

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 22, 2020

In the Matter of
Hyde Development, LLC

OADR Docket No. WET-2020-006
DEP File No. SE 69-887
Seekonk, MA

FINAL DECISION

Martin Suuberg, the Commissioner of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”), has designated me as the Final Decision Maker in this appeal.

On June 16, 2020, the Petitioner Hyde Development, LLC (“the Petitioner/Applicant”) filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”) challenging a Superseding Order of Conditions (“SOC”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) had issued to the Petitioner/Applicant on June 1, 2020, 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”). The SOC denied the Petitioner/Applicant’s proposed Project to construct a driveway crossing at 65 Windham Shore Drive in Seekonk, Massachusetts (“the Property”) due to the Petitioner/Applicant’s purported failure to comply with the requirements of

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the Wetlands Regulations at 310 CMR 10.00. SOC, at pp. 13-14. The Town of Seekonk's Conservation Commission ("SCC") had previously also denied the proposed Project pursuant to the MWPA, the Wetlands Regulations, and the Seekonk Wetlands Bylaw.

In issuing its SOC, the Department only affirmed that aspect of the SCC's denial of the proposed Project under the MWPA and the Wetlands Regulations because the Department lacks jurisdiction to review decisions of local conservation commissions made pursuant to local Wetlands Protection Bylaws and Regulations. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866-67 (2007); Healer v. Department of Environmental Protection, 73 Mass. App. 714, 716 (2009); In the Matter of John Walsh and Walsh Brothers Building Co., Inc., Memorandum and Order Denying Petitioners' and Harwich Conservation Commission's Joint Motion to Proceed (September 10, 2013), 2013 MA ENV LEXIS 92, at 10; Order Granting Petitioners' Renewed Motion to Proceed (September 18, 2014); Recommended Remand Decision (April 23, 2015), 2015 MA ENV LEXIS 35; Decision Adopting Recommended Remand Decision (June 2, 2015), 2015 MA ENV LEXIS 34. Decisions of local conservation commissions approving or rejecting proposed activities in protected wetlands areas pursuant to local wetlands protection bylaws are generally appealable to the Superior Court pursuant to the Certiorari Statute, G.L. c. 249, § 4. Id. However, the failure of a project proponent to appeal to Superior Court a local conservation commission's denial of the project pursuant to the local wetlands protection bylaw renders moot the project proponent's appeal before OADR of an SOC denying the same project pursuant to the MWPA and the Wetlands Regulations. This is because of General Condition No. 3 which appears in every SOC issued by the Department.

General Condition No. 3 provides that the SOC "does not relieve the [project proponent]

. . . of *the necessity* of complying with all other applicable, federal, state, or *local statutes, ordinances, bylaws, or regulations*.” (emphasis supplied). Hence, if a project is denied under a local wetlands bylaw, and “[the] denial . . . become[s] final . . . either because it is not appealed [to Superior Court by the project proponent] or because on appeal the denial is affirmed [by the Superior Court], there remains no doubt that . . . [t]his forecloses [the project proponent’s ability to comply] with wetlands General Condition [No.] 3 and, . . . therefore, . . . the project cannot [proceed].” In the Matter of Howard Fafard, Docket Nos. 96-040, 96-044, Final Decision (December 4, 1996), 1996 MA ENV LEXIS 122 at 6. In sum, “[a] final local wetlands bylaw denial [of a project] thus makes. . . further project review under the [MWPA] and [the Wetlands] Regulations, [a] . . . futile academic exercise[e],” and as a result, an appeal before OADR challenging an SOC [either approving or denying] the same project should be dismissed as moot in accordance with 310 CMR 1.01(5)(a)2.¹ Fafard, at 7. Indeed, an SOC approving a project “must [also] be vacated in the final decision dismissing the appeal as moot, since the final local wetlands bylaw denial establishes that the project [cannot] be built as conditioned and [cannot] comply with General Condition 3 if it were built.” Id.

Here, the Petitioner/Applicant did not appeal the SCC’s local wetlands bylaw denial of the proposed Project to Superior Court. As a result, on September 15, 2020, the Department and the SCC filed a joint motion to dismiss the Petitioner/Applicant’s appeal of the SOC as moot. In response, on September 22, 2020, the Petitioner/Applicant informed OADR that it would not oppose the Department’s and the SCC’s joint motion to dismiss the appeal and did not object to the appeal being dismissed. Electronic Mail Message of the Petitioner/Applicant’s Counsel to

¹ 310 CMR 1.01(5)(a)2 provides in relevant part that “[t]he Presiding Officer may, on the Presiding Officer’s own initiative or on a party’s motion where appropriate . . . dismiss appeals for . . . mootness, . . . or where the record discloses that the proposed project [or] activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final.”

OADR Case Administrator (September 22, 2020). This notification to OADR constituted the Petitioner/Applicant's waiver to any further administrative review before the Department as well as appeal to Court of the SOC at issue. Accordingly, the Department issues this Final Decision dismissing this appeal as moot.



Date: October 22, 2020

Salvatore M. Giorlandino
Chief Presiding Officer

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