

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**

September 19, 2018

---

In the Matter of  
White Oak Land Conservation Society

---

Docket No. WET-2017-020  
MassDEP File No. 183-0642

**RECOMMENDED FINAL DECISION ON RECONSIDERATION**

The Petitioner Brian Vitalis requests that the Commissioner of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) reconsider his Final Decision in this appeal upholding the Department’s denial of his request for a Superseding Order of Conditions (“SOC”) under 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 Petitioner had sought the SOC to challenge an Order of Conditions (“OOC”) that the Town of Holden’s Conservation Commission (“Holden CC”) had issued to the White Oak Land Conservation Society (“the Applicant”) pursuant to the MWPA and the Wetlands Regulations authorizing the Applicant’s permanent four and one-half foot draw-down of water (“the proposed Project”) at the Eagle Lake Dam in Holden, Massachusetts. The Petitioner owns a residential condominium unit in the Mill Pond Place Condominiums, a condominium complex located on Village Way in Holden, abutting the Eagle Lake Dam. Petitioner’s Appeal Notice

Challenging Department's Denial of SOC Request, at p. 2.

The Department denied the Petitioner's SOC request for lack of standing because his ownership of a residential condominium unit in the Mill Pond Place Condominium Complex did not make him an Abutter to the proposed Project who could request an SOC from the Department pursuant to 310 CMR 10.05(7)(a)4.<sup>1</sup> Department's Denial Notice (September 19, 2017), at p. 1. I agreed with the Department's denial and issued a Recommended Final Decision ("RFD") recommending that the Department's Commissioner issue a Final Decision dismissing the Petitioner's appeal of the denial for lack of Abutter status and standing. The Commissioner agreed with my recommendation by issuing a Final Decision adopting my RFD in all respects. It is that Final Decision, which the Petitioner seeks reconsideration.

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); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, at 6, adopted as Final Decision on Reconsideration (November 7, 2014), 2014 MA ENV LEXIS 82. Specifically, the party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law

---

<sup>1</sup> The parties under 310 CMR 10.05(7)(a) who may request an SOC from the Department are:

- (1) the applicant or proponent of the project, 310 CMR 10.05(7)(a)1;
- (2) the owner of the land on which the project is located, if the owner is not the applicant, 310 CMR 10.05(7)(a)2;
- (3) any person aggrieved by the OOC, 310 CMR 10.05(7)(a)3;
- (4) "any owner of land abutting the land on which the work is to be done," 310 CMR 10.05(7)(a)4;
- (5) any 10 residents of the city or town where the land is located, 310 CMR 10.05(7)(a)5; and
- (6) the Department, 310 CMR 10.05(7)(a)6.

that was “clearly erroneous.” Id. In addition, 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.

Here, the Petitioner has failed to satisfy the requirements for obtaining reconsideration of the Commissioner’s Final Decision for the following reasons.

First, the Petitioner has failed to demonstrate that the Final Decision’s dismissal of his appeal for lack of Abutter status and standing was based upon a finding of fact or ruling of law that was “clearly erroneous.” As explained in detail in my RFD, which the Commissioner adopted in his Final Decision, “[p]rior Final Decisions in administrative appeals brought by individual condominium unit owners challenging the authorization of projects under the MWPA and the Wetlands Regulations in areas abutting the condominium complex support the Department’s position here that such owners lack Abutter status under 310 CMR 10.05(7)(a)4 to challenge the projects.” RFD, at p. 4. The RFD noted that these Final Decisions include: (1) In the Matter of Holly Management and Supply Co., Inc., OADR Docket No. 98-125, Final Decision (April 9, 1999), 1999 MA ENV LEXIS 712 (petitioner condominium unit owner claiming that proposed construction of additional units within the condominium complex’s common area would damage adjacent coastal bank lacked Abutter status to challenge SOC authorizing project) and (2) In the Matter of Towermarc Boxborough Limited Partnership, OADR Docket No. 99-014, Final Decision (November 3, 1999), 1999 MA ENV LEXIS 649 (petitioner owner of two condominium units in condominium complex abutting site of proposed construction of roadway lacked Abutter status to challenge SOC authorizing project).

The RFD, at pp. 4-5, explained that “[t]he rationale for an individual condominium unit owner to lack Abutter status under 310 CMR 10.05(7)(a)4 to request an SOC to challenge a local conservation commission’s OOC was explained in Towermarc, *supra*,” as follows:

[t]he interest in the condominium [complex’s] common areas [abutting the area of a proposed project] which a unit owner acquires by purchasing a condominium unit [in the condominium complex] lacks such fundamental aspects of ownership as the right to exclude others or to exercise control over the property. Furthermore, any environmental harm that [the proposed] project could cause to the common area of [the condominium complex] would affect the interests of all [of] the unit owners generally, rather than any individual interest in the common areas held by the petitioner [condominium unit owner] alone. [Under the Massachusetts Condominium Statute, G.L. c. 183A, § 10(b)(4)], the right to conduct litigation against third parties based on a generalized claim of damage to the common areas is vested exclusively in the [condominium complex’s governing body: the] condominium association . . . .<sup>2</sup>

Towermarc, 1999 MA ENV LEXIS 649, at 12-13; See also Holly Management, *supra*, 1999 MA ENV LEXIS, at 3-7.

The RFD also noted that the Final Decision in Holly Management, *supra*, recognized that an individual condominium unit owner may request an SOC from the Department pursuant 310 CMR 10.05(7)(a)3 as a person aggrieved by a local conservation commission’s issuance of an OOC authorizing a project in an area abutting the condominium complex if the owner demonstrates “a connection between the alleged wetlands injury” that the project will cause in violation of the MWPA and the Wetlands Regulations “and damage to [the owner’s] property . . . .”<sup>3</sup> RFD, at p. 7, n.8. Without such a connection, the owner lacks standing to challenge the wetlands permit as an aggrieved person pursuant to 310 CMR 10.05(7)(a)3. *Id.*

---

<sup>2</sup> Under G.L. c. 183A, § 10(b)(4)(a), the governing body of a condominium complex can be in the form of a corporation, real estate trust, or unincorporated association, and “[is responsible] for the management and regulation of the condominium [complex].” The form of the governing body is established in the Master Deed for the condominium complex recorded with the appropriate Registry of Deeds. G.L. c. 183A, § 10(b)(4)(a).

<sup>3</sup> A person aggrieved by an OOC is one of the parties under 310 CMR 10.05(7)(a) who may seek an SOC from the Department. See n.1, at p. 2 above.

The RFD found that the Petitioner in this case had failed to make that connection because “[i]n making his SOC request to the Department, the Petitioner solely asserted that he was an Abutter to the proposed Project and did not assert that he was personally aggrieved by the Holden CC’s issuance of the OOC approving the proposed Project . . . .” Id.

In his Motion for Reconsideration, the Petitioner does not dispute that the Towermarc Final Decision precludes him from having Abutter status to make an SOC request to the Department nor does he contest the RFD’s finding that he lacks standing to make the SOC request as an aggrieved person. Instead, he seeks to assert a new claim in violation of the Reconsideration rules discussed above. Specifically, he requests that his SOC request be treated as a request by a 10 Holden Residents Group pursuant to 310 CMR 10.05(7)(a)<sup>4</sup> challenging the Holden CC’s OOC authorizing the proposed Project instead of an individual request by him as an Abutter or aggrieved person.

In addition to being a new claim that is prohibited by the Reconsideration rules, the Petitioner’s request to convert his SOC request into a 10 Residents Group SOC request pursuant to 310 CMR 10.05(7)(a)5 is untimely. Under 310 CMR 10.05(7)(c), all parties authorized by 310 CMR 10.05(7)(a) to make an SOC request to the Department, including a 10 Residents Group, must make the request to the Department within the 10 business days after the local conservation commission’s issuance of the OOC that the party seeks to challenge. This requirement was made clear at p. 9 of the Holden CC’s OOC approving the proposed Project under the Section entitled “Appeals.” Undisputedly, the 10 business day deadline to make an

---

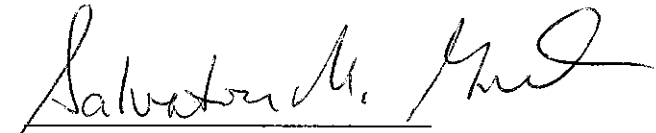
<sup>4</sup> A 10 Residents Group comprised of any 10 residents of the city or town where the land is located for a proposed project is another party that may seek an SOC from the Department. See n.1, at p. 2 above.

SOC request to the Department expired long ago.

To the extent that the Petitioner's Motion for Reconsideration is a Motion to Intervene in this administrative appeal brought by a group of 10 persons pursuant to G.L. c. 30A, § 10A<sup>5</sup> or "[a] person [or persons] claim[ing] that [they are] substantially and specifically affected by [this appeal]," the Motion is untimely because it was not filed within 21 days after the Petitioner's filing of this appeal. 310 CMR 10.05(7)(j)5.a, 5.b. The Motion also fails because there was no valid administrative appeal to intervene in since the Petitioner's appeal here was barred for lack of Abutter status and standing.

In sum, I recommend that the Commissioner issue a Final Decision on Reconsideration that denies the Petitioner's Motion for Reconsideration.

Date: 09/19/18

  
Salvatore M. Giorlandino  
Chief Presiding Officer

---

<sup>5</sup> Under G.L. c. 30A, § 10A:

*ten persons may intervene in any adjudicatory proceeding . . . in which damage to the environment as defined in [G.L. c. 214, § 7A], is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue.*

(emphasis supplied). The provisions of G.L. c. 214, § 7A define "damage to the environment" as:

*any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.*

(emphasis supplied).

**NOTICE-RECOMMENDED FINAL DECISION ON RECONSIDERATION**

This decision is a Recommended Final Decision on Reconsideration of the Chief 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 G.L. c. 30A. The Commissioner's Final Decision may be appealed and will contain a notice to that effect.

## **SERVICE LIST**

**Petitioner:** Brian Vitalis  
34 Village Way  
Jefferson, MA 01522  
**e-mail:** brian01@charter.net;

**Legal Representative:** None listed in Petitioner's Appeal Notice;

**Applicant:** White Oak Land Conservation Society  
c/o Scott Morrison, President  
P.O. Box 346  
Holden, MA 01520  
**e-mail:** info@whiteoaktrust.org;

**Legal Representative:** None listed in Petitioner's Appeal Notice;

### **Local Conservation Commission:**

Town of Holden Conservation Commission  
c/o Glenda Williamson, Conservation Agent  
1196 Main Street  
Holden, MA 01520  
**e-mail:** None listed in Petitioner's Appeal Notice;

**The Department:** Denise Child, Section Chief, Wetlands Program  
MassDEP/Central Regional Office  
Bureau of Water Resources  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** Denise.Child@state.ma.us;

**[continued next page]**



**[continued from preceding page]**

Gary Dulmaine, Wetlands Analyst  
MassDEP/Central Regional Office  
Bureau of Water Resources  
627 Main Street  
Worcester, MA 01608  
**e-mail:** Gary.Dulmaine@state.ma.us;

**Legal representative:** Elizabeth Kimball, Senior Counsel  
MassDEP/ Office of General Counsel  
One Winter Street  
Boston, MA 02108  
**e-mail:** Elizabeth.Kimball@state.ma.us;

**cc:** Anne Berlin Blackman, Chief Regional Counsel  
MassDEP/Central Regional Office  
627 Main Street  
Worcester, MA 01608  
**e-mail:** Anne.Blackman@state.ma.us;

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