

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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In the Matter of
John Walsh and
Walsh Brothers Building Co., Inc.

December 22, 2015

OADR Docket Nos. WET-2012-025,
WET-2015-020, and WET-2015-021
DEP File No. SE 32-2099
Harwich, MA

FINAL DECISION

These three consolidated Wetlands Permit appeals: (1) Docket No. WET-2012-025 (“Walsh I”), (2) Docket No. WET-2015-020 (“Walsh II”), and (3) Docket No. WET-2015-021 (“Walsh III”) concern the proposed construction by John Walsh and Walsh Brothers Building Co., Inc. (collectively “the Applicants”) of a 2,139 square foot single-family home on pilings with an attached deck, septic system, and driveway (“the proposed Project”) on real property located at 5 Sea Street Extension in Harwich, Massachusetts (“the Property”). The owners of the abutting real properties at 3 Sea Street Extension, 6 Sea Street Extension, 7 Sea Street Extension, and 8 Sea Street Extension (collectively “the Abutters”) and the Town of Harwich Conservation Commission (“HCC”) oppose the proposed Project and challenge a Superseding Order of Conditions (“SOC”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued in August 2015 (“the August 2015 SOC”) approving the proposed Project pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40

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("MWPA"), and the Massachusetts Wetlands Regulations, 310 CMR 10.00 et seq. In September 2015, the HCC and the Abutters (collectively "the Petitioners") filed the appeals in Walsh II and Walsh III respectively challenging the August 2015 SOC because the proposed Project would purportedly be detrimental to a Coastal Dune area in violation of the MWPA and the Wetlands Regulations.¹ The Applicants and the Department disputed the Petitioners' claims and requested that the August 2015 SOC be affirmed.

Previously, in October 2012, the Department had initially issued an SOC ("the October 2012 SOC") denying the proposed Project after agreeing with the HCC that the proposed Project would: (1) be built in a Coastal Dune; and (2) not satisfy the Performance Standards for work in a Coastal Dune as set forth in the Wetlands Regulations at 310 CMR 10.28.² In the Matter of John Walsh and Walsh Brothers Building Co., Inc., Docket No. 2012-025, Recommended Remand Decision (April 23, 2015), 2015 MA ENV LEXIS 35, at 1-2, adopted by Decision Adopting Recommended Remand Decision (June 2, 2015), 2015 MA ENV LEXIS 34. The Applicants challenged the Department's denial by filing the appeal in Walsh I contending that both the HCC and the Department erred in denying the proposed Project because the proposed

¹ The Wetlands Regulations at 310 CMR 10.28(2) define a Coastal Dune as:

any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

² "Performance Standards" are "th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA]." 310 CMR 10.04. The Performance Standards appear at 310 CMR 10.25 through 10.35 and 10.37, and 310 CMR 10.54 through 10.60. *Id.*

Project would not take place in a Coastal Dune but in the Buffer Zone to a Coastal Dune. *Id.*, at 2-3, 34-57.³

The Applicants contended that the proposed Project would not take place in a Coastal Dune based on a Coastal Dune delineation that the HCC had previously accepted on March 4, 2009 when it issued an Order of Conditions to the owner of the Property approving the construction of drainage improvements in a 40 foot wide private roadway that the Property shares with abutting real properties (“the 2009 Order”). *Id.* The Applicants contended that based on the Wetlands Regulations and prior Final Decisions in other Wetlands Permit Appeals, the Coastal Dune delineation of the 2009 Order governed the proposed Project and not a 2012 Coastal Dune delineation that was the basis of both the HCC’s and the Department’s denial of the proposed Project. *Id.*

On the parties’ Cross-Motions for Summary Decision, the Chief Presiding Officer agreed with the Applicants’ position that the Coastal Delineation of the 2009 Order governed the proposed Project, and recommended that I issue a Remand Decision: (1) granting the Applicants’ Motion for Summary Decision that the Coastal Dune delineation of the 2009 Order governed the

³ The Wetlands Regulations define “Buffer Zone” as an area of land extending 100 feet horizontally outward from the boundary of any protected wetlands. 310 CMR 10.02(2)(b); 310 CMR 10.04 The Wetlands Regulations at 310 CMR 10.53(1) set forth the general standards for work in a Buffer Zone adjacent to a protected wetlands area. *Id.* The regulation provides that the local Conservation Commission and the Department (“the permitting authority”):

shall impose conditions to protect the interests of the [MWPA] identified for the adjacent [wetlands] area. . . . The issuing authority may consider the characteristics of the buffer zone, such as the presence of steep slopes, that may increase the potential for adverse impacts on [the adjacent wetlands] areas. Conditions may include limitations on the scope and location of work in the buffer zone as necessary to avoid alteration of [the adjacent wetlands] areas. The issuing authority may require erosion and sedimentation controls during construction, a clear limit of work, and the preservation of natural vegetation adjacent to the [protected wetlands] area and/or other measures commensurate with the scope and location of the work within the buffer zone to protect the interests of the [MWPA]. . . .

310 CMR 10.53(1). The provisions of 310 CMR 10.28(3) also impose limitations on activities in a Buffer Zone to a Coastal Dune.

proposed Project, (2) denying the HCC's and the Department's Motions for Summary Decision that the 2012 Coastal Dune delineation governed the proposed Project, (3) vacating the Department's October 2012 SOC denying the proposed Project, and (4) remanding the matter to the Department for further review of the proposed Project in accordance with the requirements of the MWPA and the Wetlands Regulations, and issuance of a new SOC based on the Coastal Dune delineation of the 2009 Order and the protected wetlands resources impacted by the proposed Project. Walsh I, 2015 MA ENV LEXIS 35, at 5-6, 10-21, 34-57. I accepted the Chief Presiding Officer's recommendations, vacated the SOC, and remanded the matter to the Department for further review of the proposed Project based on the Coastal Dune delineation of the 2009 Order and the protected wetlands resources impacted by the proposed Project. Walsh I, 2015 MA ENV LEXIS 34.

On remand, the Department reviewed the proposed Project a second time in accordance with my Remand Order. Department's SOC Transmittal Letter to Applicant (August 24, 2015), at p. 1. As the result of its review, the Department issued the August 2015 SOC approving the proposed Project subject to certain conditions after determining "that the project area contributes to the protection of the [MWPA] statutory interests of flood control, storm damage prevention[,] and the protection of wildlife habitat[.]" and that the proposed Project could be approved because the Coastal Dune delineation of the 2009 Order placed the proposed house outside the Coastal Dune, specifically "in the buffer zone . . . to a Coastal Dune and within Land Subject to Coastal Storm Flowage." Id. The Department also approved the proposed Project because the Applicants reduced wetlands impacts by "submit[ing] a revised plan, dated 6/24/15, redesigning the proposed septic system, and eliminating the 10 inch thick concrete containment wall." Id. The Department also imposed

a number of conditions on its approval of the proposed Project, including that prior to construction, the Applicants were to erect an erosion control/limit of work barrier such as a silt fence between the proposed Project and the Coastal Dunes to the south as depicted on the plan and were to maintain these erosion and siltation controls in proper functioning condition until all disturbed areas at the project site were stabilized or the Department determined that the control measures were no longer necessary. August 2015 SOC Special Condition No. 4, at p. 13 of SOC. Construction equipment, vehicles, and work also were not permitted outside the barrier and the destruction of vegetation outside the barrier was prohibited. August 2015 SOC Special Condition No. 5, at p. 13.

On September 4 and 8, 2015, respectively, the HCC and the Abutters filed their separate appeals in Walsh II and Walsh III challenging the August 2015 SOC approving the proposed Project. As noted above, the Petitioners filed the appeals contending that the proposed Project would be detrimental to Coastal Dune in violation of the MWPA and the Wetlands Regulations. The Applicants and the Department disputed the Petitioners' claims and requested that the August 2015 SOC be affirmed.

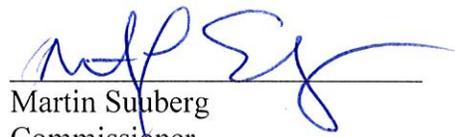
Recently, the Petitioners, the Applicant, and the Department (collectively "the parties") filed a proposed Settlement Agreement and Final Order of Conditions ("FOC") for my review and approval pursuant to 310 CMR 1.01(8)(c) to resolve these three consolidated Wetlands Permit appeals (Walsh I, Walsh, II, and Walsh III). See proposed Settlement Agreement and Final Order of Conditions ("FOC"). After reviewing their proposed Settlement Agreement and FOC, I find that the parties' settlement of these three consolidated Wetlands Permit appeals (Walsh I, Walsh, II, and Walsh III) is reasonable and consistent with wetlands protection under

the MWPA and the Wetlands Regulations, and respectful of local wetlands protection by-laws.

The settlement affirms the Department's August 2015 approval of the proposed Project subject to 13 Special Conditions set forth in the FOC. These Special Conditions include Special Conditions Nos. 4 and 5, which incorporate Special Conditions Nos. 4 and 5 of the August 2015 SOC discussed above at pp. 4-5. The Applicant is also required to re-file with the HCC by January 16, 2016, a Notice of Intent ("NOI") under the Town of Harwich's Wetlands Protection By-law only, seeking approval of the proposed Project utilizing the Applicant's plan that the Department approved in its FOC. FOC Special Condition NO. 13.⁴

Accordingly, I issue this Final Decision approving and incorporating the Settlement Agreement that the parties have reached. I have also signed the FOC in accordance with the Settlement Agreement.

Under the terms of 310 CMR 1.01(8)(c) and the Settlement Agreement, the HCC's and the Abutters' respective claims in these consolidated appeals (Walsh I, Walsh II, and Walsh III) are dismissed as they have waived whatever rights they may have had to further administrative review before the Department as well as appeal to court of the October 2012 SOC and the August 2015 SOC that were at issue in the case.



Martin Suuberg
Commissioner

⁴ During the course of the litigation of Walsh I, the HCC and the Applicant agreed that the Applicant would have to file the NOI with the HCC even if the Applicant prevailed on the Coastal Dune delineation issue.

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