

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

March 28, 2019

In the Matter of
Michael Carrigan, Carrigan
Development, LLC

OADR Docket No. WET-2018-017
Gloucester, MA

RECOMMENDED REMAND DECISION

INTRODUCTION

Carrie Fryklund (“Fryklund” or “Petitioner”) filed this appeal concerning the real property at 186 Concord Street, Gloucester, Massachusetts (“the Property”), which is owned by the Applicant, Carrigan Development, LLC (“Applicant” or “Carrigan”). The Petitioner challenges the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) dismissal of her request for a Superseding Order of Conditions (“SOC”). The appeal is brought pursuant to the Wetlands Regulations, 310 CMR 10.00, and the Wetlands Protection Act, G.L. c. 131 § 40. The MassDEP regional office dismissed the SOC Request on the grounds that the Petitioner failed to send a timely photocopy of the SOC Request to Carrigan. Carrigan has moved to dismiss this appeal on the same grounds. For the reasons discussed below, I recommend that MassDEP’s Commissioner issue an interlocutory remand decision denying Carrigan’s motion to dismiss, and remanding the matter to MassDEP’s Northeast Regional Office to review the Petitioner’s SOC Request and issue an SOC for the proposed Project in accordance with the MWPA and the Wetlands Regulations.

BACKGROUND

Fryklund is an abutting property owner to the Property. The Property is a 22 acre lot on which Carrigan seeks to develop a 12 unit single family residential cluster development with two affordable units and 80% open space. The Gloucester Conservation Commission issued an Order of Conditions approving the proposed project on September 20, 2018. The last possible day for Fryklund to send her SOC Request to MassDEP was October 4, 2018. See 310 CMR 10.05(c) and (d) (SOC request must be in writing and sent by certified mail or hand delivery within ten days of issuance of the Order, Determination, or Notification, which is being appealed, to MassDEP's appropriate regional office, here the Northeast Regional Office); 310 CMR 10.05(1) (when the specified time period is 10 days or less only business days are counted).

The regulations state when an SOC request is sent to the MassDEP regional office "a copy of the request shall at the same time be sent by certified mail or hand delivered to the conservation commission and the applicant, if he is not the appellant." 310 CMR 10.05(7)(d). Under 310 CMR 10.05(7)(j), "[p]apers required or permitted to be filed under 310 CMR 10.05 must be filed with the Department, at the address designated in the Reviewable Decision, within the timelines specified in 310 CMR 10.05."

Fryklund timely hand delivered the SOC Request to MassDEP on October 3, 2018. On that same date, Fryklund delegated to Dennis McGurk, another interested neighbor, delivery of the photocopy of the SOC Request for the Applicant, Carrigan. McGurk attempted to hand deliver the SOC Request to the attorney who had represented Carrigan throughout the Commission proceedings, Deborah A. Eliason. Eliason had previously indicated that "all communications [for the project before the Commission] be directed to her." Notice of Claim, p.

3. However, Attorney Eliason informed McGurk that she was not authorized to accept service of the SOC Request on behalf of Carrigan. Brief of Applicant Carrigan Development, LLC, p. 2.

Later that day on October 3, 2018, Attorney Eliason informed Carrigan in a telephone call that she been told that the SOC Request had been filed and to expect to receive a copy. Brief of Applicant Carrigan Development, LLC, p. 2; Carrigan Affidavit, ¶ 5.

McGurk responded to Attorney Eliason's refusal to accept service that same day, October 3, 2018, by going to the U.S. Post Office in Gloucester and sending a certified copy of the request to Carrigan. Brief of Petitioner, Carrie Fryklund, p. 4; Fryklund Aff. McGurk erred in addressing the envelope, addressing the envelope to "Essex Avenue, Essex," instead of the correct address of "Essex Avenue, Gloucester." Essex abuts Gloucester near the Carrigan office address (489 Essex Avenue, Gloucester) and Essex Avenue travels through both towns. Notice of Claim, p. 2 (December 4, 2018). The post office continued attempting to deliver to Carrigan, and finally achieved delivery on October 16, 2018, despite the address error. Fryklund Aff. Fryklund never received notice from the U.S. Post Office that there were problems delivering the envelope, and thus Fryklund believed that it had been properly delivered via certified mail. Fryklund Aff.

Less than a week after Attorney Eliason refused service, Carrigan went to the Commission's office and obtained "what he believed to be an incomplete copy" of the SOC request. Brief of Applicant Carrigan Development, LLC, p. 2.

Carrigan finally received the SOC request on October 16, 2018. It was enclosed in an envelope that was incorrectly addressed and allegedly reached Carrigan because the postal delivery person knew him. Brief of Applicant Carrigan Development, LLC, p. 2; Carrigan Affidavit, ¶ 7.

On November 20, 2018, MassDEP dismissed the SOC Request on the grounds that Carrigan did not receive a copy of it until October 16, 2018. Fryklund appealed that dismissal here, to the Office of Appeals and Dispute Resolution.

DISCUSSION

Shortly after receiving Fryklund's appeal, I issued an Order to Show Cause requiring the parties to file briefs "addressing the legal standard applicable to the circumstances of this case and the allegations in the Notice of Claim, citing relevant MassDEP adjudicatory decisions and analogous Massachusetts appellate case law." Order to Show Cause (December 18, 2018).

MassDEP responded by asserting that the appeal should be dismissed because the photocopy of the SOC Request was mailed to the incorrect address. Carrigan and Fryklund responded by briefing the correct standard of review for dismissal of an SOC request when the applicant is not timely served with a photocopy (discussed below); Carrigan argued for dismissal based upon that standard, and Fryklund argued that her SOC request should be reviewed on the merits by MassDEP's Northeast Regional Office.

On January 23, 2019, I issued an Order For Further Briefing by MassDEP, requiring it to brief its position on whether dismissal is appropriate in light of the correct standard of review briefed by Carrigan and Fryklund. After reviewing the Applicant's and Fryklund's responses (including affidavits) and the appropriate standard of review, MassDEP reassessed its position and determined that "no prejudice was suffered by [Carrigan] as a result of" the untimely service on Carrigan, and thus the SOC Request should be granted by MassDEP. MassDEP asserts that because Carrigan had been notified on October 3, 2018, by his attorney that the SOC request had been filed, he was not prejudiced by the failure to receive notice until October 16, 2019.

The applicable standard of review is clear: the failure to timely serve an applicant with a photocopy of an SOC Request is *not* a jurisdictional defect in the appeal requiring dismissal. Matter of Capozzi, Docket No. 99-003, Final Decision (January 20, 2000). Instead, the decision whether to allow an appeal to proceed despite untimely service on the applicant is a discretionary decision that should focus on whether the Applicant suffered prejudice as a consequence of the untimely service. The focus should be on whether the Applicant has been prejudiced by proceeding with the project before learning of the SOC request.¹ Id.; Matter of U.S. Naval Shipbuilding Museum, Inc., Docket No. 2001-35, Recommended Final Decision (September 15, 2001), adopted by Final Decision (October 15, 2001); see also Matter of Lawrence J. Rothschild, Docket No. 99-198, Motion Decision (March 9, 2000); Matter of Victor Matter of Haddad, Docket No. 98-028, Ruling on Motion to Dismiss (November 5, 1998); see e.g. Reardon v. Spangler, Docket No. 01-1863-B, Memorandum of Decision and Order on Motion to Dismiss Pursuant to Mass. R. Civ. P. 4(j) (May 13, 2002).

Carrigan asserts that he was prejudiced because on October 4, 2018, he contracted for delivery of an excavator and a loader to the Property, which was delivered that same day for \$1,200.00. Carrigan Aff., ¶ 8. When he received the appeal on October 16, 2018, he paid \$1,200.00 to have the equipment removed from the Property. Carrigan Aff., ¶ 8. Also on October 6, 2018, Carrigan conferred with his consulting firm “regarding the start-up of the Project,” for which he paid \$130.

While I appreciate Carrigan’s position, there has been no showing of prejudice as a consequence of the later service on October 16, 2019. That is because, as MassDEP asserts,

¹ I have viewed all allegations and inferences to be drawn in the light most favorable to Fryklund. 310 CMR 1.01(11)(d)(2); Matter of Duda, Docket Nos. 87-048 and 87-063, Decision and Order of Hearing Officer on Motion to Dismiss (March 4, 1987). Claims may be dismissed as legally insufficient, if it appears beyond doubt that the Petitioner is entitled to no relief. Matter of Lawson, Docket No. 2000-111, Recommended Final Decision (February 2, 2001), adopted by Final Decision (February 7, 2001).

Carrigan had been notified on October 3, 2018, by his attorney that the SOC request had been filed. Despite this notice, Carrigan made the conscious choice to proceed with delivery of an excavator and loader and consultation with his consulting firm. That was his choice to make, but he made those decisions knowing from his attorney that the appeal had been filed. Therefore, Carrigan was not prejudiced by the lack of notice, he incurred the expenses because of his decision to proceed, despite being informed that an appeal had been filed.

For all the above reasons, I recommend that MassDEP's Commissioner issue an interlocutory remand decision denying Carrigan's motion to dismiss and remanding the matter to MassDEP's Northeast Regional Office to review the Petitioner's SOC Request and issue an SOC for the proposed Project in accordance with the Wetlands Act and the Wetlands Regulations

NOTICE- RECOMMENDED REMAND DECISION

This decision is a Recommended Remand Decision of the Presiding Officer. It has been transmitted to the Commissioner for his consideration. 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.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Remand 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.

The parties are also advised that should the Commissioner adopt this Recommended Remand Decision the Commissioner's Decision will not be appealable pursuant to G.L. c. 30A. See Town of East Longmeadow v. State Advisory Commission, 17 Mass. App. Ct. 939, 940 (1983) ("[a]n administrative order requiring subordinate administrative body to reconsider its

order is neither final nor appealable” under G.L. c. 30A); Matter of National Development and NDNE Lower Falls, LLC, Docket No. 2008-073, Recommended Remand Decision (January 26, 2009), Decision Adopting Recommended Remand Decision (January 28, 2009); Matter of Christopher N. Colby, OADR Docket No. WET-2016-012, Recommended Remand Decision (October 12, 2018), Decision Adopting Recommended Remand Decision (October 26, 2018).



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Michael Carrigan, Carrigan
Development, LLC

Docket No. WET-2018-017

File No. 28-2602
Gloucester

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Date: March 28, 2019