

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 15, 2024

In the Matter of
Salvatore and Nancy Vigorito

OADR Docket Number: WET-2023-010
DEP File No. 028-2859
MassDEP NERO
Princeton, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION

This is an appeal by Barbara S. Friedfertig (“Petitioner”) of a Superseding Order of Conditions (“SOC”) issued by the Department of Environmental Protection’s (“Department”) Northeast Regional Office to Salvatore Vigorito and Nancy Vigorito (“the Applicants”) on May 9, 2023, 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 allows the Applicants’ proposal to build a second story on their property located at 10 Point Road, Gloucester, Massachusetts (“Project”). The SOC overturned the Order of Conditions (“OOC”) denying the project issued by the Gloucester Conservation Commission (“Commission”) on the basis that the Commission had previously issued a Certificate of Compliance certifying that earlier work on the property had conformed to a 2017 Order of Conditions.

After completing my review of the Parties Pre-filed Testimony, including Petitioner’s Rebuttal Pre-filed Testimony, I issued a Recommended Final Decision (“RFD”) on March 19,

2024, recommending that the Commissioner issue a Final Decision affirming the SOC because the Petitioner lacks standing to bring her claims. The Commissioner appointed Chief Presiding Officer Salvatore Giorlandino as Final Decision Maker on June 17, 2024.¹ The Chief Presiding Officer issued a Final Decision on July 3, 2024. The Petitioner filed a Motion to Reconsider on July 15, 2024. The Department and the Applicants filed oppositions timely.

The Petitioner's motion raises two arguments: that I erroneously struck the Affidavit of Anthony Macchi ("Macchi Affidavit") and that the standing analysis in the RFD was erroneous. After reviewing the Petitioner's motion and the oppositions, I recommend that the Final Decision Maker deny the motion.

I. Standard of Review

A party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); Matter of Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (Nov. 4, 2014), 2014 MA ENV LEXIS 83, *6, adopted as Final Decision on Reconsideration (Nov. 7, 2014), 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." Id. 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" Id. 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. at 7.

¹ The Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(b) provide that "[e]very final decision" issued in an administrative appeal "shall be in writing and shall be signed by the [Department's] Commissioner or a designee of the Commissioner."

II. The Petitioner has failed to meet the “heavy burden” required for reconsideration of the Commissioner’s final decision

A. The Petitioner has not demonstrated that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous"

In her Motion for Reconsideration, the Petitioner reargues her position that the late-filed affidavit of Anthony Macchi (“Macchi Affidavit”) was relevant and should not have been stricken and that the other parties were not prejudiced.² The Petitioner filed the Macchi Affidavit, offered as an architect and building code expert, with her Rebuttal PFT, just nine days before the scheduled adjudicatory hearing. The Department moved to strike the Macchi Affidavit on procedural grounds because the Macchi Affidavit was offered without leave and on substantive grounds because it was based on building code regulations and not the performance standards of the MWPA. The Applicant argued in opposition that Mr. Macchi's testimony "offers evidence that is directly relevant to the Petitioner's allegations of particularized harm and harm to the interests protected by the" MWPA. Opposition to Motion to Strike, p. 2. The Petitioner also argued that the Macchi Affidavit was in response to the Applicant’s testimony regarding permits issued for the first floor and that filing the Macchi Affidavit "caused no undue hardship to the Applicants or to the Department, both of whom substantively responded to Mr. Macchi's testimony." *Id.* at p. 5. These arguments were considered and addressed in the RFD.

The Petitioner acknowledges she did not request leave from the Presiding Officer to offer rebuttal testimony of an additional witness³ and also that the decision to strike is discretionary.⁴ She acknowledges the extensive case law relied on in the Recommended Final Decision to support the exercise of discretion to strike the Macchi Affidavit. I decided to strike the Macchi

² Motion to Reconsider, pp. 3-4.

³ 310 CMR 1.01(13)(f)3. provides: “Prior to any applicable deadline for providing rebuttal testimony, the Presiding Officer may grant a party’s request to offer the rebuttal testimony of an additional witness only where necessary to ensure a fair hearing.”

⁴ Motion to Reconsider, p. 2.

Affidavit because it was filed without proper notice and not in accordance with the Department's regulations for submitting rebuttal testimony. The RFD, which was adopted as the Final Decision, details the rationale on which I relied for striking the Macchi Affidavit, citing multiple relevant sources of law. The decision to strike the late filed affidavit was well within my discretion.

Second, the Petitioner's argument is that the Macchi Affidavit would show that the Petitioner had standing as a person aggrieved, was made before.⁵ Because the testimony was stricken, I did not consider it in my RFD. Nevertheless, I did address it to explain why it did not support the Petitioner's standing as an aggrieved person. See RFD, p. 22, footnote 16.

B. The Petitioner 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.

First, the Petitioner responded to the Department's Motion to Strike⁶ and those arguments were considered in the RFD.⁷ In her Motion for Reconsideration, the Petitioner reargues her position that the late-filed affidavit of Anthony Macchi ("Macchi Affidavit") was relevant and should not have been stricken and that the other parties were not prejudiced.⁸ The Petitioner's argument that she should have been allowed to file additional evidence pursuant to 310 CMR 10.05(7)(j)⁶ is baseless. Macchi's Affidavit was filed on February 29, 2024, nine (9) business days after the Department's February 15, 2024, filing, and thirty-one (31) business days after the Applicant's January 16, 2024, filing. The cited regulation allows a Petitioner to file rebuttal evidence, limited to countering evidence in the other Parties filings, if done within seven (7)

⁵ Motion to Reconsider, pp. 4-6.

⁶ See Petitioner's Opposition to Department's Motion to Strike, pp. 1-8.

⁷ See RFD, p. 20 n. 15.

⁸ Motion to Reconsider, pp. 3-4.

days. Macchi's Affidavit was filed too late to fit within this narrow regulatory timeframe and was properly stricken.

Second, the Petitioner also reargues her position that the Macchi Affidavit would show that the Petitioner had standing as a person aggrieved.⁹ Because the Macchi Affidavit was stricken, I did not consider it in the RFD. Nevertheless, I did address it to explain why it did not support the Petitioner's standing as an aggrieved person. See RFD, p. 21, footnote 16. Each of these arguments was made and adequately considered in the RFD.

III. Conclusion.

The Petitioner has not met her heavy burden to justify reconsideration. Her arguments merely "repeat[] matters adequately considered in the final decision[and] renew[] claims or arguments that were previously raised, considered and denied." 310 CMR 1.01(14)(d). The Petitioner has failed to demonstrate that the Final Decision is based on findings of fact or rulings of law that are clearly erroneous and materially impact the Final Decision. For the reasons discussed herein, I recommend that the Commissioner or her designee issue a Final Decision on Reconsideration denying the motion.

Date: August 15, 2024



Patrick M. Groulx
Presiding Officer

⁹ Motion to Reconsider, pp. 4-6.

NOTICE OF RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration of the Presiding Officer. It has been transmitted to the Department's Commissioner for her Final Decision on Reconsideration in this matter. This decision is therefore not a Final Decision on Reconsideration 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 on Reconsideration may be appealed and will contain a notice to that effect.

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