

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 17, 2019

In the Matter of
Kevin Slattery and
Etchstone Properties, Inc.

Docket No. WET-2018-015
MassDEP File No. 259-0790
Pepperell, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION

INTRODUCTION

The Petitioner Ronald Naimo requests that the Commissioner of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) reconsider his October 7, 2019 Final Decision dismissing the Petitioner’s appeal of a Superseding Order of Conditions (“SOC”) that the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Kevin Slattery and Etchstone Properties, Inc. (collectively “the Applicants”) on October 11, 2018, 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 authorized the Applicants’ Birch Drive roadway extension project in Pepperell, Massachusetts (“the proposed Project”) that is to support a planned 20 home affordable housing project. SOC Transmittal Letter, at p. 1. The proposed Project, which includes the Birch Drive roadway extension and supporting infrastructure, utilities, and stormwater management, was previously approved by the

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Town of Pepperell's Conservation Commission ("PCC"). For the reasons discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision On Reconsideration denying the Petitioner's Motion for Reconsideration of the Final Decision because the Petitioner has failed to demonstrate that the Final Decision is based on findings of fact and/or rulings of law that are clearly erroneous.

PRIOR PROCEEDINGS

On September 19, 2019, I issued a detailed Recommended Final Decision ("RFD") recommending that the Department's Commissioner issue a Final Decision granting the Applicants' Motion to Dismiss the Petitioner's appeal of the SOC and affirming the SOC because of the Petitioner's failure to: (1) file a proper Appeal Notice in accordance with the Wetlands Regulations and (2) state a claim upon which relief could be granted. The RFD, which the Department's Commissioner adopted as his Final Decision, noted the following.

The Wetlands Regulations at 310 CMR 10.05(7)(j) authorize certain parties to file an administrative appeal with the Office of Appeals and Dispute Resolution ("OADR") to challenge an SOC issued by the Department, including: (1) an "aggrieved person, if previously a participant in the permit proceedings" and (2) a Ten Residents Group comprised of "any ten residents of the city or town where the land [for the proposed activity authorized or rejected by the SOC] is located, if at least one resident was previously a participant in the permit proceeding." 310 CMR 10.05(7)(j)2.a. The Regulations require these parties to file an administrative appeal with OADR within 10 business days after the SOC's issuance and also require them to submit with their appeal an Appeal Notice that contains important information to

prosecute the appeal.

Under the Wetlands Regulations, a party filing an administrative appeal of an SOC as an “aggrieved person” must include in its Appeal Notice:

- (1) the party’s “complete name, address, phone number, fax number and email address and, if represented, counsel's name, address, phone number, fax number and email address”;
- (2) “demonstration of participation in previous permit proceedings”;
- (3) “sufficient written facts to demonstrate status as a person aggrieved”; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the party contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]”

310 CMR 10.05(7)(j)2.b.iii, 2.b.v. Under 310 CMR 1.01(4)(b), as incorporated by 310 CMR 10.05(7)(j)9.b, the party or its authorized representative must also sign the Appeal Notice. “This signature . . . constitute[s] a certification that the signer has read the [Appeal Notice] and believes the content of the [Appeal Notice] is true and accurate, and that the [Appeal Notice] is not interposed for delay. Signature by an authorized representative also certifies the full power and authority to represent the party.” 310 CMR 1.01(4)(b).

For a Ten Residents Group administrative appeal of an SOC, the Wetlands Regulations require the Group’s Appeal Notice to include:

- (1) the “complete name, address, phone number, fax number and email address” of each Group member and, if represented, counsel's name, address, phone number, fax number and email address”;
- (2) the “complete name, address, phone number, fax number and email address” of the Group’s designated representative;

- (3) “demonstration of participation in previous [permit] proceedings” by at least one Group member; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and does not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Group contends] ha[ve] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] . . .”

310 CMR 10.05(7)(j)2.b.i, 2.b.iv, 2.b.v. Under 310 CMR 1.01(2)(b), as incorporated by 310 CMR 10.05(7)(j)9.b, the Appeal Notice of a Ten Residents Group “shall [also] include a signed affirmation by . . . each [Group] member . . . that the [individual identified in the Appeal Notice as the Group’s designated] representative is duly authorized to represent the party in [the] . . . appeal” if the individual is not an attorney.

As discussed in detail at pp. 7-17 of the RFD, the Petitioner’s original Appeal Notice here challenging the SOC failed to comply with the Appeal Notice requirements set forth above in a number of respects, including failing to state clearly whether his appeal of the SOC had been filed on behalf of himself as “an aggrieved person” and/or on behalf of 10 Pepperell residents, including himself (“the Ten Pepperell Residents”) listed in his original Appeal Notice. As a result of the deficiencies in the Petitioner’s original Appeal Notice, I issued an Order on November 19, 2018 (“the November 19th Order”) directing the Petitioner to file with OADR by December 3, 2018 a signed and dated Amended Appeal Notice/More Definite Statement

pursuant to 310 CMR 1.01(6)(e) and 11(b)¹ stating clearly whether his appeal of the SOC had been filed on behalf of himself as “an aggrieved person” and/or on behalf of the Ten Pepperell Residents.

My November 19th Order stated that if the Petitioner was proceeding in the appeal as “an aggrieved person”, his Amended Appeal Notice/More Definite Statement was to contain the following information required by the Wetlands Regulations:

- (1) the Petitioner’s “complete name, address, phone number, fax number and email address and, if represented, counsel’s name, address, phone number, fax number and email address”;
- (2) “demonstration of [the Petitioner’s] participation in previous permit proceedings” in this matter;
- (3) “sufficient written facts to demonstrate [the Petitioner’s] status as a person aggrieved”; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Petitioner contended] ha[d]

¹ 310 CMR 1.01(6)(e) provides that:

Upon a Presiding Officer’s own initiative or by motion of any party, the Presiding Officer may order any party to file any pleading, reply to any pleading, or permit any party to amend or withdraw its notice of claim or other pleading upon conditions just to all parties.

310 CMR 1.01(11)(b), in turn, provides that:

Where a notice of claim for adjudicatory appeal is so vague or ambiguous that it does not provide adequate notice of the issues to be addressed and the relief sought, any party may move for, or the Presiding Officer may order, a more definite statement. The motion or order shall set forth the defects complained of and the details desired. A motion or order for a more definite statement also may seek or require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken. The more definite statement shall be filed within ten days of the Presiding Officer’s order being sent or within another time as may be ordered. If the more definite statement is not filed within the prescribed deadline, the Presiding Officer may either dismiss the adjudicatory appeal, grant the relief sought, or make another order as may be appropriate.

been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC].”

My November 19th Order also stated that if the Petitioner was proceeding in the appeal as the authorized representative of the Ten Pepperell Residents, the Petitioner’s Amended Appeal Notice/More Definite Statement was to contain the following information required by the Wetlands Regulations:

- (1) the “complete name, address, phone number, fax number and email address” of each of the Ten Pepperell Residents . . . and, if represented, counsel's name, address, phone number, fax number and email address”;
- (2) the “complete name, address, phone number, fax number and email address” of the Ten Pepperell Residents’ designated representative;
- (3) “demonstration of participation in previous [permit] proceedings” by at least one member of the Ten Pepperell Residents; and
- (4) “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Ten Pepperell Residents contended] ha[d] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC] . . .”

Lastly, my November 19th Order made clear that “[i]f the Petitioner fail[ed] to file with OADR an Amended Appeal Notice/More Definite Statement by December 3, 2018 [in accordance with my November 19th Order], I [would] issue [an RFD] in accordance with 310 CMR 1.01(10) and (11)(b) recommending that the Department’s Commissioner issue a Final Decision dismissing this appeal.”²

In response to my November 19th Order, the Petitioner filed a document on December 3,

² See n. 1 above, at p. 5.

2018 purporting to be his Amended Appeal Notice/More Definite Statement, which, as discussed at pp. 14-17 of the RFD, failed to comply with my November 19th Order for the following reasons.

First, the document was not signed and dated by the Petitioner as required by 310 CMR 1.01(4)(b). As a result, the Petitioner, in violation of 310 CMR 1.01(4)(b), failed to “[certify in writing] that [he] ha[d] read the document and believe[d] the content of the document [to be] true and accurate, and that the document [had] not interposed for delay.”

Second, the document did not state clearly whether the Petitioner’s appeal of the SOC had been filed on behalf of himself as “an aggrieved person” and/or on behalf of the Ten Pepperell Residents. The document appeared to suggest that he was only proceeding in the appeal as the “Group Representative” of the Ten Pepperell Residents because the document: (1) identified him as the “Group Representative” and (2) failed to set forth “sufficient written facts to demonstrate [his] status as a person aggrieved” as required by the Wetlands Regulations at 310 CMR 10.05(7)(j)2.b.iii and my November 19th Order. On the latter point, the Petitioner’s failure to set forth those facts meant he lacked standing to appeal the SOC as a “person aggrieved,” and, as such, his appeal was subject to dismissal if he had brought the appeal as a “person aggrieved.” In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 15-16, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10 (a party’s standing to pursue a claim is jurisdictional in nature).

Third, if the Petitioner had brought the appeal of the SOC as the Group Representative of the Ten Pepperell Residents, the appeal was subject to dismissal for failure to comply with 310

CMR 1.01(2)(b) as a result of the Petitioner's failure to "include a signed affirmation by . . . each [Resident] member . . . that the [Petitioner] . . . [was] duly authorized to represent the [Resident] in [the] . . . appeal." In the Matter of Beechwood Knoll School, OADR Docket No. WET-2008-050, Recommended Final Decision (September 17, 2008), 15 DEPR 257, 259 (2008), adopted as Final Decision (September 19, 2008) (dismissing an appeal where "[t]here was no affirmation filed by the residents to designate a representative for this appeal, although [the appellant] had filed the appeal on behalf of the entire group").

Lastly, regardless of whether he had brought the appeal of the SOC as a "person aggrieved" and/or as the Group Representative of the Ten Pepperell Residents, the Petitioner's appeal of the SOC was subject to dismissal due to the Petitioner's failure to set forth:

"a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Petitioner, individually and/or at the Representative of the Ten Pepperell Residents, contend[ed] ha[d] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]"

310 CMR 10.05(7)(j)2.b.i, 2.b.iii, 2.b.iv, 2.b.v.

DISCUSSION

It is well settled that a party seeking reconsideration of a Final Decision issued by the Department's Commissioner in an administrative appeal of a Department enforcement order or permit decision has the heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); 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.” *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” *Id.*, 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.*, at 7.

Here, the Petitioner has failed to satisfy the requirements for obtaining reconsideration of the Commissioner’s Final Decision because the Petitioner failed to set forth any specific findings of fact and/or rulings of law of the RFD that, in his view, are clearly erroneous and impacted the Commissioner’s Final Decision adopting the RFD and dismissing the Petitioner’s appeal of the SOC. The Petitioner merely re-submitted a signed copy of the December 3, 2018 document discussed above purporting to be his Amended Appeal Notice/More Definite Statement. He signed the document as the “Group Representative” of the Ten Pepperell Residents. This signed document, however, failed to “include [as required by 310 CMR 1.01(2)(b),] a signed affirmation by . . . each [Resident] member [of the Ten Pepperell Residents]. . . that the [Petitioner] . . . [has been] duly authorized to represent the [Resident] in [the] . . . appeal” since the appeal’s filing in October 2018. The Petitioner’s failure to include such a signed affirmation by each member of the Ten Pepperell Residents means that the Petitioner, contrary to his assertions, has only been representing himself in this appeal since its inception in October 2018.

Undisputedly, the Petitioner should have filed a proper Amended Appeal Notice/More Definite Statement more than one year ago (December 3, 2018) in response to my November

19th Order and he failed to do so. His filing now of a signed version of the document he filed more than one year ago on December 3, 2018, and only after the issuance of the Commissioner's Final Decision dismissing his appeal of the SOC, does not salvage his appeal of the SOC. Indeed, his filing of the signed document now gives rise to a reasonable conclusion that the filing has been made for the purpose of delay.


Regardless of his motive or motives for filing the signed document at this time, the Petitioner has failed to demonstrate that the grounds for dismissal of his appeal of the SOC as set forth in the RFD and adopted by the Commissioner's Final Decision and summarized above at pp. 7-8, were based upon a finding of fact and/or ruling of law that was clearly erroneous. Specifically, the Petitioner has failed to refute the RFD's findings and rulings that the document he filed more than one year ago on December 3, 2018 purporting to be his Amended Appeal Notice/More Definite Statement:

- (1) violated 310 CMR 1.01(4)(b) because the Petitioner failed to sign and date the document;
- (2) violated the Wetlands Regulations at 310 CMR 10.05(7)(j)2.a because the Petitioner failed to state clearly in the document whether his appeal of the SOC had been filed on behalf of himself as "an aggrieved person" and/or on behalf of the Ten Pepperell Residents;
- (3) violated the Wetlands Regulations at 310 CMR 10.05(7)(j)2.b.iii because the Petitioner failed to set forth "sufficient written facts [in the document] to demonstrate [his] status as a person aggrieved" and such failure meant he lacked standing to appeal the SOC as a "person aggrieved";
- (4) violated 310 CMR 1.01(2)(b) because the Petitioner failed to "include [in the document] a signed affirmation by . . . each [Resident] member [of the Ten Pepperell Residents]. . . that the [Petitioner] . . . [was] duly authorized to represent the [Resident] in [the] . . . appeal;" and
- (5) violated the Wetlands Regulations at 310 CMR 10.05(7)(j)2.b.i, 2.b.iii,

2.b.iv, and 2.b.v because the Petitioner failed to set forth in the document “a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error [was] inconsistent with [the Wetlands Regulations at] 310 CMR 10.00 and [did] not contribute to the protection of the interests identified in the [MWPA], including reference to the statutory or regulatory provisions [that the Petitioner, individually and/or as the Representative of the Ten Pepperell Residents, contend[ed] ha[d] been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC]”

CONCLUSION

For the reasons discussed above, I recommend that the Department’s Commissioner issue a Final Decision On Reconsideration denying the Petitioner’s Motion for Reconsideration of the Final Decision because the Petitioner has failed to demonstrate that the Final Decision is based on findings of fact and/or rulings of law that are clearly erroneous.



Date: December 17, 2019

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision On Reconsideration of the Chief 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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