

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

January 29, 2019

In the Matter of
Santo Anza, Individually, and
As Trustee of 429 Whitney Street
Realty Trust, and S.A. Farm LLC

OADR Docket No. 2018-026
Northborough, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

The Petitioners, Santo Anza, S.A. Farm LLC and Santo Anza, Trustee, 429 Whitney Street Realty Trust (collectively, “Anza”) appealed the Unilateral Administrative Order (“UAO”)¹ issued by the Massachusetts Department of Environmental Protection (“MassDEP”) concerning the real property at 429 Whitney Street, Northborough, Massachusetts (“the Property”). The UAO was issued pursuant to G.L. c. 111 §§ 2C and 142A-142O and the Air Pollution Control regulations at 310 CMR 6.00, 7.00, and 8.00. For the reasons discussed below, I recommend that MassDEP’s Commissioner issue a Final Decision adopting this Recommended Final Decision to allow MassDEP’s motion to dismiss the appeal as untimely.

BACKGROUND

The UAO alleged that Santo Anza, as Trustee of 429 Whitney Trust, is the owner of the Property, which is the location of S.A. Farm LLC. Santo Anza is the Manager of S.A. Farm LLC. The Property is 15.74 acres of land. After Anza purchased the mostly wooded and

¹ Enf. Document No. : 00005764.

undeveloped Property in 2009 most of the trees and vegetation were clear-cut. The Property is located close to two residential neighborhoods, with some homes located as close as 350 feet away. UAO, ¶¶ 5-6.

On August 1, 2013, Santo Anza was found guilty in Worcester Superior Court for illegally disposing solid waste and creating nuisance odors from dumping waste at the Property, in violation of G.L. c. 111 § 150 and §§ 142A-142. Santo Anza was sentenced to one year of confinement for each of the solid waste violations (eight total counts). The sentences were to run concurrently and were suspended for five years subject to the conditions of probation. Santo Anza was sentenced to five years of probation for each of the nuisance odor violations, with the probation terms to run concurrently. UAO, ¶¶ 7-8.

Since Santo Anza completed probation on August 22, 2018, Anza's activities at the Property have been "the source of foul and putrid odors that have disrupted the neighbors' peace and comfort as well as their use of their property." UAO, ¶ 8. MassDEP received 284 complaints of odors emitted from the Property between August 23, 2018 and October 4, 2018. The complaints were from 23 different complainants, some of whom live as far away as a half-mile from the Property. "The complainants often describe the odors as 'putrid' and report physical effects of the odors, and that residents have had to change outdoor plans, close windows on warm days, move outdoor activities inside, and even leave their properties for periods of time." UAO, ¶ 8. The Northborough Board of Health's agent verified odor complaints attributable to the Property on 21 separate occasions after August 23, 2018. MassDEP personnel confirmed off-site offensive odors from the Property on 5 separate occasions in September and October 2018. The odors were described as "putrid rotten food," "sour pungent rotting food," and "rancid sour." UAO, ¶ 10. As a consequence, the UAO alleged violations of

air pollution control regulations that generally prohibit the emission of nuisance odors that cause or contribute to a condition of air pollution. 310 CMR 7.09(1), 7.09(4), and 7.01(1).

Among other things, the UAO generally ordered Anza to cease and desist from causing a condition of air pollution; identify the sources of the nuisance odors; and submit a report to MassDEP that identifies (1) actions taken to prevent the emission of odors from the Property and (2) the specific sources of the odors. UAO, pp. 3-4. Anza appealed the UAO to the Office of Appeals and Dispute Resolution (“OADR”). MassDEP responded with a motion to dismiss the appeal, arguing that it was not timely filed.

DISCUSSION

MassDEP correctly points out that the timeliness of an appeal has been construed as a jurisdictional requirement that has been strictly applied. Late filing due to mistakes or negligence has not been considered to excuse parties from this strict jurisdictional requirement. See e.g. Matter of Erkkinen, Docket No. 2011-006, Recommended Final Decision (May 13, 2011), adopted by Final Decision (May 23, 2011) (appeal of \$35,100.00 PAN was three days late); Matter of Berkshire Housing Authority, Docket No. 2010-007, Recommended Final Decision (March 16, 2010) (dismissing c. 91 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 c. 91 appeal as untimely by one day); Matter of Joseph Demaio, Docket No. 97-063, Final Decision (April 9, 1998) (dismissing wetlands 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).

MassDEP first served the UAO on October 16, 2018, via email pursuant to 310 CMR 7.51(3)(c)3, which provides:

The Department may make service of an order in any other manner, including any form of electronic mail, facsimile or other electronic medium, national overnight carrier, regular mail to the last known address, or other publication or method of delivery. The Department uses such alternative or substitute methods of service only when exigent circumstances require it doing so or when the person to be served declines to accept receipt or mail is returned from either of the service methods specified in 310 CMR 7.51(3)(c)1. and 2. The fact of service in such cases is established by such records as may be available. The date of service shall be the date on which the Department initiates electronic transmission, the date of publication, one day after the date of overnight mailing or three days after the date of regular mailing. (emphasis added)

Pigsley Aff., ¶ 3.

MassDEP filed an affidavit from the Regional Director of MassDEP's Central Regional Office in Worcester attesting that exigent circumstances existed because "the foul and putrid odors have an immediate adverse impact on the nearby residents and the odor-generating activities cited [above] in the UAO [were] ongoing, creating the potential for additional adverse impacts on local residents." *Id.* at ¶ 4. This is consistent with the UAO allegations, which state that the nuisance odors were widespread, frequent, and disruptive to normal daily living for many people. See supra., pp. 2-3.

Pursuant to the preceding provision, 310 CMR 7.51(3)(c)3, the effective date of service of the emailed UAO was October 16, 2018, because that was the "date on which [MassDEP] initat[ed] electronic transmission" There is no dispute that the email was sent to a correct email address.

The UAO and the applicable regulations provided that an appeal must be “received” by MassDEP within ten days “from the date of this Order.” 310 CMR 7.51(3)(e). The UAO specified that the appeal must be sent to: “Case Administrator, Office of Appeals and Dispute Resolution, One Winter Street – 2nd Floor, Boston, MA 02108.” UAO, p. 5.

Because the UAO was dated October 16, 2018, the appeal was to be received by OADR on October 26, 2018. However, OADR did not receive the appeal until October 30, 2018. Previous to that, Anza’s counsel had emailed an unsigned copy of a notice of appeal to an attorney in MassDEP’s Office of General Counsel and the Regional Director for MassDEP’s Central Regional Office on Friday, October 26, 2018, at 6:04 p.m. That, however, does not cure the untimeliness of the appeal, for two reasons. First, because the notice was received on October 26, 2018, after 5:00 p.m., the regulations provide that the actual filing date was the “following business day,” which was Monday, October 29, 2018. See 310 CMR 1.01(3)(a)(5) (“Where papers may be filed by electronic medium and are received during regular business hours, they shall be deemed filed on the date received. Papers received after regular business hours shall be deemed filed on the following business day.”); 310 CMR 1.01(3)(c) (regular business hours are between 9:00 a.m. and 5:00 p.m.). In addition, Anza’s attempt to file by email was also defective because it did not comply with the UAO nor the Rules of Adjudicatory Proceeding requirements to file a signed appeal with OADR. See 310 CMR 1.01(3) and (4)(b).

In addition to service by email, the UAO was also deposited in the U.S. Mail to Anza on October 16, 2018, and was delivered on October 17, 2018. *Pigsley Aff.*, ¶ 4. However, pursuant to 310 CMR 7.51(3)(c), the effective date of service of the mailed

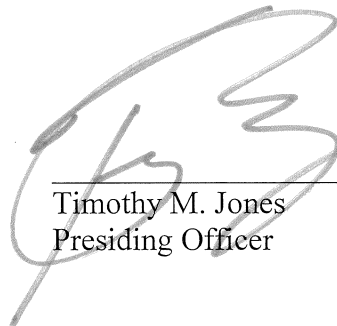
UAO was “three days after the date of regular mailing,” which was October 19, 2018. As a consequence, the appeal was required to be received by OADR ten days later, on October 29, 2018. However, OADR did not receive Anza’s appeal until October 30, 2018. Pigsley Aff., ¶ 6.

For all the above reasons, Anza’s appeal was not timely filed and MassDEP’s motion to dismiss for untimeliness should therefore be allowed.

NOTICE- RECOMMENDED FINAL DECISION

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



Timothy M. Jones
Presiding Officer

1/29/19

SERVICE LIST

In The Matter Of:

Santo Anza, et al.

Docket No. 2018-026

File No. 00005764
Northborough

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DEPARTMENT

Date: January 29, 2019

