

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 25, 2021**

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In the Matter of  
Edward and Peri Jacobs

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OADR Docket No. WET-2020-013  
DEP File No. SE 7-2096  
Bourne, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

This appeal involves a superseding order of conditions (“SOC”) issued to Edward and Peri Jacobs (“Applicants”) by the Massachusetts Department of Environmental Protection pursuant to the Massachusetts Wetland Protection Act (“MWPA”), M.G. L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. The SOC affirmed an Order of Conditions (“OOC”) issued to the Applicants by the Bourne Conservation Commission (“BCC”) approving the Applicants’ proposed residential project. The Petitioner is Barbara Princiotta, an abutter to the project site (“Petitioner”). The Applicants and MassDEP have moved to dismiss the appeal. For the reasons discussed below, I recommend that MassDEP’s Commissioner issue a Final Decision dismissing the appeal and affirming the SOC.

**BACKGROUND**

On December 31, 2019, the Applicants filed a Notice of Intent (“NOI”) with the BCC seeking approval to construct a proposed garage and deck addition to an existing single-family house, install an upgraded innovative alternative septic system and complete associated site

grading, landscape, and utility work at their residential property at 60 Arlington Drive in Bourne. Notice of Intent, MassDEP Basic Documents. The project site is abutted by single-family houses to the north and south, Buttermilk Bay to the west and Arlington Road to the east. Id. Wetland Resources at or near the project site include Buttermilk Bay, Land Subject to Coastal Storm Flowage (“LSCSF”) and Coastal Bank. The proposed project would be constructed in the 50-foot Buffer Zone to the Coastal Bank, with the proposed work being 19 feet from the Coastal Bank at its closest point. Id.

After a hearing, the BCC approved the project with conditions and issued its OOC on February 25, 2020 under both the MWPA and the Bourne Wetlands Bylaw. OOC, MassDEP Basic Documents. The Petitioner timely requested an SOC from MassDEP. She did not appeal the BCC’s approval under the bylaw to Superior Court. In her request for an SOC she asserted that the additional weight load to the Coastal Bank from the proposed project was of significant concern, and the Applicants had failed to meet their burden of demonstrating that the proposed project would not adversely affect the stability of the Coastal Bank as required by 310 CMR 10.30(6). She also raised concerns about the nitrogen loading calculations submitted with the NOI relative to the proposed septic system upgrade. Request for SOC, MassDEP Basic Documents. After reviewing the project file and conducting an on-site meeting, MassDEP affirmed the OOC in an SOC issued on or about October 26, 2020. The SOC added special conditions to the approval based on MassDEP’s opinion that the biggest risk to the stability of the Coastal Bank was runoff. The additional special conditions require placement of a continuous erosion control barrier along the top of the Coastal Bank and along the property line; storage of construction supplies and material away from the resource area; stabilization of exposed soil areas with a protective covering until they are revegetated; and roof runoff directed into drywells

located as far from the top of the Coastal Bank as possible. SOC, Special Conditions, MassDEP Basic Documents.

As in her request for the SOC, the Petitioner's appeal to the Office of Appeals and Dispute Resolution ("OADR") asserted that the additional weight load to the Coastal Bank from the proposed project was of significant concern and would adversely affect the stability of the Coastal Bank. Notice of Claim at p. 2. She also asserted that the planned impervious surfaces and runoff would increase erosion of the coastal bank and decrease its stability. Notice of Claim at p. 3. She reiterated her claims about the drywells and the septic system. The Petitioner also asserted that MassDEP's review of the project was flawed because: (1) the timing of the on-site meeting at high tide prevented MassDEP from accessing the seaward side of the property to observe the Coastal Bank, the existing erosion or a failed seawall; (2) the Petitioner was prevented from entering the project site during the meeting; and (3) the Plan reviewed by MassDEP was not the final plan submitted by the Applicants. Notice of Claim at p. 4. However, the Petitioner did not allege facts in her appeal notice that would establish her standing to bring this appeal as a person aggrieved. Therefore, I issued an Order for a More Definite Statement ("the Order") directing her to file a statement which contained sufficient written facts to demonstrate her status as a person aggrieved as defined in 310 CMR 10.04 no later than May 19, 2021. See Order for a More Definite Statement, May 11, 2021.

Instead of filing a response to the Order, a consultant retained by the Petitioner to review project site plans, the Notice of Intent, photographs, and MassDEP correspondence sent a "site review letter" addressed to the attorney representing MassDEP in this appeal, and the Petitioner's attorney filed a copy of the letter with OADR. The site review letter identified potential concerns about the stability of the coastal bank during construction, but there was no mention in the letter

of how the Petitioner “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 interests identified in [the Wetlands Protection Act]. 310 CMR 10.04 (definition of person aggrieved). In fact, there was no mention of the Petitioner or her property at all. See BSC Group correspondence dated May 19, 2021. On May 27, 2021, the Applicants and MassDEP jointly moved to dismiss the appeal on the ground that the Petitioner failed to comply with the order to file a More Definite Statement. The Petitioner did not respond to the motion to dismiss.

### **DISCUSSION**

Procedural and substantive grounds warrant dismissal of this appeal. An appeal may be dismissed when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10) and (11)(d)1; see 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).

Additionally, 310 CMR 1.01(3)(e) provides that "[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case." See also Matter of Tucard, LLC, OADR Docket No. 2009-076, 2010 MA ENV LEXIS 211, Recommended Final Decision

(September 2, 2010), adopted by Final Decision (September 28, 2010).

**A. THE PETITIONER’S APPEAL SHOULD BE DISMISSED PURSUANT TO 310 CMR 1.01(10) FOR FAILURE TO FILE DOCUMENTS AS REQUIRED**

310 CMR 1.01(11)(d)1. provides that “[a] party may move to dismiss where another party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders, otherwise fails to prosecute the case or demonstrates an intention not to proceed...” 310 CMR 1.01(10) authorizes the Presiding Officer to impose sanctions, including the sanction of dismissal, on a party “when a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01.” Sanctions include:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party’s pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e), under 310 CMR 1.01(11)(a)2.f, a “Presiding Officer may [also] summarily dismiss [an appeal] sua sponte,” when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding

Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Presiding Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Presiding Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." As discussed below, the sanction of dismissal is warranted.

**1. The Petitioner Failed to Comply with the Order For a More Definite Statement.**

The Order required the Petitioner to file with OADR a statement which contained sufficient written facts to demonstrate her status as a person aggrieved as defined in 310 CMR 10.04. The site review letter prepared by a consultant for the Petitioner and addressed to MassDEP counsel was (1) wholly unresponsive to the Order and (2) not directed to OADR as a response to the Order. The letter never mentioned the Petitioner or her property and cannot reasonably be read as a more definite statement of the Petitioner's claim that she is a person aggrieved. By not properly responding to the Order for a More Definite Statement the Petitioner "failed to file documents as required . . . comply with orders issued..."

**2. The Petitioner's Failure to Respond to the Motion to Dismiss Demonstrates an Intention Not to Prosecute the Appeal.**

310 CMR 1.01(11)(a)1. affords a party faced with a motion to dismiss seven business days after the motion is filed to file a written objection. "A failure to file a timely response may result in a grant of the relief requested by the moving party." As noted above, the Petitioner did not file a response to the motion to dismiss. By failing to respond she "otherwise failed to prosecute the adjudicatory appeal [and] has demonstrate[d] an intention not to proceed."

The Petitioner's failure to respond "shows an indifference to the outcome of this proceeding that . . . manifests [an] intention not to proceed" with the further prosecution of her

appeal. Matter of Evergreen Construction Co., Inc., Docket Nos. 98-166, 98-172, Recommended Final Decision, 8 DEPR 45 (February 14, 2001), adopted by Final Decision, 8 DEPR 45 (February 26, 2001); see also Matter of Samoset Auto Service, Inc., Docket No. 94-003, Final Decision-Order of Dismissal (May 24, 1994) (petitioner's failure to respond to motion to dismiss demonstrated that it had abandoned prosecution of its appeal, and for this reason alone, it was appropriate to dismiss the appeal for lack of prosecution without reaching the merits of the motion to dismiss) .

**B. THE PETITIONER'S APPEAL SHOULD BE DISMISSED FOR LACK OF STANDING.**

This appeal should also be dismissed on substantive grounds: the Petitioner is not a person aggrieved by the SOC. The wetland appeal regulations require a person claiming to be aggrieved by the SOC to plead sufficient written facts to demonstrate status as a person aggrieved, that is, they must specify in writing how, as a result of the SOC, they "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 statutory wetland interest." 310 CMR 10.05(7)(j); 310 CMR 10.04 (definitions). The Petitioner has not demonstrated that she is a person aggrieved.


In her Appeal Notice, the Petitioner described herself as an abutter whose property "includes a portion of the Coastal Bank that is the subject of this action." Appeal Notice at p. 2. The Appeal Notice alleges that multiple aspects of the proposed project will add a significant weight load to the Coastal Bank and that erosion of an already eroding Coastal Bank will increase. Missing from the Appeal Notice are any facts demonstrating how the Petitioner "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 statutory wetland interest." Her Pre-hearing Statement failed to augment the Appeal Notice. The Petitioner's non-response to the Order for a

More Definite Statement also failed to identify any potential harms she might suffer as a result of the proposed project. Therefore, the Petitioner has failed to establish her right to bring this appeal as a person aggrieved and the appeal should be dismissed.

### **CONCLUSION**

The petitioner has failed to comply with 310 CMR 1.01(6)(b), 310 CMR 10.05(7)(j), and failed to respond to the motion to dismiss. As a result, I recommend that MassDEP's Commissioner issue a Final Decision dismissing the Petitioner's appeal for her failure to comply with the Order and for her failure to state sufficient facts to establish her status as a person aggrieved. The SOC should be made final.

Date: 6/25/2021



Jane 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**

In The Matter Of:

Edward and Peri Jacobs

Docket No. WET-2020-013

File No. SE 07-2096  
Bourne

### **Representative**

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CONSERVATION COMMISSION