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

February 13, 2018

In the Matter of Wilbraham Land and Development LLC	OADR Docket No. 2017-016 Wilbraham, MA PAN-WE-17-00001049

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, the Petitioner Wilbraham Land and Development LLC ("WLD") challenges a $29,960.00 Civil Administrative Penalty ("PAN") that the Western Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP") issued to WLD on March 1, 2017 for its purported environmental violations at its real property in Wilbraham, Massachusetts. MassDEP has moved for summary decision contending that WLD's appeal was not timely filed and must be dismissed. WLD opposes the motion, contending that MassDEP's issuance of the PAN violated constitutional requirements of due process. For the reasons discussed below, I have determined that MassDEP's service of the PAN comported with due process requirements and the appeal was not timely filed by WLD. I recommend that MassDEP's Commissioner issue a Final Decision: (1) granting MassDEP's Motion for Summary Decision; (2) dismissing the appeal; and (3) affirming the $29,960.00 PAN.

BACKGROUND

This appeal arises in the context of enforcement actions taken by MassDEP after its inspectors observed alleged violations of several environmental laws at property owned by WLD in Wilbraham, Massachusetts. MassDEP issued a Unilateral Administrative Order ("UAO") to WLD on December 16, 2016 that required WLD to remedy the violations. During a follow-up inspection on January 19, 2017, MassDEP observed that the alleged violations had not been corrected. On January 27, 2017, MassDEP issued a Notice of Enforcement Conference ("NOEC") to WLD at its Boston office, inviting WLD to attend a conference with MassDEP personnel on February 14, 2017 to discuss the violations. WLD did not attend the conference. Both the UAO and the NOEC were mailed to WLD by certified mail, return receipt requested.[1]

The following material facts are undisputed. The green cards for the UAO and the NOEC were returned to MassDEP by the United States Postal Service. WLD management was not aware of the UAO or the NOEC at the time they were sent. Affidavit of Courtney Desmond at ¶ 12. (hereafter "Desmond Aff.") WLD's employee who was responsible for processing the mail and ensuring it reached its intended recipient at WLD's Boston office abruptly resigned on February 17, 2017. Desmond Aff. at ¶ 13.

On March 1, 2017 MassDEP issued the PAN that is the subject of this appeal.[2] The PAN was sent by certified mail, return receipt requested, and also by regular mail. Affidavit of Kellie Niemiec at ¶ 5. (hereafter "Niemiec Aff.") Both envelopes containing the PAN were properly addressed to WLD at its Boston office. Niemiec Aff. at ¶¶ 5, 7 and Exhibit 2. The green card for the PAN was not returned to MassDEP. Nor was the certified or the regular mail returned.

[1] The return receipt is commonly known as the "green card".

[2] The PAN is dated February 28, 2017.

Niemiec Aff. at ¶ 6. On June 8, 2017, Ms. Niemiec requested proof of delivery from the United States Postal Service. The Postal Service confirmed that the certified mail had been delivered on March 3, 2017 at 1:37 pm. Niemiec Aff. at ¶ 7 and Exhibit 3. The signature does not match an individual currently or formerly located in WLD's Boston office. Desmond Aff. at ¶ 15. The delivery confirmation shows the address of the recipient as "717". The building in which WLD's office is located, 717 Atlantic Avenue in Boston, houses multiple tenants. WLD's suite, 1A, is locked. Desmond Aff. at ¶ 16.

On or about April 1, 2017 MassDEP issued an invoice to the Petitioner for the penalty and mailed it to WLD's property in Wilbraham.[3] WLD or its representative subsequently contacted MassDEP and was told that the PAN had been issued in February. MassDEP emailed a copy of the PAN to the WLD's attorney on June 1, 2017. WLD filed this appeal with the Office of Appeals and Dispute Resolution on June 22, 2017.

On October 10, 2017, MassDEP moved for summary decision. MassDEP contends that because the appeal was not filed until June 22, 2017, well after the 21-day deadline for filing an appeal had run, WLD waived its right to an adjudicatory hearing, and the Office of Appeals and Dispute Resolution ("OADR") lacks jurisdiction to hear the appeal. MassDEP seeks dismissal of the matter. WLD opposes the motion. WLD argues that MassDEP's efforts to notify WLD of the PAN did not satisfy constitutional requirements of due process. WLD asserts that the appeal is timely because it was filed within 21 days of when WLD received what it argues is constitutionally sufficient notice of the PAN.

[3] WLD asserts that MassDEP had been expressly instructed to send mail to its corporate office in Boston, not its property in Wilbraham, and WLD was not alerted to the invoice until the following month. See Petitioner's Opposition to the Department of Environmental Protection's Motion for Summary Decision to Dismiss the Appeal at p. 2, note 1.

STATUTORY AND REGULATORY FRAMEWORK

When the Massachusetts legislature enacted the Administrative Penalties Statute, it authorized MassDEP to assess civil administrative penalties upon persons in violation of the state's environmental laws and prescribed the methods to be employed for such assessment. M.G.L. c. 21A, § 16. MassDEP promulgated 310 CMR 5.00, the Administrative Penalty Regulations, to implement its authority under the statute to "promote protection of public health, safety and welfare, and the environment, by promoting compliance, and deterring and penalizing noncompliance, with laws, regulations, orders licenses, and approvals to which 310 CMR 5.00 apply". 310 CMR 5.02(1). The regulations also serve the purpose of assuring that MassDEP assesses penalties "lawfully, fairly, and consistently" and effectively administers its programs and enforces applicable laws and regulations. 310 CMR 5.02(2) and (3). Like the statute, the regulations set forth how MassDEP's notice of its intent to assess a penalty is to be communicated to the alleged violator. The regulations detail how the notice is to be served, when it is deemed issued, what details it must contain, and the alleged violator's right to an adjudicatory hearing on the penalty assessment. Additionally, the regulations describe the circumstances under which the right to an adjudicatory hearing is deemed to have been waived.

M.G.L. c. 21A, § 16, the Administrative Penalty Statute, provides:

> Whenever the department seeks to assess a civil administrative penalty on any person, the department shall cause to be served upon such person, either by service, in hand, or by certified mail, return receipt requested, a written notice of its intent to assess a civil administrative penalty which shall include...a statement of such person's right to an adjudicatory hearing on the proposed assessment, the requirements such person must comply with to avoid being deemed to have waived the right to an adjudicatory hearing and the manner of payment thereof if such person elects to pay the penalty and waive an adjudicatory hearing…
>
> Whenever the department seeks to assess a civil administrative penalty on any person, such person shall have the right to an adjudicatory hearing under chapter

> thirty A whose provisions shall apply except when they are inconsistent with the provisions of this section…
>
> Such person shall be deemed to have waived such right to an adjudicatory hearing unless, within twenty-one days of the date of the department's notice that it seeks to assess a civil administrative penalty, such person files with the department a written statement denying the occurrence of any of the acts or omissions alleged by the department in such notice, or asserting that the money amount of the proposed civil administrative penalty is excessive… If a person waives his right to an adjudicatory hearing, the proposed civil administrative penalty shall be final immediately upon such waiver.

The Administrative Penalty Regulations describe in further detail the procedures MassDEP must follow when it issues a PAN. 310 CMR 5.33 requires MassDEP to serve the PAN by "one or more of the following methods"

> (1) Service in hand at the person's last known address in the Commonwealth or at the last known address of any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service.
>
> (2) Service in hand personally to the person, or to any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service.
>
> (3) By certified mail, return receipt requested, addressed to the person's last known address in the Commonwealth, or to the last known address of any officer, employee, or agent of the person authorized by appointment of the person or by law to accept service.

In this case, MassDEP opted to serve the PAN by certified mail as provided in subsection (3). MassDEP also simultaneously mailed a copy of the PAN by regular mail. The PAN was deemed issued when it was postmarked. 310 CMR 5.08(2)("If given by mail (either regular mail or certified mail, return receipt requested), the notice shall be deemed to be issued when postmarked by the U.S. Postal Service").

The provisions of the penalty regulations pertaining to receipt of the PAN provide that:

> (2) If given by certified mail, return receipt requested, the notice shall be deemed to be received either:

(a) when signed for by:

1. the person, or
2. the person's officer, employee, or agent, including, without limitation, any officer, employee, or agent authorized by appointment of the person or by law to accept service, or

(b) when returned by the U.S. Postal Service to the Department as unclaimed, unless the Department is persuaded that the notice was not claimed for reasons beyond the control of the person to whom the notice was sent.

(3) If given by regular mail, the notice shall be deemed to be received no later than the third business day after it is mailed to the person, unless the Department is persuaded otherwise by the person to whom the notice was mailed.

310 CMR 5.09. The regulations, like the statute, provide that the right to an adjudicatory hearing is deemed to have been waived unless the person to whom the PAN was issued files its appeal within 21 days of the date the PAN was issued. 310 CMR 5.35.

STANDARD OF REVIEW FOR SUMMARY DECISION

310 CMR 1.01(11)(f) provides that summary decision may issue where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See e.g. Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc. Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home Centers, Inc., supra, citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980). A party may move for summary decision on any of the issues that are the subject of the adjudicatory appeal. 310 CMR 1.01(11)(f). Summary decision is appropriate

where the party seeking summary decision can "demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." 310 CMR 1.01(11)(f). "A party opposing the motion may not rest upon the mere allegations or denials of said party's pleadings, but must respond…setting forth specific facts showing there is a genuine issue for hearing on the merits." 310 CMR 1.01(11)(f).

DISCUSSION

I. THE MATERIAL FACTS ARE UNDISPUTED AND MassDEP IS ENTITLED TO SUMMARY DECISION AS A MATTER OF LAW

A. The undisputed material facts demonstrate that MassDEP complied with the statutory and regulatory requirements for issuance of the PAN.

MassDEP issued the PAN on March 1, 2017. The PAN was mailed to WLD by certified mail, return receipt requested on that date. Niemiec Aff. at ¶ 5. That same day, MassDEP mailed the PAN to WLD by regular mail. Id. The envelopes containing the PAN were addressed to "AJ Goulding, Wilbraham Land and Development, LLC, 717 Atlantic Avenue, Suite 1A, Boston, MA 02111." Niemiec Aff., Exhibit 2. This is WLD's office address. Desmond Aff. at ¶ 3. The Petitioner does not dispute that the PAN was issued as required by the plain language of the Administrative Penalties Statute or the Administrative Penalty Regulations.

B. The undisputed facts demonstrate that MassDEP's issuance of the PAN complied with constitutional due process requirements.

WLD claims that as a matter of law, it was not provided with constitutionally sufficient notice of the PAN. WLD argues that (a) MassDEP knew WLD did not receive the certified mail when the return receipt was not returned and (b) MassDEP's failure to take additional steps at that point to notify WLD of the PAN deprived WLD of its right to due process. WLD claims that it did not receive the PAN or have actual notice of it until June 1, 2017 when it was sent via

email by MassDEP in response to an inquiry by Petitioner's counsel. Relying on Jones v. Flowers, 547 U.S. 220 (2006), WLD contends that MassDEP had reason to believe that WLD did not receive actual notice of the PAN when the green card was not returned and was required to take additional reasonable steps to notify WLD.

1. The Requirements of Due Process

Because the assessment and collection of a civil administrative penalty by MassDEP is a "taking of property", the 14th Amendment to the United States Constitution mandates MassDEP to satisfy the Constitutional requirements of due process. ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law") The United States Supreme Court addressed the due process requirements in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), wherein the court set forth the "elementary and fundamental requirement of due process" as "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. 306, 314 (notice by publication as to known persons constitutionally defective because not reasonably calculated under the circumstances to inform interested parties). The Supreme Court has stated that actual notice is not required. Dusenberry v. United States, 534 U.S. 161, 170-171, 172 (2001)(mailed notice of forfeiture proceedings sent to prisoner in care of the penitentiary where he was incarcerated was acceptable; due process clause only requires government's effort at notice to be "reasonably calculated" to apprise a party of the pendency of the action, it does not require "actual notice"). The "notice reasonably calculated" must be made in good faith. Mullane, 339 U.S. at 314. First class mail is "reasonably calculated" to provide actual notice comporting with

due process, but mail delivery is not always perfect, and the courts have accepted that not everyone entitled to receive notice by mail actually will. Town of Andover v. State Financial Servs., 432 Mass. 571, 736 N.E. 2d 837 (2000), citing Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 489-490. Certified mail, such as is required by the Administrative Penalties Statute, satisfies due process and provides greater assurance of mail being received. Town of Andover, 432 Mass. at 575.

In Town of Andover, certified mail sent by the plaintiff Town of Andover intended for the defendant State Financial Services was delivered to a contractor working on a renovation project in State Financial's building. The contractor signed for the mail and then either lost it, misplaced it or forgot about it. Because of the renovations and the absence of any place in the building to leave mail, the Postal Service sometimes delivered State Financial's mail to a contractor and State Financial knew this. Id. at 572. The question presented was whether the 14th amendment's due process clause requires landowners to receive actual notice of foreclosure proceedings barring rights of redemption. The SJC held that it does not. The SJC held that notice by certified mail satisfied the Town's due process obligations because it was "reasonably calculated" to provide the required notice. The Petitioner failed to receive notice due to its own problems addressing known problems with mail delivery in its building. "The giving of notice was frustrated not by a defect in the legislative determination that notice by certified mail would be adequate, but rather by the notice recipient's own passivity with respect to existing conditions likely to obstruct mail delivery." Id. at 576. As noted above, the SJC recognized the U.S. Supreme Court's implicit "acceptance of the fallibility of mail delivery and the possibility that some interested parties may not in fact receive notice delivered by this method." Andover 432 Mass. 571, 574-575. See also Edward J. Lewis LLC v. Keyes, 12 TL 144633, 23 LCR 260, 2015

Mass LCR 84 (April 29, 2015)(Tax lien foreclosure on real property; due process clause of the 14th amendment does not require that a landowner receive actual notice of the foreclosure proceedings, citing Jones v. Flowers); City of Boston v. DeGraff, 2009 Mass. App. Unpub. LEXIS 100 (February 19, 2009); Carmel Credit Union v. Bondeson, 55 Mass. App. Ct. 557, 772 N.E. 2d 1089 (2002)(certified mail is a method "reasonably calculated" to provide actual notice).

Jones v. Flowers, 547 U.S. 220 (2006), presented a situation where the government knew its attempt at service had failed. In Jones, the U.S. Supreme court held that where a mailed notice of a tax sale is returned unclaimed, the state must take additional reasonable steps to notify the property owner before the state can sell the property. In Jones the government was aware that its attempted notice was ineffective because the notice it mailed was returned, therefore its failure to take further reasonable steps to provide actual notice was deemed to have violated due process. The state's knowledge that the attempt to provide notice has failed is what distinguishes Jones from Mullane and Dusenberry. In Jones, notice of a tax delinquency was sent by certified mail to Jones by the Arkansas Commissioner of State Lands. No one was home to sign for the notice and no one retrieved it from the post office within the next 15 days. Jones, 547 U.S. 220 at 224. The post office returned the notice to the Commissioner who had issued it as "unclaimed." Id. Two years later when the state intended to sell Jones's property, the Commissioner again sent Jones a certified letter to notify him that his house would be sold if he did not pay his taxes. Again, the notice was returned to the Commissioner as "unclaimed." Id. Acknowledging its prior holdings that due process does not require "actual notice", the court framed the question as whether knowledge by the state that notice had failed is part of the circumstances and conditions that varies what notice is required. Id. at 228. Citing numerous state and federal cases that had addressed the question and decided that due process requires

"something more" before property can be sold, the court stated that "[d]eciding to take no further action is not what someone 'desirous of actually informing' Jones would do; such a person would take further reasonable steps if any were available." Id at 230. "One reasonable step…would be for the State to resend the notice by regular mail so that a signature was not required." Id. at 234. As noted above, WLD relies on Jones to support its claim that the notice of the PAN by certified mail was constitutionally deficient. As discussed below, since MassDEP did not know WLD had not received the certified mail, and because MassDEP issued the PAN by regular mail as well as by certified mail, Jones does not control the outcome.

2. MassDEP was not required to take additional steps to provide notice.

WLD argues that when MassDEP did not receive the green card for the PAN after receiving the green cards for the UAO and the NOEC, MassDEP had reason to believe that WLD did not receive actual notice and should have taken further steps to provide notice.[4] Petitioner's Opposition to the Department of Environmental Protection's Motion for Summary Decision to Dismiss the Appeal at 4-5 (hereafter "Opposition"). WLD argues "[w]here, as here, the government has reason to suspect that actual notice has not been received, Jones controls, and the government is obligated to take some additional steps to ensure that a party is notified." Opposition at 6. WLD suggests that the additional steps could have included re-sending the PAN by certified mail or contacting WLD by telephone. Id. at 5. WLD also suggests that MassDEP could have contacted the Postal Service to determine why the green card never came back, and if

[4] This argument is not compelling. The PAN was mailed months after the UAO and the NOEC were mailed. Both the UAO and the NOEC were issued by MassDEP, received by WLD, and not responded to. MassDEP may reasonably have concluded that its notices were simply being ignored, rather than falling victim to an irresponsible employee of WLD. See Desmond Aff. at ¶ 13. The fact that some green cards are returned and other are not proves the point about mail delivery being fallible. What might have given MassDEP a reason to believe notice had failed would be the mail being returned as unclaimed or undelivered.

it had done so, it would have learned that "the address to which the PAN was delivered was incomplete, and it could have taken further steps to ensure that WL&D received actual notice." Id. For the reasons discussed below, I do not find these arguments persuasive.

There is no dispute that the green card for the PAN was not returned to MassDEP by the Postal Service. Niemiec Aff. at ¶ 6. However, there is also no dispute that neither the certified mail nor the regular mail was returned as "unclaimed" or "undeliverable." Niemiec Aff. at ¶ 6. Contrary to WLD's conjecture that MassDEP had "reason to suspect", there are no facts that support a conclusion that MassDEP knew anything about the certified mail after it was sent. Unless the mail itself was returned as "unclaimed" or "undelivered", the lack of a green card does not, in my judgment, meet the Jones threshold for requiring "additional reasonable steps." As the Supreme Judicial Court noted in Town of Andover, mail delivery is not infallible. In this case, where delivery has been confirmed, the lack of a green card does not equate to MassDEP knowing that WLD did not receive the certified mail. As previously stated, in Jones the distinguishing characteristics were that the intended notice had been returned to the government agency and as a result, the government knew its notice had failed. This is not the case here. Particularly where WLD has admitted to problems receiving mail in the past, and admits its office door is kept locked, its situation is akin to State Financial's "own passivity with respect to existing conditions likely to obstruct mail delivery" described in Town of Andover. The problem is not with MassDEP's issuance of the PAN. Cases decided since Jones support the conclusion that MassDEP's actions in this case were constitutionally sufficient. See e.g. JLP v. Royce, 2017 Ind. App. Unpub. LEXIS 1437 (Ct. of Appeals of IN, October 31, 2017)(Distinguishing cases where agency was specifically aware that intended recipient had not or would not receive notice); Tupaz v. Clinton County, 499 F. Supp. 2d. 182 (U.S. D. C. N.D.N.Y. June 7, 2007)(The

return receipt was returned to the County but a line had been drawn where the signature belonged; the court found that when the County checked the Postal Service's "Track and Receive" service to verify delivery, it satisfied its obligations where the lack of signature raised suspicions).

As previously noted, WLD does not even mention in its opposition the reasonable extra step the court in Jones suggested would suffice: regular mail.[5] Even if it were true that service of the certified mail had failed and that MassDEP had known, by sending the PAN via regular mail simultaneously with the certified mail, MassDEP took the "further reasonable step" to provide notice to WLD that the U.S. Supreme Court in Jones suggested would pass constitutional muster if the certified mail notice had been returned to the agency. Jones, supra, at 234-235. WLD is silent in its Opposition regarding the copy of the PAN sent by regular mail. The regular mail was presumed to have been delivered on March 6, 2017. 310 CMR 5.09(3)("If given by regular mail, the notice shall be deemed to be received no later than the third business day after it is mailed to the person, unless the Department is persuaded otherwise by the person to whom the notice was mailed."); see Falmouth Hospital Association v. Enterprise Rent-A-Car Co. of Boston, 2017 Mass. App. Div. LEXIS 12 (January 30, 2017)("It is well established by Massachusetts common law that there is a presumption that an addressee received mail that was deposited with the post office, postage prepaid."); see also Commonwealth v. Crosscup, 369 Mass. 228, 239, 339 N.E. 2d 731 (1975)("Proper mailing of a letter is 'prima facie' evidence in civil cases of its receipt by the addressee.") WLD has offered no facts that rebut the presumption

[5] Of curious note is the fact that the only mail WLD claims to have received from MassDEP is the invoice mailed to its property in Wilbraham. It was to that address that WLD instructed DEP not to send mail because that was not its mailing address. A party cannot insist that MassDEP send mail to a particular address, here, WLD's Boston office, and then complain when they do not receive the mail at that address, through no fault of MassDEP.

of receipt arising from the fact of sending the PAN by regular mail. Asserting that its suite is locked does not rebut the presumption.

Notwithstanding its argument that "actual notice" was required, the Petitioner correctly notes that the constitutional standard does not necessarily require actual notice. Opposition at 4. Neither the Administrative Penalty Statute nor the Administrative Penalty Regulations requires MassDEP to ensure receipt of a Penalty Assessment Notice. Even taking as true WLD's assertion that it did not receive the certified mail copy of the PAN, WLD had 21 days from March 6, 2017, the day the regular mail is presumed to have been delivered, to appeal the PAN. Its appeal was filed on June 22, 2017.

Contrary to WLD's assertion in footnote 4 at page 4 of its Opposition,[6] MassDEP is not required to establish that the PAN was delivered. It is required to establish that it effected service of the PAN in accordance with the requirements of the statute and the regulations and the requirements of due process. MassDEP has done so. The envelopes were properly addressed to WLD. MassDEP has produced a postmark and a stamped receipt that prove mailing, as well as a delivery confirmation. The postmark is legible and there is no evidence that anything untoward happened to the mail after it was transferred from MassDEP to the Postal Service. While WLD claims that it does not recognize the signature on the delivery confirmation, it cannot dispute that the PAN was delivered to 717 Atlantic Avenue, Boston; the delivery confirmation shows that it was. The facts here are similar to those in Town of Andover, where the building had no

[6] WLD cites to In the Matter of Peabody Truck Equipment Corporation, 1987 WL 228982, at *5 (Sep. 8, 1987) to argue that it should be afforded the benefit of the doubt where MassDEP cannot establish that the PAN was delivered to WLD. In the Matter of Peabody Truck Equipment Corporation is inapposite because in that case an illegible postmark raised doubts about when mail was sent, and MassDEP could not produce proof of the date of mailing.

mailboxes and a contractor signed for certified mail, but apparently never gave it to State Financial Services.

It is not for MassDEP to explain why the Postal Service confirmation does not contain the suite number. Nor is it MassDEP's responsibility to manage how WLD receives its mail. There is no dispute that the envelope was properly addressed to the Petitioner. Even with the lack of a suite number on the delivery confirmation, I disagree with the Petitioner that MassDEP should have suspected that actual notice had not been provided to the Petitioner. Here, there is no "unique information about the intended recipient" that altered MassDEP's obligations. See, e.g. Robinson v. Hanrahan, 409 U.S. 38(1972)(state knew property owner was in prison when it sent notice of forfeiture proceeding to his home address); Covey v. Town of Somers, 351 U.S. 141(1956)(Town officials knew property owner was incompetent and without the protection of a guardian).

The attempt at notice in this case was not a "mere gesture" see Mullane, supra, but was a reasonably calculated effort to convey the notice to WLD. M.G.L. c. 21A § 16 does not require proof of receipt. Here, proof of mailing – of issuance – was sufficient. As the court in Jones v. Flowers affirmed, due process does not require that a [person] receive actual notice before the government may take [its] property. The PAN was mailed to WLD's address in Boston, was sent via both certified and regular mail, and was reasonably calculated under all of the circumstances to reach WLD.

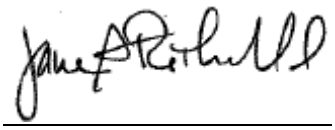
I find as a matter of law that MassDEP issued the PAN in full satisfaction of the constitutional requirements of due process.

C. WLD waived its right to appeal the PAN.

Both M.G.L. c. 21A, § 16 and 310 CMR 5.00 are explicit that a failure to appeal a PAN within 21 days of the date the PAN is issued is deemed a waiver of the right to appeal. Timely filing is a jurisdictional requirement. In the Matter of Gould, OADR Docket No. 2014-012, 2104 MA ENV LEXIS 66, Final Decision (August 18, 2014); In the Matter of Erkkinen, Docket No. 2011-006, Recommended Final Decision (May 13, 2011), adopted by Final Decision, 2011 MA ENV LEXIS 63 (May 23, 2011). The PAN was issued on March 1, 2017. The appeal was filed on June 22, 2017. Because the appeal was not filed within 21 days after the PAN was issued, WLD waived its right to a hearing on the PAN. Where an appeal is not timely, OADR lacks jurisdiction to hear the appeal. Matter of Peabody Truck Equipment Corporation, Hearing Officer's Decision on Request for Determination of Timeliness of Penalty Appeal, 1987 WL 228982 (Sept. 8, 1987).

II. CONCLUSION

For the foregoing reasons, I recommend that MassDEP's Commissioner issue a Final Decision: (1) granting MassDEP's Motion for Summary Decision; (2) dismissing the appeal as untimely; and (3) affirming the affirming the $29,960.00 PAN.



Date: 2/13/2018

Jane A Rothchild
Presiding Officer

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.

SERVICE LIST

In the Matter of
Wilbraham Land and
Development, LLC

Docket No. 2017-016
PAN-WE-17-00001049

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