

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 3, 2019

In the Matter of
Thomas T. Mierzejewski

OADR Docket No. 2016-021
Lanesborough, MA


RECOMMENDED FINAL DECISION

Thomas T. Mierzejewski, ("Petitioner") filed this appeal on August 1, 2016, with the Office of Appeals and Dispute Resolution ("OADR"). The appeal concerns the real property at 189 and 195 Narragansett Avenue, Lanesborough, Massachusetts ("the Property"). The Petitioner challenges the denial of a simplified waterways license and written determination that the Massachusetts Department of Environmental Protection's Western Regional Office ("MassDEP") issued pursuant to G.L. c. 91 and the Waterways Regulations, 310 CMR 9.00. After reviewing the administrative record, I recommend that MassDEP's Commissioner issue a Final Decision granting MassDEP's motion to dismiss the appeal and dismissing the appeal based upon the Petitioner's failure to prosecute the appeal and to comply with deadlines and orders.

Shortly after the appeal was filed I issued a Scheduling Order, establishing dates and requirements for a Pre-Hearing Conference and an Adjudicatory Hearing. The parties subsequently and jointly requested a continuance of the Pre-Hearing Conference and the

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Adjudicatory Hearing, asserting that they were engaged in settlement discussions and that additional time, sixty days, would be beneficial to achieving a settlement agreement. I allowed that motion, rescheduling the Pre-Hearing Conference to November 17, 2016 at 11:00 a.m., stating: "If there is no settlement by [November 16, 2016], the Pre-Hearing Conference will occur at that date and time and there will be no further extensions, absent a showing of good cause." October 17, 2016, Ruling and Order Allowing Extension.

The parties were unable to reach a settlement agreement and on November 17, 2016, I held a Pre-Hearing Conference with the parties. At the parties' request, I then issued an order staying the appeal to allow them additional time to engage in settlement discussions. November 17, 2016, Ruling and Order Allowing Parties' Request for Stay. Over a year and one-half later and with no activity in the appeal (other than one status report requesting additional time), I requested that the parties file a status report by August 10, 2018, "along with an explanation why this appeal should not be dismissed for failure to prosecute." July 30, 2018, Order Requiring Status Report.

MassDEP filed a timely response, stating:

For two years, since the Scheduling Order dated August 11, 2016, there has been no litigation activity in the above matter. On information and belief, the Applicant/Petitioner has passed away earlier this year. Accordingly it would appear as though dismissal is appropriate at this time, unless sufficient facts and reasons are presented on behalf of the estate and heirs why this matter should not be dismissed for lack of prosecution. The Applicant/Petitioner's representative will need to present such information today in its own Status Report. If insufficient information is presented, the Department respectfully requests that this matter be dismissed.

The Petitioner's counsel did not respond by the August 10, 2018 deadline, and instead filed a statement on August 16, 2018, stating that the Petitioner was deceased and that his son "is

buying out his siblings [with respect to the Property] and that he wishes to move forward with the [c. 91 small dock license] application.”

On August 27, 2018, I issued a Ruling and Order Staying Appeal to allow time for the Petitioner’s counsel to resolve probate issues in order to move forward with this appeal. But I stated: “the appeal shall be stayed until these issues are cleared up and there is sufficient authorization from an appropriate court to proceed with the appeal. During the stay the parties shall file a joint status report every three months beginning with October 1, 2018. Failure to comply with the status report requirement will result in dismissal of the appeal, absent a showing of good cause.” Ruling and Order Staying Appeal (emphasis added). Since that time, I received three quarterly status reports from MassDEP; all of those reports stated that MassDEP had received no communication from Petitioner’s counsel and there had been no activity in the appeal. Indeed, Petitioner’s counsel has not filed any status reports or any other pleadings with OADR, or made any contact whatsoever with OADR.

Given the above circumstances, I recommend that the MassDEP’s Commissioner issue a Final Decision granting MassDEP’s motion to dismiss the appeal based upon the Petitioner’s counsel failure to: (1) oppose the motion to dismiss, (2) comply with the order staying the appeal and file documents as required, (3) meet the time limits established by the order, and (4) prosecute the appeal in accordance with the rules and orders. See 310 CMR 1.01(3)(e), 1.01(5)6, 1.01(10), 1.01(11)(b), and 1.01(11)(d); see Matter of Tucard, LLC, Docket No. 2009-076, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010); 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).

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.

Date: June 3, 2019



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Thomas T. Mierzejewski

Docket No. 2016-021

File No. X259653/14-4447
Lanesborough

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DEPARTMENT

Date: June 3, 2019