

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

September 20, 2016

In the Matter of
Arthur T. King Sr.

OADR Docket No. 2016-017
Wales, MA

RECOMMENDED FINAL DECISION

This is an appeal by Donna M. Decorie ("Petitioner" or "Decorie"), concerning the real property at 9 Shore Drive, Wales, Massachusetts ("the Property"), which is owned by the Applicant, Arthur T. King, Sr. Decorie's property is at 11 Shore Drive, and abuts the Applicant's Property. Both properties are located on Lake George, a Great Pond. The Petitioner challenges the waterways license that the Department's Western Regional Office issued to the Applicant pursuant to G.L. c. 91 and 310 CMR 9.00. The Applicant purchased the Property in 2011. The license was issued for two docks that had been on the Property since at least 2009. Decorie has no docks on her property but may apply for a single dock at some point in the future. Decorie has 69 feet of lake frontage and the Applicant has 60. The gist of Decorie's complaint is that the license allowed the Applicant to place his dock 13 feet from her property line instead of the presumptive 25 feet.

Shortly after Decorie filed this appeal, I issued a Scheduling Order (June 17, 2016), setting forth in detail the parties' obligations and dates for a Pre-Hearing Conference and the



Adjudicatory Hearing. I also specified that compliance with orders was mandatory and that sanctions, including dismissal of the appeal, may be entered for noncompliance.

The Scheduling Order scheduled the Pre-Hearing Conference for July 7, 2016. On July 6, 2016, I issued an Order Regarding Pre-Hearing Conference, which rescheduled the Pre-Hearing Conference, partially due to Decorie's failure to comply with the requirements of the Scheduling Order. In the July 6th Order I repeated that the parties, including Decorie, were required to comply with all orders. I noted that Decorie was in violation of the Scheduling Order because she failed to file a Pre-Hearing Statement three business days before the Pre-Hearing Conference. In fact, she had not filed any Pre-Hearing Statement. I stated that I would "not enter sanctions at [that] time, but I [would] likely do so in the future if noncompliance continues."

On August 14, 2016, I held the Pre-Hearing Conference. Once again, Decorie did not file a Pre-Hearing Statement, despite: (1) the clear requirements to do so in the Scheduling Order and Order Regarding Pre-Hearing Conference and (2) my admonition in the Order Regarding Pre-Hearing Conference that the failure to file the Pre-Hearing statement in the future would likely result in sanctions, including dismissal of the appeal.

At the Pre-Hearing Conference, I asked Decorie why she had not filed the Pre-Hearing Statement. She responded by saying only that she thought she had provided all the necessary information. She made that claim even though the Order Regarding Pre-Hearing Conference specifically repeated the need to file the Pre-Hearing Statement she failed to file previously and even though the substance of a Pre-Hearing Statement, as specified in the Scheduling Order, is significantly different from the Notice of Claim. Regarding the merits of her claim, Decorie was

unable to articulate any way in which the Applicant's docks interfered with her rights to access her property from the water.

In light of the above, there are several legal bases for dismissal of this appeal. First, an appeal may be dismissed as a sanction when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10) and (11)(d)1; see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

Second, the adjudicatory rules require that "[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case." 310 CMR 1.01(3)(e) (emphasis added).

For all of the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision dismissing Decorie's appeal based upon her failure to: (1) comply with orders and the Rules of Adjudicatory Proceeding and file documents as required and (2) prosecute the appeal. See 310 CMR 1.01(3)(e); 310 CMR 1.01(5)2; 1.01(5)6, 1.01(10).

NOTICE- RECOMMENDED FINAL DECISION

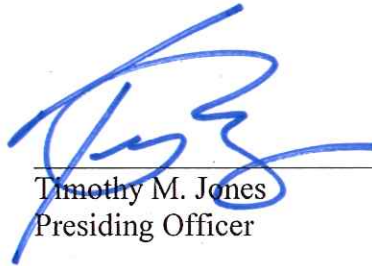
This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant 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 her sole discretion, directs otherwise.

Date:

9/20/16



Timothy M. Jones
Presiding Officer

SERVICE LIST

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Arthur T. King Sr.

Docket No. 2016-017

File No. W12-3717
Wales

Representative

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