

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 7, 2024

In the Matter of
Ricardo Baldissera

OADR Docket No. WET-2021-026
DEP File No. SDA
Plymouth, MA

RECOMMENDED FINAL DECISION

This is an appeal of a Negative Superseding Determination of Applicability (“SDA”) issued to Ricardo Baldissera (“Applicant”) by the Massachusetts Department of Environmental Protection (“MassDEP”) on April 5, 2021 concerning exempt minor activities at Baldissera’s property located at 403 Federal Furnace Road, Plymouth, Massachusetts (the “Baldissera Property”). The SDA affirmed a negative determination of applicability issued by the Plymouth Conservation Commission (PCC”). MassDEP determined that the following normal residential activities in the Buffer Zone do not require the filing of a Notice of Intent because they will not alter a wetlands resource area subject to protection under the Massachusetts Wetland Protection Act, G.L. c. 131, sec. 40 (“MWPA”) and the Wetlands Regulations, 310 CMR 10.00: (1) maintenance of lawn and landscaped areas; (2) storage of firewood; (3) placement of a children’s swing set; (4) placement of a chicken coop; and (5) other exempt minor activities permissible under 310 CMR 10.02(2)(b)1.

The appeal is brought by Ethel Clair Koury (“Petitioner”), an abutter to the project site. Petitioner is the record owner of the abutting property at 393-395 Federal Furnace Road, Plymouth, Massachusetts (the “Koury Property”).¹

I. Procedural History

On April 21, 2021, MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) received from Petitioner an Adjudicatory Hearing Fee Transmittal Form and a check for the \$100 filing fee. However, OADR did not receive from Petitioner a separate Notice of Claim as required by 310 CMR 1.01(6)(b) and 310 CMR 10.05(7).

On May 17, 2021, at Presiding Officer Jane Rothchild’s request, OADR’s Case Administrator emailed Petitioner’s attorney to notify him that OADR had received the check and the fee transmittal form but not the Notice of Claim, and that if he had filed a Notice of Claim by mail to request that he email a copy to her. On May 21, 2021, Petitioner’s attorney emailed the Case Administrator stating “We will have the appeal document to you by early next week.” On May 26, 2021, the Case Administrator again contacted Petitioner’s attorney who later that day filed a Notice of Claim. The document was not dated.

On June 9, 2021, after reviewing the Notice of Claim, the Presiding Officer issued Petitioner an Order for More Definite Statement pursuant to 310 CMR 1.01(6)(b) and 310 CMR 1.01(11)(b) because the Notice of Claim failed to allege any facts sufficient to establish that Petitioner had standing to bring the appeal as a person aggrieved. On June 17, 2021, in response

¹ Koury’s daughter, Sharon Racette (“Racette”) has alleged that she filed this appeal on behalf of her mother. Racette stated during the September 30, 2021 Prehearing Conference in this matter that Koury suffers from Alzheimer’s Disease and is accordingly unable to prosecute the appeal. Racette alleged that she has been prosecuting this appeal pursuant to an authorization from Jennifer L. McClory (“McClory”), who Racette asserted is Koury’s attorney-in-fact. However, the Durable Power of Attorney (the “POA”) and authorization letter fail to explain how the power of attorney has passed to McClory, who is the second successor attorney-in-fact under the POA.

to OADR's Order for a More Definite Statement, Petitioner submitted an "Amended Notice of Claim for Adjudicatory Hearing" containing a list of objections to the SDA and supporting exhibits.

At a Prehearing Conference on September 30, 2021, the Presiding Officer noted concerns with respect to the timeliness of the Notice of Claim and established a schedule for the Applicant and MassDEP to file motions to dismiss the appeal and for Petitioner to file an opposition. The Applicant and MassDEP filed a Joint Motion to Dismiss on October 7, 2021, arguing: (i) OADR lacks jurisdiction over the appeal because Petitioner failed to timely file a proper Notice of Claim complying with the Wetlands Appeal Regulations at 310 CMR 10.05(7)(j)(2); and (ii) Petitioner's appeal is based on speculative and conclusory claims and therefore she lacks standing and has failed to state a basis on which appellate relief can be granted. Petitioner filed an Opposition to the Joint Motion to Dismiss on October 15, 2021, arguing (i) when the contents of a Notice of Claim do not meet the requirements of 310 CMR 1.01, a Presiding Officer has discretion, pursuant to the Adjudicatory Proceeding Regulations at 310 CMR 1.01(6)(b), to dismiss the appeal or require a more definite statement; (ii) Petitioner's appeal should be deemed timely based on principles of equitable tolling; and (iii) Petitioner has met the threshold for standing as an "aggrieved person" and her appeal must proceed.

I was appointed as a Presiding Officer in July 2023 and was assigned this appeal in January 2024. After reviewing the entire record, I find that Petitioner's failure to timely file a properly pled Notice of Claim requires dismissal of this wetlands appeal. I also find that Petitioner has failed to state sufficient facts to demonstrate status as a person aggrieved. Accordingly, I recommend that this appeal be dismissed

II. Petitioner's Untimely Notice of Claim Requires That This Appeal Be Dismissed

Petitioner argues that pursuant to 310 CMR 1.01(6)(b), when there is a content-related defect in a notice of claim, a Presiding Officer can exercise discretion either to dismiss an appeal or require a more definite statement. Therefore, according to Petitioner, “[u]nlike the time limitation for filing an appeal, the requirement of a Notice of Claim is not jurisdictional”.

Petitioner's argument is flawed. This is a wetlands appeal, and under 310 CMR 10.05(7)(j)9.b., the following regulations shall apply to wetland appeals: 310 CMR 1.01(1) through (5), (6)(c), (f) through (k); (8); (10); (12)(a)(c)(d); (13)(a) through (c), (e) through (h), (j), (l) through (n); (14)(b) through (g) and 1.03: *Miscellaneous Provisions Applicable to All Adjudicatory Proceedings*. 310 CMR 1.01(6)(b) specifically does **not** apply to wetland appeals, and in a conflict between the sets of rules, the wetland appeals regulations take precedence. 310 CMR 10.05(7)(j)9.a. Simply put, Petitioner's argument fails because 310 CMR 1.01(6)(b) does not apply to this case.

This matter does not involve a mere defect in the contents of a notice of claim. Rather, the defect is Petitioner's failure to timely file a notice of claim in the first place, as required by 310 CMR 10.05(7)(j). That governing regulation provides, in relevant part:

Any applicant, landowner, [or] aggrieved person if previously a participant in the permit proceedings... may request review of a Reviewable Decision by filing an Appeal Notice no later than ten business days after the issuance of the Reviewable Decision... **Any party listed in 310 CMR 10.05(7)(j)2.a. that fails to timely file an Appeal Notice pursuant to 310 CMR 10.05, shall be deemed to have waived its right to appeal the Reviewable Decision.**

310 CMR 10.05(7)(j)2.a. (emphasis added). The next subsection of the regulation provides that:

“The Appeal Notice shall include... a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L.c. 131, § 40, including

reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision.

310 CMR 10.05(7)(j)2.b.v.

In this case, MassDEP issued the SDA at issue on April 5, 2021. Within the ten-day period to appeal the SDA, Petitioner filed only an Adjudicatory Hearing Fee Transmittal Form and a check for the \$100 filing fee. The Fee Transmittal Form includes the following notice immediately below the document's title:

“IMPORTANT! This form is intended for fee transmittal only. The contents of a request for an adjudicatory appeal (Notice of Claim) are established at 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's action.”

However, despite that clear notice, Petitioner identified only the names and contact information for Petitioner, Applicant Baldissera, and the project at issue. It did not contain any statement of alleged errors in the SDA or that the SDA is inconsistent with 310 CMR 10.05. Indeed, Petitioner did not identify any objections at all until June 17, 2021, when she submitted her Amended Notice of Claim for Adjudicatory Hearing.

Because Petitioner failed to file, within the ten-day period, a Notice of Claim complying with 310 CMR 10.05(7)(j)(2), this appeal must be dismissed. The recent decision in Matter of Emile Tayeh, Jr., OADR Docket No. WET-2019-016, Recommended Final Decision (June 8, 2020) discusses the clear ramifications of failing to timely file a notice of claim. “The Wetlands Regulations provide that a person with a right to file an appeal of a SOC must file the appeal within ten business days of the date the SOC is issued. The administrative cases have consistently construed the timely filing of an appeal as a jurisdictional requirement that has been strictly applied.” Matter of Boyajian, OADR Docket No. WET-2010-030, Recommended Final Decision, 2011 MA ENV LEXIS 50 (February 23, 2011), adopted by Final Decision, 2011 MA ENV LEXIS 48 (March 9, 2011); Matter of Berkshire Housing Authority, Docket No. 2010-007, Recommended

Final Decision (March 16, 2010) (dismissing appeal as untimely by one day), adopted by Final Decision (March 19, 2010); Matter of Stanley E. Bogaty and Frances Bogaty, Docket No. 2001-005, Final Decision (September 19, 2001) (dismissing appeal as untimely by one day); Matter of Joseph Demaio, Docket No. 97-063, Final Decision (April 9, 1998) (dismissing appeal as untimely by two days); see also Matter of Xarras, Docket No. 2008-059, Recommended Final Decision (June 26, 2008), adopted by Final Decision (June 27, 2008); Matter of Bay Park Development Trust, Docket No. 88-291, Final Decision - Order of Dismissal (March 31, 1989); Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993); Matter of Cross Point Limited Partnership, Docket No. 95-088, Final Decision (April 30, 1996). T

III. Principals of Equitable Tolling Are Not Applicable In This Case

“The ten-day appeal period is a jurisdictional element that requires dismissal of the appeal if not fulfilled.” Matter of Town of Swansea, OADR Docket No. WET-2014-020, Recommended Final Decision (March 27, 2015). Petitioner’s claims that an adjudicatory appeal of a wetland matter such as the instant SDA “presents a procedural morass” or that Petitioner may not have been represented by counsel when she submitted her Fee Transmittal Form is not a basis to toll the appeal deadline. “The appeal period cannot be extended or modified.” Matter of Fred Bottomley, Docket No. WET-2009015, Recommended Final Decision (Apr. 30, 2009), adopted by Final Decision (May 5, 2009); Matter of R & R Home Construction Corp., Docket No. 95-009, Final Decision (Apr. 14, 1995). Moreover, even if Petitioner was pro se, she was nevertheless required to comply with the applicable procedural rules. Matter of Dan and Eva Barstow, OADR Docket No. 2019-026, Recommended Final Decision (January 22, 2020), 2020 MA ENV LEXIS 16, at 8-9, adopted by Final Decision (February 19, 2020), 2020 MA ENV LEXIS 12; Lawless v. Bd. of Registration in Pharm., 466 Mass. 1010, 1011 n.3 (2013).

“Tolling of the appeal period has been permitted in strictly limited circumstances. Tolling may be appropriate when: 1) a party that was entitled to receive notice of an SOC did not receive notice; and 2) the failure to receive notice caused the party to fail to file a timely appeal.” See, e.g., Matter of Jose Verissimo, Docket No. WET-2008-006, Recommended Final Decision (June 5, 2008), adopted by Final Decision (July 3, 2008).

Those circumstances are not present here. Petitioner clearly received timely notice of the Department’s SDA decision which includes, in Section D of WPA Form 2, a list of the contents of an appeal notice required by 310 CMR 1.01(6) and 310 CMR 10.05(7)(j). The Fee Transmittal Form that Petitioner submitted states that it is intended for fee transmittal only and that the contents of a Notice of Claim appear in 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department’s SDA.

IV. Petitioner Lacks Standing And Has Failed To State A Claim

Under the governing regulation, “[a]ny applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding may request review of a Reviewable Decision...” 310 CMR 10.05(7)(j)(2)(a). Petitioner has failed to establish that she is an “aggrieved person” for purposes of this appeal. The regulation defines “aggrieved person” as

any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in M.G.L. c. 131, §40. Such person must specify in writing sufficient facts to allow the Department to determine whether or not the person is in fact aggrieved.

310 CMR 10.04. Here, to be “aggrieved,” Petitioner must present evidence that: 1) Applicant’s proposed usage of his property contravenes the interests of the Wetlands Act; and 2) the usage

would cause Petitioner a private, particular injury. She has done neither. For example, her allegation that “compaction and saturation of soils on [Baldissera’s] Property will increase the flooding impact to [Petitioner]’s property” is too vague and speculative to establish standing. “An allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement.”

Matter of Jerry Marone, Docket No. WET 2021-025, Recommended Final Decision (June 11, 2021), adopted by Final Decision (June 21, 2021) (dismissing appeal claiming that failure to install a culvert under a driveway would result in excess runoff onto petitioner’s property). Similarly, Petitioner’s statement that “[Baldissera]’s Request does not supply sufficient information to rebut the presumptions of the WPA and Regulations” is insufficient to establish that Applicant’s proposed usage would impact the interests of the Wetlands Act.

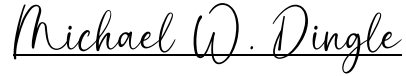
Based on these same deficiencies, Petitioner has failed to state a claim upon which appellate relief can be granted. Even if OADR had jurisdiction to address this matter, Petitioner’s Amended Notice of Claim still fails to provide a clear and concise description of the alleged errors in the SDA including a description of how the alleged errors are inconsistent with 310 CMR 10.00 and do not contribute to the protection of the interests identified in the Wetlands Protection Act. See 310 CMR 10.05(7)(j)(2)(b)(v). As noted above, Petitioner’s objections are vague, speculative, and without factual basis. An appeal may be dismissed if alleged wetlands impacts are remote, speculative or otherwise based upon conclusion rather than fact. Matter of Town of Falmouth Department of Public Works, Docket No. 93-032, Decision and Order on Motion to Dismiss, 1 DEPR 217 (September 2, 1994) (dismissing appeal based on speculative claim that extension of highway would cause cars to careen off into surrounding wetlands).

Conclusion

Petitioner failed to file a timely Notice of Claim within the ten-day period mandated by 310 CMR 10.05(7)(j)(2). Accordingly, her appeal should be dismissed. Even if a Notice of

Claim had been timely filed, Petitioner has failed to demonstrate her status as an “aggrieved person” as defined in 310 CMR 10.04. Accordingly, I recommend that the Commissioner issue a Final Decision dismissing this appeal.

Date: March 7, 2024


Michael W. Dingle
Presiding Officer

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP’s 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 may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner’s office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

SERVICE LIST

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