

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 6, 2017

In the Matter of

MEZ Realty Inc.

OADR Docket No. 2016-036
RTN 4-26217
Mashpee, MA

RECOMMENDED FINAL DECISION

MEZ Realty Inc. (“the Petitioner”) filed its Request for an Adjudicatory Hearing (Appeal Notice) on December 28, 2016, purportedly pursuant to 310 CMR 40.0050, the Massachusetts Contingency Plan (MCP)¹ provision authorizing appeals of permit decisions, and orders issued under the authority of M.G.L. c. 21E, § 9.² The document attached to the Petitioner’s Appeal Notice (also referred to in this decision as a “Notice of Claim”) which is the subject of the Petitioner’s appeal is a Notice of Responsibility (NOR)³ and a Request for Information (RFI)

¹ The Massachusetts Contingency Plan, 310 CMR 40.0000, is the set of regulations governing the cleanup of contaminated waste sites.

² This section of Chapter 21E provides, in pertinent part, that “[w]henver it has reason to believe that oil or hazardous material has been released or that there is a threat of release of oil or hazardous material, the department may issue to any person described in paragraph (a) of section five an order requiring such person to conduct an assessment of such release or threat of release. Releases and threats of release for which the department orders such assessment shall be determined by reference to the Massachusetts contingency plan.”

³ “Notice of Responsibility and NOR each means a notice from the Department to a person informing such person of his or her potential liability pursuant to M.G.L. c. 21E, § 5.” 310 CMR 40.0006.

which includes an interim deadline for responding.⁴ Based on the applicable law cited below, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioner's Appeal because the Petitioner cannot appeal the NOR and RFI.

Applicable Law

310 CMR 40.0050(1) states that "[w]herever expressly provided by 310 CMR 40.0000, any person who is aggrieved by a permit decision of the Department, or order issued pursuant to M.G.L. c. 21E, § 9, may request an adjudicatory hearing before the Department." Appeals of Notices of Responsibility and Requests for Information are not expressly provided for in the MCP; in fact, they are expressly excluded from the appeal provisions of 310 CMR 40.0050. 310 CMR 40.0050(8), at subsections (b), (d) and (e), states:

(8) The following determinations shall not be subject to an adjudicatory hearing:

(b) a decision whether to issue a Notice of Responsibility to any person pursuant to 310 CMR 40.0160(1);

(d) a decision whether to issue a Request for Information pursuant to 310 CMR 40.0165;

(e) a decision whether to establish Interim Deadlines pursuant to M.G.L. c. 21E, § 3A(j) and 310 CMR 40.0167;

310 CMR 1.01(5)(a)15.f.v authorizes the Presiding Officer to issue a Recommended Final Decision dismissing an appeal as part of the process for prescreening appeals if the Notice

310 CMR 40.0160(1)(a) requires the Department to "attempt to identify and notify [Responsible Parties] and [Potentially Responsible Parties] of their potential liability under M.G.L. c. 21E through the issuance of a Notice of Responsibility (NOR) prior to taking or arranging a response action" as authorized by M.G.L. c. 21E, § 4 ("The department, whenever it has reason to believe that oil or hazardous material has been released or that there is a threat of release of oil or hazardous material, is authorized to take or arrange for such response actions as it reasonably deems necessary.")

⁴ The Notice of Responsibility is dated December 6, 2016. It was not signed by the Department. The Request for Information contained within the NOR at page 3 sets a deadline of November 23, 2016 for the Petitioner to respond, and "Attachment A", describing the specific information requested, contains an Interim Deadline of December 1, 2016. These deadlines occur prior to the date of the NOR.

of Claim purports to appeal an unappealable document. This is such a case. 310 CMR 40.0050(1), cited by the Petitioner, authorizes appeals of permit decisions and enforcement orders when expressly provided by 310 CMR 40.0000. As noted above, this appeal concerns a Notice of Responsibility and a Request for Information. Neither is an appealable document. As a result, there is no jurisdiction over the Petitioner's appeal. 310 CMR 1.01(5)(a)2. authorizes the Presiding Officer to dismiss an appeal on her or his own initiative when there is a lack of jurisdiction. Based on the foregoing, I recommend that the Department's Commissioner issue a Final Decision dismissing the appeal and directing the Department to refund to the Petitioner the filing fee that it paid for filing this appeal. I believe the refund is appropriate because the Petitioner filed the appeal in error.

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: 1/6/2017



Jane A Rothchild
Presiding Officer

SERVICE LIST

IN THE MATTER OF:

MEZ REALTY INC.

Docket No. 2016-036

Mashpee

REPRESENTATIVE

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