

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 9, 2017

---

In the Matter of  
Habitat for Humanity

---

OADR Docket No. 2016-018  
Kingston, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

Seven residents of Kingston ("Petitioners") bring this appeal with respect to real property at 20 Brentwood Avenue, Kingston, Massachusetts ("the Property").<sup>1</sup> The Petitioners challenge the Superseding Order of Conditions ("SOC") that the Massachusetts Department of Environmental Protection's Southeast Regional Office ("DEP") issued to the Applicant, Habitat for Humanity of Greater Plymouth, Inc., allowing its project to construct a single family residence on 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 protected Resource Areas at the Property include a perennial stream with associated riverfront area and bordering vegetated wetlands ("BVW"). G.L. c. 131 § 40; 310 CMR 10.02; 310 CMR 10.55 and 10.58.

The issue in this appeal is a narrow one that the parties agreed should be resolved as a matter of law on summary decision. Both the SOC and the Kingston Conservation Commission's Order of Conditions approving the project relied upon the wetlands delineation set

---

<sup>1</sup> The residents are William McCall, Kathleen Nelson, Anne and Frank Iacobucci, Francis Rapoza, Barbara Coyle, and Richard Harrington.

This information is available in alternate format. Contact Michelle Waters-Ekanem, Director of Diversity/Civil Rights at 617-292-5751.

TTY# MassRelay Service 1-800-439-2370

MassDEP Website: [www.mass.gov/dep](http://www.mass.gov/dep)

Printed on Recycled Paper

forth in an Order of Resource Area of Delineation (“ORAD”) that the Commission issued on August 3, 2010. Ordinarily, an ORAD expires within three years from issuance, which would have precluded reliance on the ORAD. Here, however, Habitat and DEP argue that the ORAD’s effectiveness was sufficiently extended by the Permit Extension Act, Section 173 of Chapter 240 of the Acts of 2010, as amended by Sections 74 and 75 of Chapter 238 of the Acts of 2012 (collectively the “Extension Act”). The Extension Act operates to extend by four years the expiration of any permit or approval that was in effect or existence during the tolling period beginning on August 15, 2008 and extending through August 15, 2012.

It is undisputed that the ORAD satisfies the tolling period requirement because it was in effect during that period. The Petitioners argue, however, that the Extension Act did not extend the ORAD because it does not meet certain requirements of the Extension Act. Specifically, they assert that it is not the type of determination or approval that is subject to the Extension Act. They add that there is no permit authorizing a specific project that was approved for development *as part* of the ORAD. Thus, they conclude that the ORAD is simply part of pre-development activities that are not subject to the Extension Act.

DEP and Habitat disagree with the Petitioners. They contend that the ORAD is precisely the type of determination or approval that is subject to the Extension Act. They primarily premise their argument upon the Extension Act’s definition of approval, arguing that its plain meaning encompasses an ORAD.

After reviewing the entire administrative record, I agree with DEP and Habitat. Summary decision should be entered in their favor and against the Petitioners. An ORAD falls within the plain meaning of the Extension Act as the type of determination or approval that is extended by operation of law. Thus, the Extension Act extended the period during which the



ORAD is valid to August 2, 2017. As a consequence, I recommend that DEP's Commissioner issue a Final Decision affirming the SOC.

### **BACKGROUND**

The Property is a 1.879 acre lot. It includes Riverfront Area of Howard's Brook and BVW. The Commission issued the ORAD on August 3, 2010, to the owners at that time, Mark and Cheryl Guidoboni.

An ORAD's purpose and scope are clear. The Wetlands Regulations at 310 CMR 10.05 (3)(a)1 provide that any person who wishes to know whether the Wetlands Act applies to land or to work that may affect a resource area may file a request for a determination of applicability with the local conservation commission. Matter of Bosworth, Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), adopted by Final Decision (March 14, 2016). The request is sometimes referred to as an ANRAD, the acronym for "abbreviated notice of resource area delineation." The process provides a procedure for a party to confirm the delineation of wetland Resource Areas that are identified on the plans filed with the Conservation Commission. 310 CMR 10.05(4)(b)2. In response, the Conservation Commission issues an Order of Resource Area Delineation ("ORAD"), generally affirming or rejecting the ANRAD. An ORAD is binding as to the location of resource areas identified by the proponent. 310 CMR 10.05(6)(a)3. It is not binding with respect to resource areas at the property that were not identified by the proponent. Bosworth, supra.; Matter of Boston Properties, LP, Docket No. WET 2004-012, Recommended Final Decision (May 4, 2012), adopted by Final Decision (May 11, 2012).

ORADs are generally entitled to preclusive effect for a period of three years, or longer if they are extended. See Matter of Tompkins-Desjardins Trust, Docket No. WET-2010-035,

Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 7, 2011). The purpose of allowing a period for reliance upon the ORAD is to facilitate reasonable reliance and predictability for those affected by the ORAD property. Id.

On September 14, 2012, Habitat filed a Notice of Intent to conduct a percolation test for a proposed septic system. At that time, the property was still owned by the Guidobonis. On November 20, 2012, the Commission approved the Notice of Intent and issued an Order of Conditions for a percolation test. The property was then conveyed to Habitat on December 26, 2012.

On January 22, 2016, Habitat filed the Notice of Intent to build the single family residence. The Commission approved that in an Order of Conditions issued on March 21, 2016. That Order of Conditions relied upon the previously issued ORAD. The Order of Conditions was appealed to DEP, and DEP issued the SOC also approving the project. The Petitioners then appealed the SOC here, to the Office of Appeals and Dispute Resolution ("OADR").

### **STANDARD OF REVIEW**

The Adjudicatory Rules, 310 CMR 1.01(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home



Centers, Inc., supra. (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)).

### DISCUSSION

Whether the ORAD was extended by the Extension Act requires me to determine whether the Extension Act applies to the ORAD. In general, statutory terms must be interpreted according to their plain, usual, and ordinary meaning. Language should generally not be implied if it is not present, absent a clear intent to the contrary. Courts generally accord an agency's interpretation of its regulations considerable deference. However, courts will "not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." Water Department of Fairhaven v. Department of Environmental Protection, 455 Mass. 740, 749-50 (2010); 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); Matter of Milton, Docket No. WET 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012). When the meaning of a statute is not plain from its language, I am obligated to consider "the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." DiFiore v. American Airlines, Inc., 454 Mass. 486, 490 (2009), quoting Industrial Fin. Corp. v. State Tax Comm'r, 367 Mass. 360, 364 (1975).

On August 5, 2010, the Commonwealth enacted the Extension Act, which was created by Section 173 of Chapter 240 of the Acts of 2010, as amended by Sections 74 and 75 of Chapter

238 of the Acts of 2012. With limited exceptions, the Extension Act (as amended) “automatically extends, for [four] years beyond its otherwise applicable expiration date, any permit or approval that was ‘in effect or existence’ during the qualifying period beginning on August 15, 2008 and extending through August 15, 2010.” Matter of Tompkins-Desjardins Trust, Docket No. WET-2010-035, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 7, 2011). The Extension Act’s general purpose is to extend the period for approvals or determinations effective during the tolling period to facilitate development that might have otherwise been hindered by the economic downturn that began in 2008.

The Extension Act provides: “Notwithstanding any general or special law to the contrary, an approval in effect or existence during the tolling period shall be extended for a period of 4 years, in addition to the lawful term of the approval.” St. 2010, c. 240, § 173(b)(1), as amended by St. 2012, c. 238, § 75. It is undisputed that the ORAD was in effect or existence during the tolling period. What is disputed, however, is whether the ORAD is an “approval.”

The Extension Act defines “approval” as:

“... any ... determination ... or other approval or determination of rights from any municipal, regional or state government entity, including any ... commission, or other instrumentality of the municipal ... government entity, concerning the use or development of real property, including ... determinations ... or other approvals or determinations of rights issued or made under ... chapter 131 ....”

St. 2010, c. 240, § 173(a).

The plain language of the definition of approval includes the ORAD. It is a “determination” or “other approval or determination of rights” from a municipal commission concerning the “use or development” of real property, “including” determinations or other approvals under c. 131, which includes the Wetlands Act. In particular, the ORAD determines



and approves wetlands boundaries on the Property, and thus the consequential use or development rights that flow from that determination. It is binding as a matter of right, and the delineated boundaries in conjunction with the Wetlands Regulations and the Wetlands Act establish uses or development rights concerning the Property.

The Petitioners rely upon Clause 5 of the Extension Act, which provides: “In the case where an owner or petitioner sells or otherwise transfers a property or project, in order for an approval to receive an extension, all commitments made by the original owner or petitioner under the terms of the permit must be upheld by the new owner or petitioner.” St. 2010, c. 240, § 173(b)(5). This provision applies here because the ORAD was obtained by the owners who preceded Habitat. The Petitioners argue that the use of the term “permit” in this provision indicates an intention that there be some sort of permit or other approval, other than the ORAD, for the Extension Act to apply.

I disagree. The specific effect of this provision is to bind Habitat to the terms of the ORAD. The use of the term “permit” does not require that the approval be a “permit.” That conclusion is confirmed by the plain meaning and definition of “approval,” which was discussed previously. Because it unambiguously defines approval and does not contain any requirement that the approval be a “permit,” the Petitioners’ argument to the contrary is without merit. The limiting provision’s reference in Clause 5 to “permit” does not vary the more specific and unambiguous definition of approval, which contains no such reference.

The petitioners also argue that the approval itself—the ORAD—must specifically provide or approve “development” of the property. They argue that there was no development approved for the premises at the time the ORAD issued, and that development was not approved until the Commission later issued the Order of Conditions and DEP issued the SOC. While that may be

true, the Petitioners read the Extension Act too narrowly. By its express terms the Act applies to the “use” or “development” of real property “including . . . determinations . . . or other approvals or determinations of rights issued or made under . . . chapter 131 . . . .” St. 2010, c. 240, § 173(a). It is not limited to development. The ORAD expressly relates to the use of the property and it is a determination of rights under c. 131. Because it is part of a specific category of sanctioned approvals it is not merely a pre-development “activity,” as the Petitioners argue.

The application of the Extension Act to the ORAD is consistent with a DEP guidance document. See Mass DEP Q&A on the Permit Extension Act. That guidance specifically provides that the Act applies to superseding determinations of applicability and superseding orders of resource area delineation (“SORAD”) because the Act expressly includes orders and determinations concerning the use or development of real property. The SORAD falls within that definition because it determines whether specific buildings or structures will be located in a resource area or will affect a resource area. The guidance goes on to state that the SORAD is not a pre-development activity because it is undertaken within the context of a specific development process. Indeed, in this case, the ORAD was separate and apart from any other permit necessary to construct a building on the property. There was no other measure that had to be taken to finalize the binding nature of the ORAD.

For all the above reasons, I recommend that DEP’s Commissioner issue a Final Decision affirming the SOC.

#### **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.

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.

Date:

1/9/17



\_\_\_\_\_  
Timothy M. Jones  
Presiding Officer

SERVICE LIST

In The Matter Of:

Habitat for Humanity Plymouth

Docket No. WET-2016-018

File No. SE 037-0825  
Kingston

Representative

Party

David Y. Bannard  
Thomas L. Elkind  
Foley & Lardener  
111 Huntington Avenue  
Boston, MA 02199  
[dbannard@foley.com](mailto:dbannard@foley.com)  
[telkind@foley.com](mailto:telkind@foley.com)

APPLICANT  
Habitat for Humanity Plymouth

James Middleton  
c/o Habitat for Humanity of Greater  
Plymouth  
P.O. Box 346  
72 North Main Street  
Carver, MA 02330  
[hfhgpxecdir@verizon.net](mailto:hfhgpxecdir@verizon.net)

George H. Boerger  
459 Washington Street, Suite 27  
P.O. Box 2827  
Duxbury, MA 02331  
[George@boergerlaw.com](mailto:George@boergerlaw.com)

PETITIONERS  
William McCall

David Bragg  
Mass DEP Office of General Counsel  
One Winter Street  
Boston, MA 02108  
[David.Bragg@state.ma.us](mailto:David.Bragg@state.ma.us)

DEPARTMENT

Cc:  
Gary Makuch  
MassDEP Southeast Regional Office  
20 Riverside Drive  
Lakeville, MA 02347  
[Gary.Makuch@state.ma.us](mailto:Gary.Makuch@state.ma.us)

DEPARTMENT



Kingston Conservation Commission      CONCOM  
Kingston Town House  
26 Evergreen Street  
Kingston, MA 02364  
[bgordon@kingstonmass.org](mailto:bgordon@kingstonmass.org)

Date: January 9, 2017

