COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 20, 2019

In the Matter of
Liatsos, Pinchin, and Southwick

Docket No. WET-2016-005, -006, -007
Mashpee, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION AFTER REMAND

These consolidated appeals were brought by 12 residents of Mashpee and the trustees of the New Seabury Condominium Trust 1A, the association of unit owners of the Tidewatch Condominiums located at 94 Shore Drive West, Mashpee (collectively, "Petitioners"). The appeals originally challenged the Superseding Orders of Conditions ("SOC") that the Massachusetts Department of Environmental Protection's Southeast Regional Office ("MassDEP") issued to the applicants: Michael and Dawn Southwick; Kenneth Liatsos Trust and Gloria Liatsos Trust; and David and Glenys Pinchin (collectively, "Applicants"). The SOC approved the Applicants' project at their abutting oceanfront properties located at 118, 124, and 126 Shore Drive West, Mashpee ("the Site"). The SOC was issued pursuant to the Wetlands Protection Act, G.L. c. 141 § 30, and the Wetlands Regulations, 310 CMR 10.00. The appeals concern the protected wetlands resource areas of Coastal Beach and Coastal Bank. See 310 CMR 10.02, 10.27, 10.30.

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I recently issued a Recommended Final Decision After Remand ("RFDAR"), which was partially adopted by MassDEP's Commissioner in his Final Decision After Remand ("FDAR"). The FDAR adopted the RFDAR's:

> (1) finding that the third proposed Coastal Bank stabilization project ("Project III") complied with the Performance Standards for Coastal Bank (310 CMR 10.30(4) and (6));
>
> (2) finding that Project III failed to comply with the performance standards for Coastal Beach (310 CMR 10.27(3)); and
>
> (3) recommendation to vacate the SOC and deny the proposed Final Order of Conditions because Project III failed to comply with the Coastal Beach performance standards.

The Commissioner declined to adopt the RFDAR's finding that Project III is a prohibited Coastal Engineering Structure under 310 CMR 10.30(3).

Since then, the Applicants filed a Motion for Reconsideration of the FDAR, arguing that the RFDAR: (1) applied an incorrect burden of proof regarding whether the Project III piling array complied with the Coastal Beach performance standards; and (2) incorrectly applied the Coastal Beach Performance standards because the RFDAR purportedly concluded that the Project III piling array would not be installed on the Coastal Beach. MassDEP and the Petitioners opposed the Motion for Reconsideration, contending that the Applicants' assertions are incorrect. See Department's Response to Applicants' Motion for Reconsideration; Petitioners' Response to Applicants' Motion for Reconsideration. I agree with MassDEP and the Petitioners and recommend that the Motion for Reconsideration be denied.

STANDARD OF REVIEW

To succeed on a motion for reconsideration a party must meet a "heavy burden." Matter of LeBlanc, Docket No. 08-051, Recommended Final Decision on Reconsideration (February 4, 2009), adopted by Final Decision (February 18, 2009). The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." See 310 CMR 1.01(14)(d). In addition, "[w]here [a] motion [for reconsideration] [1] repeats matters adequately considered in the final decision, [2] renews claims or arguments that were previously raised, considered and denied, or [3] where it attempts to raise new claims or arguments it may be summarily denied." Id.

DISCUSSION

I. The RFDAR Applied the Correct Burden of Proof

The Applicants argue that the RFDAR applied an incorrect burden of proof because it purportedly imposed on MassDEP and the Applicants the burden of proving that Project III would not adversely affect the Coastal Beach. Instead, the Applicants assert that "it was [the Petitioners'] burden to establish by a preponderance of the evidence that the Department's wetlands expert, Mr. Mahala, erred in determining that [Project III] does meet the Coastal Beach Performance Standard."[1] Motion for Reconsideration, p. 3. The Applicants' position is without merit for several reasons.

First, the Applicants misapprehend the standard of review. This adjudicatory proceeding, like all similar adjudicatory proceedings before the Office of Appeals and Dispute Resolution, is

[1] The Applicants incorrectly state that MassDEP and the Petitioners agreed to their asserted burden of proof. In fact, the Applicants claim that the Petitioners agreed to their asserted burden of proof on page 4 of the Petitioners' Initial Brief After Remand Hearing, but, as the Petitioners point out, there is no support for the position on the cited page, or anywhere else in the Petitioners' Initial Brief. See Petitioners' Response to Motion for Reconsideration, p. 3, n. 4. The Applicants' also inaptly cite as a supporting citation: Matter of Milton, Docket No. 2011-030, Recommended Final Decision (March 29, 2012), adopted by Final Decision (April 6, 2012). That decision does not support the stated principle.

based upon a de novo standard of review, not review of whether there was error in the underlying permitting proceedings (as the Applicants assert). As stated in the Pre-Hearing Conference Report and Order that I issued at the outset of these appeals, "[t]his is a de novo appeal, and the Petitioners, as the parties bringing this appeal, have the burden of going *forward*; they are required to present 'credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).'" Pre-Hearing Conference Report and Order (emphasis added), citing 310 CMR 10.05(7)(j)3.c and Matter of Jodi Dupras, Docket No. WET-2012-026, Recommended Final Decision (July 3, 2013), adopted by Final Decision (July 12, 2013); see Matter of John Soursourian, Docket No. WET -2013-028, Recommended Final Decision (June 13, 2014), adopted by Final Decision (June 19, 2014). To be clear, and as similarly articulated numerous times in MassDEP adjudicatory decisions over the last several years:

> *"[R]eview at this stage is [for the Presiding Officer] . . . to determine whether the Department's decision to issue a superseding order conforms to the standards set forth in the Wetlands Protection Regulations. The Department is a party to the proceeding, and its obligation is to defend the interests of the Wetlands Protection Act*, not as it saw them at the time it issued the superseding order, but as it currently sees the situation. If it becomes convinced that the interests of the Act require it to take a different position from one that it had adopted previously, it should be allowed to do so." Matter of Capolupo, [Docket No. 2000-097, Ruling on Motion for Partial Summary Decision (March 15, 2001)]. *The Presiding Officer is not bound by MassDEP's prior orders or statements, and instead is responsible in wetland appeals for independently adjudicating appeals and making a recommendation to MassDEP's Commissioner that is consistent with and in the best interest of the Act, Regulations, and MassDEP's policies and practices*.

Soursourian, supra. (emphasis added, citing several supporting MassDEP adjudicatory decisions). Thus, the Applicants are incorrect in asserting that "it was [the Petitioners'] burden

to establish by a preponderance of the evidence that the Department's wetlands expert, Mr. Mahala, erred in determining that [Project III] does meet the Coastal Beach Performance Standard."

Second, the RFDAR properly allocated the evidentiary burdens in the adjudicatory proceeding. As stated in the RFDAR and the Wetlands Regulations, the Petitioners had the burden of going *forward* by producing credible evidence from a competent source in support of their position to satisfy the elements of their prima facie case.[2] RFDAR, p. 22; 310 CMR 10.03(2); 310 CMR 10.05(7)(j); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) ("the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department's position."). The RFDAR did not ignore the provision in 310 CMR 10.03(7)(j)3.b establishing the preponderance of evidence standard for the Petitioners to ultimately prevail on the merits. Indeed, as stated in the RFDAR, and consistent with a long line of MassDEP adjudicatory permitting decisions: "[s]o long as the initial burden of production or going forward is met, which it was, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies." RFDAR, pp. 22-23 (citing Matter of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006). It has long been the requirement in MassDEP adjudicatory proceedings that the prevailing party establish their case by a

[2] "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); Commonweatlh v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006).

preponderance of the evidence. That standard applies across the board, to petitioners, applicants, interveners, and MassDEP.[3]

The RFDAR stated that "A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." RFDAR, p. 23 (citing Massachusetts Jury Instructions, Civil, 1.14(d)). This is consistent with Matter of Town of Hamilton and Massachusetts caselaw: "The weight or preponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. *After the evidence has been weighed*, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there" (citations omitted)." Stepakoff v. Kantar, 393 Mass. 836, 843, 473 N.E.2d 1131, 1136 (1985) (emphasis added) (quoting Sargent v. Massachusetts Accident Co., 307 Mass. 246, 250 (1940)).

After analyzing and weighing all the evidence in the administrative record and applying the preponderance standard, I concluded that "a preponderance of the evidence demonstrates that [the piling array] . . . will not comply with the coastal beach performance standards." RFDAR, p. 6. I added: "To be clear, it is not the pilings themselves that would be in noncompliance with the regulations; rather, it is their proximity to one another (they are too close together) and their

[3] The Wetlands Regulations provide that "Any person [like the Applicants] who files a Notice of Intent to perform any work within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone has the burden of demonstrating to the issuing authority: . . . that the proposed work within a resource area will contribute to the protection of the interests identified in M.G.L. c. 131, § 40 by complying with the general performance standards established by 310 CMR 10.00 for that area." 310 CMR 10.03(1)(a)2.

unnecessary vertical extension above [the beach] . . . which will *cause erosion and a lowering of the beach*." RFDAR, p. 6 (emphasis added).

I made findings similar to those above in summing up various sections of the RFDAR. For example, I found:

- "Instead, the greater weight of the evidence shows the range of potential impacts would be significantly greater than what is predicted by [the Applicants' expert,] Bosma." RFDAR, p. 53.

- "And, more to the point, as I previously found based upon the Petitioners' and the *Applicants' survey data* there has been a general lowering of the [Bayswater] beach caused by the pilings." RFDAR, pp. 54, 55 (emphasis in original)

- "Bayswater shows a lowering of the beach even though the studies and circumstances are biased against showing that and even though substantial nourishment has been added to Bayswater. Despite the biased results, they do show an adverse effect—causing the mean high water line to be just 10 feet away from the piling array and thus interact with the pile array more frequently is undoubtedly more than a negligible change; indeed, one of the variables that predict the rate of scour is the frequency of interaction with waves and currents. The lowering of the beach will increase that rate, which will in-turn increase the rate of erosion and scour, which will continue to feed off of itself leading to more detrimental results over the long-term. As discussed below, the pilings [proposed by the Applicants] would be close enough to cause the same or similar results over the long-term." RFDAR, p. 56.

- "[T]he frequent wave interaction with the piles will not lead to the scour holes, but it will lead to the general lowering of the beach that has been observed at Bayswater. And in major storms, which Bayswater has not yet experienced, the erosion and scour will be much more serious and any nourishment that may be covering the coir envelopes will quickly dissipate." RFDAR, p. 66.

- In sum, and for the reasons discussed above, a preponderance of the evidence demonstrates that the Applicants' arguments that erosion and scour resulting from the pile array or Project III will be minimal and not amount to an adverse effect are without merit. The Applicants attempted to provide optimistic

> forecasts, but that was undone by Ramsey's *testimony and the literature upon which he relied, showing, among other things,* that the [Applicants'] testimony is unreliable and *overlooks a number of factors that would generally lead to more substantial impacts*." RFDAR, p. 68. (emphasis added)

Third, the Applicants' argument that the Petitioners provided "no affirmative evidence" that Project III would adversely affect the Coastal Beach is without merit. The Petitioners submitted an abundance of affirmative evidence based upon persuasive expert testimony, exhibits, and research literature. The Petitioners' case was grounded on the axiom that when moving water, such as waves, strikes hard vertical surfaces erosion and scour of surrounding sediment will generally result. RFDAR, pp. 44, 45-47; Bosma PFT (7/25/17), pp. 5, 10; Bosma PFT (5/25/18), p. 5. From there, the Petitioners elaborated on why Project III would erode and adversely impact the beach in these appeals.[4] See Ramsey PFT, pp. 6-12, 17-18 and Exs. 1-6; Ramsey Rebuttal PFT, pp. 2-28 and Exs. 1-7; Munroe PFT, pp. 5-6; Munroe Rebuttal PFT, pp. 6-8. In contrast, the Applicants' and MassDEP's evidence had numerous reliability and credibility issues that *seriously* undermined the weight of that evidence throughout the appeal.[5] See e.g. RFDAR, pp. 36-38, 39-41, 45-47, 52, 54-56, 59-60, 61-63, 64, 65, 66-68. Balancing that against the Petitioners' compelling and persuasive evidence leads to the inevitable

[4] The Applicants continue to mischaracterize the administrative record concerning the Bayswater project with arguments that there has been no evidence of lowering of the beach or scouring and erosion with Bayswater. Motion for Reconsideration, pp. 6-7. In fact, the Petitioners' and *the Applicants'* evidence show the opposite to be true, that there has been a general lowering of the beach despite the provision of a large volume of nourishment. RFDAR, pp. 17-18, 53-56. The administrative record also demonstrates why one would not observe scour holes associated with Bayswater, and instead would see the general lowering of the beach that is occurring. RFDAR, pp. 54-55.

[5] The Applicants' contention that the RFDAR ignored the "unequivocal testimony" of MassDEP's expert, Mahala, is without merit. Motion for Reconsideration, p. 5. On the contrary, the RFDAR found the opposite, that the testimony was repeatedly equivocal and inconsistent, and thus accorded appropriate weight to it. RFDAR, pp. 4-5, 14-18, 34-35, 54-55, 63-68. In fact, much of the equivocation arose from Mahala's testimony that was critical of the Applicants' (including Bosma's) positions, not the Petitioners. Id. Moreover, much of Mahala's testimony adopted Bosma's testimony (the Applicants' expert), which was repeatedly found to be unreliable or not persuasive. RFDAR, p. 64 (citing Transcript II, pp. 248-49); see e.g. RFDAR, pp. 36-38, 39-41, 45-47, 52, 54-56, 59-60, 61-63, 64, 65, 66-68.

conclusion that the piling array will cause unabated erosion and a general lowering of the beach, and thus an adverse effect.[6]

For all the above reasons, the Applicants' argument that the RFDAR applied the incorrect standard of proof is without merit.

II. The RFDAR Correctly Applied The Coastal Beach Performance Standards to the Piling Array

The Applicants argue for the first time in this adjudicatory proceeding that the Coastal Beach performance standards are inapplicable to Project III's piling array component. The Applicants' assertion of this new argument alone warrants denial of their Motion for Reconsideration. LeBlanc, supra.; 310 CMR 1.01(14)(d). Moreover, this new argument is without merit for a number of reasons.

[6] Although not relevant to the outcome of these appeals, the Applicants' mistaken assertion that the consequences of climate change were not foreseeable at the time the Wetland Regulations were promulgated in 1978 should be corrected for the administrative record. Motion for Reconsideration, p. 7; see e.g. A Guide to the Coastal Wetlands Regulations of the Massachusetts Wetlands Protection Act, pp. 1-2 (Division of Wetlands, Department of Environmental Quality Engineering, 1979) ("Coastal wetlands provide citizens of the Commonwealth with irreplaceable benefits. Manmade structures, regardless of design or cost, cannot improve upon or even match the functions of natural systems. . . . The Massachusetts legislature recognized the danger of inappropriate development on coastal wetlands in the mid 1960's and began enacting laws to protect wetlands. . . . The geology of the coast is active. The *constantly rising sea level* and the consequent landward movement of coastal features, and the constant interaction between the land and the sea means that coastal features are in constant movement." (emphasis added)); Cooke, Robert. "The energy plan: And perils of burning coal cited by scientists." The Boston Globe 1 June 1977: 2. Print ("Where it will most likely lead, he added, is to drastic changes in the earth's climate, to altered agricultural patterns, decrease of the polar ice pack, and to gradual inundation of our coastal cities. . . . Carbon dioxide will be the first industrial emission to affect climate on a global scale, with a significant effect appearing sometime in the next 20 years."); Schwabach, Robert. "What the devil is happening to the weather." The Boston Globe 30 January 1977: A1. Print ("If the polar ice cap started to melt, every coastal city in the world would be submerged. . . . There is not much to worry about there because the ice from the western end is only enough to raise the sea level of the world about 20 feet, which would merely submerge most of the cities of the world, including Miami."); The Impact Team. "Our Changing Weather Is Worse Than We Realize." The Boston Globe 8 May 1977: 20, Parade section. Print ("Climatologists agree that the entire globe is in for unstable weather over the next several decades. Droughts and floods, hurricanes and tornados, killing frosts and throttling snows will occur far more often and randomly than ever before."). The Applicants also mistakenly contend that the RFDAR insinuates that "coastal resiliency should be prohibited in the face of calamitous effects of climate change." The RFDAR makes no such suggestion and the Applicants' argument misapprehends the present scope of "coastal resiliency" measures. See e.g. https://www.mass.gov/service-details/coastal-resilience-grant-program and http://resilientma.org/sectors/coastal-zones (the two websites list examples of resiliency that presently include: artificial dunes and dune nourishment; planting vegetation; bioengineering; sand fencing; conservation strategies that mitigate flooding, store carbon, and manage stormwater; strategies to elevate and/or move buildings and infrastructure; strategies to restore tidally-driven rivers, estuarine, and marine habitats; nature based techniques to protect shorelines and stabilize banks such as beach nourishment and soft armoring; and use of green infrastructure such as floodable parks and open spaces to manage stormwater and increase storm protection).

First, it has been undisputed throughout this adjudicatory proceeding that the Applicants' proposed design for their coastal stabilization project includes two rows of pilings to be buried vertically approximately ten feet into the Coastal Beach and elevated four feet above its surface. Bosma (5/25/18) PFT, p. 3, Ex. 2; Bosma (7/26/17) PFT, Ex. 3; Marden PFT, p.4, Ex. 5. In fact, both of the Applicants' experts, Bosma and Marden, testified that the pilings will be embedded 10 feet below surface of the Coastal Beach "just below the tow of the bank." Id.; Bosma PFT, p. 18. Because they are being installed adjacent to and seaward of the existing tow of the Coastal Bank, they are being installed on the Coastal Beach, and thus the Coastal Beach performance standards apply. See 310 CMR 10.27(2) (under natural conditions the coastal beach extends from the mean low water line to the "dune line, coastal bankline, ..."); 310 CMR 10.27(2) ("[a]ny project on a coastal beach except, except any project permitted under 310 CMR 10.30(3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift beach").

Second, the Applicants' assertion that I "unequivocally conclude[d] [in the RFDAR] that the [timber pilings] are on the Coastal Bank, not the Coastal Beach" is without merit. The Applicants made the assertion by quoting my findings that: (1) "the piling array is part of the bank, and not the beach;" (2) "the pilings *would 'replace' the 'coastal bank line' creating a point where the beach will terminate*;" and (3) "the most seaward edge of the pilings is the landward edge of the beach, and the pilings are thus a part of the bank, not the beach." RFDAR, pp. 42-43 (emphasis added). However, in quoting these findings, the Applicants ignored that portion of my findings citing the rule at 310 CMR 10.27(2) that "Coastal beaches extend from the mean low water line landward to the dune line, coastal bank line *or the seaward edge of existing human-made structures, **when these structures replace one of the above lines***, whichever is closest to

the ocean." RFDAR, at p. 43 (emphasis supplied). Simply stated, I did not find in the RFDAR that the timber pilings "are ***on*** the Coastal Bank, not the Coastal Beach." I only confirmed that *if the project were built,* the seaward edge of the timber pilings *would become* the *new* demarcation between Coastal Bank and Coastal Beach at this site, as specified by the regulations.

For all the above reasons, the Applicants' argument that Coastal Beach performance standards are not applicable is without merit. Accordingly, the Motion for Reconsideration should be denied.

NOTICE-RECOMMENDED FINAL DECISION ON RECONSIDERATION AFTER REMAND

This decision is a Recommended Final Decision on Reconsideration After Remand 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 may be appealed and will contain a notice to that effect.

Date: _9/20/2019____

Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matters Of:	Kenneth Liatsos Trust and Gloria J. Liatsos Trust David and Glenys Pinchin Michael and Dawn Southwick
Docket Nos. WET-2016-005	File Nos. SE 43-2787
WET-2016-006	SE 43-2786
WET-2016-007	SE 43-2785
	Mashpee

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