COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS

# DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

 June 15, 2015

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In the Matter of Docket No. WET-2014-020

 No. SE 72-1376

Town of Swansea Swansea

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**RECOMMENDED DECISION ON MOTION FOR RECONSIDERATION**

**AND OTHER MOTIONS**

This appeal was filed by Bruce Hodge and four other abutters, Jacalyn Hodge, Robert Pacheco, Mark Huck, and Honey Huck (the “Petitioners”), challenging the denial of their Request for a Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection (“the Department”) for work by the Town of Swansea on Pearse Landing and Circuit Drive, which provide access to a Town Landing in Swansea. The Petitioners own land abutting the ways. The Notice of Intent was filed on behalf of the Town of Swansea Police Department and Harbormaster (the “Applicant”) under the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. The project is the grubbing, grading, and deposit of crushed shells on sections of the unimproved ways. The Swansea Conservation Commission had approved the work, which had already been commenced, in an Order of Conditions. The Department denied the Petitioners’ Request for an SOC because the property law and other issues raised by the Petitioners were outside the Department’s jurisdiction. The dispute centered on land ownership and whether the Town had the authority to conduct the work on the ways. The Commissioner’s Final Decision adopted a Recommended Final Decision that upheld the denial of the request for an SOC.

After the issuance of the Final Decision on June 1, 2015, the Petitioners filed two motions: 1) Petitioners’ Motion to Stay Proceedings; to Reopen and Remand this Matter for Further Proceedings; To Require the Town of Swansea to Interplead Certain Citizens of the Town of Swansea, or in the Alternative Dismiss the Town’s NOI; For Further Instructions, and for Any Other Relief Appropriate in the Premises (sic); and 2) Petitioners’ Motions to Vacate the Final Decision; to Reopen the Record and Remand, or in the Alternative for Reconsideration of the Recommended Final Decision and Final Decision. Because a Final Decision has been issued, the Motions to Stay, Remand, Reopen and similar relief are deemed incorporated in the Motion for Reconsideration. See 310 CMR 1.01(14)(e)(motions to reopen hearings prior to Final Decision). I recommend that the motions be denied.

**THE RECOMMENDED FINAL DECISION AND FINAL DECISION**

The Recommended Final Decision concluded that the Department properly dismissed the Petitioners’ Request for an SOC, on the grounds that the Department lacks authority to resolve property disputes and the Petitioners’ appeal primarily raised a property law issue. To the extent the Petitioners sought enforcement against the Town, that outcome similarly cannot be achieved through a Request for an SOC or an appeal of a denial of a Request for an SOC. The segmentation claim, based on the Petitioners’ belief that the Town intended to pursue additional work, also lacked merit. Although the Petitioners raised an additional claim that related to an issue within appellate jurisdiction, the issue was not clearly identified in the Request as required by the regulations, nor was it clearly stated in the supplement filed after the Department allowed clarification of the initial Request, the Notice of Claim, or the issues identified for adjudication. Claims not timely raised must be dismissed. See 310 CMR 10.05(7)(a) and (c). The Department’s Commissioner issued a Final Decision adopting the Recommended Final Decision, sustaining the Department’s denial of the Request for an SOC and dismissing the appeal.

**STANDARD FOR REVIEW**

For reconsideration, a party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was “clearly erroneous.” See [310 CMR 1.01(14)(d)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=310MADC1.01&tc=-1&pbc=62714483&ordoc=0346652801&findtype=L&db=1012167&vr=2.0&rp=%2ffind%2fdefault.wl&mt=208). In addition, a motion for reconsideration may be summarily denied where 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.

It is well settled that a party seeking reconsideration of a Final Decision has the heavy burden of demonstrating that the Final Decision was unjustified. [310 CMR 1.01(14)(d)](http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW10.01&fn=_top&sv=Split&docname=310MADC1.01&tc=-1&pbc=62714483&ordoc=0346652801&findtype=L&db=1012167&vr=2.0&rp=%2ffind%2fdefault.wl&mt=208); Matter of LeBlanc, Docket No. 08-051, Recommended Final Decision on Reconsideration (February 4, 2009), adopted by Final Decision (February 18, 2009); Matter of Jody Reale, OADR Docket No. WET-2010-012, Recommended Final Decision on Reconsideration (July 29, 2010), adopted as Final Decision on Reconsideration (July 30, 2010); Matter of Patriots Environmental Corp., OADR Docket No. 2011-016, Recommended Final Decision on Reconsideration (January 29, 2013), adopted as Final Decision on Reconsideration (February 7, 2013); Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision on Reconsideration (August 28, 2013), adopted as Final Decision (September 5, 2013). Moreover, reconsideration may not be based on the party’s disagreement with the result established in the Final Decision. Matter of Frank A. Marinelli, OADR Docket No. 1985-032, Decision on Motion for Reconsideration, adopted as Final Decision on Reconsideration (January 6, 1998); Patriots Environmental, supra; Dupras, supra.

 Under the hearing rules, a hearing may be reopened for the purpose of receiving new evidence prior to the issuance of a final decision. 310 CMR 1.01(14)(e). The Department’s Commissioner may remand a case to the Presiding Officer to receive new evidence or to recommend additional findings of fact or conclusions of law. Id.

THE PETITIONERS’MOTIONS

The Petitioners describe recent events in Swansea that they claim have an effect on this proceeding. Apparently, a “Citizens Article” was approved, which would convert Circuit Drive to a statutory private way. A statutory private way is open to the public and laid out by selectmen similar to town ways, but the various costs including maintenance must be paid by abutters. M.G.L. c. 82, ss 21-24; M.G.L. c. 84, s. 12; United States v. 125.07 Acres of Land More or Less, 707 F. 2d 11 (1st Cir. 1983). The Petitioners contend that the Town is no longer the sole manager of the project under review, and additional parties should be joined in this proceeding. The Petitioners frame this situation as a substantial change in material circumstances that affect the outcome of this case that has arisen outside the control of the Petitioners. The Petitioners alleged certain improprieties related to the warrant article and the Town Meeting.

In support of reconsideration, the Petitioners further argue that the Final Decision did not include a statement of reasons as required by the regulations. 310 CMR 1.01(14)(d). They also contend that the Town did not demonstrate a colorable claim of authority to file a Notice of Intent to pursue the proposed project. They described as “unlawful special privileging” the statement in the Recommended Final Decision that the Department routinely reviews projects proposed by municipalities in reliance on their assertion of authority to conduct work without proof of ownership. Finally, they object to the exclusion of the buffer zone issue, even though it was not identified as an Issue for Adjudication set forth after the Pre-Hearing Conference.

DISCUSSION

Remand or re-opening of this proceeding, as urged by the Petitioners, is not warranted. The events in Swansea as to the status of Circuit Drive, while certainly important to the Petitioners, do not affect the wetlands permitting of the project, for two reasons. First, the wetlands permit is entirely separate from other issues that may affect property. The wetlands regulations clearly state that an Order of Conditions does not grant any property rights or exclusive privileges, nor does it authorize any injury to private property. An Order of Conditions remains valid with transfer of management or ownership of property. Second, while other abutters may be affected by any newly imposed costs, the concern is outside the scope of interests of the Wetlands Protection Act and may not be raised in a wetlands appeal. In addition, as discussed in the Recommended Final Decision, abutters were either provided notice or had an opportunity to show notice was required and not provided; the Petitioners may not pursue a claim on their behalf. See 310 CMR 10.05(4)(a). It is not uncommon to have revisions to projects or changes in circumstances surrounding projects during the course of review, but abutter notice always occurs only with the initial filing of a Notice of Intent. Abutters must follow a project during the course of review to learn of revisions or changes in circumstance.

Reconsideration of the Final Decision, as urged by the Petitioners, is also not warranted. The Petitioners assert that the Final Decision did not comply with the regulations because it does not contain a statement of reasons. When a Final Decision adopts a Recommended Final Decision, it incorporates by reference the reasons stated therein. Where the Department’s Commissioner modifies or rejects a Recommended Final Decision, typically reasons are stated in the Final Decision but that was not the case here because the Commissioner adopted the Recommended Final Decision in its entirety. As the Petitioners note, it is the Final Decision that may be subject to reconsideration, but when a Final Decision has adopted a Recommended Final Decision, the reasons stated therein provide the grounds for the Final Decision. The standard for reconsideration is explicit in the regulations at 310 CMR 1.01(14)d) and has been discussed in prior cases.

The Petitioners allege that rather than follow precedent as articulated in Tindley, the Final Decision establishes a special privilege for municipalities. Tindley v. DEQE, 10 Mass. App. Ct. 623 (1980). Tindley stands for the proposition that an applicant need only demonstrate a colorable claim of property ownership to support the filing of a Notice of Intent. Id.; see 310 CMR 10.05(4)(a). The Final Decision concluded that the Department did not abuse its discretion by relying on the town’s assertion that it has the authority to conduct work on the ways. The Petitioners objected to an additional, more general statement that the Department routinely reviews projects proposed by municipalities and properly relies on assertions of municipal ownership of land by municipal authorities without further proof of ownership. Department practice in this regard is not properly characterized as a “special privilege” for municipalities, but simply reflects an assumption that, for example, a Town has authority to work on a Town road. Because a wetlands permit creates no rights or privileges and the Department lacks expertise in municipal law, the Department does not become involved with the various issues that may arise involving various forms of ways. 310 CMR 10.05(6)(i). The issuance of an Order of Conditions does not affect the basic rule that any dispute related to ownership must be resolved in court. Tindley, supra. In this case, there were ways clearly shown on the plan where work had or would occur, and the Department should have no role in the dispute between the Petitioners and the Town as to the status of the ways.

The Petitioners also state as grounds for reconsideration the omission of the “buffer zone claims” from the issues for adjudication. The problem here for the Petitioners, as already addressed in the Final Decision, is one of timing. The Pre-hearing Conference was held on October 29, 2014. The relevant Issue for Adjudication, issued on November 6, 2014, was framed broadly so that the Petitioners could have made arguments related to this claim:

In denying the request for a Superseding Order of Conditions, whether the Department properly determined that the Petitioners failed to meet the requirements of 310 CMR 10.05(7)(c) by not stating how the Commission’s Order of Conditions is inconsistent with 310 CMR 10.00 and does not contribute to the interests of the Wetlands Protection Act within the applicable time period?

The schedule anticipated motions from the Town and the Department by November 21, 2014, followed by the Petitioners by December 12, 2014. The Petitioners objected to a Department motion to strike related to their discussion in their opposition to summary decision of the status of the area as buffer zone or flood plain, referring to a flood map attached as an exhibit. See Petitioners’ Combined Objection to Respondent Town and Department of Environmental Protection Motions to Dismiss and for Summary Decision, and Petitioners’ Cross Motions for Summary Decisions to Vacate the Department’s Denial of Petitioners’ Application for a Superceding (sic) Order of Conditions and Revoke the Existing Order of Conditions because of the Town’s Failure of Standing to Assert a Colorable Claim to Develop its Project, or, in the Alternative, To Remand the Decision for Further Proceedings Before the Swansea Conservation Commission, or the Department (December 12, 2014). In their objection and request to amend the issues, the Petitioners specifically stated that, “it was the Respondent Town, on November 19, 2014, intentionally put the ‘buffer zone v. flood zone’ jurisdictional issue into contention, not petitioners.” Petitioners’ Objection to the Department’s Motion to Strike, and Petitioners’ Cross Motion to Amend Issues for Resolution, Affording Parties Additional time to Respond, or to Remand this Matter to the Department for Further Proceedings (December 23, 2014), p. 8. The Issue for Adjudication was not unduly narrow, but did focus on the relevant inquiry, which was the sufficiency of the Petitioner’s request for an SOC. The pleadings were not an opportunity to make a case that had not been made when required under the regulations at 310 CMR 10.05(7)(c), to state how the Commission’s Order of Conditions is inconsistent with 310 CMR 10.00 and does not contribute to the interests of the Wetlands Protection Act within the applicable time period. For these reasons, the Final Decision contained no error of fact or law.

**CONCLUSION**

The Final Decision affirmed the Department’s dismissal of the Petitioners’ Request for an SOC, for lack of jurisdiction. I recommend that the Department’s Commissioner decline to remand or reopen the hearing, and issue a Final Decision on Reconsideration denying the Petitioners’ motion for reconsideration for the reasons stated.

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 Pamela D. Harvey

 Presiding Officer

**NOTICE- RECOMMENDED FINAL DECISION ON RECONSIDERATION**

This decision is a Recommended Decision on Reconsideration of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision on Reconsideration in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner’s Final Decision is subject to 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 on Reconsideration 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.