COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

In the Matter of:

Maria Kitras, Trustee,
Gorda Realty Trust

Docket No. 2001-114
File No. SE27-237
Aquinnah

RECOMMENDED FINAL DECISION

James J. Decoulos, P. E., for the applicant, Maria Kitras, Trustee, Gorda Realty Trust.

Richard J. Gallogly, Esq. (Rackemann, Sawyer & Brewster), Boston, for the petitioners, Jack and JoAnn Fruchtman.

Rebecca Cutting, Esq., Boston, for the Department of Environmental Protection.

Francis X. Nee, Administrative Magistrate

After a hearing, I determine that applicant accurately delineated the wetlands on the project site. Additionally, I make two determinations about applicant's replication plan. First, it provides a replacement area greater than the surface area of the wetland that will be lost and thus complies with 310 CMR 10.55(4)(b)1. Second, it complies with all other requirements of 310 CMR 10.55(4)b)2-7. Based on these determinations, I make the superseding order of conditions final.

BACKGROUND AND PROCEDURAL HISTORY

On March 15, 2000, the applicant, Maria Kitras, Trustee, Gorda Realty Trust, filed a notice of intent with the Aquinnah Conservation Commission pursuant to both G. L. c. 131, § 40, the Wetlands Protection Act and the

Aquinnah Wetlands Bylaw seeking approval to build a house, install a septic system, dig a well and build a driveway. Two days later, the town clerk sent the applicant a letter stating that because of a moratorium on permitting imposed by the Martha's Vineyard Commission, a statutorily-created regional planning agency, the Aquinnah Conservation Commission could not act on the notice of intent. This raised two questions under the Wetlands Protection Regulations. First, did the Department of Environmental Protection have authority to address applicant's subsequent request for a superseding order of conditions? Second, does applicant have approval for its project under the local wetlands bylaw? I decided these questions in the affirmative before this matter went to hearing.

On May 30, 2000, applicant sought a superseding order of conditions from the DEP regional office pursuant to the Wetlands Protection Regulations. Applicant based her request on a provision that allows applicants to pursue a superseding order when--as happened here--a conservation commission fails to hold a public hearing within 21 days of receipt of a notice of intent. DEP's regional office accepted the request but did not act on it immediately because the proposed project was being reviewed by the Executive Office of Environmental Affairs under G. L. c. 30 §§ 60-62N, the Massachusetts Environmental Policy Act.

On July 24, 2000, the EOEA Secretary determined that applicant had to file an environmental impact report for her project because it would alter more than 5,000 square feet of bordering vegetated wetland. On March 26, 2001, after a second notice of project change, the Secretary determined that the

project no longer needed an environmental impact report because in its latest iteration, it would not alter more than 5,000 square feet of bordering vegetated wetland.

On July 12, 2001, the DEP regional office issued a superseding order of conditions approving the revised project pursuant to the Wetlands Protection Regulations. The Conservation Commission and petitioners, Jack and JoAnn Fruchtman, abutters, who were not involved in the proceedings before the superseding order was issued, each requested an adjudicatory hearing.

On April 5, 2002, in a ruling denying summary decision to the Fruchtmans and the Conservation Commission, I determined that the DEP regional office had jurisdiction to review applicant's notice of intent and to issue a superseding order of conditions because the Conservation Commission had neither held a public hearing nor issued an order within the required time. See 310 CMR 10.05(7)(b)(4).

Meanwhile, on July 25, 2000, after the Martha's Vineyard Commission lifted its moratorium, the Aquinnah Conservation Commission voted to deny applicant's request for a permit pursuant to the local wetlands bylaw. After a prehearing conference on January 9, 2002, the parties raised the local bylaw issue with me and I stayed this administrative appeal until the question was resolved.

On March 21, 2003, applicant filed a copy of an Agreement for Judgment that it and the Aquinnah Conservation Commission entered in superior court. In it, the Commission agreed to grant applicant's request for an order of conditions

pursuant to the local bylaw retroactive to July 12, 2001 (the date of the superseding order of conditions) because the Commission had failed to adhere to the procedural requirements of the local wetlands bylaw. I concluded that this left applicant with a valid permit pursuant to the local bylaw. Accordingly, I lifted the stay, and conducted a second prehearing conference.

Three parties participated in the conference: applicant, DEP and the Fruchtmans. The Conservation Commission withdrew its claim for an adjudicatory hearing in March 2003 and I dismissed its appeal. See Matter of Kitra, Docket No. 2001-115, Final Decision Order of Dismissal (March 20, 2003). The remaining parties agreed on witnesses, issues and a schedule that included the filing of written direct testimony before the hearing.

All of the witnesses filed written testimony and appeared at the hearing, which began, as scheduled, on February 10, 2004. Petitioners presented testimony from two witnesses, who work for the Daylor Consulting Group: W. Sterling Wall, a geologist and Kurt N. Olson, who holds a Ph.D. in forestry. Applicant presented testimony from Mario J. DiGregorio and DEP presented testimony from Daniel J. Gilmore, who holds a bachelor's degree in biology and was the DEP employee responsible for issuing the superseding order of conditions. Because all of these witnesses are familiar with the site and have extensive wetlands experience, I determined that they are experts competent to provide the opinions that they offered.

After the close of the hearing, on February 11, 2004, DEP unsuccessfully attempted to introduce evidence as an attachment to its closing brief[1]. Additionally, applicant unsuccessfully moved to reopen the hearing to present new evidence[2]. These events, however, contributed little to the length of time between the hearing and this recommended decision[3].

DISCUSSION

While the superseding order of conditions allows the applicant to build a house, install a septic system and dig a well in the buffer zones of several resource areas, the focus of this proceeding is the portion of the superseding order that allows applicant to build a driveway that will permanently alter bordering vegetated wetland. This includes both filling to accommodate the driveway surface and filling for footings for a bridge to carry a segment of the driveway over a portion of bordering vegetated wetland.

Although the Wetlands Protection Regulations generally prohibit destruction of bordering vegetated wetland, they contain both a general exception and a "limited project" exception, either of which could apply to applicant's project.

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[1] Petitioner's March 16, 2004, Motion to Strike is granted.
[2] Petitioner's August 16, 2004 Motion to Reopen the Hearing is denied.
[3] My personal situation caused the delay. In March 2004, after suffering further deterioration of my vision, I began a medical leave that extended through mid August. When I returned, I began working with the Massachusetts Commission for the Blind to identify approaches and equipment to allow me to adapt to my new situation and continue to work. Since returning, I have focused on writing recommended decisions in cases, such as this, where I had held a hearing before taking medical leave. I have also moved new cases through the adjudicatory system. Additionally, I have spent a substantial amount of time developing a workable system for handling filings. I have also received extensive training in the use of adaptive equipment and software, as well as a newly acquired guide dog.

In this proceeding, I applied the general exception to the prohibition on destruction bordering vegetated wetland. It allows destruction or impairment of as much as 5,000 square feet of bordering vegetated wetland, if applicant replicates all of the lost wetland in accordance with certain construction requirements. See 310 CMR 10.55(4)b. DEP relied on this exception when it issued the superseding order of conditions that is the subject of this appeal.

The "limited project" exceptions apply to specific projects, including driveways that are the only reasonably available means of access to otherwise buildable upland lots. This more liberal exception neither limits the area of bordering vegetated wetland that a project may destroy, nor requires applicants to replicate all bordering vegetated wetland that will be lost. Additionally, it relaxes the requirements for construction of replication areas. See 310 CMR 10.53(3)e.

During the hearing, applicant asked me to consider the project pursuant to the "limited project" exception. Applicant noted that although it had requested "limited project" status in its notice of intent, the regional office had approved its project only under the more restrictive general exception. Although applicant's request had support in the record, I rejected it on procedural grounds.

The record indicates that the only access to the proposed house from a public way is across land owned by a neighbor. Applicant proposes to place the driveway within an existing easement that contains bordering vegetated wetland on the neighbor's lot. Applicant sought permission to build the driveway in upland on neighbor's property outside the easement. Applicant

asserts that because the neighbor opposes the project, he rebuffed the request. According to Daniel Gilmore, who is DEP's witness and the person responsible for reviewing applicant's proposal, the project meets "the requirements of a limited project pursuant to 310 CMR 10.53(3)e and could be approved as such if it... [does not] meet the bordering vegetated wetland performance standards."

Despite the proposal's apparent eligibility for "limited project" status, I rejected applicant's request that I review it as a limited project. I did so because the request came too late. Although applicant requested "limited project" status, the superseding order of conditions approved the project only under the more general exception. The time for applicant to challenge the regional office's failure to grant a "limited project" exception was immediately after it issued the superseding order. Applicant, however, did not appeal the superseding order of conditions. At the adjudicatory hearing stage, it is too late for applicant to challenge the superseding order.

In this case, the "limited project" exception would provide little of practical value because applicant cannot fill more than 5,000 square feet of bordering vegetated wetland without filing an environmental impact report, undergoing further review and obtaining approval pursuant to the Massachusetts Environmental Policy Act. As discussed above in "Background and Procedural History," applicant filed two notices of project change before persuading the Secretary of Environmental Affairs that the project could go forward without an environmental impact report because it would alter less than 5,000 square feet of bordering vegetated wetland. The limited project exception contained in DEP's

Wetland Protection Regulations cannot exempt applicant from the requirements of the Massachusetts Environmental Policy Act.

This decision addresses the Fruchtmans' appeal of the superseding order that approved applicant's project. It focuses on the driveway. It addresses whether the project is eligible for the exception that allows destruction of as much as 5,000 square feet of bordering vegetated wetland if applicant complies with specific replication requirements. See 310 CMR 10.55(4)b. The most significant requirement is that an applicant must provide a replacement area equal to the area of bordering vegetated wetland that will be lost. See 310 CMR 10.55(4)(b)1. The remaining requirements are generally less precise and concern the location and construction of the replacement area. See 310 CMR 10.55(4)(b)2-7.

To prevail, applicant must show by a preponderance of the evidence that its project (1) will destroy no more than 5,000 square feet of bordering vegetated wetland and (2) its replication plan meets the regulatory standards.

Applicant's witness, Mario DeGregorio, and DEP's witness, Daniel Gilmore, testified that the project would permanently alter only 2,362 square feet of bordering vegetated wetland. If I accept their figure, the project can go forward because the superseding order requires construction of a replication area of 2,540 square feet.

Petitioners, whose direct case met their burden of going forward, argue that the project is not eligible for the exception because construction of the

driveway will permanently alter more than 5,000 square feet of bordering vegetated wetland. Additionally, petitioners contend that the replication plan is deficient for two reasons. First, the replication area is smaller than the area that the project will alter and, thus, it does not comply with the requirement that the surface of the replacement area be equal to the surface of the lost area. Second, it fails to meet other requirements for construction of replication areas. Petitioners' witnesses, W. Sterling Wall and Kurt N. Olson, testified that driveway construction would permanently alter 5,225 square feet of bordering vegetated wetland within the easement on the neighbor's property and an additional 442 square feet of bordering vegetated wetland on the applicant's land for a total alteration of 5,667 square feet. If I accept their estimate, I must vacate the superseding order because the project will destroy more than 5,000 square feet of bordering vegetated wetland.

Applicant and petitioners present evidence on (1) whether the proposed driveway location is upland or bordering vegetated wetland and (2) the amount of bordering vegetated wetland that the project will destroy. Their witnesses agreed that the driveway is proposed in a transitional zone that is either flat or rises at a slight grade from wetland on the east to upland on the west, and that this is a particularly difficult environment in which to distinguish wetland from upland. They also agree that groundwater levels in this area fluctuate substantially during the year. They based their different opinions on the presence or absence of wetland indicator plants and hydric soils, as well as the local hydrology. Additionally, they all found support for their positions in the DEP

publication, "Delineating Bordering Vegetated Wetlands under the Massachusetts Wetlands Protection Act," (1995). Neither petitioners nor applicant however produced a preponderance of evidence to support their position.

With the petitioners' and applicant's testimony equally balanced, the testimony of Daniel Gilmore, DEP's witness, is decisive. He testified that prior to issuing the superseding order of conditions, he reviewed applicant's wetlands line in the field. He examined vegetation and dug soil test pits. He concluded that applicant's wetland line accurately demarcated the wetlands on the site in accordance with the Wetlands Protection Regulations and the Wetlands Handbook. He testified that his review convinced him that applicant correctly determined that the project would destroy no more than 2,362 square feet of bordering vegetated wetland. He was so sure of this that he decided that he did not need to review the project pursuant to the 'limited project" exception, even though applicant had requested that the project be so reviewed.

On the final issue, whether the proposed replication plan meets the requirements of 310 CMR 10.55(b) 2-7, Gilmore testified that on February 15, 2001, as part of a Notice of Project Change applicant provided a wetlands replication construction sequence and timetable that complies with the requirements for construction of replication areas. In contrast, petitioners' make no specific references to the replication plan and make only unsupported assertions that applicant will not replicate the lost bordering vegetated wetland in accordance with the regulatory standard.

Based on Gilmore's testimony, I find that the project will alter 2,362 square feet of bordering vegetated wetland. Based on this finding, I conclude that applicant's proposal provides a replacement area greater than the surface area of the wetland that will be lost and, thus, complies with 310 CMR 10.55(4)(b)1.

Additionally, based on Gilmore's testimony, I find that applicant's replication plan meets the requirements for construction of areas intended to replicate lost bordering vegetated wetland. Based on this finding, I conclude that applicant's replication plan complies with the requirements of 310 CMR 10.55(b) 2-7.

HOLDING AND DISPOSITION

Applicant accurately delineated the wetlands on the project site.

Applicant's replication plan provides a replacement area greater than the surface area of the wetland that will be lost and, thus, complies with 310 CMR10.55(4)(b)1.

Applicant's replication plan complies with the requirements of 310 CMR 10.55(4)b)2-7.

Accordingly, the superseding order of conditions issued to applicant on July 21, 2001, is now final.

NOTICE

This is a recommended final decision. It has been transmitted to the Commissioner of the Department of Environmental Protection for his final

decision. It is not subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to the Superior Court pursuant to G.L. c. 30A. The Commissioner's final decision is subject to these rights 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 portion of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Francis X. Nee
Administrative Magistrate

SERVICE LIST

In Re: Maria Kitras, Trustee, Gorda Realty Trust
Docket Nos. 2001-114 & 2001-115 File No. SE 27-237

Representative	Party
James J. Decoulos Decoulos & Company 185 Alewife Brook Parkway Cambridge, MA 02138	APPLICANT Maria Kitras, Trustee Gorda Realty Trust
Richard J. Gallogly, Esq. Rackemann Sawyer & Brewster One Financial Center - 29th Floor Boston, MA 02111-2659	PETITIONER (2001-114) Jack/JoAnn Fruchtman
H. Rebecca Cutting, Esq. DEP - Office of General Counsel One Winter Street Boston, MA 02108	DEPARTMENT Dept. of Environmental Protection
cc: Daniel Gilmore DEP - Southeast Regional Office 20 Riverside Drive Lakeville, MA 02347	DEPARTMENT Dept. of Environmental Protection

Date: August 23, 2005

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

November 10, 2005

In the Matter of

Maria Kitras, Trustee
Gorda Realty Trust

Docket No. 2001-114
File No. SE27-237

Aquinnah

Final Decision

I adopt the recommended final decision of the Administrative Magistrate.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. Any party may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

Robert W. Golledge, Jr.
Commissioner

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Date: November 14, 2005