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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 8, 2021

In the Matter of
Deborah Burke,
Malden Redevelopment Authority

OADR Docket No. WET-2020-012
DEP File No. 210-0097
Malden, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

The Friends of Roosevelt Park and Salemwood Community (“Petitioners”) filed this appeal concerning the real property at Roosevelt Park, Salem Street, Malden, Massachusetts (“the Property”). The Petitioners challenge a Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued to the Applicant, Deborah Burke, Malden Redevelopment Authority (“Malden”), to construct a multi-use artificial turf athletic field (“Project”) at the Property. The SOC was issued pursuant to the Wetlands Regulations, 310 CMR 10.00, and the Wetlands Act, G.L. c. 131 § 40.

The SOC was preceded by the Malden Conservation Commission’s (“Commission”) Order of Conditions approving the Project, following a number of public hearings on the Project. The Project would require: (1) replacing natural turf athletic fields with synthetic, multi-use athletic turf fields (soccer, lacrosse, football, and other sports); (2) planting of additional trees and landscaping; (3) replacing existing drainage pipes under the existing field; and (4) installing

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additional stormwater management systems, including the redesign of an existing stormwater detention basin to improve flow within the basin and accept and treat stormwater from the athletic fields.

After issuing to the Petitioners an Order to Show Cause Why the Appeal Should Not Be Dismissed and considering the parties' responses, I recommend that MassDEP's Commissioner issue a Final Decision affirming the SOC. In sum, the Petitioners failed to state a claim upon which relief can be granted; failed to meet their burden of going forward as required by the Order; and failed to comply with the Order. For all these reasons the appeal should be dismissed and the SOC affirmed as requested by MassDEP and Malden.

PERFORMANCE STANDARDS AND THE BLSF

It is undisputed that the only Wetlands Resource Area at issue is Bordering Land Subject to Flooding ("BLSF"). 310 CMR 10.57. And here, the only BLSF wetlands interests at stake are storm damage protection and flood control. See 310 CMR 10.57(1)(a)1. Flood Control means the prevention or reduction of flooding and flood damage. 310 CMR 10.04. Storm Damage Prevention means the prevention of damage caused by water from storms, including, but not limited to, erosion and sedimentation, damage to vegetation, property or buildings, or damage caused by flooding, water-borne debris or water-borne ice. 310 CMR 10.04.

BLSF is "an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies. . . ." 310 CMR 10.57(2)(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 Bordering Land Subject to Flooding. Over time, incremental filling of these areas 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). The BLSF boundary is established according to 310 CMR 10.57(2)(a)3.a, b, and c.

The Performance Standards generally provide that compensatory storage shall be provided for all flood storage volume that will be lost as the result of a proposed project within BLSF when that loss will cause an increase or will contribute incrementally to an increase in the horizontal extent and level of flood waters during peak flows. Work within BLSF shall not restrict flows resulting in an increase in flood stage or velocity. 310 CMR 10.57(4)(a)(1)-(2).

The part of the BLSF area at issue has been used for many years as part of a recreational area at Roosevelt Park, which is a 3.76 acre parcel adjacent to the Salemwood School; the parties do not dispute that this usage over the years degraded any potential wildlife habitat in BLSF. See 310 CMR 10.57(1)(a)3 (BLSF that is not significant to the protection of wildlife habitat include "paved and graveled areas, golf courses, cemeteries, playgrounds, landfills, fairgrounds, quarries, gravel pits, buildings, lawns, gardens, roadways (including median strips, areas enclosed within highway interchanges, shoulders, and embankments), railroad tracks (including ballast and embankments), and similar areas lawfully existing on November 1, 1987 and maintained as such since that time").

PRIOR PROCEEDINGS AND ORDER TO SHOW CAUSE

After I held a Pre-Hearing Conference with the parties I determined that the Petitioners' Notice of Claim is ambiguous and does not sufficiently allege a claim for relief in compliance with 310 CMR 10.05(7)(j)2.b.v. and 310 CMR 1.01(6). In particular, I stated that the Petitioners

had not asserted how the proposed project is in noncompliance with the BLSF wetlands interests of storm damage prevention and flood control nor whether there exists BLSF wildlife habitat despite the allegedly degraded condition of the Property for such habitat. This is in noncompliance with the regulations' requirement that the Notice of Claim provide a:

a clear and concise statement of the alleged errors contained in the Reviewable Decision and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, § 40, including reference to the statutory or regulatory provisions the Party alleges has been violated by the Reviewable Decision, and the relief sought, including specific changes desired in the Reviewable Decision.

310 CMR 10.05(7)(j)2.b.v.

Given the above status of the appeal, I issued an Order for Petitioners to Show Cause Why the Appeal Should Not Be Dismissed ("Order"). I required the Petitioners to meet their burden of going forward pursuant to 310 CMR 1.01(11)b, 310 CMR 1.01(6)(b), and 310 CMR 10.05(7)(j) and show cause why the appeal should not be dismissed.

The Order specified that the Petitioners must: (1) file a written, signed statement, pursuant to 310 CMR 1.01(6)(b) and 310 CMR 10.05(7)(j), that specifically, clearly and concisely sets forth the facts and claims (including each element of the claims) which are grounds for the appeal, and the relief sought; and (2) file written credible evidence from a "competent source" in support of their claims, pursuant to 310 CMR 1.01(11)(b). That provision requires the Petitioners to "file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken." I stated that the evidence must be signed and authenticated by the witness under the penalties of perjury and indicate the witness' qualifications and background.

I explained that “[a] competent source’ is a witness who has sufficient expertise to render testimony on the technical issues on appeal.” Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), adopted by Final Decision (August 19, 2010). 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. Pittsfield Airport Commission, *supra*, (petitioner’s failure to submit expert testimony in appeal challenging Department’s Commissioner’s issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner’s claims because Variance was “detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance,” including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,], [and (4)] . . . runway safety and design”).

DISCUSSION

The Petitioners responded to the Order with: (1) a fourteen-page single spaced document outlining “10 claims” which “are the grounds” for the appeal; (2) four written statements signed under the penalties of perjury from individuals who have various backgrounds addressing the possible environmental harms from Per- and Polyfluoroalkyl Substances (“PFAS”) and micro-plastics; and (3) a number of related exhibits (“Petitioners’ Response”).

MassDEP and Malden responded to the Petitioners’ Response. MassDEP’s Response requested that I dismiss the appeal, and included an affidavit from MassDEP wetlands analyst Michael Abell. MassDEP asserted that the Petitioners’ Response fails to comply with the Order and fails to state a claim upon which relief can be granted. MassDEP argued that the Petitioners’

purported experts did not offer any testimony concerning the “relevant wetland resource interests of storm damage prevention and flood control. Instead, they focus on the dangers of [PFAS] associated with artificial turf fields. While PFAS is certainly a growing concern for MassDEP and the Commonwealth of Massachusetts, [MassDEP argues] it is not relevant to this appeal of an SOC that conditions a project to meet the performance standards of BLSF (namely, storm damage prevention and flood control).” See MassDEP Response. MassDEP concludes that the Petitioners have not shown how the Project is inconsistent with the BLSF interests of storm damage and flood control.

Malden responded to the Petitioners’ Response with a Motion to Dismiss or in The Alternative Motion for Summary Disposition, which included an affidavit from Stephen J. O’Neill, P.E., Associate/Principal Engineer, Hayner/Swanson, Inc. Malden moved to dismiss the appeal for reasons similar to those of MassDEP. Malden adds that even though the Petitioners’ claims concerning PFAS and micro-plastics do not have a sufficient nexus to storm damage prevention and flood control, during the Commission’s public hearings process Malden committed to using an alternative, organic fill. Malden also added that the Project in fact furthers the BLSF storm damage prevention and flood control interests because it reduces impervious area, reduces the rate and volume of runoff, increases flood storage volumes on site, and increases the removal of total suspended solids. Malden Response, p. 6, O’Neill Aff.

I agree with MassDEP and Malden that the Petitioners’ Response fails to comply with Order and fails to state a claim upon which relief can be granted. 310 CMR 1.01(11)(d). There are several fatal flaws with the Petitioners’ Response. First, while the Petitioners’ witnesses may be very qualified with respect to harm that may result in the abstract from PFAS and micro-plastics, there has been no showing that they have any wetlands background or education to

qualify them with respect to how the Project may be contrary to the wetlands interests of storm damage and flood control. That is contrary to the requirements of the Order and the Wetlands Regulations.

Second, even if the Petitioners' experts were qualified to testify to wetlands impacts, there is no evidence showing how the Project is inconsistent with the BLSF interests of storm damage prevention and flood control. Those wetlands interests are focused on prevention or reduction of flooding and flood damage; and the prevention of damage caused by water from storms, including, but not limited to, erosion and sedimentation, damage to vegetation, property or buildings, or damage caused by flooding, water-borne debris or water-borne ice. 310 CMR 10.04 (flooding and storm damage prevention). Here, BLSF furthers those interests by allowing temporary storage for flood waters. There is no allegation or evidence that any component of the project would adversely affect the temporary storage of flood waters or that there is insufficient compensatory storage for any possible impacts in the BLSF. These are fatal flaws under both the the Order and the Wetlands Regulations.

CONCLUSION

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision affirming the SOC. In sum, the Petitioners failed to state a claim upon which relief can be granted, failed to meet their burden of going forward as required by the Order, and failed to comply with the Order. For all of these reasons the appeal should be dismissed and the SOC affirmed as requested by MassDEP and Malden.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been

transmitted to the Commissioner for his 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 his sole discretion, directs otherwise.

Date: March 8, 2021

A handwritten signature in black ink, appearing to be 'T. Jones', written over a horizontal line.

Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Deborah Burke, Malden Redevelopment
Authority

Docket No. WET-2020-012

File No. 210-0097
Malden, MA

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