

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**May 22, 2024**

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In the Matter of  
City of Lowell

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OADR Docket Number: WET-2021-036  
DEP File No. 206-0797  
Lowell, Massachusetts

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Petitioner, Steven O’Neil, (the “Petitioner”) filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”)<sup>1</sup> of the Massachusetts Department of Environmental Protection (“MassDEP”) to challenge the Superseding Order of Conditions (“SOC”) issued by MassDEP’s Northeast Regional Office to the City of Lowell (“City” or “Applicant”), pursuant to the Massachusetts Wetlands Protection Act (“MWPA”), G.L c. 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. The SOC approved the City’s proposed Project (the “proposed Project”) which includes the redevelopment of the existing T-intersection at Varnum Avenue and Old Ferry Road by reconfiguring it into a roundabout with associated drainage, sidewalk, and landscaping. The proposed Project is located partially within a regulated wetlands resource area, specifically, Bordering Land Subject to Flooding (“BLSF”).

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<sup>1</sup> OADR is an independent quasi-judicial office in MassDEP which is responsible for advising its Commissioner in resolving all administrative appeals of MassDEP Permit Decisions, Environmental Jurisdiction Determinations, and Enforcement Orders.

This appeal has a long history of delays to which every party to this appeal has contributed. The former Presiding Officer in this appeal conducted a Pre-Hearing Conference (“PHC”) on October 14, 2021, and issued a PHC Report and Order thereafter setting the evidentiary adjudicatory hearing (“Hearing”) date to adjudicate the appeal for February 10, 2022. All Parties then submitted the sworn Pre-filed Testimony (“PFT”) of their respective witnesses for the Hearing, per the schedule established in the PHC Report and Order.<sup>2</sup> Over the following year the Hearing was rescheduled two (2) times by the former Presiding Officer and postponed at the Parties’ request four (4) times, with the last postponement occurring on December 14, 2022 due to the death of one the Petitioner’s witness, Steven Eriksen, the principal of Norse Environmental Services, Inc. In postponing the December 14, 2022 Hearing, I directed the Parties to provide proposed new dates for the Hearing to be conducted in February or March 2023. The Parties failed to propose any new dates for rescheduling the Hearing. No filings were made by any Party until the Department submitted a Notice of Substitute Counsel on March 16, 2023. The next filing after that was the Department and City of Lowell’s Motion to Dismiss the Petitioner’s appeal for Failure to Prosecute on June 7, 2023. Only then did the Petitioner file a Motion to Substitute Witness (as a result of Mr. Erksen’s death) and an Opposition to the Motion to Dismiss.

I denied the Motion to Dismiss given the shared responsibility for the preceding delays.<sup>3</sup> In the same Ruling and Order I granted the Petitioner’s substitution of Maureen Herald as a witness, adopting Mr. Eriksen’s Pre-filed Testimony, except for personal statements in which she

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<sup>2</sup> Pursuant to the PHC Report and Order schedule, the Department and the City also submitted a Motion to Dismiss on standing that the former Presiding Officer denied. See Ruling and Order Denying MassDEP’ and City’s Motion to Dismiss, November 16, 2021.

<sup>3</sup> Ruling and Order on (1) MassDEP’ and City of Lowell’s Motion to Dismiss for Failure to Prosecute; and (2) Petitioner’s Motion for Substitute Witness, November 22, 2023. In the ruling I indicated that Department and the City of Lowell could renew their Motion at any time should the proceedings fail to move forward as a result of delay caused by the Petitioner and such refiled motion addresses any prejudice or harm they have or would suffer from such delay

did not participate, and denied the Department's request to file sworn rebuttal Pre-filed testimony ("Rebuttal PFT") because her Pre-filed Testimony is identical to Mr. Eriksen's, with the exception noted above and MassDEP would have the opportunity to cross-exam Ms. Herald.

On December 13, 2023, the Parties filed a Joint Motion to Submit the Matter for adjudication on the Record, waiving their right to an adjudicatory hearing pursuant to 310 CMR 1.01(13)(g).<sup>4</sup> I granted that Motion and consequently no Hearing took place as requested by the Parties.

As discussed in detail below, based on a preponderance of the evidence submitted by the Parties and the governing wetlands statutory and regulatory requirements, I find that the Department properly issued the SOC approving the proposed Project and accordingly I recommend that the Department's Commissioner issue a Final Decision in the appeal affirming the SOC.

### **ISSUES FOR ADJUDICATION**

The issues for adjudication in this appeal as reported in the PHC Report and Order issued by the prior Presiding Officer are as follows:

1. Whether the Proposed Project constitutes Redevelopment pursuant to 310 CMR 10.04 and 310 CMR 10.05(6)(k)-(q)?
2. Whether the Proposed Project complies with the BLSF performance standard at 310 CMR 10.57(4)(a)2?

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<sup>4</sup> "Parties may elect to waive participation in a hearing and to submit their case upon the record. Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses."

## **WITNESSES**<sup>5</sup>

The evidence in the administrative record includes the Department's basic records and the pre-filed, sworn written testimony and exhibits submitted by witnesses on behalf of the Parties.

### **For the Petitioner:**

Steven Eriksen. As noted above, Mr. Eriksen is deceased. At the time of his pre-filed testimony, Mr. Eriksen was the principal of Norse Environmental Services, Inc., and had been for approximately 35 years. He was a Certified Soil Scientist, Licensed Soil Evaluator, Registered Sanitarian, and Licensed Construction Supervisor. During his career, he evaluated soils and plants, delineated wetlands areas, analyzed soils, designed subsurface septic systems, and prepared filings for permitting under G.L. c. 91 and federal and local laws. Mr. Eriksen was qualified as an expert.

Maureen Herald: As noted above, Ms. Herald is the Petitioner's substitute witness for Mr. Eriksen. Ms. Herald is the current President of Norse Environmental Services, Inc. She is a Certified Soil Scientist, Soil Evaluator, and Professional Wetlands Scientist. She has worked at Norse Environmental since 2001. On behalf of her clients, Ms. Herald has submitted land use related permit applications with federal, state, and local government entities, including to the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and MassDEP. Ms. Herald attested that she is personally familiar with this matter and with Mr. Eriksen's testimony. She adopted the substance of Mr. Eriksen's testimony, except for matters to which she lacks personal knowledge. Ms. Herald is qualified as an expert.

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<sup>5</sup> Throughout this Recommended Final Decision, the witnesses' Pre-Filed Direct Testimony is referred to as "[Witness] PFT, ¶ X" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] PFR, ¶ X." Exhibits to testimony are referred to as "[Witness] Ex. X."

Nicolas M. Reitzel III, P.E.: Mr. Reitzel is currently employed as a FEMA PA Specialist at Dewberry, Inc. to support public assistance services for the Puerto Rico disaster recovery efforts. He was previously a City Engineer in Greenfield, Massachusetts responsible for the design, review and management of City capital improvement projects including technical consulting for the City Conservation Commission. He is a registered Professional Civil Engineer in Massachusetts. He is qualified as an engineering expert.

**For the City:**

Eric K. Gerade, P.E., LEED AP: Mr. Gerade has been a Professional Engineer since 2002 and is registered as a Professional Civil Engineer in the Commonwealth of Massachusetts. Mr. Gerade is currently employed as a Project Manager in the Land Development group at Vanasse Hangen Brustlin, Inc., where he has worked since March 2017. His responsibilities include managing land development civil engineering design and permitting, including site plans, hydrology studies and stormwater management plans. Mr. Gerade is qualified as an engineering expert.

Robert Nagi, P.E.: Mr. Nagi is a principal and Senior Project Manager at Vanasse Hangen Brustlin, Inc., where he has worked for 32 years. He is a Registered Professional Civil Engineer in the Commonwealth of Massachusetts. Mr. Nagi's responsibilities include traffic engineering and permitting, including state and local permitting and planning. Mr. Nagi is qualified as an engineering expert.

**For MassDEP:**

Gary Bogue: Mr. Bogue has worked with MassDEP since 1985 in several different programs and has been a Wetlands Analyst with MassDEP's Wetlands Program since 2006. Mr. Bogue is

responsible for drafting Superseding Orders of Conditions, conducting wetlands site visits, reviewing delineations and soil data, reviewing hydrologic calculations and construction plans and applying the MWPA, Wetlands Regulations and MassDEP’s Stormwater Policy. In addition to multiple wetlands specific trainings, he has a Bachelors and a Masters in biology. He is qualified as an expert witness.

## **BACKGROUND**

### **The Property**

The proposed Project site is a 1.1-acre portion of a City-owned right-of-way and private property consisting of a three-way intersection with areas of grass to the southeast and undeveloped woodlands to the southwest with generally flat topography within the right-of-way and steeper slopes outside of the right-of-way. Bogue PFT, ¶ 12; SOC cover letter, pages 1-2.

Part of the Property is within the 100-year flood plain, which is categorized as Bordering Land Subject to Flooding (“BLSF”) associated with the Merrimac River. Bogue PFT, ¶ 5; SOC cover letter, page 2. The Property is located within a Zone AE with a base flood elevation of 155.5 feet (adjusted local datum), as determined by Federal Emergency Management Agency (“FEMA”). Bogue PFT, ¶ 13; SOC cover letter, page 2.<sup>6</sup> The Petitioner’s property is also within BLSF, but no work is proposed to occur on the Petitioner’s property. SOC cover letter, page 2.

### **The Proposed Project**

The City proposed the proposed Project to improve a T-intersection at Varnum Avenue and Old Ferry Road. SOC cover letter, page 1. The proposed Project will also add associated

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<sup>6</sup> National Flood Insurance Program Rate Map, Map Number 25017CO138E, Parcel 138 effective date June 4, 2010.

drainage, sidewalk, and landscaping improvements along Pawtucket Avenue and at the Pawtucket Avenue and Old Ferry Road intersection. Id.

Mr. Nagi testified on behalf of the City that based upon the traffic study completed, the proposed Project intersection is sub-standard from a traffic operational perspective.<sup>7</sup> Nagi PFT, ¶¶ 10, 12; Nagi, Ex. B. He also testified that the current intersection of Varnum Avenue and Old Ferry Road provides single approach and departure lanes on all three of the legs of the unsignalized intersection with bicycle accommodations provided in each of the shoulders approaching the intersection along Varnum Avenue. Nagi PFT, ¶ 13. The proposed roundabout would also provide single approach lanes to the intersection on all three approaches along with bicycle accommodations and, therefore would not widen the intersection by more than a single lane. Nagi PFT, ¶ 13. The proposed Project would increase impervious surfaces by approximately 0.145 acres (6,316 square feet). Eriksen PFT, ¶ 10, as adopted by Herald Aff.; Bogue PFT, ¶ 14; SOC cover letter, page 2.

Because the proposed Project is located within BLSF and will result in filling of that protected wetlands resource area, Compensatory Storage to accommodate flood waters is required. Bogue PFT, ¶ 24; SOC cover letter, page 1. The purpose of the Compensatory Storage standards at 310 CMR 10.57(4)(a) is to ensure that the functions of the BLSF are preserved. Bogue PFT, ¶ 7. On the west side of Old Ferry Road, approximately 4,294 cubic feet of BLSF is proposed to be filled and 6,417 cubic feet of Compensatory Storage is proposed. Bogue PFT, ¶ 17; SOC cover letter, page 3. On the east side of Old Ferry Road BLSF impacts are 187.4 cubic feet and Compensatory Storage of 337.6 feet is proposed. Bogue PFT, ¶ 17; SOC cover letter, page 3. The proposed Project is shown on the revised plan dated on June 30, 2021, titled “Varnum Avenue

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<sup>7</sup> Mr. Nagi testified that this is the case with or without consideration of the Market Basket development. Nagi PFT, ¶ 12.

Floodplain Mitigation, Proposed Market Basket, Pawtucket Boulevard, Lowell Massachusetts.” (“Revised Plan”).<sup>8</sup> Bogue PFT, ¶ 17; Bogue Ex. 2. See also SOC Special Condition #20.

The proposed Project separately addresses stormwater and includes the installation of a catch basin that will discharge to a stormwater detention basin on the west side of Old Ferry Road. Bogue PFT, ¶ 14. The stormwater management system is not used to meet Compensatory Storage. Bogue PFT, ¶ 15; Bogue PFR, ¶ 26; Gerade PFT, ¶ 15. The stormwater catch basin is not included in the Compensatory Storage calculation. Gerade PFT, ¶ 16. The outlet from the basin is on the west side of Old Ferry Road, at a higher elevation than the 100-year flood plain opposite 10 Old Ferry Road on the east side of Old Ferry Road; therefore, Old Ferry Road is a barrier during a 100-year flood. Bogue PFR, ¶ 27. The Department determined that the proposed Project is subject to Stormwater Standard 7 as a redevelopment project. SOC cover letter, page 2.

### **PETITIONER’S BURDEN OF PROOF IN THE APPEAL**

Under the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), the Petitioner, as the Party challenging the SOC, has the burden of proof on all Issues for Adjudication in the Appeal. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iii; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b.

To prove his contention that the Department erred in issuing the SOC, the Petitioner was required to “produce at least some credible evidence from a competent source in support of [his] position [in the appeal].” See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b. The Petitioner had to present “credible evidence from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR

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<sup>8</sup> The plan was revised in response to MassDEP’s comments and included design modifications and revised Compensatory Storage calculations to correct for errors in the amount of impact to BLSF. SOC cover letter, page 2.

10.05(7)(j)3.c. “A ‘competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003).

### **STANDARD OF REVIEW**

My review of the evidence presented by the Parties is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SOC. See In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 MA ENV LEXIS 67, at 29, adopted by Final Decision (September 18, 2019), 2019 MA ENV LEXIS 93. “Hence, if during the pendency of an administrative appeal, ‘[the Department] becomes convinced’ based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, ‘that the interests of

[MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],’ the Department is authorized to, and should change its position.” In the Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 MA ENV LEXIS 106, at 15, adopted by Final Decision, (October 24, 2019), 2019 MA ENV LEXIS 104. Additionally, as the Presiding Officer responsible for adjudicating this appeal “[I am] not bound by MassDEP’s prior orders or statements [in the case], and instead [I am] responsible . . . for independently adjudicating [the] appeal[I] and [issuing a Recommended Final Decision] to MassDEP’s Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP’s policies and practices.” In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, at 16, adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6.

The relevancy, admissibility, and weight of the evidence presented by the Parties are governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies 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. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record . . . rests within the sound discretion of the Presiding Officer. . . .” See In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84 (petitioners’ expert testimony “that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed [privately owned wastewater treatment facility] . . . was speculative in nature and not reliable”), adopted by Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62.

## **STATUTORY AND REGULATORY FRAMEWORK**

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests: protection of public and private water supply; protection of ground water supply; flood control; storm damage prevention; prevention of pollution; protection of land containing shellfish; protection of fisheries; and protection of wildlife habitat. MWPA; 301 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2013 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017), 2017 MA ENV LEXIS 33.

Redevelopment is defined in the Wetlands Regulations, in relevant part, as follows:

For purpose of the Stormwater Management Standards as provided in 310 CMR 10.05(6)(k) through (q), redevelopment is defined to include the following projects:

- (a) maintenance and improvement of existing roadways including widening less than a single lane, adding shoulders, correcting substandard intersections, improving existing drainage systems and repaving;
- (b) development, rehabilitation, expansion and phased projects on previously developed sites provided the redevelopment results in no net increase in impervious area; and
- (c) remedial projects specifically designed to provide improved stormwater management such as projects to separate storm drains and sanitary sewers

and stormwater retrofit projects. (Emphasis supplied.) 310 CMR 10.04: Redevelopment.

The Wetlands Regulations define “BLSF” as “an area which floods from a rise in a bordering waterway or water body. Such areas are likely to be significant to flood control and storm damage protection.” 310 CMR 10.57(1)(a)1. BLSF provides a “temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basin of a pond or lake. During periods of peak run-off, flood waters are both retained (i.e., slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by [BLSF].” 310 CMR 10.57(1)(a)2. Building in BLSF areas leads to “incremental filling [which] causes increases in the extent and level of flooding by eliminating flood storage volume or by restricting flows, thereby causing increases in damage to public and private properties.” 310 CMR 10.57(1)(a)2.

The Wetlands Regulations require Compensatory Storage for projects proposed within BLSF provide as follows:

310 CMR 10.57(4)(a): Bordering Land Subject to Flooding

1. Compensatory Storage shall be provided for all flood storage volume that will be lost as the result of a proposed project within Bordering Land Subject to Flooding, when in the judgement of the issuing authority said loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows.

Compensatory storage shall mean a volume not previously used for flood storage and shall be incrementally equal to the theoretical volume of flood water at each elevation, up to and including the 100-year flood elevation, which would be displayed by the proposed project. Such compensatory volume shall have an unrestricted hydraulic connection to the same waterway or water body. Further, with respect to waterways, such compensatory volume shall be provided within the same reach of the river, stream or creek.

## **DISCUSSION**

**A. The proposed Project Constitutes Redevelopment Pursuant to 310 CMR 10.04 and 310 CMR 10.05(6)(k)-(q).**

The Petitioner contends the proposed Project does not constitute “Redevelopment” as defined by the Wetlands Regulations at 310 CMR 10.04 for the purpose of the Stormwater Management Standards, and that therefore the proposed Project must fully meet all nine stormwater management standards.<sup>9</sup> To reach this conclusion, the Petitioner contends that the proposed Project must meet all of the regulatory categories in the definition of Redevelopment at 310 CMR 10.04<sup>10</sup> or that the proposed Project does not meet any of the regulatory categories in the definition of Redevelopment.<sup>11</sup> In support of his position that the proposed Project is not Redevelopment, the Petitioner argues that the proposed Project has a new footprint, adds new land area and additional impervious surface and as such is a combination of new development and Redevelopment.<sup>12</sup>

The Department and the City contend that the proposed Project is a Redevelopment project. Nagi PFT, ¶¶ 10-13; Gerade PFT, ¶¶ 9-11; Bogue PFT, ¶¶ 19-22. The proposed Project improves a substandard intersection and does not widen the road more than a single lane. Nagi PFT, ¶ 10; Gerade PFT, ¶ 11; Bogue PFT, ¶ 21. The Department contends that the wetlands

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<sup>9</sup> Mr. Reitzel testified on behalf of the Petitioner that he agrees that the proposed Project “meets generally the standards of improvement of a roadway on its face.” Reitzel Supp. PFT, ¶ 4. He goes on, however, to testify that it “runs afoul of the remainder of this provision as to the widening of less than a single lane.” Reitzel Supp. PFT, ¶ 4.

<sup>10</sup> Pet. MOL at 7.

<sup>11</sup> Pet. Rebuttal MOL at 1.

<sup>12</sup> In support of its position the Petitioner cites In the Matter of Demoulas Super Markets, Inc., Docket No. 2003-051, Recommended Final Decision (April 28, 2004) (“Demoulas”) (Entire “combination” project cannot be classified under stormwater management standard 7 policy as a “Redevelopment project” subject to the standard’s requirement that there be no net increase in impervious area. Standard 7 applies only to work in the now-impervious “redevelopment” area.). First, Demoulas was decided based on the stormwater policy that preceded the stormwater regulations in 2007. Second, Demoulas should not be relied upon because Stormwater Standard 7 has been revised substantially since Demoulas was decided.

regulatory definition of Redevelopment is disjunctive both between the subparagraphs and within the subparagraphs. The Department and the City contend that subparagraph (a), applies to Redevelopment projects that are “maintenance and improvement of existing roadways.” As a result, MassDEP contends that the regulation presents a list or category of items that are “maintenance and improvement of roadways,” and that each item listed qualifies as Redevelopment. Bogue PFT, ¶ 21; MassDEP MOL at 3. The City agrees with the Department contending that the plain language of the regulatory definition is that each of the enumerated projects within the category of “maintenance and improvement of existing roadways” is independently a Redevelopment project. City MOL at 7. I agree with MassDEP and the City that the regulatory language is disjunctive and that to try and read it differently would result in “absurd consequences.”<sup>13</sup>

The regulation specifically states that “redevelopment is defined to include the following projects.” This language clearly intends to address multiple types of projects, rather than a project that includes multiple items. Rather, each type of project or item is a separate project description. As such, subparagraph (a) includes a list of “maintenance and improvement of roadways” projects and each item listed (“including widening less than a single lane, adding shoulders, correcting substandard intersections, improving existing drainage systems and repaving”) qualifies as Redevelopment. Bogue PFT, ¶ 21; MassDEP MOL at 3; City MOL at 7. For example, a “maintenance and improvement of roadways” project consisting solely of roadway repaving is Redevelopment; a “maintenance and improvement of roadways” project consisting solely of

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<sup>13</sup> Agency regulations should not be interpreted so as to lead to “absurd consequences.” Craft Beer Guild, LLC v. Alcoholic Beverages Control Commission, 481 Mass. 506, 525 (2019). “[S]ome modicum of common sense must be used’ when interpreting statutes and regulations.” In the Matter of Ikea Property, Inc., Docket No. DEP-04-669, Ruling on Cross-Motions for Partial Summary Decision (August 11, 2006), quoting North Shore Realty Trust v. Commonwealth, 434 Mass. 109, 111 (2001).

adding shoulders to a roadway is Redevelopment; as is each additional type of project listed within subparagraph (a) in the definition of Redevelopment. I agree with the Department that to prevent small repaving or widening projects from qualifying as Redevelopment, while allowing larger projects including all the listed components to qualify, would be nonsensical. Similarly, the lists within subparagraphs (b) and (c) are also drafted disjunctively. Finally, I agree with the Department that the assertion that correcting a substandard intersection cannot involve a change in footprint or geometry or be unrelated to traffic increases caused by development would exclude most projects. In sum, a Redevelopment project as that term is defined in the Wetlands Regulations need not include all the items listed in the definition but can include only one or more of the listed items. The proposed Project at issue in this appeal is only improvement of a roadway; the SOC does not authorize any other activities.<sup>14</sup>

The Petitioner cites to In the Matter of the City of Boston Public Works Department, OADR Docket Nos. WET-2019-021, WET-2019-022, Recommended Final Decision (March 17, 2021), to distinguish the proposed Project, contending that the Boston Public Works project was Redevelopment because it only partially modified the roadway by leaving the bridge substructure intact. The Petitioner contends that here there will be nothing left of the existing roadway which will be replaced with the proposed rotary. Pet. MOL at 9. However, this is a distinction without a difference. Both projects are Redevelopment projects, each with distinct requirements regarding the level and type of construction.

Based on a preponderance of the evidence submitted by the Parties and the governing wetlands statutory and regulatory requirements, I find that the proposed Project is a

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<sup>14</sup> The Petitioner argues that the proposed project is not about improving existing drainage systems but is traffic mitigation for an adjacent shopping plaza development. Pet. Rebuttal MOL, at 2. Regardless, the SOC authorizes only the improvement of the roadway discussed therein.

Redevelopment project as defined at 310 CMR 10.04: Redevelopment. As such, it is subject to Stormwater Standard 7, 310 CMR 10.05(6)(k)7.<sup>15</sup>

**B. The Proposed Project Complies with the BLSF Performance Standard at 310 CMR 10.57(4)(a)2.**

Regarding BLSF, the Wetland Regulations require that:

[w]ork within Bordering Land Subject to Flooding, including that work required to provide the above-specified compensatory storage, shall not restrict flows so as to cause an increase in flood stage or velocity. 310 CMR 10.57(4)(a)(2).

The Petitioner contends that the stormwater detention basin will result in a restriction of compensatory stormwater flow. Reitzel PFT, ¶¶ 28-33; Eriksen PFT, ¶ 13, as adopted by Herald Aff. However, the detention basin cannot serve to provide Compensatory Storage to manage flood waters. Bogue PFT, ¶ 26; SOC cover letter, page 2.<sup>16</sup> As a result, the stormwater basin is not included in the revised Compensatory Storage calculation on which the SOC relies. Bogue PFT, ¶ 26; Gerade PFT, ¶ 16; SOC cover letter, page 2. The Petitioner's expert testimony related to the stormwater management system does not change this fact.

In the course of its SOC review, the Department directed the City to correct its Compensatory Storage calculations to exclude stormwater management systems. SOC cover

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<sup>15</sup> While not identified as an issue for adjudication, MassDEP's expert, Mr. Bogue, testified that because the proposed Project is a Redevelopment project, the City's proposal to improve existing drainage systems meets the requirements under 310 CMR 10.05(6)(k)7. Bogue PFT, ¶ 22. Mr. Bogue testified that Redevelopment under Stormwater Standard 7 requires the stormwater standards to be met to the maximum extent practicable. Bogue PFR, ¶ 27. MassDEP determined that the proposed Project meets the standard because the proposed Project improvements include the installation of a catch basin that will discharge to a stormwater detention basin on the west side of Old Ferry Road. Bogue PFT, ¶ 22. Currently, there is no treatment of stormwater runoff at the Property. Bogue PFT, ¶ 22. Mr. Bogue testified that Old Ferry Road is a barrier between the detention basin discharge and the property at 10 Old Ferry Road during a 100-year flood. Bogue PFR, ¶ 27. As such there is no evidence that any TSS discharge from the basin would cause additional pollution at 10 Old Ferry Road. Bogue PFR, ¶ 27; Bogue, Ex. 2. See also Gerade PFT, ¶ 12. See also SOC cover letter, page 2.

<sup>16</sup> See In the Matter of Martin Burke and Melmar Properties, LLC, OADR Docket No. WET 2021-031, Recommended Final Decision (November 28, 2023), 2023 MA ENV LEXIS 60, at 33 (stormwater management structure capacity is a separate volume and cannot be used as Compensatory Storage), adopted by Final Decision (January 11, 2024), 2024 MA ENV LEXIS 3.

letter, page 2. The revised calculations and Revised Plans filed by the City confirm that the Compensatory Storage volume being provided adequately mitigates the anticipated flood plain impacts and excludes the stormwater detention basins from the calculation. Bogue PFT, ¶ 25. Mr. Bogue further testified that the areas around the outside of the basin and along the roundabout would provide the required Compensatory Storage, at the required incremental elevation levels, and would not restrict flows or cause an increase in flood stage or velocity. Bogue PFT, ¶ 25. As a result, flood waters would have an unrestricted hydraulic connection to the water body associated with the BLSF. Bogue PFT, ¶ 25. The slow draining of the stormwater detention basin will not restrict flows to cause an increase in flood stage or velocity, because the detention basin will not be serving to provide Compensatory Storage. Bogue PFT, ¶ 25.

The Petitioner has not shown that the proposed Project design violates the BLSF performance standard which requires that work within BLSF “shall not restrict flows so as to cause an increase in flood stage or velocity.” 310 CMR 10.57(4)(a)(2). The Petitioner contends only that the outlet control for the proposed Project’s drainage basin will restrict flows. Pet. MOL at 12-13. As explained above, the drainage basin is part of the stormwater management system and is not included in Compensatory Storage calculations. Nor has the Petitioner explained how a restriction of flow from this below-ground-level stormwater basin, that is not being used for Compensatory Storage, would increase flood stage or velocity. Bogue PFT, ¶¶ 23-26.

Based on a preponderance of the evidence submitted by the Parties and the governing MWPA and Wetlands Regulations, I find that the proposed Project complies with the BLSF performance standards set forth in 310 CMR 10.57(4)(a)2.

## **CONCLUSION**

In sum, based on a preponderance of the evidence submitted by the Parties and the governing wetlands statutory and regulatory requirements, I find that the Petitioner has failed to meet his burden of proof in the appeal. The proposed Project is a Redevelopment Project subject to Stormwater Standard 7 and the proposed Project complies with the Compensatory Storage requirements of the Wetlands Regulations for projects within BLSF. As a result, I recommend that the Department's Commissioner issue a Final Decision in the appeal affirming the SOC approving the proposed Project.

**Date:** May 22, 2024



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Margaret R. Stolfa  
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 her 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 her sole discretion, directs otherwise.

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CONSERVATION COMMISSION

DEPARTMENT

DEPARTMENT