

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

November 29, 2007

In the Matter of Michael Jeanson &
Jeanson Homes, Inc.

OADR Docket No. WET-2007-005
DEP File No. 85-971
Acton, MA

ORDER TO SHOW CAUSE

On November 16, 2007, the Office of Appeals and Dispute Resolution (“OADR”) of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) received this appeal of John Appelmans (“the petitioner”).¹ In this appeal, the petitioner has appealed the October 16, 2007 decision of the Department’s Central Regional Office issuing a

¹ OADR is separate and independent of MassDEP’s program offices, Regional Offices, and Office of General Counsel (“OGC”). OADR is staffed by a Case Administrator, an Administrator of Alternative Dispute Resolution (“ADR”), and Presiding Officers. A Chief Presiding Officer, who reports to MassDEP’s Commissioner, supervises Presiding Officers and other OADR staff.

Presiding Officers in OADR are experienced attorneys at MassDEP appointed by MassDEP’s Commissioner to serve as neutral hearing officers, and are responsible for facilitating settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. See 310 CMR 1.01(1)(a); 310 CMR 1.01(1)(b); 310 CMR 1.01(5)(a)15. Under 310 CMR 1.03(7), Ex Parte communications between OADR’s Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited and all MassDEP staff involved in the appeals process are informed of these requirements. Additionally, Recommended Final Decisions of Presiding Officers in appeals are subject to review by MassDEP’s Commissioner pursuant to 310 CMR 1.01(14). Under the regulation, the Commissioner may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision. All Final Decisions are subject to judicial review pursuant to G.L. c. 30A, § 14. These provisions ensure that the appeal process at MassDEP will be fair and will result in unbiased decision-making.

Superseding Order of Conditions to Michael Jeanson and Jeanson Homes, Inc. (“the applicants”).

On November 26, 2007, I issued a Scheduling Order to secure the just and speedy determination of this appeal in accordance with the requirements of 310 CMR 1.01 and 310 CMR 10.05(7)(j) (effective October 31, 2007). The Scheduling Order informed the parties to this appeal of the dates of the Pre-Screening Conference, and Hearing. See ¶¶ 3 and 10 of Scheduling Order.² The Scheduling Order informed the parties that the issuance of the Scheduling Order did not necessarily mean that the petitioner had filed this appeal in accordance with the requirements of 310 CMR 1.01 and 310 CMR 10.05(7)(j). See ¶ 1 of Scheduling Order.

The provisions of 310 CMR 10.05(7)(j)(2)a, effective October 31, 2007, and the prior version of the regulation established a deadline of ten business days to appeal a Superseding Order of Conditions.³ Here, the Department’s Central Regional Office issued the Superseding Order of Conditions on Tuesday, October 16, 2007. The ten business days following the issuance of the Superseding Order of Conditions were as follows:

- (1) Wednesday, October 17, 2007;
- (2) Thursday, October 18, 2007;
- (3) Friday, October 19, 2007;
- (4) Monday, October 22, 2007;
- (5) Tuesday, October 23, 2007;

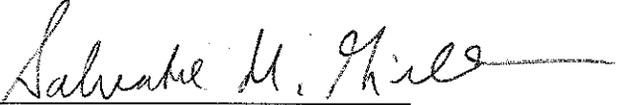
² The Pre-Screening Conference is scheduled for 2:00 p.m., Tuesday, December 11, 2007, in the Department’s Central Regional Office, and the Hearing is scheduled for 10:00 a.m., Tuesday, March 11, 2008, in the Department’s Central Regional Office. See ¶¶ 3 and 10 of Scheduling Order.

³ The current regulation states that the Appeal Notice must be filed “no later than ten business days after the issuance of the Reviewable Decision.” 310 CMR 10.05(7)(j)(2)a, effective October 31, 2007. The prior version of the regulation required “[t]he request for a hearing . . . be sent to the Department by certified mail or hand delivered within ten days after the date of issuance of the Superseding Order . . .” 310 CMR 10.05(7)(j), effective prior to October 31, 2007. The regulations defined “ten days” as ten business days. 310 CMR 10.05(1).

- (6) Wednesday, October 24, 2007;
- (7) Thursday, October 25, 2007;
- (8) Friday, October 26, 2007;
- (9) Monday, October 29, 2007; and
- (10) Tuesday, October 30, 2007.

In sum, it appears that the petitioner had until Tuesday, October 30, 2007 to appeal the Superseding Order of Conditions. The petitioner, however, appealed on November 16, 2007. Accordingly, I am inclined to issue a Recommended Final Decision recommending that the Department's Commissioner dismiss this appeal as untimely. The parties are directed to file memoranda with OADR by Thursday, December 6, 2007, setting forth their respective positions on this issue. Specifically, the parties are directed to address the following question: Whether this appeal should be dismissed as being untimely?

Date: 11/29/07


Salvatore M. Giorlandino
Acting Chief Presiding Officer

SERVICE LIST

Applicants: Michael Jeanson &
Jeanson Homes, Inc.
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Acton, MA 01720;

Petitioner: John Appelmans
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Acton, MA 01742;

The Local Conservation Commission: Acton Conservation Commission
472 Main St
Acton, MA 01720;

The Department: Philip Nadeau, Section Chief
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