

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

October 24, 2016

In the Matter of
FTO Realty Trust

OADR Docket No. WET-2015-024
Tewksbury, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION

FTO Realty Trust (“Petitioner” or “FTO”) filed this appeal to challenge the Superseding Order of Conditions (“SOC”) issued by the Department’s Northeast Regional Office concerning the real property at 20 Riverview Avenue, Tewksbury, Massachusetts (“the Property”). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40, and the Wetlands Regulations, 310 CMR 10.00. The Property lies adjacent to the Shawsheen River, and it contains the following wetlands resource areas: Bordering Land Subject to Flooding (“BLSF”), Riverfront Area associated with the Shawsheen River, and Bordering Vegetated Wetlands (“BVW”). See 310 CMR 10.02, 10.55, 10.57, 10.58. The Property is within the Zone AE on the preliminary FEMA Flood Insurance Rate Map, dated February 11, 2011.

I recently issued a Recommended Final Decision (“RFD”) to affirm the SOC. That RFD was adopted by the DEP Commissioner in his Final Decision. The appeal is before me again based upon the FTO’s motion for reconsideration. DEP opposes the motion for reconsideration. For the reasons discussed below, I recommend that DEP’s Commissioner issue a Final Decision on Reconsideration denying FTO’s motion for reconsideration.

BACKGROUND

The Property is presently occupied by a 640 square foot cottage built on pilings and a 100 square foot shed. FTO has proposed a project for the Property, consisting primarily of a single-family house with driveway, deck, retaining wall, some site clearing and grading, and related appurtenances (“the Project”). The house and retaining wall were proposed to be located approximately 115 feet from the bank of the river. The Project would include alterations to BLSF, Riverfront Area, and Buffer Zone to BVW. It also included filling approximately 21,504 cubic feet of BLSF for the house, with approximately 21,599 cubic feet of proposed compensatory flood storage. FTO also proposed that the house would be encircled by a 4 foot high retaining wall. See October 6, 2015 SOC denial.

DEP issued an SOC denying the Project under 310 CMR 10.57(4)(a), finding it would impede flood waters, restrict the hydraulic connection to the river, and result in flooding to nearby Riverview Avenue. See October 6, 2015 SOC denial. FTO appealed the SOC denial here, to the Office of Appeals and Dispute Resolution (“OADR”) (“First Appeal”).

While the parties were litigating the First Appeal, FTO was preparing and filing a new Notice of Intent (file no. 305-1010) for the same project at the same location, with some alterations that were apparently intended to further compliance with the Wetlands Regulations. See 310 CMR 10.02, 10.03, 10.05. DEP later intervened in the second Notice of Intent proceedings, asserting that the project as presently designed did not comply with the BLSF performance standards (“Second Appeal”). 310 CMR 10.05(7).

Shortly after FTO filed the new Notice of Intent, I allowed FTO’s motion to stay the First Appeal based upon DEP’s policy titled “Wetlands Program Policy 88-3: Multiple Filings” (“the

Multiple Filings Policy”). I also “ordered [the parties] to comply with the Multiple Filings Policy.”

FTO has long been on notice that the Multiple Filings policy requires the applicant (FTO) to dismiss one of the appeals “21 days from the date of issuance of the [second] Order of Conditions” If it does not, the policy provides that the appeal based upon the first filed Notice of Intent shall be dismissed. Accordingly, in the RFD I allowed DEP’s motion to dismiss the First Appeal after FTO failed to choose an appeal to be dismissed. I pointed out that DEP decisions have been faithful to this policy, stating that in the absence of a showing of good cause and the applicant’s failure to designate which Notice of Intent to pursue, the earlier Notice of Intent should be dismissed. See e.g. Matter of Sampson, Docket No. 2001-108, Recommended Final Decision (January 24, 2002), adopted by Final Decision (January 30, 2002); Matter of Costello, Trustee, William Realty Trust, Docket Nos. 92-047/048, Final Decision-Order of Dismissal (April 28, 1995).

STANDARD OF REVIEW AND DISCUSSION

To succeed on a motion for reconsideration a party must meet a “heavy burden.” Matter of LeBlanc, Docket No. 08-051, Recommended Final Decision on Reconsideration (February 4, 2009), adopted by Final Decision (February 18, 2009). The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was “clearly erroneous.” See 310 CMR 1.01(14)(d). In addition, “[w]here [a] motion [for reconsideration] [1] repeats matters adequately considered in the final decision, [2] renews claims or arguments that were previously raised, considered and denied, or [3] where it attempts to raise new claims or arguments it may be summarily denied.” Id.

Here, FTO has done nothing more than repeat matters adequately considered in the final decision; renew claims or arguments that were previously raised, considered and denied; and attempt to raise new arguments. On those bases alone the motion for reconsideration should be summarily denied. Nevertheless, I have discussed below some of FTO's arguments and why they are without merit.

FTO asserts that the dismissal was beyond my authority. That is incorrect. The adjudicatory proceeding regulations enumerate, "without limitation," the broad powers of the Presiding Officer, which include dismissal of an appeal. See 310 CMR 1.01(5)15.f.

FTO also argues that the Multiple Filings Policy is contrary to the Wetlands Regulations and the Wetlands Act. I disagree. The Act gives DEP broad authority to effectuate its purpose, which includes the adoption of reasonable regulations and policies that are not contrary to the Act. See Engie Gas & LNG LLC v. Department of Public Utilities, 475 Mass. 191, 56 N.E.3d 740 (2016); Tompkins v. DEP, Docket No. ESCV2011-00997-B (Mass. Super. October 4, 2012); G.L. c. 131 § 40 ¶ 31. Here, the Multiple Filings Policy's stated purpose is to avoid the unnecessary expenditure of scarce resources that would be required for reviewing and issuing two or more Orders of Conditions for the same project and later litigating multiple appeals. In furtherance of those goals, the Multiple Filings policy provides: "In the case of adjudicatory hearings, the applicant has 21 days from the date of issuance of the Order of Conditions to withdraw, in writing, one of the two Notices of Intent. Failure to do so will result in the applicant being required to show cause why the earlier filed Notice of Intent should not be dismissed." Neither the Wetlands Act nor the Wetlands Regulations prohibit the Multiple Filings Policy and it is a reasonable measure that provides an applicant the opportunity to choose which Notice of Intent to pursue. In fact, the regulations require the filing of "a Notice of Intent," and nowhere

do they allow the filing of multiple Notices of Intent for the same project, as was done in this case. 310 CMR 10.05(4) (emphasis added). Here, because FTO refused to choose which appeal to dismiss, the First Appeal was dismissed pursuant to the Multiple Filings Policy.¹

FTO also repeats the argument that it was given an insufficient basis for DEP's intervention in the Second Appeal. That is incorrect, as discussed in the RFD. DEP cited to the specific regulatory provision with which it believed the project failed to comply, asserting that the project as presently designed did not comply with the BLSF performance standards. 310 CMR 10.05(7). Abutters to the Property also appealed the OOC, requesting that DEP issue an SOC denying the project.

FTO has been on notice since at least when it filed its motion to stay this appeal that the Multiple Filings policy plainly requires that it choose one Notice of Intent to pursue. I also required FTO to comply with that policy as part of my prior order staying this case, but FTO did not do so.

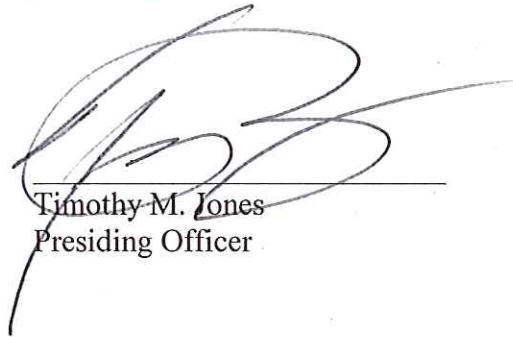
For all the above reasons, the DEP Commissioner should issue a Final Decision on Reconsideration denying the motion for reconsideration and affirming the SOC.

¹ FTO also asserts that the First Appeal should not have been dismissed because DEP's intervention in that appeal was purportedly untimely and the appeal never should have been initiated in the first instance. That argument is incorrect and inconsistent with prior DEP decisions. See M.G. Hall Company, Docket No. WET-2012-023, Recommended Final Decision (May 7, 2013), adopted by Final Decision (March 19, 2014).

NOTICE-RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration 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 may be appealed and will contain a notice to that effect.

Date: 10/24/16



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

FTO Realty Trust

Docket No. WET-2015-024

File No. 305-0982
Tewksbury

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CONCOM
Tewksbury Conservation
Commission

Date: October 24, 2016

