

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

September 26, 2019

In the Matter of
Windsor Place, LLC

OADR Docket No. WET-2019-025
Wayland, MA

PRE-HEARING CONFERENCE REPORT AND ORDER

The Office of Appeals and Dispute Resolution (“OADR”) received this appeal by Windsor Place, LLC (“Petitioner”), concerning the real property at 24 School Street, Wayland, Massachusetts (“the Property”). The Petitioner challenges a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued. I allowed a group of 14 residents to intervene as a party (“Intervenors”) pursuant to 310 CMR 1.01 after no objects were filed to the Intervenors’ motion to intervene.

On September 24, 2019, I conducted a Pre-Hearing Conference with the parties. One of the topics of discussion during the Conference was potential settlement of this appeal. In the interest of reaching a settlement, I strongly encourage the parties to continue seriously reviewing and considering the potential problems or weaknesses in their cases, something that parties too often do not take seriously. It is likely that those weaknesses will be exposed in the adjudicatory hearing, and in my decision I will take them into consideration. It thus behooves the parties to do the same at this early stage of the case and seriously attempt to reach a settlement, before a substantial expenditure of resources occurs.

I stated during the Conference that if the appeal is not settled or resolved through dispositive motions, it will be resolved via an adjudicatory hearing that is now scheduled for **January 29, 2020** from 9:30 a.m. until 5:00 p.m. in MassDEP's Northeast Regional Office. MassDEP is responsible for scheduling a conference room and cancelling the prior conference room reservation that was for November 6, 2019.

Any party who fails to file any required materials in accordance with the schedule may be subject to sanctions pursuant to 310 CMR 1.01.¹ The Adjudicatory Hearing, if it remains necessary, will focus exclusively on the Issues for Resolution in the Appeal. Based upon the discussion at the Conference, I have framed the issues for adjudication as follows:

ISSUES FOR RESOLUTION IN THE APPEAL

Phase I:

- (1) Whether there was sufficient information under G.L. c. 131 § 40, 310 CMR 10.05(4)(a), 10.05(7)(h), 10.05(6)(c), to “describe the site, the work or the effect of the work on the interests identified in M.G.L. c. 131, § 40”

¹ Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under 310 CMR 1.01(11)(a)2.f, a “Presiding Officer may [also] summarily dismiss [an appeal] sua sponte,” when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to “issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions.”

Phase II:

- (2) Whether the work proposed for the Buffer Zone is sufficiently conditioned pursuant to 310 CMR 10.53(1) to prevent adverse impacts to the Resource Areas and protect the interests of the Wetlands Act.²
- (3) Whether the proposed work complies with the Stormwater Management Standards in 310 CMR 10.05(6)(k).

The *Phase I* issue above is to be resolved based *solely* upon the record that was before the Conservation Commission when it issued its Order of Conditions. The parties may also submit testimonial evidence from appropriate witnesses that bears upon the sufficiency of the record before the Commission. The parties may not, however, submit additional evidence on the merits that is outside the record that was before the Commission. To be clear, the parties may offer evidence as to whether the Commission's record is sufficient and why and how additional evidence concerning, for example, a numerical groundwater mounding analysis (like MODFLOW) is necessary or unnecessary, but the parties may not submit such additional evidence on the merits as part of *Phase I*. See e.g. David A. Bosworth Co., Inc., Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016), adopted by Final Decision (March 14, 2016); Matter of Elite Home Builders, Docket No. WET 2014-027 & 028, Recommended Final Decision (August 14, 2015); Final Decision (August 20, 2015); Matter of Silva, Docket No. WET 2008-002 and 003, Recommended Final Decision (May 23, 2008), adopted by Final Decision (June 20, 2008).

² See e.g. Matter of Karen McNiff, Trustee Chocoura Realty Trust, Docket No. WET-2011-016, Recommended Final Decision (July 25, 2013), adopted by Final Decision (July 31, 2013); Matter of Milton, Docket No. 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012); Matter of Capital Group Properties, LLC, Docket No. 2012-012, Recommended Final Decision, (February 11, 2013), adopted by Final Decision (April 16, 2013). Matter of Kornblith and Newman, Docket No. WET-2010-016, Recommended Final Decision (October 8, 2010), adopted by Final Decision (November 16, 2010); Matter of Trammell Crow Residential, Docket No. WET 2010-037, Recommended Final Decision (April 1, 2011), adopted by Final Decision (April 21, 2011); Matter of Nielsen, Docket No. WET 2008-046, Recommended Final Decision (April 12, 2010), adopted by Final Decision (May 11, 2010).

If I find in *Phase I* that there was sufficient information, the remaining issues for *Phase II* will be heard de novo in *Phase II*; as a consequence, the parties may submit evidence, including, for example, numerical groundwater mounding analysis (like MODFLOW), outside the Commission's record with respect to those issues. In their submissions, however, the parties must clearly separate litigation regarding *Phase I* and *Phase II*.

At the Conference, I informed the parties that litigation of *Phases I* and *II* to occur in the most efficient and expeditious way possible. One way to do that is for the parties to submit all the evidence concerning *Phases I* and *II* simultaneously and cover both *Phases I* and *II* in the adjudicatory hearing. However, I mentioned to the parties I was amenable to bifurcating the submission of evidence and the adjudicatory hearing, if that was the parties' preference. If the parties cannot reach an agreement as to how they wish to proceed, I will decide that issue after reviewing the parties' positions on how to proceed, i.e., whether to bifurcate or resolve *Phases I* and *II* simultaneously. If the parties desire to bifurcate the phases, *Phase I* will be first adjudicated, and how the remainder of the appeal proceeds will depend upon the outcome of *Phase I*. In that case, I would endeavor to issue a decision on *Phase I* within 45 days of the adjudicatory hearing.

The evidence to be submitted by the parties and the Adjudicatory Hearing shall focus on the preceding issues. This is a de novo appeal, and thus the Petitioner has the burden of going forward with its prima facie case. To ultimately prevail, they must prove each element of their case by a preponderance of the evidence.

THE PARTIES' RESPECTIVE WITNESSES FOR HEARING

The adjudicatory hearing will be recorded via a digital recording device unless a party retains at its expense a stenographer, in which case the party or parties shall pay for copies of the

transcript to be provided to the MassDEP and OADR. The purpose of the Hearing will be the cross-examination of witnesses who have filed sworn written Pre-filed Testimony on behalf of a party in the case according to the schedule that I established at the Pre-Screening Conference. See 310 CMR 1.01(12)(f).³ The Pre-filed Testimony must: be signed under the penalties of perjury, demonstrate that the witness has sufficient personal knowledge and experience to offer the testimony being submitted, and include a sufficient factual basis for the witness' testimony.

The parties' respective witnesses for the Adjudicatory Hearing should have been identified in their Pre-Hearing Statements. These witness designations may be modified upon a **timely** showing of good cause and request for leave to modify the witness designation. Specified witnesses for whom prefiled direct testimony is not timely submitted will not be allowed to testify at the Hearing. Duplicative testimony from multiple witnesses will generally not be allowed, absent a showing of good cause.

The Pre-filed Testimony is the witnesses' Direct Examination Testimony, and, perhaps, their Rebuttal Testimony at the Hearing. Id. The witnesses' Pre-filed Testimony must contain evidence that is relevant to resolution of the issues in the case. 310 CMR 1.01(13)(h)1.⁴ The

³ 310 CMR 1.01(12)(f) provides in relevant part that:

The Presiding Officer may order all parties to file within a reasonable time in advance of the hearing the full written text of the testimony of their witnesses on direct examination, including all exhibits to be offered in evidence. Failure to file pre-filed direct testimony within the established time, without good cause shown, shall result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner. The Presiding Officer may exclude direct testimony offered at the hearing that was not included in the pre-filed direct testimony but was reasonably available at the time it was filed. The Presiding Officer may also require the filing of written rebuttal testimony within a reasonable time after the filing of the direct testimony. All pre-filed testimony shall be subject to the penalties of perjury. . . .

⁴ 310 CMR 1.01(13)(h)1 provides that:

[u]nless otherwise provided by any law, the Presiding Officer need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. Unduly repetitious or irrelevant evidence may be excluded.

Pre-filed Testimony must also include the originals or true copies of all documents cited by the Testimony as supporting the witnesses' testimony and a party's positions in the case. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2. Specifically, the Pre-filed Testimony must include "all exhibits to be offered in evidence," 310 CMR 1.01(12)(f), and "[a]ll evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision [in the appeal]. . . ." 310 CMR 1.01(13)(h)2. Any Pre-filed Testimony that fails to include that documentary evidence is incomplete and untimely. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2.

Under 310 CMR 1.01(12)(f), a party's "[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner." Id. Indeed, "a petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 310 CMR 1.01(10) a party's failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for "failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01." Under 310 CMR 1.01(10), the Presiding Officer may "issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner.

The cross-examination of witnesses at the Hearing will be subject to time limits or other limits set by the Presiding Officer. 310 CMR 1.01(13)(d); 310 CMR 1.01(13)(f).⁵ Moreover, the Adjudicatory Rules mandate that “[i]f a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise.” 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)3. The Adjudicatory Rules also do not permit the re-direct examination of witnesses following their cross-examination unless authorized by the Presiding Officer. 310 CMR 1.01(13)(h)3. “If redirect examination is allowed by the Presiding Officer, it shall be limited to the scope of cross-examination.” *Id.* Hence, if a party chooses not to cross-examine a witness, the witness may not provide oral Re-direct Examination Testimony at the Hearing. *Id.* There is also no requirement that a party cross-examine its opponent’s witnesses at the Hearing. *Id.*

SCHEDULE OF PROCEEDINGS

In addition to dates specified above, the schedule is as follows:

⁵ 310 CMR 1.01(13)(d) provides in relevant part that:

1. Absent agreement of the parties to time limits for the hearing acceptable to the Presiding Officer, the Presiding Officer may establish a limit on the amount of time allotted to each party to present its case and examine witnesses. This time shall be allocated equally among opposing parties, unless the Presiding Officer orders otherwise for good cause. . . .

3. The Presiding Officer may grant a request for modification of time limits only for good cause. In determining whether to grant a request to modify time limits, the Presiding Officer may consider: whether or not the requesting party has used the time since the commencement of the hearing in a reasonable and proper way and has complied with all orders regulating the hearing; the requesting party’s explanation as to how the requested added time would be used and why it is necessary to ensure a fair hearing; and any other relevant and material facts the requesting or opposing party may wish to present in support of or opposition to the request.

Under 310 CMR 1.01(13)(f), the Presiding Officer may “[limit] the number of witnesses that parties may offer [at the Adjudicatory Hearing] and may exclude the testimony of any witness which would be duplicative, irrelevant, or otherwise unnecessary.”

1. By **October 4, 2019**, the parties shall file any objections to this Pre-Hearing Conference Report and Order. Failure to file objections shall constitute a waiver of the right to file them after the deadline.
2. By **October 4, 2019**, the parties shall jointly inform OADR how they desire to litigate Phases I and II, whether simultaneously, as discussed above, or in a bifurcated manner. If the parties are unable to reach an agreement, they shall submit separate position statements by October 4, 2019, asserting their positions.
3. By **November 15, 2019**, the Petitioner shall file its pre-filed direct testimony, exhibits, and a memorandum of law.
4. By **December 23, 2019**, MassDEP and the Interveners shall file their pre-filed direct and rebuttal testimony and exhibits and a memorandum of law.
5. By **January 10, 2020**, the Petitioner shall file its rebuttal testimony and exhibits and a memorandum of law.

The Hearing will be held in MassDEP's Northeast Regional Office on **January 29, 2020 at 9:30 a.m.** unless the appeal is resolved on dispositive motion or the parties file by **4 p.m. on January 28, 2020**, a fully executed Settlement Agreement for review by the Department's Commissioner. The hearing will be recorded via a digital recording device unless a party (or parties) retains at its expense a stenographer, in which case the party or parties shall pay for copies of the transcript to be provided to the Department and OADR.

Date: September 26, 2019



Timothy M. Jones
Presiding Officer

SERVICE LIST

In the Matter of:

Chris D 'Antonio, Windsor Place LLC.

Docket No. WET-2019-025

File No. 322-0897
Wayland

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September 26, 2019