COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

In the Matter of	September 19, 2008
Princeton Development, Inc.	Docket No. DEP-07-47 DEP File No. 103-585 Bedford

RECOMMENDED FINAL DECISION

The applicant's wetlands permit must be vacated because the proposed project cannot be built and the applicant cannot submit a revised project more than four months after a full hearing was held on the merits of the original project.

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Stephen M. Leonard, Esq. and Rachel A. Lipton, Esq. (Brown Rudnick Berlack Israels LLP, Boston), for the applicant, Princeton Development, Inc.

Elizabeth B. Kimball, Esq. (Office of General Counsel, Boston), for the Department of Environmental Protection.

Natalie S. Monroe, Administrative Magistrate.

This appeal challenges a wetlands permit that the Department of Environmental Protection (the "DEP") issued to Princeton Development, Inc. ("Princeton") in accordance with the Wetlands Protection Act, M.G.L. c. 131, § 40. The permit allows Princeton to build a 186-unit, six-building, moderate-income housing development in Bedford. The Town of Bedford Conservation Commission opposes the permit on the grounds that the project does not comply with the Wetlands Protection Act or the Wetlands Protection Regulations, 310 CMR 10.00 (the "Wetlands Regulations").

I held a hearing in this appeal on September 11, 2007 and September 12, 2007. On November 14, 2007, the Superior Court upheld a comprehensive permit (the

"Comprehensive Permit") that Princeton had obtained for the development under the affordable housing statute, M.G.L. c. 40B, §§ 20-23 ("Chapter 40B"). Princeton did not appeal the Superior Court's decision and therefore the Comprehensive Permit is now final.

Certain elements of the development that the Superior Court upheld in the Comprehensive Permit differ from the development that is the subject of this appeal. Most significantly, the Comprehensive Permit limits the development to 156 units and five buildings; it also includes local wetlands-related requirements that Princeton has not included in the project at issue here.

In light of the Superior Court's ruling and the finality of the Comprehensive Permit, the Bedford Conservation Commission has moved to vacate the wetlands permit on the grounds that the project can never be built. Princeton opposes the motion and has asked to re-open the record to present a revised project that allegedly complies with the Comprehensive Permit.

For the reasons set forth below, I grant the Conservation Commission's motion and deny Princeton's motion. I therefore recommended that the permit be vacated and the appeal be dismissed as moot.

Factual and Procedural Background

A. The Project at Issue in this Appeal.

This appeal involves a mixed-income apartment complex at 350 and 350A Concord Road in Bedford (the "Wetlands Project"). The project would consist of 186 apartments in six buildings. Site amenities would include an outdoor swimming pool, a clubhouse, access roads and parking.

The development would be located on two parcels of land that are separated by a 65-foot wide strip of land that is owned by the Town of Bedford and that is used as a public bicycle path. The main entrance for the development would be located on the parcel to the north of the bicycle path (the "northern parcel"). One apartment building ("Building No. 1"), the swimming pool, parking and a stormwater management system also would be built on the northern parcel. The clubhouse would be located in Building No. 1. Five apartment buildings, parking, a stormwater management system, access drives and related infrastructure would be built on the parcel to the south of the bicycle path (the "southern parcel").

B. The Two Permits.

On July 5, 2001, Princeton applied to the Bedford Zoning Board of Appeals (the "ZBA") under Chapter 40B for a comprehensive permit to construct a seven-building, 258-unit, moderate-income housing development at the site. On September 20, 2003, while the application was still pending before the ZBA, Princeton revised the development, changing it from 258 units to 213 units in seven buildings.

On May 24, 2004, the ZBA granted Princeton a comprehensive permit (the "Comprehensive Permit"), with conditions. One of these conditions required Princeton to eliminate two buildings, Building Nos. 1 and 7, and to reduce the development to five buildings. The ZBA also denied Princeton's request to be exempt from several local regulations, including certain local wetlands bylaws.

Princeton appealed the Comprehensive Permit to the Housing Appeals Committee (the "HAC"), asserting that the ZBA's conditions rendered the project uneconomic, as that term is used in Chapter 40B. While the appeal was pending, Princeton revised the

project again. In this revision, Princeton eliminated Building No. 7, reconfigured Building No. 1 and reduced to 186 the number of apartment units in the development.

On August 24, 2004, while its appeal of the Comprehensive Permit was pending before the HAC, Princeton applied to the Bedford Conservation Commission for a wetlands permit under the Wetlands Protection Act, M.G.L. c. 131, § 40. The application, called a notice of intent, was based on site plans dated July 15, 2004, which depicted a 186-unit, six building development. Building No. 1 was part of the project.

On September 20, 2005, the HAC upheld the ZBA's Comprehensive Permit, with two exceptions not relevant here. Important to this appeal, the HAC ordered Princeton to remove Building No. 1 and it limited Princeton to a five-building, 156-unit development. The HAC also upheld the ZBA's decision not to exempt Princeton from certain local wetlands bylaws. On October 20, 2005, Princeton appealed the HAC's decision to the Massachusetts Superior Court.

On March 26, 2006, the Conservation Commission voted to deny Princeton a wetlands permit. On April 4, 2006, Princeton filed a request for a superseding order of conditions with the DEP, asking that agency to grant the wetlands permit. Three months later, Princeton made changes to the development and therefore submitted to the DEP a revised set of plans, dated July 10, 2006 (the "July 2006 Plans"). Under the then-current project, Princeton still planned to construct a six-building, 186-unit development. Building No. 1 remained part of the project plans, and remained sited on the northern parcel.

On September 25, 2006, the DEP issued Princeton a wetlands permit (the "Wetlands Permit") for the development. The permit was based on the July 2006 Plans.

The Conservation Commission appealed the Wetlands Permit by filing a request for an adjudicatory hearing with the DEP. The DEP transferred the appeal to the Division of Administrative Law Appeals ("DALA") on January 17, 2007. At the time of the transfer, Princeton's appeal of the Comprehensive Permit was still pending in the Superior Court.

C. The Proceedings at DALA.

After the appeal was transferred to DALA, I held a pre-hearing conference on February 27, 2007. On March 5, 2007, the parties submitted a list of agreed-upon issues for adjudication.

On March 16, 2007, the Conservation Commission moved to stay this case until the Superior Court decided Princeton's appeal of the Comprehensive Permit. The Conservation Commission argued that if the Court upheld the Comprehensive Permit, the project at issue in this appeal (the "Wetlands Project") could not be built. The commission contended, for example, that the Wetlands Project includes Building No. 1, and if the Comprehensive Permit were upheld, Princeton would have to re-design the project to eliminate that building. The Conservation Commission reasoned that it therefore would be a waste of resources to litigate this appeal when the Wetlands Project could be rendered futile.

Both Princeton and the DEP opposed the stay. In its opposition brief, Princeton stated that if it lost in Superior Court, it simply would remove Building No. 1 from the project. It represented that if it removed Building No. 1, the northern parcel would cease

to be an issue for this appeal. For example, the company stated that:

> Princeton has designed a pool, clubhouse, parking and a stormwater management system for the northern parcel without the need for any further action by the Conservation Commission … and/or the DEP because work will be located entirely outside of the buffer zone to any resource area.

Princeton's Opposition to the Motion to Stay Proceedings, dated March 23, 2007, at p. 9 n.3. Princeton further represented that if it lost in Superior Court, the southern parcel would not change:

> Changing to the 156-unit plan would not change any aspect of the 156 units and other features of the development located on the southern parcel… as reflected in the July 10, 2006 plan referenced in the [Wetlands Permit].

Princeton's Motion to Set a Hearing Schedule, dated April 11, 2007, at p. 2. Princeton therefore argued that it would not be a waste of resources to proceed to a full hearing in this appeal.

Based on Princeton's representations concerning the project, I did not stay this appeal pending a decision from the Superior Court. I did, however, stay the case for sixty days. I did this because the Superior Court had heard oral argument on the appeal in December of 2006, and it seemed reasonable to wait an additional sixty days for the Court's ruling. Moreover, in the event the Superior Court did not rule within sixty days, I ordered the parties to segregate their pre-filed testimony so that all testimony relating to the northern parcel was presented separately. Consequently, if the Superior Court ruled after pre-filed testimony had been submitted, and that ruling went against Princeton, testimony regarding the northern parcel easily could be "excised" from the case.

The Superior Court did not issue a ruling during the sixty-day stay and the stay therefore was lifted. The parties submitted pre-filed testimony and exhibits between June

15, 2007 and July 30, 2007. I held a hearing on September 11, 2007 and September 12, 2007. At the end of the hearing the parties agreed to a schedule for filing post-hearing briefs and reply briefs. According to that schedule, post-hearing briefs were filed on November 2, 2007, and reply briefs were submitted on November 19, 2007.

On November 20, 2007, the day after filing its reply brief, Princeton notified me that the Superior Court had denied its appeal of the Comprehensive Permit. In its ruling, the Superior Court upheld the HAC's decision to eliminate Building No. 1 and to limit the development to 156 units. The Superior Court's decision also upheld the conditions in the Comprehensive Permit, including conditions requiring Princeton to comply with certain local wetlands bylaws. See Princeton Development, Inc. v. Housing Appeals Committee, Civil Action No. 2005-3711 (Mass. Super. Ct. Nov. 14, 2007).

Princeton took the position that the Superior Court ruling changed nothing and that I should issue a recommended final decision on the Wetlands Permit. On November 21, 2007, the Conservation Commission moved to file a supplemental brief in which it argued that the Wetlands Permit should be vacated in light of the Superior Court's decision.

Because neither Princeton nor the Conservation Commission fully explained its position, I ordered both parties to file a memorandum of law that addressed the following alternatives:

(1) proceeding with the issuance of a recommended final decision on the Wetlands Project;

(2) staying this matter pending resolution of an appeal of the Superior Court's decision; and

(3) vacating the Wetlands Permit and dismissing the appeal as moot.

See Order to File, dated November 29, 2007, at p. 2.[1] The order also provided that the DEP could file a memorandum of law, if it so chose.

Both the Conservation Commission and Princeton responded to the order on January 14, 2008.[2] The Conservation Commission continued to press for the dismissal of this appeal on the grounds that it was moot. Princeton maintained that the Wetlands Project was not moot and that I could issue a recommended final decision on that project. Princeton also argued that, if I preferred, I could instead issue a wetlands permit for a 156-unit project. The DEP filed a response ten days late, on January 24, 2008, in which it supported Princeton's position.

On January 25, 2008, Princeton changed course and moved to re-open the record to submit new project plans (the "2008 Plans"). Princeton claimed that the new project (the "2008 Project") complied with the Comprehensive Permit, which had become final because Princeton had not appealed the Superior Court's ruling. The Conservation Commission opposed Princeton's motion; the DEP supported it.

On June 9, 2008, I held a conference to, among other things, clarify all of the changes that Princeton was proposing. At the conference, however, the parties could not agree on the extent of the proposed changes. I therefore asked Princeton to submit the July 2006 Plans[3] with a Mylar overlay of the 2008 Plans so I could more readily compare the differences between the two projects. At Princeton's suggestion, I also allowed the

[1] The brevity of the parties' filings was understandable. The parties were simply transmitting to this tribunal the Superior Court's decision and, in the Conservation Commission's case, requesting leave to submit a supplemental closing brief.
[2] The parties filed fifteen briefs, motions, cross-motions and oppositions in connection with the order to file. While I have reviewed all of the filings, I summarize only the most pertinent ones here.
[3] These are the plans of record for the Wetlands Project.

company to file a narrative that explained the changes. Finally, I allowed both the DEP and the Conservation Commission to respond to the Mylar and narrative.

On June 13, 2008, Princeton filed a narrative and a one-page summary of the 2008 Plans with a one-page Mylar summary of the July 2006 Plans. On July 2, 2008, both the DEP and the Conservation Commission responded to Princeton's filings.[4]

D. Differences Between the Wetlands Project and the 2008 Project.

In its 2008 Project, Princeton plans to make changes at both the northern and southern parcels.

1. The Northern Parcel.

In its 2008 Project, Princeton has eliminated Building No. 1 altogether. Princeton proposes instead to build a clubhouse and pool on the northern parcel, both of which would be outside the one-hundred-foot buffer zone to the wetlands on the site.[5] Furthermore, while the Wetlands Project called for sixty-five parking spaces on the northern parcel, the 2008 Project would have six parking places on that parcel, all of which would be outside the one-hundred-foot buffer zone.

In the 2008 Project, moreover, Princeton proposes to change the stormwater management system on the northern parcel. While the Wetlands Project utilized two bio-retention areas and an extended detention basin, the 2008 Project would use one bio-retention basin and an infiltration basin. In the 2008 Project, moreover, the stormwater management system would be moved out of the buffer zone, although grading would

[4] Six additional filings followed, three each from Princeton and the Conservation Commission. While I have considered all of the filings, I summarize only the most pertinent ones here.

[5] Under the Wetlands Regulations, the DEP can regulate work both in a wetland and within one-hundred feet of a wetland (the "buffer zone"). See 310 CMR 10.02.

occur in the buffer zone. The revised system would not discharge directly into a wetland, but would discharge toward one.

2. The Southern Parcel.

In the 2008 Project, Princeton has added retaining walls behind Buildings Nos. 3, 5 and 6 on the southern parcel. The retaining walls would be 880 feet long and would be built within fifty feet of the wetlands on that parcel. Finally, the Wetlands Project called for extensive grading and replacement plantings within twenty-five feet of the wetlands on the southern parcel. The 2008 Project eliminates a significant amount of the grading and replacement plantings.

Discussion

As set forth above, the Conservation Commission has moved to dismiss this appeal on the grounds that the Wetlands Project cannot be built and therefore the appeal is moot. Princeton argues the appeal is not moot because I can issue a wetlands permit for either the Wetlands Project or the 2008 Project.

After considering all of the parties' filings, including their briefs, affidavits and exhibits, as well as the July 2006 Plans, the 2008 Plans, and Princeton's narrative and Mylar overlay, I conclude that (a) the Wetlands Project is futile; and (b) the record should not be re-opened to consider the 2008 Project. I therefore recommend that the Wetlands Permit be vacated and that the appeal be dismissed as moot.

A. The Wetlands Project: Six-Buildings, 186 Units.

"Work at issue in a wetlands permit appeal … is futile if the applicant cannot carry it out." Matter of Bankert, Docket No. 2003-027, Recommended Final Decision, 11 DEPR 169, 172 (Aug. 9, 2004). A project is futile, for example, if the applicant has been "denied a necessary local permit and the denial has become … final." Id. Generally, in such a situation, the wetlands permit must be vacated and the appeal dismissed as moot. See, e.g., Matter of Bjorklund, Docket No. 94-065, Final Decision and Order of Dismissal, 1 DEPR 210 (Aug. 23, 1994) (where a project cannot be built because it has been denied a necessary federal, state or local approval, the applicant's permit appeal may be dismissed as moot).

The Wetlands Project is futile because it cannot be built. As previously discussed, because Princeton did not appeal the Superior Court's decision upholding the Comprehensive Permit, that permit is now final. This means that Princeton cannot build the Wetlands Project, *i.e.*, the six-building, 186-unit development that is the subject of this appeal. It therefore would be futile to review and rule upon the Wetlands Project. Matter of Bankert, 11 DEPR at 172.

Princeton acknowledges that the Wetlands Project cannot be built, but nevertheless argues that I should issue a recommended final decision based upon it. Princeton explains that if I issue a recommended final decision upholding the Wetlands Permit, the DEP could then approve the 2008 Project and amend the Wetlands Permit accordingly. Princeton is wrong. The Wetlands Protection Act and the Wetlands Regulations "do not provide authority for obtaining approval for project elements after a permit is issued." Matter of Rockport, 14 DEPR 157, 166 (July 17, 2007). Stated

differently, I cannot grant a wetlands permit for a project knowing that the project cannot be built and that the applicant intends to make substantial changes once the permit is issued. In this case, those changes include a new stormwater management system on the northern parcel, the elimination of plantings that the DEP had required, the elimination of grading in the buffer zone on the southern parcel, and the addition of 880 linear feet of retaining walls within fifty feet of the wetlands on the site.

It is true that, when it issued the Wetlands Permit, the DEP knew the project might have to be revised. This does not change the result, however. When the DEP issued the Wetlands Permit, it had not reviewed the plans for the 2008 Project and therefore never determined whether this new project complies with the Wetlands Protection Act. Indeed, the 2008 Plans did not exist when the DEP issued the Wetlands Permit. Similarly, the fact that the 2008 Project may have less environmental impact than the Wetlands Project does not mean that the 2008 Project complies with the Wetlands Protection Act or that Princeton should be allowed to "switch" projects after a final wetlands permit has been issued.[6]

Contrary to Princeton's claims, moreover, nothing in the Wetlands Permit authorizes Princeton to revise its project after this appeal is concluded. The permit simply states:

> Any proposed or executed change in the plans approved under this [Wetlands Permit] shall require the applicant to file a new Notice of Intent with the conservation commission or to inquire of the MassDEP in writing whether the change is substantial enough to require a new filing.

[6] It also is not clear that the project will have less impact on every wetland on the site; for instance, Princeton has added retaining walls in the buffer zone to the wetlands on the southern parcel.

Superseding Order of Conditions, dated September 25, 2006, at Condition 26.[7]

Finally, Princeton argues that I can issue a permit on the Wetlands Project because the Comprehensive Permit did not "deny" that project. This is without merit. In the Comprehensive Permit, the HAC expressly denied Princeton's request to construct the project that the DEP approved; that is, the HAC refused to allow Princeton to build 186 units and explicitly eliminated Building No. 1. The Comprehensive Permit also contained other construction requirements which, by Princeton's own admissions, conflict with the Wetlands Project. Thus, while the Comprehensive Permit allows Princeton to build a 156-unit apartment complex, it also denied the Wetlands Project.

B. The 2008 Project: Five-Buildings, 156 Units.

As previously discussed, Princeton argues that even if the Wetlands Project cannot be built, this case is not moot because I can rule instead on the 2008 Project. After reviewing the parties' filings, I conclude that the record should not be re-opened to consider the 2008 Project. Not only does Princeton's motion come too late in the appeal process, it also would it be a waste of resources to review the 2008 Project at this time because it appears the project does not comply with Comprehensive Permit.

[7] Nor is the DEP's policy for amending a final wetlands permit, called a final order of conditions, applicable here. See DWW Policy 85-4, "Amending an Order of Conditions," dated September 17, 1995 (revised March 1, 1995). That policy applies only to "relatively minor" changes that are "unforeseen," *i.e.,* changes that arise unexpectedly after the final wetlands permit has been issued. Id. In this case, the 2008 Project is not unforeseen because Princeton knows now, before a final wetlands permit has been issued, that it must revise its project. It also is doubtful that the changes could be considered minor. See, e.g., Matter of Kenwood Dev. Corp., Docket No. 97-022, Procedural Ruling and Order, 5 DEPR 5, 9 (Jan. 23, 1998) (Policy 85-4 "provid[es] for the correction of minor, typographical errors"); Whittier Real Estate Trust, 1992 WL 367207 (DEP March 12, 1992) (the addition of a second access road is not a minor change under Policy 85-4).

1. Finality, Fairness and Local Review.

Princeton's motion comes far too late in the appeal. Princeton moved to revise the project after the parties had had a full hearing and after they had filed both post-hearing briefs and reply briefs. The hearing that was held – including all of the issues for adjudication, the pre-filed testimony, the live testimony and the parties' exhibits – related to the Wetlands Project. The closing briefs also pertained to the Wetlands Project.

Were I to allow Princeton to revise the project now, I would have to "re-start" the adjudicatory process. By way of example, the Conservation Commission and the DEP would have the right to identify new issues for adjudication based on the project changes, as well as to request discovery on the new project elements. The parties then would have to identify witnesses to address the changes; these witnesses may or may not be the same individuals who testified at the first hearing. If the parties did not file dispositive motions, they next would have to file new testimony concerning the revised project. Finally, a new hearing would have to be held and additional post-hearing briefs submitted. At every step in the proceedings, moreover, the parties and this tribunal would have to parse through the original issues, testimony and evidence to determine what is and what is not applicable to the revised project.[8] Thus, even though the "re-started" adjudicatory process would be limited to changes in the project, it nevertheless would consume significant time and resources.

In concluding that it is too late to revise the project now, I recognize that if Princeton still wants to pursue the 2008 Project, it will have to file a new notice of intent with the Bedford Conservation Commission. This undoubtedly will cost Princeton both

[8] Given the litigious nature of this case to date, moreover, it is unlikely that the parties would agree on anything at any stage of the re-opened proceedings. See, e.g., supra at footnotes 2 and 4. Multiple motions and filings therefore would be likely, resulting in the expenditure of yet more time and more resources.

time and resources. This does not tip the balance in favor of allowing Princeton's motion, however.

First, this is a situation of Princeton's own making. At the outset of this appeal, the Conservation Commission moved to stay this case until the Superior Court ruled on Princeton's appeal of the Comprehensive Permit. That motion was denied based on Princeton's representation that, if it lost in Superior Court, Building No. 1 would be "excised" from the plans, the northern parcel would cease to require a wetlands permit, and the remainder of the Wetlands Project would go forward unchanged. This meant, Princeton represented, that the hearing could proceed on the Wetlands Project; if the company lost in Superior Court, I could simply disregard the issues and evidence pertaining to the northern parcel and rule on the southern parcel.

This has not come to pass in any respect. Princeton did not follow the course it had represented at the beginning of this appeal. Instead, Princeton submitted a plan with a new stormwater management system on the northern parcel that requires approval under the Wetlands Protection Act. Similarly, Princeton made changes to the southern parcel that also need review and approval under the Wetlands Protection Act. As outlined above, these changes would mean "re-starting" the adjudicatory process at considerable time and expense to the parties and this tribunal.

The need to file a new notice of intent does not tip the balance in favor of re-opening the record for a second reason. Under the Wetlands Regulations, a notice of intent for a proposed project must be presented to the local conservation commission in the first instance. 310 CMR 10.05(4). This initial review not only allows conservation commissions to evaluate projects in their towns, it also provides the public with an

opportunity to learn about and comment on projects that may impact them. See, e.g., 310 CMR 10.05(5).

When Princeton filed its notice of intent with the Bedford Conservation Commission, it submitted plans that had been prepared in 2003 and revised in 2004. After Princeton asked the DEP to issue a wetlands permit, the agency allowed Princeton to revise the project without sending the project back to the Conservation Commission for local review.[9] As a result, the public and the Conservation Commission did not have a chance to evaluate the Wetlands Project while Princeton's wetlands application was pending before the commission. Since one project revision has evaded local review, it would be appropriate for Princeton's 2008 Project to be presented to the Conservation Commission. Thus, the fact that Princeton would have to file a new notice of intent does not weigh in favor of allowing it to revise its project at this late stage in the proceedings.

Moreover, in concluding that it is too late for Princeton to revise its project, I also considered the fact that in April of 2007, Princeton offered to prepare a set of plans depicting a 156-unit development. See Princeton's Motion to Set a Hearing Schedule, dated April 11, 2007, at p. 2. When Princeton made this offer, however, it was not seeking to revise its project. To the contrary, Princeton still planned to go forward with the Wetlands Project. It was offering the 156-unit project as a hypothetical project for the parties and this tribunal to review *in addition to* the Wetlands Project.[10] Thus, Princeton's April 2007 offer is not evidence that Princeton sought to revise its project

[9] The DEP apparently determined that the project changes did not require a remand to the Conservation Commission. See DWW Policy 91-1, "Administrative Appeals Policy for the Review of Project Plan Changes," dated February 9, 1991 (revised March 1, 1995).

[10] That is, it was suggesting that the parties submit evidence on, and this tribunal hold a hearing on, both the Wetlands Project *and* a hypothetical 156-unit development. DALA does not have the authority to issue wetlands permits for hypothetical projects. Nor would it have been appropriate to require the parties to submit evidence and legal argument on two projects.

earlier and it does not make Princeton's current motion "timely." Indeed, it is not clear that the 156-unit development from April of 2007 is the same as the 2008 Project. In April of 2007, Princeton represented that if it built a 156-unit development, the northern parcel would not require any wetlands review and the southern parcel would be unchanged. As previously discussed, this is not true for the 2008 Project.

Finally, I note that the 2008 Project would not fall within the DEP's plan change policy because that policy only allows the DEP to review project changes that are "insubstantial." See DWW Policy 91-1, "Administrative Appeals Policy for the Review of Project Plan Changes," dated February 9, 1991 (revised March 1, 1995).
A plan change is "insubstantial" only if (a) it does not significantly change the project configuration; and (b) it results in "unchanged or decreased impact to any wetland resource areas." Id. The 2008 Project substantially re-configures the development, including entirely re-designing the northern parcel. Moreover, Princeton has not shown that the addition of 880 feet of retaining walls within fifty feet of the wetlands will result in "unchanged or decreased impact to" those resource areas. Id. (applicant has the burden of showing that the project changes comply with Policy 91-1).

At the start of this appeal, Princeton argued for and obtained a full hearing on the merits of the Wetlands Project. In pressing for the hearing, Princeton represented that if it lost in Superior Court, there would be no need to re-open the hearing. Four months after the hearing closed, Princeton changed its tune and asked to re-open the appeal to submit a revised project. There has to be an end to litigation. For all the reasons set forth above, that time has come.

2. The 2008 Project May Not Be the Final Project Under the Comprehensive Permit.

Even if it were not too late for Princeton to revise its project, it would be a waste of resources to re-open the record to consider the 2008 Project at this time. The Bedford Building Inspector has submitted an affidavit stating that the 2008 Project contains major project changes that do not comply with the Comprehensive Permit and, as a consequence, he would not approve the revised project. Moreover, Princeton could have submitted the 2008 Project for approval under the Comprehensive Permit, but has not done so. Under the circumstances, it would be a waste of time and resources to review the project at this time.

Christopher Laskey is both the Inspector of Buildings and Code Enforcement Officer (the "Building Inspector") for Bedford and the town's Zoning Enforcement Officer. Affidavit of Christopher Laskey, dated July 2, 2008 ("Laskey Aff."), at ¶ 1. He states that the Comprehensive Permit is based on project plans dated September 23, 2003 and revised on July 28, 2004 (the "2003/2004 Plans"). Id. at ¶¶ 4, 7. As the town's Building Inspector, Mr. Laskey must review any changes to the project that differ from the 2003/2004 Plans to ensure that the changes comply with the Comprehensive Permit. Id. at ¶¶ 5, 18. See also Comprehensive Permit at Conditions 10.1 and 10.2. If the changes are minor and comply with the Comprehensive Permit, he can approve them. Id. If Mr. Laskey determines that the changes are major, or if they do not comply with the Comprehensive Permit, Princeton must submit the revised project plans to the Zoning Board of Appeals (the "ZBA") for approval. Id. See also 760 CMR 56.05(11) (procedures for submitting plan changes after a comprehensive permit has been issued).

Mr. Laskey states that he could not approve the 2008 Project for two reasons: (1) the changes are not minor; and (2) the revisions would violate the Comprehensive Permit. First, Mr. Laskey states that the 2008 Project eliminates Building No. 1, relocates the swimming pool and proposes to build a new building (the clubhouse) on the northern parcel. Laskey Aff. at ¶ 18.[11] He explains further that in the 2008 Project, Princeton proposes five new drainage structures within twenty-five feet of wetlands, as well as 880 linear feet of new retaining walls within fifty feet of wetlands on the southern parcel. Id. at ¶¶ 12, 18. Mr. Laskey considers each of these changes to be major. Id. Therefore, he would not approve them and believes that they must be presented to the ZBA for approval. Id.

Second, Mr. Laskey states that he also could not approve the 2008 Project because it does not comply with the Comprehensive Permit. Laskey Aff. at ¶ 6. Mr. Laskey states, for example, that the Comprehensive Permit upheld a local wetlands bylaw that prohibits any activity within twenty-five feet of a wetland. Id. at ¶ 7. According to Mr. Laskey, however, the 2008 Plans show that portions of two detention basins would be located less than twenty-five feet from the wetlands on the southern parcel. Id. at ¶ 8.[12]

Mr. Laskey further states that the Comprehensive Permit also upheld, with certain specific exceptions, a local wetlands bylaw that prohibits any structures from being built within fifty feet of a wetland. Laskey Aff. at ¶ 14. According to Mr. Laskey, Princeton now proposes to build new retaining walls, which are considered structures, within fifty

[11] Because the Comprehensive Permit was based on the 2003/2004 Plans, Mr. Laskey compared the 2008 Plans to this earlier plan set, and not to the July 2006 Plans. Princeton never submitted the July 2006 Plans to Mr. Laskey or the ZBA for approval.

[12] According to Mr. Laskey, the Comprehensive Permit allowed certain exceptions to this bylaw, but those exceptions did not extend to the detention basins. Id. at ¶ 7.

feet of the wetlands on the southern parcel. Id. at ¶¶ 10, 13-16. These retaining walls, which would be 880 feet long, would be in addition to other retaining walls that the Comprehensive Permit specifically allowed. Id. at ¶ 14. Finally, Mr. Laskey states that the 2008 Project also depicts additional structures, including drainage structures and a recycling and dumpster facility, within fifty feet of the wetlands on the southern parcel. Id. at ¶ 17. It is his opinion that, as do the retaining walls, these other proposed structures violate the Comprehensive Permit. Id.

It is Mr. Laskey's responsibility to determine, in the first instance, whether the 2008 Project complies with the Comprehensive Permit. He has determined that it does not. Mr. Laskey's testimony is based on his personal knowledge and is supported by the 2006 Plans, the 2008 Plans, the Comprehensive Permit and an affidavit from the Town of Bedford's Public Works Engineer.[13] Moreover, while Princeton argued that the town should not be allowed to submit Mr. Laskey's affidavit, the company did not present any evidence to refute the statements and conclusions in that affidavit.[14]

Thus, even if I approved the 2008 Project, it appears that the project could not be built at this time. Consequently, it would be a waste of time and resources to allow Princeton to re-open the record to submit the 2008 Plans.

[13] I cannot and do not rule on whether the 2008 Project complies with the Comprehensive Permit. I must, however, determine whether Mr. Laskey's testimony is factually-supported; this includes reviewing the Comprehensive Permit and all of the other evidence presented.

[14] I considered, for example, the affidavit that Princeton submitted from Joseph Peznola; it is conclusory, makes legal argument and does not call Mr. Laskey's affidavit into question.

In reaching this conclusion, I note that Princeton could have sought approval from the Building Inspector or the ZBA several months ago. The Chapter 40B regulations state, in pertinent part:

> (a) If after a Comprehensive Permit is granted … an Applicant desires to change the details of its Project, as approved [in the Comprehensive Permit], it shall **promptly** notify the Zoning Board of Appeals in writing, describing such change. Within 20 days the Board shall determine and notify the Applicant whether it deems the change substantial or insubstantial, with reference to the factors set forth at 760 CMR 56.07(4).
>
> (b) If the change is determined to be insubstantial or if the Board fails to notify the Applicant by the of such 20-day period, the Comprehensive Permit shall be deemed modified to incorporate the change.
>
> (c) If the change is determined to be substantial, the Board shall hold a public hearing within 30 days of its determination and issue a decision within 40 days of termination of the hearing….

760 CMR 56.05(11)(a)-(c) (emphasis added). Had Princeton submitted the 2008 Project to the ZBA, the board could have ruled on the project by now. This would have allowed Princeton to present this tribunal with a final project that definitely could be built under the Comprehensive Permit. Absent that approval, it would be a waste of time to review a project that may or may not ever be built.

Conclusion

For the reasons set forth above, I deny Princeton's motion to re-open the record to revise its project. Moreover, the 2006 Project cannot be built and therefore it would be futile to grant a permit for it. I therefore recommend that the Wetlands Permit issued to Princeton be vacated and that the appeal be dismissed as moot.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Natalie S. Monroe
Dated: September 19, 2008 Administrative Magistrate

Notice

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the Commissioner of the Department of Environmental Protection for a final decision in this matter. This decision therefore is not a final decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to 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 portion of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.