a Notice of Intent within 21 days of the NOI’s filing;
2. when the commission has failed to issue an OOC within 21 days after holding a hearing on the NOI;
3. when the commission has failed, within 21 days of receiving a request, to make a determination in response to a Request for Determination of Applicability;
4. when the commission has issued an OOC, or a positive or negative Determination of Applicability.

M.G.L. c. 131, § 40, para. 19.

The provisions of the wetlands regulations at 310 CMR 10.05(7)(b) mirror the MWPA’s statutory language. In response to a request by a person permitted by 310 CMR 10.05(7)(a) to request Departmental action, the Department is authorized to issue a Superseding Determination or a Superseding Order when a conservation commission has done one of four specified actions:

² The Petitioners’ claim begs the question of how much time is “significant”. In a case decided on other issues, the Presiding Office noted that the Order of Conditions in effect for the subject project “remains valid through several extension Permits...as well as the Permit Extension Act of 2012.” Matter of Bulfinch Companies, Inc., Docket No. WET-2014-015, Recommended Final Decision (September 9, 2014), adopted by Final Decision (September 23, 2014)(Order of Conditions had been in effect since 2004).

1. Issued a Determination of Applicability;
2. Issued a Notification that an area is not significant to any interest identified in the MWPA;
3. Issued an Order of Conditions or an Order of Resource Area Delineation; and
4. Failed to timely hold a public hearing or issue an Order, Determination or Notification.

310 CMR 10.05(7)(b).

Neither the MWPA nor the Wetlands Regulations specifies a right to a review by the Department of a conservation commission's action to extend an order of conditions. In interpreting the wetlands regulations, the plain meaning controls. See Matter of Sullivan, Docket No. WET-2011-013, Recommended Final Decision (May 31, 2011), adopted by Final Decision (June 22, 2011). Applying traditional rules of construction, I give the words of the regulation their plain, usual and ordinary meaning to understand their intent. Absent a clear intent otherwise, language should not be implied if it is not present. Warcewicz v. Dep't. of Environmental Protection, 410 Mass. 548, 574 N.E.2d 364, 365-66 (1991) (language should not be implied where it is not present and thus it was improper for agency to import a definition from one regulatory body into another); see also Matter of Sullivan, Docket No. WET 2011-013, Recommended Final Decision (May 31, 2011), adopted by Final Decision (June 22, 2011). The plain language of 310 CMR 10.05(7)(b) indicates an intent to limit appeals to those actions specified, and precludes appeals of extension permits because they are not included in the regulation. If the Department had intended to provide a right to appeal extension permits, it would have included them in the regulation. The provisions of 310 CMR 10.05(7)(c) through (i) contain detailed rules governing the Department's review of orders that are appealable to the Department. Absent from those provisions is any reference to appellate rights for extension permits. As a result, I conclude that the Department did not intend to provide a right to administratively appeal extension permits.

310 CMR 10.05(7)(j), governing appeals to the Office of Appeals and Dispute Resolution ("OADR") from certain actions taken by the Department, supports this conclusion. The provisions of this regulation specify that appeals are limited to "Reviewable Decisions" made by the Department. A

“Reviewable Decision” is defined as “a MassDEP decision that is a superseding order of condition or superseding denial of an order of conditions, a superseding determination of applicability, and/or a superseding order of resource area delineation, or a variance.” 310 CMR 10.04. Notably absent from this definition is any mention of extension permit decisions, providing additional support for the conclusion that the Department did not intend to provide OADR with jurisdiction over these decisions.

The Petitioners cite two cases for the proposition that OADR can adjudicate the merits of wetlands appeals not involving “Reviewable Decisions”. One case involved an expired order of conditions that was improperly extended by the conservation commission. The other involved a so-called “amended” Determination of Applicability. Both cases involved actions taken by a conservation commission that were not authorized by the MWPA or the wetlands regulations. See Towermarc, supra (Extension of expired order of conditions), and Matter of Kenwood Development Corporation, Docket No. 97-022, Ruling and Order, (January 23, 1998) (Binding Determination of Applicability extended sua sponte by the conservation commission). These cases are not persuasive and do not provide a basis to assert jurisdiction in this appeal.

In Kenwood Development, supra, the Department declined a request to issue a Superseding Determination of Applicability where it considered the conservation commission’s amendment to a binding Determination of Applicability invalid. The Administrative Law Judge (“ALJ”) responsible for adjudicating the case asserted jurisdiction over the conservation commission’s appeal and found that exceptions should be made in appropriate circumstances to the rule that a Determination of Applicability is binding for three years in cases of fraud and mutual mistake of fact. The Petitioners rely on Kenwood as a case where a matter not within the scope of the wetland appeal regulation was adjudicated nonetheless.

Towermarc, like Kenwood, involved an action by a conservation commission that was clearly not authorized by the regulations. There, the order of conditions had already expired when the conservation commission extended it and the request for the permit extension had not been made in conformance with the mandatory 30 day provision of 310 CMR 10.05(8). Towermarc is distinguishable on its facts and is neither persuasive nor controlling for several reasons. First, as the ALJ noted in her decision, the appeal in Towermarc could not be characterized as an appeal of an extension permit, but rather a challenge to the Conservation Commission's alleged extension of a permit that had expired. Relying on the assertion of jurisdiction in Kenwood Development, the ALJ believed that the Department could exercise jurisdiction over the appeal based on her belief that the Department had a fundamental responsibility to protect wetlands interests by maintaining the integrity of the permitting process, a process that in Towermarc had obviously gone awry.

No similar facts are alleged here. In the present case, Edgewood's valid and effective permit was extended in response to an extension request made prior to the permit's expiration in conformance with 310 CMR 10.05(8). Second and more importantly, the Department's Commissioner, the Final Decision-Maker in all administrative appeals of the Department's permit and enforcement determinations, rejected the ALJ's conclusion that the Office of Appeals should exercise jurisdiction in Towermarc. While indicating that the Department may "have jurisdiction to review whether alleged procedural violations of conservation commissions require overturning a commission's decision", the Commissioner concluded that the Department should not exercise jurisdiction where state courts were a more appropriate forum to rule on the legality of the conservation commission's extension of an expired permit. Towermarc, Final Decision, 9 DEPR 131 (2002); Cf. Matter of Jose Verissimo, Docket No. WET-2008-006, Recommended Final Decision (June 5, 2008), adopted by Final Decision (July 3, 2008)(noting that the Department plays no role in a conservation commission's extension of an order of

conditions and that “extensions are not identified as an area where a request can be made for Department action.”). In Towermarc, as a matter of policy, the Commissioner chose not to assert jurisdiction in a case involving an already-expired order of conditions. See also Matter of John Gormally, Docket Nos. 2001-149 to 2001-155, 9 DEPR 184, Recommended Final Decision (July 3, 2002), adopted by Final Decision (July 15, 2002)(noting that Towermarc does not support the proposition that the Department can assert jurisdiction to review a Commission’s issuance of an extension of an expired Order of Conditions because “...in the Final Decision the Commissioner declined to assert jurisdiction....”). Even if the Department were authorized to review procedural violations of the RCC (and no case subsequent to Towermarc has been cited to hold that it does), the Petitioners’ Notice of Claim does not allege that the RCC committed procedural violations of the MWPA or the wetlands regulations. Rather, the Petitioners claim that the passage of time since the original OOC was issued warrants a fresh look in the form of a new Notice of Intent. Assuming Petitioners’ factual allegation about site conditions to be true, those facts do not alter the wetland appeal regulations to confer jurisdiction upon the Department where the regulations clearly evince an intent not to do so.

While the Petitioners lack an administrative remedy, they could seek a remedy in court pursuant to M.G.L. c. 249, § 4.³ See also Matter of Sam Scola, Docket No. WET 2011-044, Recommended Final Decision (May 9, 2012), adopted by Final Decision (May 9, 2012)(“Based on the lack of a regulatory provision allowing an administrative appeal to the Department of a local Conservation Commission’s enforcement actions or the revocation of an OOC, the Department and the Commissions have

³ See M.G.L. c. 249, § 4. This section provides in 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 or, if the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations, in the land court or, if the matter involves fence viewers, in the district court.”

consistently taken the position that that such appeals must be brought in Superior Court pursuant to the certiorari statute....”),⁴

As noted above, the ALJ’s conclusion in Towermarc was not adopted as a Final Decision. And I disagree with the Petitioners that Kenwood Development Corporation, the single case relied upon the ALJ in Towermarc, stands for the proposition that OADR has jurisdiction to adjudicate matters that are not “Reviewable Decisions”.

CONCLUSION

For the foregoing reasons. I recommend that the Department’s Commissioner issue a Final Decision dismissing the appeal for failing to state a claim upon which relief can be granted.

Date: 1/22/2019



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 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.

⁴ There are at least two cases where extension permit decisions by a local conservation commission were addressed by the Superior Court on direct appeal from the commission. See Porcaro v. Town of Hopkinton, Memorandum of Decision Upon Defendant’s Motion to Dismiss, 2001 Mass. Super. LEXIS 620, 2001 WL 1809814, (Middlesex Super. Ct., December 19, 2001) (appeal of denial of extension permit request) and Cahaly v. Falmouth Conservation Commission, Memorandum of Decision and Order on Defendant’s Motion to Dismiss, 2006 Mass. Super LEXIS 595, 2006 WL 4119670 (Barnstable Superior Ct., September 25, 2006)(appeal from denial of extension permit request; appeal dismissed where extension request was not timely). These cases support the proposition that the Superior Court, applying well-established principles of municipal law, is the appropriate place to challenge a conservation commission’s action on a request for an extension permit.

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

In the Matter of
Edgewood Development Company, LLC

Docket No. WET-2018-006
File No. SE 272-0483

Petitioner: Ten Residents Group

Legal Representative: George F. Hailer, Esq.
Lawson & Weitzen LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
ghailer@lawson-weitzen.com

Applicant: Edgewood Development Company, LLC

Legal Representative: Brian M. Hurley, Esq.
Rackemann, Sawyer & Brewster
160 Federal Street
Boston, MA 02110
bhurley@rackemann.com

The Department: James Mahala, Chief, Wetlands & Waterways Program
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
james.mahala@mass.gov

Legal Representative: Elizabeth Kimball, Esq., Senior Counsel
MassDEP Office of General Counsel
One Winter Street
Boston, MA 02108
elizabeth.kimball@mass.gov

cc: Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
Office of General Counsel
20 Riverside Drive
Lakeville, MA 02347
shaun.walsh@mass.gov

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
Leslie.defilippis@mass.gov

Blair Bailey, Esq.
Town Counsel
Town of Rochester
37 Marion Road
Rochester, MA 02270
bbailey@townofrochester.com

Town of Rochester Conservation Commission
c/o Laurell Farinon, Conservation Agent
37 Marion Road
Rochester, MA 02270
lfarinon@townofrochester.com