

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

February 26, 2020

In the Matter of

OADR Docket No. WET-2019-035

Ronald and Penney Mattes

DEP File No. SE-3-5607
Superseding Order of Conditions
Barnstable, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this wetlands appeal, Tracey L. Taylor (“the Petitioner”) and Kathleen Cook and Bruce McCue (“the Intervenors”) challenge a Superseding Order of Conditions (“SOC”) that the Department’s Southeast Regional Office issued to Ronald and Penney Mattes (“the Applicants”) on October 2, 2019 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”). The SOC approved the Applicants’ proposed Project involving construction of a single-family dwelling with associated grading, utilities, septic system and a driveway crossing in Barnstable, Massachusetts. As approved and conditioned, the proposed Project includes 3,250 square feet of wetlands replication as mitigation for the proposed wetlands alteration. The Petitioner and the Intervenors are abutters to the project site. They object to the SOC, alleging that it fails to comply with the applicable regulations and fails to protect the interests of the MWPA, particularly regarding flood control, storm damage protection and prevention of

pollution. Specifically, they allege that the Bordering Vegetated Wetland (“BVW”) which will be altered by the proposed Project extends onto the Petitioner’s property. The BVW allegedly floods during and after periods of substantial precipitation. The Petitioner and Intervenors claim that the proposed Project will result in increased flooding, storm damage and pollution to their properties.

BACKGROUND

I conducted a Pre-Screening/Pre-Hearing Conference (“Conference”) with the parties and their respective legal counsel and representatives on December 19, 2019. During the Conference I explained that the Petitioner and Intervenors had the burden of going forward and were required to put forth credible evidence in support of their claims. Pursuant to the Pre-hearing Conference Report and Order dated December 31, 2019, the Petitioner and the Intervenors were required to file their Pre-filed Testimony (“PFT”) by January 31, 2020. See Pre-hearing Conference Report and Order at pp. 11-12. The Petitioner and Intervenors did not file their PFT or request an extension of the filing deadline for good cause prior to its expiration. On February 7, 2020, I issued an Order to Show Cause pursuant to 310 CMR 1.01(6)(d) directing the Petitioner and the Intervenors to show cause why this appeal should not be dismissed as a result of their failure to file their PFT by the deadline established in the Pre-hearing Conference Report and Order. Their response was due no later than February 19, 2020; no response was filed.

DISCUSSION

A. Standard of Review

An appeal may be dismissed when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the

proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10) and (11)(d)1; see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002); Matter of Edwin Mroz, Docket No. 2017-021, Recommended Final Decision (June 7, 2019), adopted by Final Decision (June 18, 2019).

Additionally, 310 CMR 1.01(3)(e) provides that "[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case." See also Matter of Tucard, LLC, OADR Docket No. 2009-076, 2010 MA ENV LEXIS 211, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010).

B. The Petitioner's and Intervenors' Failure to File Testimony Warrants Dismissal.

Under 310 CMR 1.01(12)(f), a party's "[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner." Matter of Ross and Marilyn Wescott, OADR Docket No. 2006-154, Recommended Final Decision (December 8, 2014), adopted as Final Decision (December 22, 2014), 21 DEPR 150, 151 (2014); Matter of Autobody Solvent Recovery Corp., OADR Docket No. 2013-046, Recommended Final Decision (May 29, 2014), 2014 MA ENV LEXIS 39, at 8, adopted as Final Decision (June 2, 2014), 2014 MA ENV LEXIS 41; Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 19, adopted as Final Decision

(April 2, 2013), 2013 MA ENV LEXIS 26. Indeed, “a petitioner’s failure to file written direct testimony is a serious default,” and “the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live.” Id., citing Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 310 CMR 1.01(10) a party’s failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for “failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01.” Wescott, supra, 21 DEPR at 151; Autobody, supra, 2014 MA ENV LEXIS 39, at 8-9. Under 310 CMR 1.01(10), the Presiding Officer may “issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner.” Id.

At the Conference and in the Pre-hearing Conference Report and Order, the parties were advised of the possible consequences for failing to file any required materials in accordance with the schedule, including the potential for sanctions pursuant to 310 CMR 1.01. See Pre-hearing Conference Report and Order at 12, note 5.¹ It was the Petitioner’s and Intervenors’ burden to

¹ Those possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party’s pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

put forth some evidence in support of their claims by the deadline established at the Conference. See 310 CMR 10.05(7)(j)3.b. (Petitioner and Intervenors have burden of going forward pursuant to 310 CMR 10.03(2)² and proving their case by a preponderance of the evidence). They failed to do so. Failure to file pre-filed testimony and failure to comply with the Order to Show Cause constitutes fatal non-compliance with the rules and orders and warrants dismissal of the appeal.

CONCLUSION

For the reasons discussed above, I recommend that the Department's Commissioner issue a Final Decision that: (1) dismisses the appeal for the reasons stated above and (2) affirms the SOC.

Date: 2/26/2020



Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final 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 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.

² 310 CMR 10.03(2) states that "[t]he burden of going forward means having to produce at least some credible evidence from a competent source in support of the position taken. This burden shall be upon the person contesting the Department's position when the Department has been requested to hold an adjudicatory hearing. In the event that under the provisions of 310 CMR 10.03 two or more persons have the burden of going forward, said burden may be placed on all or any number of them, in the discretion of the hearing officer."

SERVICE LIST

IN THE MATTER OF:
Docket No. WET-2019-035

Ronald and Penney Mattes

REPRESENTATIVE

PARTY

Tracey L. Taylor, Esq.
Law Office of Tracey L. Taylor
3206 Main Street, P.O. Box 45
Barnstable, MA 02630
tlrtaylorlaw@verizon.net

PETITIONER & INTERVENORS

Christopher J. Kirrane, Esq.
Dunning, Kirrane, McNichols & Garner,
L.L.P.
P.O. Box 560
Mashpee, MA 02649
ckirrane@dunningkirkane.com

APPLICANTS

David Bragg, Esq., Senior Counsel
MassDEP Office of General Counsel
One Winter Street
Boston, MA 02108
david.bragg@mass.gov

DEPARTMENT

Bernadette DeBlander Environmental
Engineer
Wetlands & Waterways Program
MassDEP Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
bernadette.deblander@mass.gov

DEPARTMENT

Cc.
Shaun Walsh, Chief Regional Counsel
MassDEP/Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347
shaun.walsh@mass.gov

DEPARTMENT

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108

DEPARTMENT

In the Matter of Ronald and Penney Mattes

OADR Docket No. WET-2019-035

Recommended Final Decision

Page 6 of 7

Leslie.defilippis@mass.gov

Charles H. Collins, III
Charlotte D. Collins
19 Mohawk Road
Raynham, MA 02767

PROPERTY OWNER

Barnstable Conservation Commission
c/o Darcy Karle, Conservation
Administrator
200 Main Street
Barnstable, MA 02601
Darcy.karle@town.barnstable.ma.us

CONSERVATION COMMISSION