

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

December 16, 2022

In the Matter of
Garnet Brown

OADR Docket No. WET-2022-009
DEP File No. 006-1720
Readville, Hyde Park, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION

INTRODUCTION

The Readville Residents Group, c/o Martha McDonough and France O'Brien (collectively "the Petitioners"), initiated this appeal to challenge the Superseding Order of Conditions ("SOC") issued by the Massachusetts Department of Environmental Protection ("MassDEP") to the Applicant Garnet Brown ("the Applicant") approving the construction of a 3-unit condominium building within 100 feet of Sprague Pond (the proposed Project"), and within the 100-foot buffer zone to the Bordering Vegetated Wetlands ("BVW") on real property located at 0-4 Lakeside Avenue, Readville, Hyde Park, Massachusetts ("the Property"). MassDEP issued the SOC 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").

After Pre-Filed Direct Testimony ("PFT") of witnesses was submitted by all Parties for the evidentiary adjudicatory hearing ("Hearing") scheduled for October 18, 2022, the Applicant

filed a Motion for Directed Decision seeking dismissal of the Petitioners' appeal of the SOC, citing as the grounds therefore, the fact that Petitioners had failed to submit any PFT on the issues for adjudication in the appeal that were established at the June 9, 2022 Pre-Hearing Conference that I conducted with the Parties. MassDEP assented to dismissal, however, the Petitioners failed to respond to the Applicant's Motion for Directed Decision. RFD at 13.

After completing my review of the Applicant's Motion for Directed Decision and MassDEP's response to the Motion, I cancelled the Hearing and issued a Recommended Final Decision ("RFD") recommending that MassDEP's Commissioner issue a Final Decision in this appeal granting the Applicant's Motion for Directed Decision and affirming the SOC. The RFD explained that the Petitioners, the Parties with the burden of proving in the appeal that MassDEP had improperly issued the SOC to the Applicant, failed to substantiate their claim because: (1) they failed to submit expert testimony on the two wetlands issues identified for adjudication, and (2) failed to contradict the testimony of MassDEP's and the Applicant's respective wetlands expert witnesses that the work to be conducted in the Buffer Zone of the protected wetlands areas at issue is designed to protect the interests of the BVW, will not impact the BVW, and that the planting of native species will promote the interests of the MWPA as they pertain to BVW, providing an overall benefit to the ecological health of the BVW.

As a result, I found with respect to Issue 1 for Adjudication, that the Petitioners had failed to present any wetlands expert testimonial evidence supporting the Petitioners' claim that the SOC failed to satisfy the performance standard for proposed work within an Area of Critical Environmental Concern ("ACEC") as set out in the Wetlands Regulations at 310 CMR 10.55(4)(e). I further concluded with respect to Issue 2 for Adjudication, that the SOC would not impose environmental burdens to the jurisdictional wetland resources and the proposed Project

comported with Chapter 8 of the Acts of 2021 (“Chapter 8”)¹ and the Executive Office of Energy and Environmental Affairs (“EEA”) 2021 Environmental Justice (“EJ”) Policy. The MassDEP Commissioner’s Final Decision adopted my RFD. The Petitioners filed a timely Motion for Reconsideration and the Applicant and MassDEP filed timely oppositions to the Motion.

STANDARD OF REVIEW

A Party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); In the Matter of Kevin Slattery and Etchstone Properties, Inc., OADR Docket No. WET-2018-015, Recommended Final Decision on Reconsideration (December 17, 2019), 2019 MA ENV LEXIS 149, at 10, adopted as Final Decision on Reconsideration (January 7, 2020), 2020 MA ENV LEXIS 5; In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, at 6, adopted as Final Decision on Reconsideration (November 7, 2014), 2014 MA ENV LEXIS 82. Specifically, the party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was “clearly erroneous” and materially impacted the Final Decision’s validity warranting its vacating by the Commissioner. Id. In addition, a Motion for Reconsideration may be summarily denied if “[it] repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments” 310 CMR 1.01(14)(d); Slattery, 2019 MA ENV LEXIS 149, at 10; Vecchione, 2014 MA ENV LEXIS, at 6-7. Moreover, “reconsideration [of the Final Decision is not] justified by the [party’s] disagreement with the result reached in the Final Decision.” Id.

¹ Chapter 8 of the Acts of 2021 entitled “An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy.”

DISCUSSION

In their Motion for Reconsideration and Memorandum in Support of the Motion, the Petitioners do not seek to change the result of the Final Decision, nor allege that my RFD contains an error of fact or law materially impacting the Final Decision's validity warranting the Commissioner's vacating of the Final Decision. Instead, the Petitioners seek to amend the Final Decision to add details to the recitation of the case history and procedure and to insert documents to the record. The Applicant and MassDEP agree that the Petitioners do not allege that any central ruling of the Final Decision is erroneous. See Department of Environmental Protection's Opposition to the Petitioners' Motion for Reconsideration, p. 1-2; Applicant's Opposition to the Petitioners' Motion for Reconsideration, p. 4. To prevail on its Motion for Reconsideration of the Commissioner's Final Decision, the Petitioners were required to set forth specific findings of fact or rulings of law underlying the Final Decision that are clearly erroneous and materially impact the Final Decision's validity warranting its vacating by the Commissioner. Slattery, 2019 MA ENV LEXIS 149, at 10; Vecchione, 2014 MA ENV LEXIS, at 6-7. The Petitioners failed to make this showing and have no reasonable expectation of making this showing for the following reasons.

The Petitioners Have Failed to Accurately Set Forth the Prior Proceedings in the Appeal

The Petitioners argue that the RFD does not recite all relevant procedural elements of the case. However, they do not make any assertion or demonstration that inclusion of any additional detail that would change the result of the Final Decision or correct an alleged an error of fact or law that would materially impact the Final Decision or demonstrate it to be clearly erroneous.²

² Errors in a final decision that are not material to the result are not sufficient to support reconsideration. In the Matter of City of Quincy, OADR Docket No. WET-2011-045 & 046, Recommended Final Decision on Reconsideration (June 19, 2012), adopted by Final Decision on Reconsideration (June 25, 2012).

I held a Pre-Hearing Conference in this matter on June 9, 2022. RFD at 9. The day before the Pre-Hearing Conference, the Applicant filed a Motion to Dismiss the Petitioners' appeal of the SOC asserting that the Petitioners had failed to cite any violation of the Department's regulations in issuing the SOC and failed to state a justiciable claim. Id. Not mentioned in the RFD, but relevant here in addressing the Petitioners' Motion for Reconsideration of the Final Decision, is the fact that in his Motion to Dismiss, the Applicant also asserted that Petitioners' motivation in filing the appeal was simply to delay final MassDEP approval of the proposed Project. At the Pre-Hearing Conference I acknowledged the Applicant's allegation but exercised my discretion and allowed the Petitioners' appeal of the SOC to proceed because the appeal involved a proposed project located in an Environmental Justice Neighborhood, and the challenge was brought by a pro se resident's group.³ Following a detailed discussion at the Pre-Hearing Conference to determine whether it was reasonable to glean issues relevant to the SOC sufficient to address the alleged defects in Petitioners' appeal, two wetland issues were identified for adjudication. RFD at 9-10.⁴

At the Pre-Hearing Conference, I also discussed with the Parties that they had to support their respective positions on the two wetlands issues for adjudication with the PFT of wetlands experts. See Pre-Hearing Conference Report and Order, at 9-10. As Applicant noted in his Opposition to the Petitioners' Motion for Reconsideration, the Petitioners now incorrectly assert that the Pre-Hearing Conference Report and Order stated that documents could merely be

³Although a party's pro se status in an appeal accords the party some leniency from the litigation rules, the party is not excused from complying with those rules because "[litigation] rules bind a pro se litigant as they bind other litigants." In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034.

⁴ Petitioners were also afforded the opportunity to further opine on three additional issues, but ultimately conceded a lack of any wetlands regulatory requirement governing those issues. RFD at 9-10.

referenced or attached to the PFT of their witnesses and be admitted in the evidentiary record without any testimony regarding the documents' relevance to the issues for adjudication on appeal. See also Applicant's Opposition to Petitioners' Motion for Reconsideration, at 6.

Subsequent to the Pre-Hearing Conference, the Petitioners filed the PFT of Sylie Agudelo ("Ms. Agudelo") and Paul Sutton ("Mr. Sutton") which consisted solely of documents, without any opinion or explanation as to relevance of those documents to the two issues for adjudication.⁵ Contrary to the Petitioners' assertions or intimations, the administrative record of this appeal cannot be a repository for all documents that the Petitioners desire to have included in the administrative record, but only may contain documents that are relevant to the issues for adjudication in the appeal for the following reasons.

The relevancy, admissibility, and weight of evidence presented in the appeal are governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ." Accordingly, it is appropriate to only accept into the administrative record those documents specifically identified in a witness's sworn testimony, that are relevant to the issues for adjudication on appeal, and to give those documents due weight, as appropriate.

⁵ A list of documents is attached to Ms. Agudelo's PFT and is included in the RFD, footnote 8.

In my discretion, erring on the side of inclusion, the documents included as Ms. Argudelo's and Mr. Sutton's testimony were not excluded from the record. However, they were accorded no weight because they were not relied on, or referred to, in any way to offer testimony on the wetland issues that were the subject of this adjudication.

In their Motion for Reconsideration, the Petitioners also seek to include additional documents to the administrative record of the appeal.⁶ As noted above, the Petitioners did not follow the appropriate steps to include documents in witness testimony as detailed in the Pre-Hearing Conference Report and Order. Nor do Petitioners identify, as the basis for including additional records in the administrative record, an error of fact or law that is clearly erroneous that would be addressed by doing so.

Petitioners Failed to Demonstrate that their Witnesses are Wetlands Experts

It is well settled that whether a witness has expertise to testify as an expert witness in an appeal depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006). The Petitioners assert that I should have deemed Ms. Agudelo and Mr. Sutton as "experts." I declined to do so because, as the Applicant aptly noted in his Opposition to the Petitioners' Motion for Reconsideration, neither Ms. Agudelo and Mr. Sutton are "wetlands experts" qualified to testify on the two wetlands issues for adjudication and the Petitioners failed to present conclusive evidence to the contrary. See RFD at 7-8, 17; See also, Applicant's Opposition to Petitioners' Motion for Reconsideration, at 7-9.

⁶ Petitioners' Exhibits A1 and A2 include the City of Boston Notice Concerning a Public Hearing submitted by the Petitioner on October 6, 2022, that Applicant moved to strike and I granted because it is not relevant to the wetlands issues on appeal, as well as Petitioner's June 6, 2022 filing that listed 12 public records available through various weblinks, largely related to the City of Boston's potential taking of the Property. Also included in the list are documents related to the Fowl Meadows ACEC determination. There is no dispute that the Property is within the Fowl Meadow's ACEC. RFD at 1, 5. However, Petitioner's witnesses offered no testimony regarding the relevance of any of these documents to the issues on appeal. RFD at 6-8, 17.

CONCLUSION

The Wetlands Regulations and the Adjudicatory Proceeding Rules at 310 CMR 1.01 provide a meaningful opportunity to an individual or entity having the right to challenge an SOC, to file an appeal with OADR challenging the SOC as being determinantal to wetlands in violation of the MWPA and the Wetlands Regulations. The purpose of these rules and regulations is to ensure that rights of all parties to be heard in this forum. Such an appeal must have a good faith basis to challenge the SOC's validity under the MWPA and the Wetlands Regulations. Any appeal that lacks such a good faith basis, is an improper appeal that does not further the noble cause of wetland protection. Such an appeal also results in the unnecessary expenditure of OADR's limited, publicly funded resources to adjudicate the appeal when such resources could have been utilized in adjudicating an appeal having a good faith basis.

In my RFD, I acknowledged that the Applicant sought dismissal of Petitioners' appeal prior to the Pre-Hearing Conference for failure to state a claim and because in the Applicant's view, the Petitioners had brought the appeal merely to delay final MassDEP approval for the proposed Project. As explained above, in my discretion, I accorded leniency to the Petitioners by allowing their appeal to go forward and according them with the opportunity to provide relevant testimony from wetlands experts on the issues identified for adjudication in the appeal.

Ultimately, despite these efforts to ensure that the Petitioners had an opportunity to make their case, the Petitioners failed to produce any relevant testimony, failed to rebut MassDEP's and the Applicant's expert testimony, and failed even to oppose the Applicant's Motion for Directed Decision. RFD at 11-20. Accordingly, MassDEP's Commissioner properly dismissed the Petitioners' appeal in his Final Decision. The Petitioners' lack of effort resulting in the dismissal of their appeal has now been followed by their request that the Commissioner vacate his Final Decision and reinstate the Petitioners' appeal of the SOC, not because of a critical error

of fact or law in my RFD, but merely to amend or refine the Final Decision for the Petitioners' own future purposes. In sum, under these circumstances, it would be reasonable to conclude that the Petitioners brought this appeal solely to delay final MassDEP approval of the proposed Project and not because of any valid wetlands concerns regarding the proposed Project. Whatever their intent, the facts are undisputable that they did not meet their burden of going forward and failed to sustain their case.

In conclusion, for the reasons discussed above, I recommend that MassDEP's Commissioner issue a Final Decision on Reconsideration denying the Petitioners' Motion for Reconsideration of the Final Decision because the Petitioners have failed to demonstrate that the Final Decision is based on findings of fact and/or rulings of law that are clearly erroneous and materially impact the Final Decision's validity warranting the Commissioner's vacating of the Final Decision.

Date: December 16, 2022



Margaret R. Stolfa
Presiding Officer

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 Department's Commissioner for his Final Decision On Reconsideration in this matter. This decision is therefore not a Final Decision On Reconsideration and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision On Reconsideration may be appealed and will contain a notice to that effect.

SERVICE LIST

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