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 26, 2025

In the Matter of Mary Rahal and Pathways Association, Inc.	OADR Docket No. WET-2017-009 DEP File No. SE 16-2237 Dennis, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATION

This appeal arises out of the issuance by the Southeast Regional Office ("SERO") of the Massachusetts Department of Environmental Protection ("Department") to Mary Rahal and Pathways Association, Inc. ("Applicants") of a March 2, 2017 Superseding Order of Conditions ("SOC") pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations at 310 CMR 10.00, *et seq*. The SOC authorizes the Applicants to build a stairway along a right of way ("ROW")[1] to allow foot traffic to access Cape Cod Bay in Dennis, Massachusetts ("Project"). Brian S. Hickey and Mary P. Hickey (collectively "Petitioners") appealed to the Department's Office of Appeals and Dispute Resolution ("OADR"),[2] arguing that the Department erred in issuing the SOC authorizing the Project because it will have "adverse effects on the stability of the coastal bank" that it will cross in contravention of 310 CMR 10.30(6).

[1] The "ROW" is the twenty-foot right of way that extends south from Cape Cod Bay to Shore Drive.

[2] OADR is an independent, neutral, quasi-judicial office within the Department responsible for advising the Department's Commissioner in the adjudication of such an appeal. The Commissioner is the final decision-maker in the appeal unless she designates another final decision-maker in the appeal pursuant to 310 CMR 1.01(14)(b).

An Adjudicatory Hearing was held in this matter on May 21, 2019 ("Hearing"), before the prior Presiding Officer in the appeal. I was appointed Presiding Officer in the appeal on September 22, 2023. On March 8, 2024, I issued a Tentative Recommended Final Decision ("TRFD") pursuant to 310 CMR 1.01(14)(a) and (14)(c) recommending that the Department's Commissioner issue a Final Decision in the appeal affirming the SOC with agreed modifications, removal of the bottom landing, and a direction to the Department to prepare a Final Order of Conditions consistent with the Final Decision for the Commissioner's signature.

Under 310 CMR 1.01(14)(a), the Parties "ha[d] seven [business] days from the receipt of the [TRFD] to file objections to the [TRFD] and supporting arguments with [OADR]." On March 19, 2024, the Petitioners filed objections to the TRFD. The Applicants submitted a response on March 27, 2024, and the Department submitted its response on March 29, 2024. Both the Applicant and the Department rejected the Petitioners' objections and supported the TRFD. I issued a Recommended Final Decision ("RFD") on April 10, 2024, incorporating my recommendations from the TRFD.

The Commissioner issued a Final Decision in this appeal on April 9, 2025, adopting the RFD in its entirety. See In the Matter of Mary Rahal and Pathways Assoc., Inc., OADR Docket No. WET-2017-009, Recommended Final Decision (April 10, 2024), 2024 WL 5681711, adopted as Final Decision (April 9, 2025), 2025 WL 1298681. The Petitioners filed a Motion for Reconsideration on April 18, 2025, asking the Commissioner to vacate the Final Decision and deny the Project. The Motion for Reconsideration included an Affidavit in Support from Edward Rainen. The Applicant and the Department filed Oppositions to the Motion for Reconsideration on April 30, 2025.

I. The Standard for Motions to Reconsider.

A party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); In the Matter of Kevin Slattery and Etchstone Properties, Inc., OADR Docket No. WET-2018-015, Recommended Final Decision on Reconsideration (December 17, 2019), 2019 WL 8883857, *5, adopted as Final Decision on Reconsideration (January 7, 2020), 2020 WL 2616493; In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 WL 6633667, *2, adopted as Final Decision on Reconsideration (November 7, 2014), 2014 WL 6633699. Specifically, the party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous" and materially impacted the Final Decision's validity warranting its vacating by the Commissioner. Id. In addition, a Motion for Reconsideration may be summarily denied if "[it] repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments . . . ." 310 CMR 1.01(14)(d); Slattery, 2019 WL 8883857, *5; Vecchione, 2014 WL 6633667, *2. Moreover, "reconsideration [of the Final Decision is not] justified by the [party's] disagreement with the result reached in the Final Decision." Id.

II. Discussion.

The Petitioners raise several arguments in support of their Motion for Reconsideration. I start by explaining why I do not consider the Affidavit of Edward R. Rainen, Esq., submitted with the Petitioners' Motion for Reconsideration. I then turn to the substantive arguments. First, I find that the RFD followed prior cases finding that the Applicants have easement rights to the ROW, but did not speculate as to the scope of their easement rights. Second, I reject the Petitioners' argument that the Applicants' Notice of Intent lacked permission of a Landowner.

Third, I summarily deny the Petitioners' newly-raised argument that building the Applicants' Stairway will cause foot traffic to harm the coastal dune. Fourth, I decline to adopt additional conditions in the Maintenance and Monitoring Plan that the Petitioners requested previously. I recommend that the Commissioner deny the Motion for Reconsideration and issue a Final Decision on Reconsideration affirming the RFD.

A. I do not consider the Petitioners' Affidavit from Edward Rainen submitted with the Motion for Reconsideration.

The Petitioners filed an Affidavit of Edward R. Rainen, Esq., in support of the Petitioners' Motion for Reconsideration. Under 310 CMR 1.01(14)(d), a Motion for Reconsideration that "attempts to raise new claims or arguments[] may be summarily denied." The Petitioners did not seek leave to Reopen the Hearing to supplement the Administrative Record with additional testimony from Attorney Rainen, nor is there any procedure that would permit them to add additional facts to the record after the entry of a Final Decision. See 310 CMR 1.01(14)(e).[3] I therefore do not consider Attorney Rainen's testimony in this Recommended Final Decision on Reconsideration.[4]

B. The RFD was correct in recognizing the prior decisions finding that the Applicants have easement rights in the ROW but not speculating as to the scope of the Applicants' easement rights.

The Petitioners argue that the RFD should have explicitly determined whether the Applicants have the right to build railings, benches, and landings; determined that they do not have those rights; and denied the Project. They contend that "[w]hile the Department states that it

[3] "On the motion of any party, or on his or her own initiative, the Presiding Officer may at any time before a final decision is issued reopen the hearing for the purpose of receiving new evidence."

[4] I note further that Attorney Rainen primarily testifies to issues of law—including the interpretation of court opinions and instruments of conveyance—that are not appropriate for expert testimony. See Massachusetts Guide to Evidence § 704 Note ("Legal questions, as to which testimony is not permitted, should be distinguished from factual conclusions, as to which testimony is proper.").

does not generally concern itself with title matters, the RFD cites and relies upon a number of findings regarding the ownership interests of the parties," Motion for Reconsideration, p. 3, the suggestion being that the RFD should have taken the next step and determined the scope of the rights of the Applicants with respect to the building of railings, benches, and landings. The Applicants and the Department both argue that the RFD's analysis was correct and appropriate in scope. Petitioners Response, p. 2; Department Response, pp. 3-5.

The Department argues, "The Petitioners would have the Commissioner ignore the holding in Hickey, as well as the analysis by Presiding Officer Groulx in the RFD, based on their interpretation of the easement rights only allowing a walkway to be constructed if it does not have benches. Such minutiae in interpreting the extent of easement rights held by the Applicants is far removed from MassDEP's authority to issue a permit to protect the interests of the Wetlands Protection Act." Department Response, p. 4. I agree that it would not be appropriate for the Final Decision to weigh in on the Petitioners' specific rights as easement-holders.

The Department lacks jurisdiction to adjudicate disputes over property rights. Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. Ct. 623 (1980). As a matter of law, Applicant Rahal has easement rights in the ROW. See Hickey v. Pathways Ass'n, Inc., 472 Mass. 735, 765 (2015); Applicants Response, p. 1. However, the scope of the Applicants' rights remains an open question, as none of the cases discussed in the RFD decided whether the Applicants have the right to build railings, benches, and landings. Hickey, 472 Mass. at 765, held only that "right of access over the twenty foot way that runs between the plaintiffs' lots from Shore Drive to Cape Cod Bay." In Loiselle v. Hickey, 93 Mass. App. Ct. 644, 653 (2018), the court stated that "the extent of the inland owners' rights to use the access ways was implicated in the current litigation only to the extent that it bore on any rights they claimed in the disputed flats. The extent of their rights to use the beach area lying within the boundaries of the access

ways was not at issue in this case." Similarly, Hickey v. Pathways Assoc., Inc., 16 MISC 000123, 3 (Feb. 12, 2020), held only that the Applicants "have a right to use the twenty-foot right of way . . . ." Hickey v. Zoning Bd. of Appeals of Dennis, 100 Mass. App. Ct. 1102 (2021), does not address the scope of the Applicants' easement rights.

The Petitioners also argue that "Tindley requires colorable title for the project as proposed; it requires more than just colorable title." Motion for Reconsideration, p. 4. In response, the Applicants have argued that they do have the right to build the railings, benches, and landings. Applicants Response, p. 2. The Applicants' easement rights may permit the Applicants the right to pause in the ROW, or they may not. Some Massachusetts cases have found a right to stop in a right of way so long as it does not substantially obstruct the easement. See, e.g., Brassard v. Flynn, 352 Mass. 185, 189 (1967). For purposes of this appeal, though, the fact that the Applicants might have that right is sufficient to demonstrate colorable title and receive a Final Order of Conditions. The Department is correct that its "decision not to delve into the intricacies of the Applicants' easement rights is perfectly consistent with Tindley." Department Response, p. 4.

The Petitioners argue that the RFD concludes "that the [cases cited in the RFD] provide the Applicants with the legal authority as an easement holder to construct the project as designed, and restrict its use to only Pathways residents . . . ." Motion for Reconsideration, p. 4. Similarly, the Petitioners argue that "the Final Decision cites Hickey v. Conservation Commission of Dennis, 93 App. Ct. 655, 659 (2018) as dispositive for the building of the Project . . . ." Motion for Reconsideration, p. 5. Both arguments are incorrect. As just discussed, the RFD does not make any sort of determination whether the Petitioners have the easement rights that they assert; that dispute is left to the determination of a court. General Condition 2 of the SOC is explicit that it "does not grant any property rights or any exclusive privileges; it does not authorize any injury

to private property or invasion of private rights." SOC, p. 5; Department Response, p. 5. The Petitioners have therefore failed to show that the RFD contains an error of law that materially impacted the Final Decision.

C. The Notice of Intent was signed by a Landowner.

The Petitioners next argue that "the Applicants[']s Notice of Intent does not include a signature or approval from the owner of the Property as required by 310 CMR 10.05 for the specific project . . . ." Motion for Reconsideration, p. 1. The Petitioners contend that "the Applicants still do not have the specific authorization, as easement holders, to construct the Project as designed with landings and benches." Id. at p. 5. I have already addressed that the Petitioners have colorable title to construct the Stairway. I address the Petitioners' argument concerning the issue of proper approval below.

Neither the Department nor the Applicants directly addressed the Petitioners' argument in their Responses to the Motion for Reconsideration. The Petitioners' argument is nevertheless incorrect. Under 310 CMR 10.05(4)(a),[5] an applicant that is also a Landowner is not required to obtain written permission from a Landowner prior to filing a Notice of Intent. Under 310 CMR 10.04(Landowner), a "Landowner" is "the owner of record of land or an interest in land that is subject of a Reviewable Decision." There is no dispute that Applicant Rahal at least has easement rights in the ROW, as the Supreme Judicial Court held, and is therefore a Landowner. See Hickey, 472 Mass. at 765. A separate signature from a Landowner was therefore not required. See 310 CMR 10.05(4)(a). The Petitioners have therefore not met their burden with this argument.

[5] "*If the applicant is not a landowner of the Project Locus*, the applicant shall obtain written permission from a landowner(s) prior to filing a Notice of Intent for proposed work . . . ." (emphasis supplied).

D. The argument that the presence of the Stairway will cause additional foot traffic elsewhere on the Coastal Bank was not raised previously and is summarily denied.

The Petitioners next argue that the presence of the Stairway "will require all other inland easement holders [who are not members of Petitioners' Pathways Association, Inc.] to traverse the easement on the receptive sides of the 55" wide walkway and over the rocks and vegetation, potentially disturbing coastal bank stability." Motion for Reconsideration, pp. 5-6. The Petitioners ask that a Final Order of Conditions "adopt conditions necessary for the Project to meet the performance standards for activities in resource areas to avoid impacts to the coastal bank by allowing all easement holders the right to use the stairs." Motion for Reconsideration, p. 6. This is a new argument, specifically it was not made in the Petitioners' prior briefing, and is therefore summarily denied.[6]

E. I decline to adopt the Petitioners' requested conditions in the Monitoring and Maintenance Plan as they are unnecessary.

The Petitioners agreed to the implementation of the Applicants' proposed Monitoring and Maintenance Plan ("Plan") "provided that the . . . [P]lan contains a requirement that the Applicants provide written and pictorial reports from pre-selected locations to document and certify that the walkway has not caused an adverse effect to the vegetated coastal bank or to the stability of the coastal bank." Motion for Reconsideration, p. 6. The Petitioners also request that the Plan "require a filing of a [Notice of Intent ("NOI")] or [Request for Determination of Applicability ("RDA")] with the Department [pursuant to the MWPA and the Wetlands

[6] The Department did not directly address this argument in its Response to the Motion for Reconsideration. The Petitioners argue that Hickey found that because of the topography of the area, "the inland owners cannot make use of their access rights in Hickey Way unless some version of the walkway is built there." Hickey, 93 Mass. App. Ct. at 656; Petitioner Response, p. 3. Because I summarily deny the Petitioners' argument, I do not address the Petitioners' argument. I also note that there is no testimony in the record in support of the Petitioners' assertion that the presence of the stairway will result in disturbance to the stability of the coastal bank.

Regulations] with a copy to the parties in this matter" if the coastal bank is adversely affected. Id.

The Petitioners' Objections to the TRFD requested similar conditions. See Objections to TRFD, pp. 9-10. The Applicants, in their Response to the Petitioners' Objections to the TRFD, stated as follows: "the Applicant trusts the Department to enact the appropriate maintenance plan. However, the plan should not impose burdens any greater than those that are currently in place relating to the Petitioners' own stairway on the costal bank, which is mere feet away from where the Applicants' stairway will be." Applicants' Response to Objections, p. 4.[7]

The RFD declined to adopt the Petitioners' additional conditions. Instead, I recommended that a Plan be implemented, but did not suggest specific details to avoid interfering with the Department's regulatory discretion under the MWPA and the Wetlands Regulations. I note, however, that the Applicants have agreed to a Plan on terms identical to those applicable to the Petitioners' existing stairway.

I decline to recommend that the Plan require filing of an NOI or RDA. Superseding Orders of Conditions issued by the Department already include General Condition 1, which requires compliance with "all related statutes and other regulatory measures," and General Condition 3, which "does not relieve [the Applicants] of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations." SOC p. 5. What the Petitioners seek would be redundant and is therefore unnecessary.

III. Conclusion.

For the foregoing reasons, the Petitioners have failed to meet their heavy burden of demonstrating that the RFD was based on a finding of fact or ruling of law that was clearly

[7] The Department does not directly address this argument in their Responses to the Motion for Reconsideration.

erroneous and materially impacted the Final Decision's validity. I therefore recommend that the Commissioner issue a Final Decision on Reconsideration denying the Petitioner's Motion for Reconsideration.

Date: September 26, 2025

Patrick M. Groulx,
Presiding Officer

NOTICE—RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration of the Recommended Final Decision. It has been transmitted to the Department's Commissioner for her Final Decision on Reconsideration in this matter. This decision is therefore not a Final Decision on Reconsideration and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision on Reconsideration may be appealed and will contain a notice to that effect.

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