

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

November 14, 2024

**In the Matter of
P.T. Realty Investors, LLC**

**OADR Docket No. WET-2023-011
MassDEP NERO File #338-0749
Westwood**

RECOMMENDED FINAL DECISION

INTRODUCTION

Duncan M. McFarland and Ellen B. McFarland (the “McFarlands”), Trustees of the Gay Street/Sandy Valley Road Realty Trust (the “Trust,” collectively “Petitioners”), have filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”) of a Superseding Order of Conditions (“SOC”) issued by the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP” or “NERO”) pursuant to the Massachusetts Wetlands Protection Act (“MWPA”), G.L. c. 131, § 40, and Wetlands Regulations.¹ The SOC was issued to P.T. Realty Trust (the “Applicant”) authorizing the latter’s proposed construction of a single-family house and appurtenances (the “proposed Project”) at Lot 2, 490 Gay Street in Westwood, Massachusetts (the “Property”). The Petitioners requested the SOC to challenge the Order of Conditions (“OOC”) issued by the Westwood Conservation Commission (“Commission”) to the

¹ OADR is an independent, neutral, quasi-judicial office within MassDEP whose Presiding Officers (senior environmental attorneys) are responsible for advising MassDEP’s Commissioner in the adjudication of appeals filed with OADR, including this appeal.

Applicant approving the proposed Project. The Petitioners contend that they are aggrieved parties and that the SOC does not accurately depict the wetlands resource areas on and around the Property and therefore fails to satisfy the interests of the MWPA and Wetlands Regulations.

After thoroughly reviewing the administrative record, based on a preponderance of the evidence submitted by the Parties at the evidentiary adjudicatory hearing (“Hearing”) that I conducted to adjudicate this appeal and the governing wetlands statutory and regulatory requirements, I recommend that the Department’s Commissioner issue a Final Decision affirming the SOC, with the addition of special condition 6 from the OOC.

EVIDENCE

The evidence in the administrative record includes the Department’s basic documents and the pre-filed, sworn written testimony and exhibits (“PFT”) submitted by witnesses on behalf of the Parties. The witnesses below submitted PFT and were available for cross-examination at the Hearing by opposing counsel for the Parties.²

For the Petitioner:

1. **Brandon Faneuf**: Mr. Faneuf is the president of Ecosystem Solutions, Inc., an environmental consulting firm. He received a bachelor’s degree in wildlife biology and a master’s degree in wetlands conservation from the University of Massachusetts, Amherst. He is a certified wetland scientist, soil scientist, and wildlife biologist, and has worked in these fields on a full-time basis for more than 25 years. He has performed hundreds of wetlands studies and over 2,000 wetland delineations in New England. Mr. Faneuf is

² Throughout this Recommended Final Decision, the witnesses’ cross examination testimony at the Hearing is referred to as “[Witness], page:lines.”

qualified as an expert witness.

For the Applicant:

1. Robert Truax: Mr. Truax is the coordinating Principal of GLM Engineering Consultants, Inc. He received a bachelor's degree in civil engineering from the Wentworth Institute of Technology. He is a Certified Soil Evaluator and Registered Professional Engineer in Massachusetts. He has designed more than 100 subdivision and site plans for residential and commercial development projects and personally performed land survey work and prepared stormwater management plans during his over 35 years with GLM. Mr. Truax is qualified as an expert witness.
2. Nicole Hayes: Ms. Hayes is a Wetland Scientist with Goddard Consulting, LLC. She received a degree in biology from Roger Williams University. She is a Professional Wetland Scientist and has been a practicing professional consultant in the field of wetland science for over 20 years. Ms. Hayes is qualified as an expert witness.
3. Scott Goddard: Mr. Goddard is the principal of Goddard Consulting, LLC. He received degrees in environmental engineering from the Massachusetts Institute of Technology and Worcester Polytechnical Institute. He is a Professional Wetland Scientist, a Certified Wetland Scientist in New Hampshire, and a Certified Soil Evaluator in New Hampshire. He has been a practicing professional consultant in the field of wetland science for over 25 years. Mr. Goddard is qualified as an expert witness.

For the Commission:

1. Karon Skinner-Catrone: Ms. Skinner-Catrone is the Conservation Agent, Tree Warden, Floodplain Administrator, and Staff to the Stormwater Authority for the Commission.

She received a degree in biology/environmental science from Bridgewater State College. She has been the Conservation Agent for the Commission since 2004. Prior to her current position, she worked for the Stoughton Conservation Commission. Ms. Skinner-Catrone is qualified as an expert witness.

For the Department:

1. Tyler Ferrick: Mr. Ferrick is an Environmental Analyst with the Department. He received a bachelor's degree in conservation law enforcement from Unity College. He has worked for the Department since 2021. His responsibilities include reviewing Notices of Intent, reviewing 401 Water Quality Certification applications, preparing comments on filings made pursuant to the Massachusetts Environmental Policy Act ("MEPA"), assessing projects after requests for Department action, and investigating violations of the MWPA. Prior to joining the Department, he was a Project Manager/Environmental Scientist at DeRosa Environmental Consulting, Inc. Mr. Ferrick is qualified as an expert witness.

The Property

The Property is located at 490 Gay Street in Westwood, Massachusetts and the proposed Project would be constructed on Lot 2. SOC Plan, Sheet 1³; Chalk 1⁴; Goddard & Hayes PFT, ¶

³ The SOC plan includes two sheets and is titled, "Proposed Site Plan Lot 2 Gay Street, Westwood, Massachusetts, "Prepared by GLM Engineering Consultants, Inc., dated February 7, 2023, revised June 20, 2023, and July 10, 2023."

⁴ Chalk 1 is a copy of the SOC Plan that was offered by the Applicant for use during cross examination of witnesses. No party opposed its inclusion in the administrative record and Joseph Ferson, the OADR Assistant Case Administrator, took a photograph of the Chalk and provided it to the Stenographer for inclusion in the transcript. Applicant's counsel also circulated a full-size copy of the Chalk to the Parties and OADR after the Hearing. The Applicant had marked Purgatory Brook in orange marker; the BVW line in green; the proposed house in purple; the proposed driveway in black; the proposed infiltration systems in red; and the proposed pool in blue. Attorney

16; Truax PFT, ¶¶ 5-6; Truax Ex. 2. Lot 2 on the SOC Plan is 422,273 square feet, or 9.69 acres, and would contain the proposed Project. Truax PFT, ¶¶ 6, 8; Skinner-Catrone PFT, ¶ 21. Lot 1 on the SOC Plan is 80,533 square feet and contains the existing single-family home. Truax PFT, ¶ 6. Parcel A is 106,614 square feet and would remain undeveloped. Truax PFT, ¶ 6. Resource areas located on the Property include Bordering Vegetated Wetland (“BVW”), Land Under Water (“LUW”), Bordering Land Subject to Flooding (“BLSF”), Riverfront Area (“RA”), and Bank, the latter two being associated with Purgatory Brook (the “Brook”), a perennial stream. SOC Cover letter, page 1; Faneuf PFT, ¶¶ 34, 41, 46; Goddard & Hayes PFT, ¶ 17; Ferrick PFT, ¶ 3.

Purgatory Brook

The Parties agree that the Brook is a perennial stream, flows from north to south, and that it is designated as a cold-water fishery. SOC Plan, Sheet 1; Chalk 1⁵; Faneuf PFT, ¶ 47; Goddard & Hayes PFT, ¶¶ 40, 80; Truax PFT, ¶ 29; Skinner-Catrone PFT, ¶ 11; Faneuf, 40:18-20.⁶ The Brook flows through a culvert under a cart path on the Property and eventually flows into a culvert off-property, underneath Gay Street. SOC Plan, Sheet 1; Ferrick PFT, ¶¶ 29-30; Goddard & Hayes PFT, ¶ 39. North of the cart path, the Brook is a wetland stream traversing through a BVW. Faneuf PFT, ¶ 55; Ferrick PFT, ¶ 30; Goddard & Hayes PFT, ¶ 46. South of

Nylen, 43:16. During cross-examination, witnesses used colored markers to identify additional areas of the Property referenced in their testimony and the Parties referenced Chalk 1 in their closing briefs.

⁵ The Massachusetts Division of Fisheries & Wildlife has designated Purgatory Brook as a cold-water fishery resource pursuant to 310 CMR 10.04. Faneuf PFT, ¶ 47.

⁶ Q (Legere): And do we agree, then, that the flow is generally from the north to the south?
A (Ferrick): Generally.

the cart path, the Brook is narrower. The USGS map⁷ shows an approximate location for the purpose of designating a perennial stream but does not show the Mean Annual High Water (“MAHW”) line. Ferrick, 173:7-174-5.⁸

The MAHW line as designated on the SOC Plan was delineated by the Applicant. Goddard & Hayes PFT, ¶ 17. MassDEP reviewed the MAHW line and requested no changes. Goddard & Hayes PFT, ¶ 31; Ferrick PFT, ¶ 8. The Petitioners contend that the MAHW is incorrectly drawn. Faneuf PFT, ¶ 45. The Petitioners’ MAHW line, which was not delineated, is estimated on Chalk 1 in brown. Faneuf, 44:5-8, 46:2-15.

Petitioners’ Abutting Property

The Petitioners own a parcel abutting the Property to the east identified on the SOC Plan as “N/F Duncan M. McFarland Gay Street Rear” (“Eastern Parcel”). SOC Plan, Sheet 1.⁹ See Goddard & Hayes PFT, ¶ 39; Truax PFR, ¶¶ 26-27. The Petitioners’ east parcel is at a higher elevation than the Applicant’s property, including the portion containing BVW. Truax PFR, ¶

⁷ “USGS” is the acronym for the United States Geological Survey.

⁸ Q (Legere): And you just mentioned the USGS map, which we’ve heard some testimony to earlier today, is Purgatory Brook’s mean annual high water, as approved by the SOC, consistent with what’s shown on the USGS mapping?

A (Ferrick): Well, USGS map just shows an approximate location of the stream, not the mean annual high-water line.

Q: Does that track the delineation for the channel done by the applicant here and approved by the superseding order?

A: No. Does it show the exact – of the latest USGS map?

Q: Correct, the current.

A: No.

Q: What weight would you give to USGS mapping in your review of mean annual high-water delineation?

A: For determining the bankfull elevation or the mean annual high-water line?

Q: (Nods).

A: Not at all. It only determines whether it’s perennial or not, and it’s an approximate location of the stream itself.

⁹ At the Hearing, Mr. Faneuf identified this abutting property on Chalk 1. There is no other testimony regarding the ownership of this abutting property, which is not in dispute.

26¹⁰; Goddard & Hayes PFT, ¶ 39. The Petitioners also own a parcel abutting the Property to the north identified on the SOC Plan as “N/F Duncan M. McFarland Sandy Valley Road” (“Northern Parcel”).¹¹ The Northern Parcel is subject to a Conservation Restriction held by the Westwood Land Trust. Truax PFT, ¶ 27; Goddard & Hayes PFT, ¶ 39. The Northern Parcel also located at a higher elevation than the northern portion of the project Property where the Brook is located. Truax PFT, ¶ 27. The Northern Parcel is 500 to 600 feet from the proposed Project limit of work. Goddard & Hayes PFT, ¶ 39; Truax PFR, ¶ 28.

On behalf of the Petitioners, Mr. Faneuf testified that the BVW and RA on the Property is part of the same wetland system present on the Petitioners’ abutting parcels. Faneuf PFT, ¶ 42. However, the record does not include any delineation of wetland resources on the Petitioners’ parcels, beyond those resources delineated on the SOC Plan by the Applicant which extend a short distance off the Property. Faneuf, 25:20-26:1.¹² Mr. Faneuf testified that he did not enter the Northern Parcel. Faneuf, 28:19-21. Mr. Faneuf also testified that he did not delineate any wetland resources on the Eastern Parcel. Faneuf, 29:11-18.¹³

¹⁰ “[T]he 522 Plan provides the topographic elevation of the bordering vegetated wetland surveyed on Parcel 29 as elevation 164. This wetland elevation on McFarland Parcel 29 is 3-feet higher than the nearest wetland on the Property at 490 Gay Street which was surveyed by GLM as elevation 161”

¹¹ At the Hearing, Mr. Faneuf identified this abutting property on Chalk 1. There is no other testimony regarding the ownership of this abutting property, which is not in dispute.

¹² Q (Nylon): Okay. And I see the wetland line is on that -- on your property -- extends onto your property. Is that fair to say?

A (Faneuf): Yes.

Q: And did you delineate that?

A: I did not.

¹³ Q (Nylon): And you testified that you haven’t delineated the wetlands on the eastern side; correct?

A (Faneuf): Correct. I haven’t done a delineation here at all.

Q: Okay. And that would include the north as well?

A: Correct.

The Proposed Project

The proposed Project involves the construction of an additional single-family home on Lot 2 of the Property. Goddard & Hayes PFT, ¶ 16; Truax PFT, ¶¶ 5-6, 8; Skinner-Catrone PFT, ¶ 21; Ferrick PFT, ¶ 3.¹⁴ The single-family home would include a driveway, patio, pool, stormwater management system, and utilities. Goddard & Hayes PFT, ¶ 26; Truax PFT, ¶ 12; Skinner-Catrone PFT, ¶ 22; Ferrick PFT, ¶ 3. It is undisputed that a portion of the proposed Project would take place in BLSF and the 100-foot Buffer Zone to BVW. Goddard & Hayes PFT, ¶ 27; Ferrick PFT, ¶ 3. The proposed Project would result in 1,719 cubic feet of fill in BLSF and the SOC approved 1,784 cubic feet of compensatory flood storage.¹⁵ Ferrick PFT, ¶ 3; Skinner-Catrone Ex. E. In the SOC, the Department determined that no work would take place in RA or the BVW. SOC Cover letter, page 2; Goddard & Hayes PFT, ¶ 55; Skinner-Catrone PFT, ¶ 24; Ferrick PFT, ¶¶ 34, 39.

Procedural Background

The Applicant initially filed an Abbreviated Notice of Resource Area Delineation (“ANRAD”) with the Commission on September 30, 2022, to confirm the accuracy of the wetland resource areas on the Property. Faneuf PFT, ¶ 21; Goddard & Hayes PFT, ¶ 18; Skinner-

¹⁴ Lot 1 is 80,533 square feet and contains the existing single-family home. Truax PFT, ¶ 6. Lot 2 is 422,273 square feet, or 9.69 acres, and would contain the proposed Project. Truax PFT, ¶¶ 6, 8; Skinner-Catrone, ¶ 21. Parcel A is 106,614 square feet and would remain undeveloped. Truax PFT, ¶ 6.

¹⁵ Goddard and Hayes testified that the proposed Project would involve 113 cubic feet of fill in BLSF and 119 cubic feet of compensatory flood storage. Goddard & Hayes PFT, ¶ 34. However, the SOC states that these amounts will only occur between elevations 165.7 and 166.0, with an additional 1,606 cubic feet of fill and 1,665 cubic feet of compensatory flood storage between elevations 166.0 and 166.9. SOC Cover Letter, page 3.

Catrone PFT, ¶ 11.¹⁶ The Applicant subsequently withdrew the ANRAD and filed a Notice of Intent (“NOI”) for the proposed Project on February 9, 2023. Faneuf PFT, ¶¶ 27-28; Goddard & Hayes PFT, ¶¶ 24-25; Skinner-Catrone PFT, ¶¶ 19, 21.

The public hearing on the NOI took place on March 8, 2023, at which the Commission voted to issue an Order of Conditions (“OOC”) approving the proposed Project. Faneuf PFT, ¶ 28; Goddard & Hayes PFT, ¶ 28; Skinner-Catrone PFT, ¶ 24. The Commission issued an OOC approving the proposed Project on March 17, 2023. Faneuf PFT, ¶ 29; Goddard & Hayes PFT, ¶ 29; Ferrick PFT, ¶ 4; Skinner-Catrone PFT, ¶ 24. The Petitioners requested an SOC on March 29, 2023. SOC Cover letter, page 1; Ferrick PFT, ¶ 5; Goddard & Hayes PFT, ¶ 30; Skinner-Catrone PFT, ¶ 25.

MassDEP’s expert, Tyler Ferrick, conducted a site inspection on May 9, 2023, attended by the Parties and their representatives. Faneuf PFT, ¶ 30; Goddard & Hayes PFT, ¶ 31; Ferrick PFT, ¶ 6; Truax PFT, ¶ 20; Skinner-Catrone PFT, ¶ 32. Mr. Ferrick identified two locations in the wetland delineation to be corrected. Ferrick PFT, ¶ 6.¹⁷ Thereafter, in response to an information request from Mr. Ferrick, the Applicant filed revised plans showing the corrected wetland delineation, including the construction detail for the compensatory flood storage area. Ferrick PFT, ¶¶ 7-8; Ferrick Ex. F. Mr. Ferrick requested further revisions regarding the

¹⁶ Review by the Commission of the ANRAD included a site visit and changes to the wetland delineation. Goddard & Hayes PFT, ¶ 19; Skinner-Catrone PFT, ¶¶ 12-14. Following a public hearing at which the Petitioners submitted comments, the Commission voted for a peer review before continuing the public hearing. Faneuf PFT, ¶¶ 24-25; Goddard & Hayes PFT, ¶¶ 21, 23; Skinner-Catrone PFT, ¶¶ 15, 17.

¹⁷ Flag CG-4 to CG-9 and CG-9 to CG-20. Ferrick PFT, ¶ 6.

compensatory flood storage area and a final revised plan was submitted with the relevant details and was approved as the SOC Plan. Ferrick PFT, ¶¶ 10-11.

The Department issued the SOC approving the project on August 1, 2023, and the Petitioners initiated this appeal of the SOC. Ferrick PFT, ¶ 11; Goddard & Hayes PFT, ¶ 34; Skinner-Catrone PFT, ¶ 28. On September 25, 2023, I conducted a Pre-Hearing Conference at which the issues for adjudication were established as well as the schedule for the Parties to file sworn PFT of witnesses, including expert witnesses, and memoranda of law in support of their respective positions on the Issues prior to the Hearing, and to schedule a Site Visit for the Parties and a Site View. Thereafter, the Parties conducted a site visit on October 6, 2023, and I held a Site View on December 20, 2023. A Hearing was held in-person at MassDEP's Woburn office on January 9, 2024.

At the conclusion of cross-examination of the witnesses at the Hearing, the Applicant moved for directed decision contending that the Petitioners had made no showing of impact or harm to establish standing or to prevail on the issues for adjudication.¹⁸ The Petitioners opposed the motion, stating that in their post-hearing briefing they would be able to explain the impact and harm to the Petitioners' interests under the MWPA.¹⁹ The Commission did not comment at the Hearing²⁰ while the Department stated some agreement with the Applicant, except to the extent that the Department opined that the Petitioners might have satisfied the minimum

¹⁸ Nylen, 142:24-145:7.

¹⁹ Legere, 145:10-146:10.

²⁰ Ahern, 146:12-13.

necessary for standing.²¹ I reserved ruling on the motion to afford the Parties the opportunity to address the Applicant's motion in their post-hearing briefs, which were filed on February 1, 2024.

ISSUES FOR ADJUDICATION

Based on the Parties' respective positions in the appeal regarding approval of the proposed Project, the Issues for Adjudication in the appeal are the following.

1. Whether the Petitioners are persons aggrieved by issuance of the SOC approving the proposed Project.
2. Whether the Mean Annual High Water ("MAHW") mark has been properly delineated for the proposed Project.
3. Whether the proposed Project has been conditioned to meet the requirements of 310 CMR 10.58(3) and 310 CMR 10.58(4) for proposed work in Riverfront Area.
4. Whether the Bordering Vegetated Wetlands ("BVW") have been properly delineated for the proposed Project.
5. Whether the proposed Project has been conditioned to meet the requirements of 310 CMR 10.55(3) and 310 CMR 10.55(4) for proposed work in the BVW and associated Buffer Zone.

STATUTORY & REGULATORY FRAMEWORK

The Massachusetts Wetlands Protection Act and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting wetlands areas in a manner that promotes the following interests: (1) protection of public and private water supply; (2) protection of ground water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6) protection of land containing shellfish; (7) protection of fisheries;

²¹ Blakely, 146:15-23.

and (8) protection of wildlife habitat. G.L. c. 131, § 40; 310 CMR 10.01(2); See In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (August 29, 2018), 2018 WL 9847851, *3, adopted by Final Decision (September 18, 2019), 2019 WL 5209254, citing Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 224 (2010).

APPEAL ADJUDICATION PROCEDURE

I. PETITIONERS' BURDEN OF PROOF

In addition to the Adjudicatory Proceeding Rules at 310 CMR 1.01, the Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), and the requirements of the MWPA and the Wetlands Regulations govern resolution of the Petitioners' appeal of the SOC. Under 310 CMR 10.05(7)(j), the Petitioners have 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 their contention that the Department erred in issuing the SOC, the Petitioners were required to "produce [at the Hearing] at least some credible evidence from a competent source in support of [their] position[.]" 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 Petitioners 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 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 WL 3427461, *11, adopted by Final Decision (August 19, 2010), 2010 WL 3427460. 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 Carl Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006), 2006 WL 4211673 (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), 2004 WL 3973695 (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), 2003 WL 21202599, adopted by Final Decision (May 9, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned).

II. STANDARD OF REVIEW

My review of the evidence presented by the Parties at the Hearing was *de novo*, meaning that my review was anew, irrespective of any prior determination of the Department in issuing the SOC. In the Matter of Brian Corey, OADR Docket No. WET 2016-023, Recommended Final Decision (February 28, 2018), 2018 WL 2002973, *19, adopted as Final Decision (March 15, 2018), 2018 WL 2002972.

The relevancy, admissibility, and weight of evidence that all parties sought to introduce at the Hearing was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h). 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 . . . rest[ed] within the discretion of the Presiding Officer.” Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 WL 5758252, *29, adopted as Final Decision (July 7, 2015), 2015 WL 5758285 (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”).

DISCUSSION

The Petitioners contend they are persons aggrieved by the SOC because the proposed Project will “result in significant alterations to BVW and Riverfront Area on the Property, which are part of the same wetland system present on the Petitioners’ abutting property.” Faneuf PFT, ¶ 42. The Petitioners contend that the proposed Project will “harm the interests associated with BVW and Riverfront Area and protected by the MWPA, including maintaining private and/or public water supply, groundwater supply, flood control, storm damage prevention, prevention of pollution, wildlife habitat, and fisheries,” and that “[t]hese impacts will not be limited to the wetlands on the Property, but will affect the entire wetlands system, and extend to the wetlands on the McFarlands’ abutting property.” Faneuf PFT, ¶ 43. The Petitioners contend that their

wetland interests will be adversely affected. Faneuf PFT, ¶ 44. After all witnesses had provided PFT and been available for cross-examination, the Applicant moved for directed decision contending that the Petitioners had failed to provide any factual evidence to support their allegations of harm to any wetland resource areas on the Property or on their abutting properties, or that any alleged impact would be different either in kind or magnitude from any injury to the general public.

I. THE DIRECTED DECISION STANDARD OF 310 CMR 1.01(11)(e)

The Adjudicatory Proceeding Rules at 310 CMR 1.01 govern the adjudication of this appeal. The Rules at 310 CMR 1.01(11)(e) provide that:

[u]pon the petitioner's submission of prefiled testimony . . . any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue. Decision on the motion or order to show cause may be reserved until the close of all the evidence. . . .

(Emphasis supplied.) “Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party’s direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible source in support of its position on the identified issues.” In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 WL 1656467, *4, adopted as Final Decision, (April 18, 2017), 2017 WL 1656463. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the

appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

Here the Petitioners have failed to present the minimum quantum of evidence sufficient to demonstrate that they are persons aggrieved pursuant to MWPA and 310 CMR 10.04²² and 310 CMR 10.05(j)(7)2.a.²³ Further, they have failed to present sufficient evidence demonstrating that MassDEP issued the SOC to the Applicant in violation of the MWPA and the Wetlands Regulations.

1. Petitioners failed to present sufficient evidence to demonstrate their standing to challenge issuance of the SOC as “persons aggrieved” by the SOC.

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1075); In the Matter of Webster Ventures, LLC (“Webster Ventures II”), OADR Docket No. 2015-014, Recommended Final Decision (June 3, 2016), 2016 WL 3632236, *6, adopted as Final Decision (June 15, 2016), 2016 WL 3632244; In the Matter of Onset Bay II Corp., OADR Docket No. 2012-034, Recommended Final Decision (August 28, 2020), 2020 WL 6115205, *17, adopted as Final Decision (September 23, 2020), 2020 WL 6115206, affirmed, Norfolk Superior Court (June 8, 2022).²⁴ Rather, it “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322

²² Person Aggrieved means any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests identified in G.L. c. 131, § 40.

²³ While abutters may request that a Department regional office review an OOC issued by a Commission (see 310 CMR 10.05(7)(a)4), that privilege does not extend to request for review of an SOC issued by a Departmental regional office. An abutter seeking to initiate an administrative appeal of an SOC issued by a regional office must demonstrate aggrievement.

²⁴ See Tramontozzi v. Massachusetts Department of Environmental Protection, Norfolk Superior Court, C.A. No. 2082CV01007.

(1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see United States v. Hays, 515 U.S. 737, 742 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”). Findings of standing, which are based on the required lower standard of proof, do not mean a Petitioner must succeed on the merits, but address only whether the Petitioners may proceed to the merits of their challenge regarding whether the Department properly issued the SOC. Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005); Webster Ventures II, 2016 WL 3632236, at *21.

The Wetlands Appeal Regulations specify who may appeal an SOC and do not include abutters, unless they show aggrievement and prior participation. As such, in order to demonstrate that they had standing to challenge the Department’s SOC as “aggrieved persons,” the Petitioners were required to (1) demonstrate participation in the permit proceedings, which is not in dispute; and (2) put forth a minimum quantum of credible evidence supporting their claim that the SOC would or may cause them to suffer an injury in fact is which different either in kind or magnitude from that suffered by the general public and which is within the scope of the interests protected by the MWPA and the Wetlands Regulations. See G.L. c. 131, § 40; 310 CMR 10.04; Brian Corey, 2018 WL 2002973, at *11 (petitioner presented facts supporting its position as an environmental organization created for purpose of protecting resources at issue to demonstrate the minimum quantum of proof necessary to demonstrate aggrievement); In the Matter of Diamond Development Realty Trust, OADR Docket No. WET 2018-016, Recommended Final Decision, (April 2, 2019), 2019 WL 4735457, *5, adopted by Final Decision (April 8, 2019), 2019 WL 4735456 (petitioners failed to meet burden of going forward on the issue of aggrievement where testimony did not present factual foundation from which to

conclude their statements constitute credible evidence from competent source). To proceed to the “inquiry on the merits” the Petitioners must meet that minimal evidentiary threshold. See Butler, 63 Mass. App. Ct. at 441.

The Petitioners contend that they have made this showing as “persons aggrieved” because their expert proved that the proposed Project “might possibly adversely impact the interests of the [MWPA]; and (2) those adverse impacts would or could generate identifiable impacts on ‘a private right, a private property interest, or a private legal interest’ of the Petitioners,” which rights and interests the “[MWPA] is designed to protect.” (Emphasis in original; citations omitted.) Pet. Closing Brief, page 3, citing Faneuf PFT, ¶¶ 43-44; Faneuf PFR, ¶ 9.

The Applicant and the Commission contend that the Petitioners have failed to show standing because their expert’s testimony is conclusory and does not include factual evidence to support his opinions. The Applicant contends that the Petitioners failed to put forth a minimum quantum of credible evidence demonstrating that they would or might suffer a unique injury, different either in kind or magnitude from any injury, if any, that the general public could suffer within the scope of interests protected by the MWPA. App. Post-Hearing Br., pages 4-14. The Commission also asserts that the Petitioners have failed to meet their standing burden on the grounds that Mr. Faneuf’s testimony is opinion with “no scientific assertions as to how they are aggrieved or harmed.” Commission Post-Hearing Br., page 3.

MassDEP contends that the Petitioners have standing because a “minimum quantum of evidence” is a lower standard than the “preponderance of the evidence” necessary for them to be successful in their claim. MassDEP Post-Hearing Br., pages 3-6. Referencing the fact that the Petitioners are abutters and that the Petitioners state in their Notice of Appeal, legal memoranda

and expert's testimony that they assert harm, MassDEP contends that this general assertion alone is sufficient to meet the lower standard of minimum quantum of evidence. Id.

After reviewing the record, I conclude that the Petitioners have failed to meet the minimum quantum of evidence for the purpose of demonstrating standing as persons aggrieved. While the Department is correct that a minimum quantum of evidence is a lower standard than the preponderance of the evidence necessary for success on the merits, it does require more than a general conclusion asserting that "there will or might possibly be harm." To show standing as persons aggrieved, the Petitioners had to include in their testimony at least some factual support identifying the wetland resources that would be harmed, how they themselves would be harmed and how that harm would or may be different in kind and magnitude from that suffered by the general public. See 310 CMR 10.04; Webster Ventures II, 2016 WL 3632236, at *11-12; Butler, 63 Mass. App. Ct. at 441.

A wetlands expert with significant experience and education, Mr. Faneuf is a competent source, but his testimony lacks proper factual foundation, resulting in conclusory and unsupported statements and opinions. In their brief, the Petitioners cite to Mr. Faneuf's testimony at 42-44 and PFR at 9 to support standing. Mr. Faneuf testified, "As currently approved, the Project will result in significant alterations to BVW and Riverfront Area on the Property, which are part of the same wetlands system present on the Petitioners' abutting property." Faneuf PFT, ¶ 42. Even if taken as true, this statement does not allege that the Petitioners will suffer harm from the proposed Project, nor does it allege a harm that would be unique and different in kind and magnitude from any harm to the general public.

Mr. Faneuf goes on to testify,

“As detailed below, the Project’s alteration of those and associated Resource Areas will harm the interest associated with BVW and Riverfront Area and protected by the WPA, including maintaining private and/or public water supply, groundwater supply, flood control, storm damage prevention, prevention of pollution, wildlife habitat, and fisheries. These impacts will not be limited to the wetlands on the Property, but will affect the entire wetlands systems, and extend to the wetlands on the McFarlands’ abutting property.” Faneuf PFT, ¶ 43. (Emphasis supplied.)

However, as Applicant points out in its closing brief, not only are there no “details below” regarding how the Project “will or may” harm, impact or affect the wetlands on the Property or the wetlands on the Petitioners’ abutting parcels, but additionally Mr. Faneuf’s testimony fails to include a factual assertion that any harm will or may result in injury in fact to the Petitioners which is different in kind or magnitude from that suffered by the general public.

In support of their standing claim, the Petitioners also reference Mr. Faneuf’s conclusion in paragraph 44 of his PFT,

“Thus, the Project will harm the McFarlands by adversely affecting their property’s ability to protect the Act’s interests of maintaining provide and/or public water supply, groundwater supply, flood control, storm damage prevention, prevention of pollution, wildlife habitat, and fisheries under the WPA.” Faneuf PFT, ¶ 44.

This conclusion is also a general assertion that lists the interests protected by the MWPA but fails to identify any harm or adverse effect to these interests, or any harm or adverse effect to these interests that is unique to the Petitioners. Nowhere in his testimony did Mr. Faneuf identify the alleged adverse effects to any of the interests listed in paragraph 44 of his testimony, unique to the Petitioners or otherwise.

On cross-examination at the Hearing, Mr. Faneuf testified that he did not conduct any wetlands delineation of the Northern Parcel or the Eastern Parcel. Faneuf, 29:11-18. He testified that he did not evaluate any data regarding the elevation of the Petitioners’ parcels relative to the

Property. Faneuf, 26:25, 27:1-9. While the Petitioners in their legal memoranda refer to a conservation restriction on the Northern Parcel, the conservation restriction is not included in Mr. Faneuf's exhibits, nor does he reference it in asserting any harm from the proposed Project. His testimony does not include factual support for his opinion that the Petitioners would be harmed, impacted or affected in any way, much less in a way that is different in kind and magnitude from any harm to the general public.

Although it supports the Petitioners' standing claim, MassDEP nevertheless points out that "Mr. Faneuf opens his discussion on this topic with a conclusory statement that the Project will result in significant alterations to BVW and Riverfront Area on the Property, but he never answers the question of how the Project will cause these alterations." MassDEP Closing Br., page 5 (emphasis in original). MassDEP contends that Mr. Faneuf's testimony "fails to specifically connect the Project with harm to Resource Areas, either on the Property or on the Petitioners' parcels." Id.

The final paragraph the Petitioners cite to support their standing argument is Mr. Faneuf's rebuttal testimony, paragraph 9 which reads:

The Applicant has not provided nearly enough information to establish that the standard for separation from the bottom of the infiltration structure and the ESHWT is met for Roof Recharge System #1 as depicted on Sheet 2 of the final approved project plan. As currently designed, the lack of compliance with the stormwater standards will adversely impact adjacent wetland resource areas and harm the interests protected by the Act and the Department's regulations, included the stated Public Interests (set forth in M.G.L. c. 131, § 40 and 310 CMR 10.00) for, and associated with, protection of a cold-water fishery/Critical Areas like Purgatory Brook.

However, while this statement specifically alleges that the Applicant has not provided "nearly enough information" regarding compliance with the stormwater standards, Mr. Faneuf does not

make any specific factual allegation identifying a potential harm unique to the Petitioners that might result from not having “nearly enough information” or that might result from an alleged “lack of compliance with the stormwater standards.”

A wetland expert with significant experience and education, Mr. Faneuf is a competent source. However, his testimony lacks proper factual foundation, resulting in conclusory and unsupported statements and opinions. As a result, the Petitioners have failed to meet the minimum quantum of evidence for the purpose of demonstrating standing as persons aggrieved.

2. The Petitioners’ evidentiary submissions in support of their claim that the Department erred in issuing the SOC are deficient as a matter of law.

Even if Petitioners had demonstrated standing to challenge the SOC, they would not prevail. As briefly summarized below, they failed to produce sufficient evidence to support their claims.

Mean Annual High Water line (“MAHW”)²⁵: On behalf of the Petitioners, Mr. Faneuf testified regarding the field indicators he deemed relevant for delineation. Faneuf PFT, ¶¶ 58-66, 68, 70-78. He contends that the MAHW line is incorrectly delineated and that by his estimate the MAHW is located at the stone wall. Faneuf, 47:22-25.²⁶ However, as discussed above, Mr. Faneuf testified that he did not delineate any resource areas. Faneuf, 28:19-21. On cross examination he drew his estimated MAHW, at the stone wall, on Chalk 1 in brown. He then calculated the distance from his estimated MAHW line to the proposed work area to be more

²⁵ MAHW is the line that is apparent from visible markings of changes in the character or soils or vegetation between a flowing stream and, in this case, BVW and Flood Plain. See 310 CMR 10.58(2)(a)2.

²⁶ Mr. Faneuf also testified regarding his observations of vegetation, moving and standing water and soil during a site visit and included in his testimony videos, some with identified locations and with some narration. Faneuf PFT, ¶¶ 34-39, 51-56.

than 290 feet from his estimated MAHW line. Faneuf, 45:20-46:1. In doing so, he acknowledged that the proposed work is well outside even his estimate of the Riverfront Area, which would extend 200 feet from his estimated MAHW.²⁷

Bordering Vegetated Wetland (“BVW”): Mr. Faneuf also contends that the BVW delineation is incorrect, yet again, he testified that he did not delineate the BVW, on the Property or on the Petitioners’ properties. Faneuf PFT, ¶¶ 83-92. Faneuf, 29:11-15. Mr. Faneuf testified that he believed the proposed Project will alter more Buffer Zone and is closer to BVW than shown on the SOC Plan. Faneuf PFT, ¶¶ 89-90. He also testified that he used an auger to identify hydric soils in an area covered by woodchips. Faneuf PFT, ¶¶ 85-87.²⁸ He testified that he observed vegetation he deemed consistent with BVW outside the SOC Plan delineation. Faneuf PFT, ¶ 90. However, his testimony does not provide factual evidence to support these conclusions. On cross-examination, Mr. Faneuf acknowledged that he was aware of MassDEP’s protocol of using BVW data forms to establish soils, vegetation and hydrology and that he did not fill out the BVW forms for the proposed Project to comply with the Department’s protocol. Faneuf, 60:21-62:6. Nor did he otherwise include sample results in his testimony.

As such, the Petitioners’ claim that the SOC is not conditioned to meet the requirements for work proposed in the BVW and associated Buffer Zone is unsupported. Mr. Faneuf’s

²⁷ The Riverfront Area delineated by the Applicant as 200 feet from the MAHW of Purgatory Brook is shown on the Site Plan, Truax Ex. 7. The Site Plan shows that the limit of work of the Project is 320 feet from the MAHW, outside of the Riverfront Area. Truax PFT, ¶ 39; See also Goddard & Hayes PFT, ¶¶ 41, 47-48, 51, 54.

²⁸ While Mr. Faneuf testified that he had doubts about the flags he did not review (CG-1 through CG-32), he concluded that the wood chip area, not within the BVW area, is likely BVW as a result of soil auger samples. Faneuf PFT, ¶ 92. On behalf of MassDEP, Mr. Ferrick acknowledged that some of the auger samples could be indicators of hydric soils but testified that Mr. Faneuf did not conduct a vegetation analysis/dominance test to confirm the boundary. Ferrick PFT, ¶ 38.

testimony makes no allegation that there is work that will occur within the BVW.²⁹ The Applicant contends that the testimony supports the SOC's finding that there is no work proposed within BVW. SOC Cover Letter, page 2; SOC Plan (Truax Ex. 7; Ferrick Ex. E); Goddard & Hayes PFT, ¶¶ 11-14.

Buffer Zone: In issuing the SOC, MassDEP determined that the proposed Project and the associated work activity will not encroach on the boundaries of the BVW, although some work would be conducted within the Buffer Zone to the BVW. Ferrick PFT, ¶ 39; See Goddard & Hayes PFT, ¶¶ 101, 108-109. Mr. Faneuf's testimony did not offer any specific evidence of proposed work in the BVW. Ferrick PFT, ¶¶ 93-99. Nor did he provide any credible evidence of work proposed in Buffer Zone that will alter BVW or offer specific conditions in the SOC that do not protect the interests of the Act. Mr. Faneuf's testimony fails to establish that the SOC "approves a project that will increase flooding and storm damage on Petitioners' property, while degrading wildlife habitat, fisheries and groundwater on their land, as a result of alterations within Riverfront Area and Buffer Zone to BVW." The Petitioners have not met their burden to provide credible evidence of alteration of wetland resource areas causing identifiable harm to the property interests of Petitioners. In the Matter of Digital Realty Trust, OADR Docket No. WET-2013-018, Recommended Final Decision (October 9, 2013), 2013 WL 5676898, *2-3, adopted

²⁹ His only reference to the BVW as it relates to this issue is the existence of wood chips in an area he would delineate as BVW near a sign marked "Pops Park." Faneuf PFT, ¶ 93. Mr. Faneuf contends that the wood chips are likely from vegetation that was cut and chipped on the property which he asserts is an alteration that should result in removal and restoration. Faneuf PFT, ¶¶ 94-95. Further, the SOC does not approve any restoration work, or any work in the area identified by Mr. Faneuf. The referenced area is delineated on the SOC Plan as Buffer Zone. Goddard & Hayes PFT, ¶ 110. Ms. Hayes testified that she analyzed the soil in this area and found areas of upland soil and hydric soil, no wetland vegetation and identified upland species in the area. Goddard & Hayes PFT, ¶¶ 127-128.

by Final Decision (October 28, 2013), 2013 WL 5854061, citing Robert Siegrist, 2003 WL 21202599; In the Matter of Sandra Lepore, Docket Nos. 2003-092 and 093, Recommended Final Decision (September 2, 2004), 2004 WL 4737232.

The SOC Plan shows no work in the BVW, and the testimony of the Applicant's and MassDEP's respective expert witnesses supports that there will be no alteration of BVW that will adversely affect the ability of the BVW to contribute to one or more interests of the MWPA and Wetlands Regulations. Goddard & Hayes PFT, ¶¶ 57-68; Ferrick PFT, ¶ 39. The SOC includes general conditions and special conditions that include erosion controls (Special Conditions 37-40). Additionally, at the Hearing, the Applicant's counsel suggested that the Final Order could include Westwood Order of Conditions, Special Condition 6, which Mr. Faneuf agreed would eliminate any direct discharge from the pool.³⁰ Faneuf, 90:21-91:17. The Department consented to the addition of Special Condition 6. Ferrick, 183:1-7.

CONCLUSION

In sum, the Petitioners have failed to demonstrate standing to bring this appeal challenging the SOC because their expert's testimony lacks proper factual foundation, resulting in conclusory and unsupported statements and opinions. As a result, the Petitioners have failed to meet the minimum quantum of evidence for the purpose of demonstrating standing as persons aggrieved. Further, even if they had demonstrated standing as persons aggrieved by the SOC, they have failed to present sufficient evidence demonstrating that MassDEP issued the SOC to the Applicant in violation of the MWPA and the Wetlands Regulations. I recommend that the

³⁰ Westwood Order of Conditions Special Condition 6 provides: "The Applicant must submit a revised plan showing the pool filter tied into the infiltration system for seasonal drawdown."

Department's Commissioner issue a Final Decision affirming the SOC with the additional Special Condition 6 that the Parties agreed would eliminate any discharge from the pool.

Date: November 14, 2024



Margaret R. Stolf
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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