

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 8, 2022

In the Matter of
Pierre Coll and Lulu Tsai,
Trustees of Colsac Trust

OADR Docket No. WET-2022-004
DEP File No. SE 126-603
Carver, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION

INTRODUCTION

Kimberly Branch (“Ms. Branch”) on behalf of a Resident Group of 34 abutters, including herself (collectively “the Petitioners”), requests that the Commissioner of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) reconsider and vacate his October 21, 2022 Final Decision dismissing the Petitioners’ appeal of a Superseding Order of Conditions (“SOC”) that MassDEP’s Southeast Regional Office in Lakeville, Massachusetts issued to Pierre M. Coll and Lulu Tsai, Trustees of the Colsac Trust (collectively the “Applicant”) 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”).¹ The SOC approved the Applicant’s proposed construction of three separate driveways to allow access from four parcels of land (“the proposed Project”) at real property located at 0 Pine Street in Carver, Massachusetts (“the Property”).

The Commissioner’s Final Decision adopted my Recommended Final Decision (“RFD”) that had recommended that the Commissioner dismiss the Petitioners’ appeal of the SOC and affirm the SOC because of the Petitioners’ repeated failure to substantiate their claim in the appeal that MassDEP had improperly issued the SOC to the Applicant.² As explained in detail in my RFD, the Petitioners, the parties with the burden of proving in the appeal that MassDEP had improperly issued the SOC to the Applicant, had failed to substantiate their claim by repeatedly failing to identify their expert witnesses and file sworn pre-filed testimonial and documentary evidence (collectively “pre-filed testimony”) of at least one wetlands expert witness supporting their claim.³ The Petitioners had failed to file this pre-filed testimony notwithstanding my having repeatedly informed them of their burden of proof in the appeal under the Wetlands Regulations and my directives requiring them to identify their expert witnesses and file pre-filed testimony of expert witnesses supporting their claim that MassDEP improperly issued the SOC to the Applicant.⁴

As discussed in detail below, I recommend that the Commissioner issue a Final Decision on Reconsideration denying the Petitioners’ current request that the Commissioner reconsider

¹ In the Matter of Pierre Coll and Lulu Tsai, Trustees of Colsac Trust, OADR Docket No. WET-2022-004, Recommended Final Decision (October 18, 2022), 2022 MA ENV LEXIS 31, adopted as Final Decision (October 21, 2022), 2022 MA ENV LEXIS 32.

² RFD, 2022 MA ENV LEXIS 31, at 2-4, 6-17; Final Decision, 2022 MA ENV LEXIS 32.

³ Id.

⁴ Id.

and vacate his Final Decision because the Petitioners have failed to demonstrate, and cannot demonstrate, that the Final Decision's grounds for dismissing the Petitioners' appeal of the SOC and affirming the SOC as set forth in my RFD and summarized above are based on findings of fact and/or rulings of law that are clearly erroneous and materially impacted the Final Decision's validity warranting its vacating by the Commissioner.

DISCUSSION

It is well settled that a party seeking reconsideration of a Final Decision issued by MassDEP's Commissioner in an administrative appeal of a MassDEP 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 Kevin Slattery and Etchstone Properties, Inc., OADR Docket No. WET-2018-015, Recommended Final Decision on Reconsideration (December 17, 2019), 2019 MA ENV LEXIS 149, at 10, adopted as Final Decision on Reconsideration (January 7, 2020), 2020 MA ENV LEXIS 5; 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" and materially impacted the Final Decision's validity warranting its vacating by the Commissioner. 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" 310 CMR 1.01(14)(d); Slattery, 2019 MA ENV LEXIS 149, at 10; Vecchione, 2014 MA ENV LEXIS, 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.

Here, as discussed above, the Commissioner’s Final Decision adopted my RFD that had recommended that the Commissioner dismiss the Petitioners’ appeal of the SOC and affirm the SOC on the following grounds: (1) the Petitioners’ failure to substantiate their claim in the appeal that MassDEP had improperly issued the SOC to the Applicant by repeatedly failing to identify their expert witnesses and file pre-filed testimony of at least one wetlands expert witness supporting their claim;⁵ and (2) the Petitioners’ failure to file this pre-filed testimony notwithstanding their burden of proof in the appeal under the Wetlands Regulations (which they were aware of) and my directives requiring them to identify their expert witnesses and file pre-filed testimony of expert witnesses supporting their claim that MassDEP improperly issued the SOC to the Applicant.⁶ Hence, to prevail on their Motion for Reconsideration of the Commissioner’s Final Decision, the Petitioners were required to set forth specific findings of fact and/or rulings of law underlying the Final Decision’s grounds for dismissal of the Petitioners’ appeal of the SOC and affirmance of the SOC that are clearly erroneous and materially impact the Final Decision’s validity warranting its vacating by the Commissioner. Slattery, 2019 MA ENV LEXIS 149, at 10; Vecchione, 2014 MA ENV LEXIS, at 6-7. The Petitioners failed to make this showing and have no reasonable expectation of making this showing for the following reasons.

As set forth in detail in my RFD, it is undisputable that under the Wetlands Regulations, the Petitioners had the burden of proving that MassDEP improperly issued the SOC to the Applicant. RFD, 2022 MA ENV LEXIS 31, at 6-17. Their burden of proof required them to

⁵ RFD, 2022 MA ENV LEXIS 31, at 2-4, 6-17; Final Decision, 2022 MA ENV LEXIS 32.

⁶ Id.

“produce [at the evidentiary Adjudicatory Hearing (“Hearing”) in the appeal] at least some credible evidence from a competent source” supporting the Petitioners’ claim that MassDEP improperly issued the SOC to the Applicant. RFD, 2022 MA ENV LEXIS 31, at 6-7. A “competent source” of evidence includes “[sworn testimony from] a witness who has sufficient expertise” because of their education, training, experience, and familiarity with the subject matter of their testimony “to render [expert] testimony on the [wetlands] issues on appeal.” *Id.*, at 7.

Here, it was necessary for the Petitioners to have at least one wetlands expert testify at the Hearing in support of their claim in the appeal that MassDEP improperly issued the SOC to the Applicant because the Petitioners were challenging MassDEP’s wetlands determinations that formed the basis of its SOC approving construction of the three driveways at the Property at issue. *Id.*, at 1-4, 6-9. Specifically, the Petitioners challenged the following wetlands determinations made by MassDEP.

In approving construction of two of the three driveways, MassDEP determined that these two driveways would cross different intermittent streams and their construction would alter 20 square feet of bordering vegetated wetlands (“BVW”),⁷ 300 square feet of land under a waterbody,⁸ and 29 linear feet of inland bank.⁹ RFD, 2022 MA ENV LEXIS 31, at 1. In approving construction of the third driveway, MassDEP determined that its construction would alter 1,690 square feet of isolated vegetated wetlands. *Id.*

In their Appeal Notice challenging the SOC, the Petitioners asserted that MassDEP’s

⁷ BVW are a wetlands resource protected by the Wetlands Regulations at 310 CMR 10.55.

⁸ Land under a waterbody is a wetlands resource protected by the Wetlands Regulations at 310 CMR 10.56.

⁹ Inland bank is a wetlands resource protected by the Wetlands Regulations at 310 CMR 10.54.

wetlands determinations were incorrect by contending that the streams on the Property over which two of three driveways would cross were perennial streams and not intermittent streams as MassDEP had determined. RFD, 2022 MA ENV LEXIS 31, at 2-3. The Petitioners also asserted that MassDEP's wetlands determinations were incorrect because a portion of the Property where the proposed work authorized by the SOC would take place is Isolated Land Subject to Flooding pursuant to 310 CMR 10.57. Id. Hence, the Issues for Adjudication in the appeal, as reflected by the claims of the Petitioners' Appeal Notice, that required the Petitioners to present the testimony of at least one wetlands expert supporting their claims in the appeal were:

- (1) Did MassDEP properly determine that the two different streams at the Property that two of the driveways approved by the SOC will cross are intermittent streams and not perennial streams?
- (2) Did MassDEP properly determine that a portion of the Property does not constitute Isolated Land Subject to Flooding?

Id., at 14-15. Having failed to present the pre-filed testimony of at least one wetlands expert opining that these wetlands determinations were incorrect, the Petitioners' appeal of the SOC could not continue to the Hearing for adjudication and as such their appeal was properly dismissed by MassDEP's Commissioner. Id., at 15-17.

Moreover, the Commissioner's dismissal of the Petitioners' appeal for failure to file the pre-filed testimony of any wetlands experts supporting the Petitioners' claims in the appeal did not come as a surprise to the Petitioners. As explained in detail in my RFD, I informed the Petitioners of their burden of proof in the appeal multiple times from the outset of the appeal beginning with my February 22, 2022 Scheduling Order ("the February 22nd Scheduling Order") to the Parties scheduling the Petitioners' appeal of the SOC for a Pre-Screening/Pre-Hearing

Conference (“PS/PHC”) on March 31, 2022, and for a Hearing on June 29, 2022. RFD, 2022 MA ENV LEXIS 31, at 12-13. The February 22nd Scheduling Order informed the Parties (the Petitioners, the Applicant, and MassDEP) that the purpose of the PS/PHC was to establish: (1) the Issues for Adjudication in the Appeal in the event that the appeal was not settled by written agreement of the Parties and proceeded to the Hearing for adjudication of the Issues and (2) the schedule for the Parties to file pre-filed testimony of witnesses, including expert witnesses, and memoranda of law in support of their respective positions on the Issues prior to the Hearing. Id.

Pursuant to the schedule established in the February 22nd Scheduling Order, the Parties were required to file prior to the March 31, 2022 PS/PHC, Pre-Hearing Statements that were to include brief summaries of their respective positions in the appeal and set forth the names of the witnesses, including expert witnesses, who would be testifying on their behalf at the Hearing. Id. The February 22nd Scheduling Order informed the Parties that “[t]he failure of any party . . . to comply with any requirements of th[e] [February 22nd Scheduling] Order [could] result in the imposition of appropriate sanctions on that party pursuant to 310 CMR 1.01.” Id., at 13-14. The February 22nd Scheduling Order also informed the Parties of the range of sanctions that could be imposed, which included dismissal of the Petitioners’ appeal if the Petitioners failed to comply with the Order. Id.

The February 22nd Scheduling Order required the Petitioners, the individuals with the burden of proof in the appeal, to file their Pre-Hearing Statement first, specifically by Friday, March 25, 2022, three (3) business days prior to March 31, 2022 PS/PHC. Id., at 13. The Petitioners failed to file their Pre-Hearing Statement by the March 25th deadline nor requested an extension of time to file it. Id. Instead, the Petitioners filed an unsigned Pre-Hearing Statement

by e-mail after business hours (9:36 p.m.) on Wednesday, March 30, 2022 and less than 24 hours prior to March 31st Pre-Hearing Conference. RFD, 2022 MA ENV LEXIS 31, at 13. Not only was the Petitioners' Pre-Hearing Statement very late but it also violated the good faith filing requirement of 310 CMR 1.01(4)(b) by being unsigned¹⁰ and failed to include material information required by the February 22nd Scheduling Order, specifically the names of witnesses, including expert witnesses, who would be testifying on the Petitioners' behalf at the June 29, 2022 Hearing if the appeal was not settled. Id.

As previously noted in my RFD, the Petitioners' failure to file a timely and proper Pre-Hearing Statement as required by the February 22nd Scheduling Order, would have justified my immediate issuance of a Recommended Final Decision recommending that MassDEP's Commissioner issue a Final Decision dismissing the Petitioners' appeal and affirming the SOC. Id., at 14. However, exercising my discretion as Presiding Officer, I did not go the dismissal route, but instead chose leniency by allowing the Petitioners' appeal to go forward. Id. I made this clear to the Petitioners' representative, Ms. Branch, at the March 31, 2022 PS/PHC that I conducted with the Parties. Id.

In response, Ms. Branch appeared contrite at the March 31, 2022 PS/PHC by apologizing for the Petitioners' failure to file a timely and proper Pre-Hearing Statement and promising that the Petitioners would comply with my directives in the appeal, including directives requiring them to file the pre-filed testimony of witnesses, including expert witnesses, supporting their

¹⁰ The Adjudicatory Proceeding Rules at 310 CMR 1.01(4)(b) which are incorporated by the Wetlands Regulations at 310 CMR 10.05(7)(j)9, impose a good faith filing requirement which mandates that "[all] [p]apers filed [in an administrative appeal before OADR] shall be signed and dated by the party on whose behalf the filing is made or by the party's authorized representative" and that "[t]his signature shall constitute a certification that the signer has read the document and believes the content of the document is true and accurate, and that the document is not interposed for delay. . . ." The provisions of 310 CMR 1.01(10) authorize the Presiding Officer in the appeal to issue sanctions against a party for violating 310 CMR 1.01(4)(b). The range of sanctions authorized by 310 CMR 1.01(10) "include, without limitation[,]" issuing orders ranging from striking from the record of the appeal any unsigned document that has been filed in the appeal to dismissal of the appeal, depending on the circumstances of case.

claims in the appeal. RFD, 2022 MA ENV LEXIS 31, at 14. However, this promise was not honored by the Petitioners because they subsequently failed to file the pre-filed testimony of any witnesses, including the pre-filed testimony of at least one wetlands expert supporting the Petitioners' claims in the appeal. *Id.*, at 15-16. Indeed, it would be reasonable to conclude that the Petitioners never had any intention of substantiating their claims in the appeal with the testimony of a wetlands expert for the following reasons.

At the March 31, 2022 PS/PHC, without objection from the Petitioners, I established April 28, 2022 as the filing deadline for the pre-filed testimony of the Petitioners' witnesses, including expert witnesses. RFD, 2022 MA ENV LEXIS 31, at 15. The April 28th filing deadline came and went, and the Petitioners did not file the pre-filed testimony of any witnesses, including expert witnesses. *Id.* At no time prior to, and subsequent to the deadline's expiration, did the Petitioners make a request for an extension of deadline. *Id.* On April 29, 2022, one day after expiration of the April 28th filing deadline and in response to my inquiry regarding the status of the pre-filed testimony of the Petitioners' witnesses, Ms. Branch informed me that the Petitioners "[did] not have witnesses, nor questions for the Applicant and MassDEP's [witnesses for] the Hearing." *Id.*

In sum, contrary to the Petitioners' assertions, the Commissioner's Final Decision properly dismissed the Petitioners' appeal of the SOC and affirmed the SOC because of the Petitioners' repeated failure to substantiate their claim in the appeal that MassDEP had improperly issued the SOC to the Applicant. Moreover, the Petitioners cannot get around this conclusion by asserting a new claim challenging the SOC's validity, as they did in their Motion for Reconsideration.

The Petitioners' new claim is that the SOC is improper because on August 19, 2020 the

Town of Carver Conservation Commission (“CCC”) initially rejected the proposed Project under the Town of Carver’s Wetlands By-Law (“Carver Wetlands By-Law”) by denying the Applicant a variance from the By-Law’s 65-foot buffer zone requirement for proposed activities within 65 feet of protected wetlands areas, but then granting the variance and approving the proposed Project on September 20, 2020, as the result of, in the Petitioners’ words, “an unorthodox meeting” that the CCC held on that date. Petitioners’ Motion for Reconsideration, at pp. 1-2; Attachments to Petitioners’ Motion for Reconsideration.¹¹ Because this is a new claim, I summarily reject it. 310 CMR 1.01(14)(d); Slattery, 2019 MA ENV LEXIS 149, at 10; Vecchione, 2014 MA ENV LEXIS, at 6-7. I also reject the claim because the CCC’s approval of the proposed Project pursuant to the Carver Wetlands By-Law has no bearing on the validity of Commissioner’s Final Decision here dismissing the Petitioners’ appeal of the SOC and affirming the SOC *pursuant to the MWPA and the Wetlands Regulations* due to the Petitioners’ repeated failure to substantiate their claim in the appeal that MassDEP had improperly issued the SOC to the Applicant. Additionally, OADR is not the forum for any individual or entity to challenge a municipal conservation commission’s decision under municipal Wetlands By-Laws approving or disapproving of a proposed activity in protected wetlands areas. In the Matter of Hyde Development, LLC, OADR Docket No. WET-2020-006, Final Decision (October 22, 2020),

¹¹ The Attachments to the Petitioners’ Motion for Consideration included copies of the minutes of the CCC’s August 19, 2020 and September 2, 2020 meetings discussing the proposed Project. The minutes of the CCC’s August 19, 2020 meeting noted that a motion made by a CCC member to approve the proposed Project pursuant to the Carver Wetlands By-Law by granting the Applicant a variance from the By-Law’s 65-foot buffer zone requirement failed by a vote of “1 [in favor,] 2 [opposed,] [and] 1 [abstaining].” The minutes of the CCC’s September 2, 2020 meeting noted that the proposed Project was back before the CCC because “[t]he Applicant ha[d] made changes to the [proposed Project] plan [(“the Revised Plan”)] to address concerns that were voiced during the [CCC’s August 19, 2020 meeting].” The minutes also note that after a discussion of the Revised Plan, which included public input, a motion made by a CCC member to approve the proposed Project pursuant to the Carver Wetlands By-Law by granting the Applicant a variance from the By-Law’s 65-foot buffer zone requirement passed by a vote of “3 [in favor,] 1 [opposed,] [and] [no] abstentions.”

2020 MA ENV LEXIS 84, at 1-2 (“[MassDEP] lacks jurisdiction to review decisions of [municipal] conservation commissions made pursuant to [municipal] Wetlands [By-Laws]”).

The proper forum is the Superior Court pursuant to the Certiorari Statute, G.L. c. 249, § 4. Id., at 2. Hence, if the Petitioners believed that the CCC improperly approved the proposed Project pursuant to Carver Wetlands By-Law, the Petitioners should have filed a Superior Court appeal of the CCC’s decision in accordance with the Certiorari Statute, G.L. c. 249, § 4. Id.

CONCLUSION

The Wetlands Regulations at 310 CMR 10.05(7)(j) and the Adjudicatory Proceeding Rules at 310 CMR 1.01 that the Wetlands Regulations have incorporated provide a meaningful opportunity to an individual or entity having the right to challenge an SOC approving a proposed activity, to file an appeal with OADR challenging the SOC as being detrimental to wetlands in violation of the MWPA and the Wetlands Regulations. RFD, 2022 MA ENV LEXIS 31, at 9-12.¹² However, such an appeal must have a good faith basis to challenge the SOC’s validity under the MWPA and the Wetlands Regulations. Id. Any appeal that lacks such a good faith basis is an improper appeal that does not further the noble cause of wetlands/environmental protection. Such an appeal also results in the expenditure of OADR’s valuable and limited publicly funded resources to adjudicate the appeal when such resources could have been utilized in adjudicating an appeal having a good faith basis.

In my RFD, I expressed concern regarding whether a good faith basis existed for the Petitioners’ appeal of the SOC given their repeated refusal to substantiate their claim in the appeal that MassDEP had improperly issued the SOC to the Applicant. RFD, 2022 MA ENV LEXIS 31, at 17-18. This concern has been compounded by the meritless nature of the

¹² A description of OADR is set forth in Addendum No. 1, at p. 16 below.

Petitioners' pending Motion for Reconsideration of the Commissioner's Final Decision dismissing the Petitioners' appeal of the SOC and affirming the SOC as discussed above.

To sum up, for the reasons discussed above, I recommend that MassDEP's Commissioner issue a Final Decision On Reconsideration denying the Petitioners' Motion for Reconsideration of the Final Decision because the Petitioners have failed to demonstrate that the Final Decision is based on findings of fact and/or rulings of law that are clearly erroneous and materially impact the Final Decision's validity warranting the Commissioner's vacating of the Final Decision.

Salvatore M. Giorlandino

Date: December 8, 2022

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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ADDENDUM NO. 1

OADR DESCRIPTION

The Office of Appeals and Dispute Resolution (“OADR”) is a quasi-judicial office within the Massachusetts Department of Environmental Protection (“the Department” or “MassDEP”) which is responsible for advising the Department’s Commissioner in resolving all administrative appeals of Department Permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. In the Matter of Tennessee Gas Pipeline Company, LLC, OADR Docket No. 2016-020 (“TGP”), Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, at 9, adopted as Final Decision (March 27, 2017), 2017 MA ENV LEXIS 38, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner is the final agency decision-maker in these appeals. TGP, 2017 MA ENV LEXIS 34, at 9, citing, 310 CMR 1.01(14)(b). To ensure its objective review of Department Permit decisions and enforcement orders, OADR reports directly to the Department’s Commissioner and is separate and independent of the Department’s program offices, Regional Offices, and Office of General Counsel (“OGC”). TGP, 2017 MA ENV LEXIS 34, at 9.

OADR staff who advise the Department’s Commissioner in resolving administrative appeals are Presiding Officers. Id. Presiding Officers are senior environmental attorneys at the Department appointed by the Department’s Commissioner to serve as neutral hearing officers, and are responsible for fostering settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the parties and evidentiary Adjudicatory Hearings and making Recommended Final Decisions on appeals to the Commissioner. TGP, 2017 MA ENV LEXIS 34, at 9-10, citing, 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). The Department’s Commissioner, as the agency’s final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(b). Unless there is a statutory directive to the contrary, the Commissioner’s Final Decision can be appealed to Massachusetts Superior Court pursuant to G.L. c. 30A, § 14. TGP, 2017 MA ENV LEXIS 34, at 10, citing, 310 CMR 1.01(14)(f).