

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

January 22, 2024

In the Matter of
Rosalin Martinez and
Positive LLC

OADR Docket Numbers: WET-2020-017 and
WET-2020-019
DEP File No. 038-0430
Lynn, MA

RECOMMENDED FINAL DECISION

This appeal arises out of the issuance by the Massachusetts Department of Environmental Protection ("the Department") to Rosalin Martinez and Positive LLC ("Applicants") of a 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.*, approving the construction of a single-family home, driveway, and extension of Belleaire Avenue ("Project") at 0 Belleaire Avenue, Lynn, Massachusetts ("Property"). The Lynn Conservation Commission ("Petitioner") appealed the SOC to the Department's Office of Appeals and Dispute Resolution ("OADR"),¹ arguing that the Project as approved does not meet the Stormwater Standards of 310 CMR 10.05(6)(k)1., 2., and 3.

An adjudicatory hearing was held in this matter on November 17, 2021, before a former Presiding Officer. I have since been appointed Presiding Officer. Accordingly, I issued a

¹ 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).

Tentative Recommended Final Decision on January 9, 2024. The Parties had seven days² to file any objections with OADR for my consideration that either supported or opposed my recommendation to the Commissioner. 310 CMR 10.01(14)(a). The parties offered no objections within the specified timeframe.

In preparing this decision, I listened to the audio recording of the adjudicatory hearing; reviewed the Department's Basic Documents;³ and reviewed the parties' pre-filed testimony, pre-filed rebuttal testimony, briefing, and all appended exhibits. After reviewing these materials, I recommend that the Department's Commissioner issue a Final Decision affirming the SOC and requiring the Applicants to file with the Department a Site Plan with corrected spot grades and elevations.

I. Witnesses.⁴

The evidence in the administrative record consists of pre-filed, sworn, written testimony and exhibits submitted by the Parties' respective witnesses. 310 CMR 1.01(12)(f). These witnesses, who were available for cross-examination at the adjudicatory hearing, were as follows.

² Not including "intervening Saturdays, Sundays, or legal holidays." 310 CMR 1.01(3)(c).

³ "Basic Documents" are those documents in the official file of the Department program that was involved in the decision, order, or determination that is on appeal. Basic Documents generally include (1) all submissions used by the Department in reaching the decision, order, or determination and (2) all documents constituting the Department's decision, order, or determination. Basic Documents do *not* include internal deliberations of the Department. The Department's Basic Documents are admissible and probative as "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); 310 CMR 1.01(8)(a); see also Mass. Guide Evid. 201(b)(2).

⁴ Witnesses' Pre-Filed Direct Testimony will be referred to as "[Witness] PFT, ¶ []" and Pre-Filed Rebuttal Testimony will be referred to as "[Witness] RPFT, ¶ []." Exhibits to testimony are referred to as "[Witness], Ex. X". References to the hearing are "Hearing, [approximate time of recording]."

A. Witnesses for the Petitioner.

1. John McAllister.

John McAllister is a Program Manager for Waterways Engineering at Apex Companies, LLC. McAllister PFT, ¶ 1 (Jul. 13, 2021). He has worked for Apex for eight years and is responsible for its Waterways Engineering program. Id. at ¶ 3. He routinely prepares plans to ensure compliance with stormwater management regulations. Id. at ¶ 4. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See In the Matter of Jon L. Bryan, 2005 MA ENV LEXIS 50 at *9 (July 25, 2005); Mass. Guide Evid. 702.

B. Witnesses for the Applicant.

1. Thad Berry.

Thad Berry has a bachelor's degree from the University of Massachusetts Amherst in engineering. Berry PFT, ¶ 1 (Sep. 22, 2021). He is a licensed professional engineer in Massachusetts and a licensed soil evaluator. Id. He is an engineer with ASB Design Group since 2000. Id. at ¶ 2. He has experience in designing property improvements, including compliance with the stormwater regulations. Id. He designed the roadway extension and stormwater system at issue in this matter. Id. at ¶ 3. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Jon L. Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

C. Witnesses for the Department.

1. Heidi Davis.

Heidi Davis is an Environmental Analyst V with the Department. Davis PFT, ¶ 1 (Sep. 24, 2021). She has worked for the Department since 1989 and served as the Acting Section Chief for the Division of Wetlands and Waterways Program from March 2013 to June 2014. Id. at

¶¶ 2-3. In that capacity, she reviewed and signed Superseding Orders of Conditions, Superseding Determinations and 401 Water Quality Certifications, information requests and other technical information. Id. at ¶ 2. She has evaluated Notices of Intent to assess compliance with the Stormwater Standards. Id. at ¶ 3. I find her qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Jon L. Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

II. Facts.

The Property is an approximately half-acre parcel at the end of Belleaire Avenue. SOC, p. 2 (produced with the Department's Basic Documents). The Property consists of wooded areas, rocky outcrops, and historically filled land. Id. There are forested wetlands to the east and west of the filled land in the area of the proposed driveway. Id. Rock fill and a stone drain connect the wetlands hydrologically. Id. In 1990, the Department issued an Administrative Consent Order ("ACO") to a previous owner for alleged violations of the WPA which included altering and filling approximately 540 ft.² of wetlands on the Property. Id. The ACO required that the fill be removed and that the bordering vegetated wetlands ("BVW") be restored.⁵ Id.

On November 10, 2017, the Applicants submitted a Notice of Intent ("NOI") for the "[c]onstruction of a new single family home and associated utilities and landscaped areas within the buffer zone to Bordering Vegetated Wetlands. [The] Project includes minor buffer zone restoration and improvements to end of Belleaire Avenue." NOI, p. 2 (produced with the Department's Basic Documents). On July 24, 2018, the Petitioner issued a Denial Order of Conditions ("OOC") finding that the Project "cannot be conditioned to meet the performance standards set forth in the Wetlands Regulations." OOC, p. 3 (produced with the Department's

⁵ The ACO is not at issue in this matter.

Basic Documents). In support of its denial, the Petitioner stated that the Applicants "forced & requested a vote of the commission rather than allow/accept a motion by commission (consistent with the local wetland bylaw) to hire an independent consultant to" review prior unsanctioned work at the site, delineate the wetland boundaries, and determine the impact of the proposed work on two nearby certified vernal pools; the Applicants "failed to conform to the requirements of an Enforcement Order that was issued by the commission in April 2017 in response to [their] unconditioned activities at the site"; and "the [P]roject as proposed requires review by the Board of Appeals and the issuance of one or possibly more variances." OOC, p. 14.

On August 7, 2018, the Applicants timely filed a request for a Superseding Order of Conditions with the Department. Request for SOC, p. 1. On December 11, 2020, following a review of the Project, including a site inspection and analysis of the soil, the Department issued an SOC allowing the project. SOC, pp. 1-3. The Department required that the Applicants undertake the remediation required in the 1990 ACO and the Petitioner's 2017 Enforcement Order and create approximately 1,050 ft.² of BVW.⁶ Id. at pp. 2-3. The Department specifically found that the Project met the Stormwater Standards at 310 CMR 10.05(6)(k)1., 2., and 3. Id. at p. 3.

The Project as approved includes the construction of a single-family home. Berry PFT, Ex. C, p. 2 (referred to as the "Site Plan" and attached as Appendix A); Hearing, 2:28. A driveway extends from the Property southeast approximately 150 feet to a new extension to be built at the end of Belleaire Avenue. Id. The driveway has a gentle downward slope, descending approximately five feet vertically over the length of the driveway (an approximately 4% grade)

⁶ This remediation is not directly at issue in this matter.

to the extension. Berry PFT, Ex. C, p. 3. The extension is approximately 1,605 ft.² of new pavement, an impervious surface. Berry PFT, ¶ 8.

The Applicants designed a stormwater system to mitigate for the new impervious surface. Berry PFT, ¶ 8. Water on the extension is directed to a catch basin that allows it to slowly infiltrate into the ground. Id. at ¶ 9. Berry testifies that:

to mitigate for the increased pavement two Cultex Stormwater Infiltration Systems were proposed to capture the stormwater from the new roadway extension and a portion of the new driveway. The stormwater runoff will first flow into a deep sump hooded catch basin. From here the stormwater will flow to the two Cultex Infiltration Chambers. The chamber system will handle the 100-year storm even for that portion of the new roadway extension for Belleaire Avenue. Any unlikely outflow from the infiltration system (treated stormwater) will discharge to the existing wetlands in any storm SIGNIFICANTLY GREATER THAN a 100-year storm event, by trickling over established vegetation, and it is possible that this never happens as the Cultex is oversized and never even reaches its maximum capacity in a 100-year storm, as only 69 cubic feet of capacity is needed in a 100-year storm even according to my calculations.

Id. at ¶ 9 (capitalization in original). The grade of the road extension is approximately 1.6%.

Hearing, 4:14.

Berry analyzed the efficacy of the stormwater system using HydroCAD, Hearing 4:43, which is industry standard software for modeling water flows in and through engineering structures. Hearing 3:28. Berry's calculations were based solely on the extension itself. Hearing 4:43. He assumed in his analysis that the driveway did not contribute to the stormwater system during a rain event. Hearing, 3:31. Barry designed the driveway using a low-impact development ("LID") technique (referred to as "country drainage", Berry PFT, Ex. A, p. 3) where the minimally-graded road is intended to cause water on it to run primarily off the side of the road rather than down into the extension. Hearing 4:29. Barry has used this design technique before successfully. Hearing 4:29.

The proposed driveway is not crowned, Hearing, 0:56, meaning that it is flat perpendicular to the downward slope of the driveway as opposed to being slightly higher in the middle to encourage water to run perpendicular to the center line of the driveway. Barry specifically designed the driveway without crowning as part of the LID technique. Hearing 3:23. Nevertheless, he testified that the runoff into the new stormwater system will come primarily from the extension, and that any contribution from the driveway itself will be "minimal to none." Hearing, 3:42, 3:40.

III. Procedural History.

This case involves two consolidated matters. While the parties had identified several issues for adjudication, this Recommended Final Decision applies only to one of those issues: the applicability of the Stormwater Standards to the proposed Project. A review of the procedural history is appropriate to understand how the issues narrowed.

A. OADR Docket Number WET-2020-017.

In its appeal, the Petitioner alleged, among other claims, that the Applicant failed to timely appeal the Petitioner's Order of Conditions denying the Project under the Town's bylaw. On January 7, 2021, the former Presiding Officer observed that if the Commission's allegation was true, "it would appear that the Applicant would not be able to secure all necessary permits to carry-out the project, rendering this appeal moot." Order, p. 1 (Jan. 7, 2021). He ordered that the parties show cause "why the SOC should not be vacated and this appeal dismissed as moot." Id. at p. 2.

In response to the former Presiding Officer's order, the Petitioner submitted the Commission's Order of Conditions. On page 10 of that Order, in response to the question "Is a municipal bylaw or ordinance applicable?" The Commission checked "No." The Commission

explained that it "appear[ed] that a clerical error resulted in the box on Page Ten to have been incorrectly checked 'No'...." Commission Response, p. 1.

On February 2, 2021, the former Presiding Officer issued another order to show cause why the appeal should not be dismissed as moot. He directed the parties to address "(1) whether there was a clerical error when the Lynn Conservation Commission issued the Order of Conditions; (2) the effect of the apparent failure to indicate appropriately on the form if there was a bylaw denial; and (3) whether the appeal should proceed given the circumstances." Order, p. 2 (Feb. 2, 2021).

The Commission responded by arguing that it had "the inherent power, without holding a further public hearing, to correct an inadvertent or clerical error in its decision so that the record reflects its true intention." Commission Response, p. 4 (Feb. 16, 2021) (citing Dion v. Board of Appeals of Waltham, 344 Mass. 547, 552-53 (1962); Burwick v. Zoning Bd. of Appeals of Worcester, 1 Mass. App. Ct. 739, 742 (1974)). The Applicant argued that, to the contrary, the Commission lost jurisdiction over the Order of Conditions after the 21 days prescribed in M.G.L. c. 131, § 40, elapsed. Applicant Response, pp. 6-7 (citing Oyster Creek Pres., Inc. v. Conservation Comm'n, 449 Mass. 859, 865 (2007)). The Department observed that a conservation commission has the inherent power to correct a clerical error, but only "so long as no one relying on the original decision has been prejudiced by the correction." Board of Selectmen v. Monument Inn, Inc., 8 Mass. App. Ct. 158, 159 (1979) (citing Shuman v. Aldermen of Newton, 361 Mass. 758, 765 (1972)).

On April 5, 2021, the former Presiding Officer issued an order allowing the matter to proceed, stating:

I decline to dismiss this appeal as moot or remand it to Lynn. The Applicant justifiably relied upon the explicit statement that the

Notice of Intent was not denied under the local bylaw. As a consequence, dismissing the appeal for mootness because the Applicant failed to appeal the alleged bylaw denial is not warranted. In addition, remanding to the Commission would seriously prejudice the Applicant because of the substantial passage of time since the Order of Conditions was issued. A remand would cause further delay and prejudice to the Applicant, and if Lynn denies the project under the local bylaw, it will change the result of the original decision. [Monument Inn, 8 Mass. App. Ct. at 159].

Order, p. 2 (Apr. 5, 2021). That same order consolidated the matter with WET-2020-019.

B. OADR Docket Number WET-2020-019.

This matter was filed by an abutter, Charles Speropolous ("Speropolous"). After the former Presiding Officer issued an order to show cause and file a more definite statement, Mr. Speropolous submitted a filing that "met the low pleading threshold to state a claim for relief." Order (Apr. 5, 2021). That same order consolidated the matter with WET-2020-017.

C. The consolidated matters.

The former Presiding Officer conducted a Pre-Hearing Conference with the parties on April 28, 2021, and issued a Pre-Hearing Conference Report identifying the following issues for resolution in this appeal:

1. Whether the Applicant complied with the requirement to obtain or apply for all obtainable permits, variances, and approvals pursuant to 310 CMR 10.05(4)(e) and (4)(f)?
 - a. If not, what impact, if any, does that have on whether the Project should be approved under the Wetlands Regulations and the Wetlands Act?
2. Whether the Wetlands Resource areas on the Property have been fully and accurately delineated in the plans approved in the SOC?
 - a. If not, what impact, if any does that have on whether the Project should be approved under the Wetlands Regulations and the Wetlands Act?

In the Pre-Hearing Conference Report, the former Presiding Officer found that Mr. Speropolous had not yet demonstrated that he had standing and gave him time to file a more definite statement demonstrating aggrievement pursuant to 310 CMR 10.05(7)(j)2. and 10.04 (Person Aggrieved). On May 25, 2021, the former Presiding Officer entered an order finding that Mr. Speropolous made a "minimal" showing of aggrievement.

Also in the Pre-Hearing Conference Report, the former Presiding Officer requested that the Commission submit a more definite statement of its allegations that the Applicants failed to comply with applicable Stormwater Standards. On May 13, 2021, the Commission submitted a more definite statement alleging that the Applicant failed to comply with the Massachusetts Stormwater Standards, specifically 310 CMR 10.05(6)(k)1., 2., and 3. Commission Response to Conference Report, pp. 1-3 (May 13, 2021).

While Mr. Speropolous filed a witness list on June 4, 2021, he did not submit any pre-filed testimony. Neither Mr. Speropolous nor any representative on his behalf was present at the November 17, 2021, hearing. He also did not submit any briefing either before or after the adjudicatory hearing.

The adjudicatory hearing in this matter was held on November 17, 2021. Representatives for the Commission, the Department, and the Applicant were present. At the hearing, "the Commission chose to present evidence on only one issue which is whether the Superseding Order of Conditions complied with the Massachusetts Stormwater Regulations." Commission Post-Hearing Brief, p. 1 (Dec. 17, 2021). In doing so, it "withdrew any argument that the proposed project required a variance.... [and] waived any claim based upon an improper designation of wetland areas." *Id.* at p. 1 n. 2.

I was appointed the Presiding Officer in this matter on June 12, 2023. On August 10, 2023, I requested that the Department produce the Basic Documents in this matter. As of September 20, 2023, I had not received the Basic Documents and entered an order directing the Department to produce the Basic Documents by October 20, 2023. I received the Basic Documents on October 13, 2023.

On November 6, 2023, I issued an “Order to Show Cause Directing Parties to Set Forth Their Respective Positions on Whether the Hearing Should be Reopened to Receive Additional Evidence Relevant to the Appeal’s Adjudication.” I issued this order because I was unable to locate the HydroCAD model that the Applicants submitted with their Notice of Intent. Id. at pp. 3-4. I asked the parties to brief whether reopening the adjudicatory hearing was necessary. Id. at p. 4.

On November 13, 2023, the Petitioner filed an opposition objecting to the need to reopen the adjudicatory hearing. It argued that the Applicants’ HydroCAD model was “reasonably available for presentation the November 17, 2021 hearing” and that failing to produce it was not “the result of excusable neglect.” Petitioner’s Opposition to Reopen Hearing, p. 2. Neither the Applicants nor the Department filed anything supporting or opposing reopening the hearing.

On November 14, 2023, I issued another order stating

The Applicants and the Department are ordered to submit a response to the Petitioner’s filing of November 13, 2023, by Thursday, November 16, 2023. In particular, the Applicants and the Department should address the Petitioner’s statements that “the evidence that the Presiding Officer is seeking to be introduced (along with new testimony) was reasonably available for presentation at the November 17, 2021 hearing” and that the “failure to submit [the Applicants’] HydroCAD models was [not] the result of excusable neglect.

After allowing the Department’s request to extend the deadline to November 22, 2023, the Department and the Applicants filed responses on that date. The Applicants observed that their

HydroCAD model was already part of the administrative record, having been submitted to the Conservation Commission with their Notice of Intent. Applicants' Response to November 14, 2023, Order, p. 1. The Department agreed that the HydroCAD model was already part of the administrative record. Department Response to November 14, 2023, Order, p. 4.

Having reviewed these filings, I issued an Order on the Order to Show Cause on November 29, 2023, in which I ordered the Applicants to produce a copy of the HydroCAD analysis by December 8, 2023. I also ordered that on December 20, 2023, I would hold "oral argument on the parties' closing briefs and the HydroCAD analyses as well as whether there exists a question as to the credibility of any material witness." Order on Order to Show Cause, p. 4. On December 6, 2023, the Applicants submitted the HydroCAD model and a "Motion to Allow Testimony as Needed from Applicants' Expert Mary Rimmer Regarding HydroCAD Model." The Petitioner opposed that motion on December 12, 2023.

On December 20, 2023, I held oral argument with the parties on their respective positions on the merits of this Matter and their views on whether it was necessary to re-open the evidence. The parties all agreed that, given that the Applicants' HydroCAD model was part of the record before the Conservation Commission, it was part of the administrative record and therefore there was no need to reopen the evidence.

IV. Issues in this appeal.

The only remaining issue in this appeal is whether the Project, as approved in the Superseding Order of Conditions, complies with 310 CMR 10.05(6)(k)1., 2., and 3..

V. Discussion.

A. The regulatory framework.

1. The Wetlands Protection Act.

The MWPA protects several categories of land and bodies of water ("Areas Subject to Protection"),⁷ and those protections are implemented by the Wetlands Regulations at 310 CMR § 10.00, *et seq.* The regulations impose restrictions on most activities that will "remove, fill, dredge or alter" Areas Subject to Protection.⁸ 310 CMR 10.02(2)(a). The regulations also restrict activities within defined "buffer zones"⁹ that "will alter an Area Subject to Protection." 310 CMR 10.02(2)(b). "The provision for a 'buffer zone' does not appear in G. L. c. 131, § 40, and is a creation of the [D]epartment in aid of its administrative implementation of the Wetlands Protection Act." Southern New England Conference Assoc. of Seventh-Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 704 n. 3 (1986).

If a developer wishes to perform regulated activities in an Area Subject to Protection or a buffer zone, the developer must first file a Notice of Intent with the local conservation commission. See 310 CMR 10.05(4). The Department issues a file number for the notice of intent, which indicates only that the notice meets the "minimum submittal requirements contained in the General Instructions." 310 CMR 10.05(4)(c).

Upon receiving a Notice of Intent, the conservation commission must hold a public hearing within 21 days. 310 CMR 10.05(5)(a). Within 21 days after the close of the public

⁷ The MWPA pertains to "any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding...." G.L. 131, § 40; see also 310 CMR 10.02(1).

⁸ "Areas Subject to Protection" are also referred to as "Resource Areas." See 310 CMR 10.02.

⁹ A "buffer zone" is defined as "that area of land extending one hundred (100) feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a)."

hearing, if the conservation commission determines that the activities proposed will remove, fill, dredge or alter an area significant to one or more of the interests identified in the MWPA, then the conservation commission must issue an Order of Conditions. 310 CMR 10.05(6)(a)2. The Order of Conditions must

impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40 and the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

310 CMR 10.05(6)(b).

After the conservation commission issues an Order of Conditions, the applicant; the owner, if not the applicant; any person aggrieved by the Order of Conditions; any owner of land abutting the land on which the work is to be done; any ten residents of the city or town where the land is located; or the Department may request that the Department issue a Superseding Order of Conditions. 310 CMR 10.05(7)(a) and (b). Generally, after reviewing

the Notice of Intent, the Order, any informal meeting or site inspection, and any other additional plans, information, or documentation submitted under 310 CMR 10.05(7)(f) or (g), the Department shall issue a Superseding Order for the protection of the interests identified in M.G.L. c. 131, § 40. The Superseding Order shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 and stormwater standards set forth at 301 CMR 10.05(6)(k) for the protection of those interests. The Superseding Order shall prohibit any work or any portions thereof that cannot be conditioned to protect such interests. The Department may issue a Superseding Order which affirms the Order issued by the conservation commission.

310 CMR 10.01(7)(i). Following the issuance of a Superseding Order of Conditions, an "applicant, landowner, aggrieved person if previously a participant in the permit proceedings, conservation commission, or any ten residents of the city or town where the land is located, if at

least one resident was previously a participant in the permit proceeding may request review" of the Superseding Order of Conditions by OADR. 310 CMR 10.05(7)(j)2.a.

2. The Stormwater Standards.

310 CMR 10.05(k) provides the applicable Stormwater Standards:

No Area Subject to Protection under M.G.L. c. 131, § 40 other than bordering land subject to flooding, isolated land subject to flooding, land subject to coastal storm flowage, or riverfront area may be altered or filled for the impoundment or detention of stormwater, the control of sedimentation or the attenuation of pollutants in stormwater discharges, and the applicable performance standards shall apply to any such alteration or fill. Except as expressly provided, stormwater runoff from all industrial, commercial, institutional, office, residential and transportation projects that are subject to regulation under M.G.L. c. 131, § 40 including site preparation, construction, and redevelopment and all point source stormwater discharges from said projects within an Area Subject to Protection under M.G.L. c. 131, § 40 or within the Buffer Zone shall be provided with stormwater best management practices to attenuate pollutants and to provide a setback from the receiving waters and wetlands in accordance with the following Stormwater Management Standards as further defined and specified in the Massachusetts Stormwater Handbook:

1. No new stormwater conveyances (e.g. outfalls) may discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth.
2. Stormwater management systems shall be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates. This Standard may be waived for discharges to land subject to coastal storm flowage as defined in 310 CMR 10.04.
3. Loss of annual recharge to ground water shall be eliminated or minimized through the use of infiltration measures including environmentally sensitive site design, low impact development techniques, stormwater best management practices and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from the pre-development conditions based on soil type....

The remaining standards are not at issue in this matter.

The Massachusetts Stormwater Handbook ("MSH") provides explanations and guidance for complying with the Stormwater Standards. As to the first standard, direct discharge of stormwater to waters and wetlands is permitted so long as the discharge has been adequately treated. MSH, Vol. 1, p. 4. The prohibition against erosion means that there must be "no wearing away of the soil or land surface in excess of natural conditions." Id. at pp. 4-55. This is done by demonstrating that the discharge velocities are not too high to cause erosion. Id. at p. 5. An applicant may either minimize the velocity or utilize materials or practices (such as armoring) that will protect the ground against the shear forces. MSH, Vol. 3, p. 2.

The second standard requires that an applicant calculate the runoff rates from pre-existing and post-development conditions. MSH, Vol. 1, p. 5. "Measurement of the peak discharge rates is calculated at a design point, typically the lowest point of discharge at the downgradient property boundary. The topography of the site may require evaluation at more than one design point, if flow leaves the property in more than one direction." Id. The contributing drainage area includes all areas contributing drainage to a site, including off-site locations. MSH, Vol. 3, p. 15.

The third standard is intended "to ensure that the infiltration volume of precipitation into the ground under post-development conditions is at least as much as the infiltration volume under pre-development conditions." MSH, Vol. 1, p. 5. This standard requires the restoration of recharge using infiltration measures and careful site design. Id. at p. 6. Only impervious areas on the site are used to calculate the required recharge volume. MSH, Vol. 3, p. 15.

In order to demonstrate compliance with the stormwater management standards, an applicant must demonstrate that it has made all reasonable efforts to meet the standards, including through the use of environmentally sensitive site design and low impact development

("LID") techniques. Id. at pp. 3-4. "Environmentally sensitive site design" is design that incorporates low impact development techniques to prevent the generation of stormwater and non-point source pollution by reducing impervious surfaces, disconnecting flow paths, treating stormwater at its source, maximizing open space, minimizing disturbance, protecting natural features and processes, and/or enhancing wildlife habitat. Id. at p. 4. "Low impact development techniques" are innovative stormwater management systems that are modeled after natural hydrologic features. Id. Low impact development techniques manage rainfall at the source using uniformly distributed decentralized micro-scale controls. Id. Low impact development techniques use small cost-effective landscape features located at the lot level. Id.

3. The burden of proof.

As the party challenging the Department's issuance of the SOC, the Petitioner has the burden of proof in this *de novo* appeal to produce credible evidence from a competent source to support its positions. Carrigan, 2023 MA ENV LEXIS 23 at *14-15; see also 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. Specifically, the Petitioner is required 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." Matter of City of Pittsfield Airport Comm'n, OADR Docket No. 2010-041, Recommended Final Decision (Aug. 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (Aug. 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has that expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Comm. v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see, e.g., Matter of Carulli, Docket No. 2005-214,

Recommended Final Decision (Aug. 10, 2006) (dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (Oct. 25, 2006); Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted by Final Decision (June 23, 2004).

4. Standard of review.

My review of the evidence is *de novo*, meaning that in adjudicating the appeal, my review is anew based on: (1) a preponderance of the testimonial and documentary evidence presented by the parties to the appeal at the evidentiary adjudicatory hearing conducted by the Presiding Officer and (2) the governing legal requirements, irrespective of what the Department may have determined previously. In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, at *18, adopted by Final Decision (January 17, 2019), 2019 MA ENV LEXIS 8.

"Hence, if during the pendency of an administrative appeal, '[the Department] becomes convinced' based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, 'that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],' the Department is authorized to, and should change its position." Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (Oct. 16, 2019), 2019 MA ENV LEXIS 106, *15, adopted by Final Decision, (Oct. 24, 2019), 2019 MA ENV LEXIS 104. Additionally, "[t]he Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible ... for independently adjudicating [the] appea[l] and [issuing a Recommended Final Decision] to

MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices." Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (Feb. 20, 2018), 2018 MA ENV LEXIS 7 *16, adopted by Final Decision (Mar. 1, 2018), 2018 MA ENV LEXIS 6.

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

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

The Adjudicatory Proceeding Rules at 310 CMR 1.01(13)(h) governing adjudication of the appeal state that the "[t]he weight to be attached to any evidence in the record [of an appeal] will rest within the sound discretion of the Presiding Officer...." Kane Built, 2017 MA ENV LEXIS 77, *17.

B. The Motion for Sanctions.

The Applicant filed a motion for sanctions that does not appear to have been addressed. The gravamen of the Applicant's motion is that the Petitioner did not file exhibits or a memorandum of law that clearly and adequately described its position. To the Applicants, it was "unclear from the pre-filed testimony what arguments the City of Lynn [was] making and on what law these arguments [were] based." Motion for Sanctions, ¶ 6. Based on the pre-filed testimony, the testimony at the hearing, and the post-hearing briefing, the parties were able to make well-developed arguments about the Project's compliance (or lack thereof) with the stormwater standards. I do not find any prejudice to the Applicants. I therefore deny the motion.

C. Compliance with 310 CMR 10.05(6)(k)1.

Stormwater Standard 1 requires that "[n]o new stormwater conveyances (e.g. outfalls) may discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth." 310 CMR 10.05(6)(k)1. There is no debate about this standard. Mr. McAllister, on behalf of the Petitioner, testified that the Project as proposed will not "discharge untreated stormwater directly to or cause erosion in wetlands or waters of the Commonwealth." Hearing 1:27. I credit his testimony and therefore find that the Project complies with Stormwater Standard 1.

D. Compliance with 310 CMR 10.05(6)(k)2.

Under Stormwater Standard 2, "Stormwater management systems shall be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates."¹⁰ 310 CMR 10.05(6)(k)2.. The applicant must calculate the runoff rates from pre-existing and post-development conditions. MSH, Vol. 1, p. 5. The Applicant and the Petitioner both measure the peak discharge rates at the catch basin, the lowest point of discharge. McAllister, ¶¶ 35-39; MSH, Vol. 1, p. 5.

The contributing drainage area includes all areas contributing drainage to a site, including off-site locations. MSH, Vol. 3, p. 15. This means that any stormwater that runs into the catch basin from the driveway must be included in this analysis, and this is the crux of the parties' dispute. The Petitioner's expert testified that, based on its HydroCAD model, the runoff from the driveway will cause post-development discharge rates to exceed pre-development discharge rates in each of the 2-, 10-, 25-, and 100-year storms. McAllister RPFT, ¶¶ 34-42; Hearing 1:28-1:30. According to his calculations, the discharge rate would increase by 0.58 cubic feet per second in

¹⁰ The waiver for coastal storm flowage is not relevant to this matter.

the 2-year storm event, 0.8 cubic feet per second in the 10-year storm event, 1.04 cubic feet per second in the 25-year storm event, and 1.25 cubic feet per second in the 100-year storm event.

McAllister RPFT, ¶ 41.

On behalf of the Applicants, Mr. Berry testifies that “the peak rate of stormwater runoff, or peak volume, will be no greater than before the development, in fact it will be notably less as water previously running into any wetland areas is now being diffused into existing soil.” Berry PFT, ¶ 11. Although the Applicants concede that the stormwater system proposed will “capture the stormwater from the new roadway extension and a portion of the new driveway,” Berry PFT, ¶ 8, their expert testified at the Hearing that the driveway utilizes a LID technique where the rainwater is intended to drain off the sides of the driveway rather than travelling down into the extension and the catch basin. Hearing, 3:49.

The Petitioner makes two arguments in support of their position: first, it argues that the Applicants’ Site Plan has numerous errors that impede accurately calculating the effect of the proposed stormwater system. Second, it argues that its modeling shows that the Project will increase the post-development discharge rates. The Petitioner also argues that at the very least, crowning the road will decrease post-development flow.

1. The effect of drafting errors in the Site Plan on the Project.

Mr. Berry was cross-examined during the adjudicatory hearing on several errors on the Applicants’ Site Plan. In particular, the Petitioner points to an error in the elevation of the proposed driveway that would cause it to have a sharp divot instead of a gentle slope, McAllister RPFT, ¶ 22, and the alleged lack of spot grades in the extension to make it clear to contractors that stormwater is intended to flow into the catch basin. Hearing, 1:09-1:12. The Petitioner argues that these errors will cause stormwater to flow in ways that will increase post-development discharge rates. Petitioner’s Post-hearing Brief, pp. 1-2.

The Applicant argues that the erroneous spot grade in the driveway is merely a “scrivener’s error.” Applicants’ Post-hearing Brief, p. 7. Mr. Berry conceded in his testimony that this was a drafting error, Hearing, 2:57, and that both he and the Department missed it in their review. Hearing, 3:07. However, he also testified that any contractor would notice any errors in the Site Plan and ask about them before following them blindly. Hearing, 2:59. Mr. McAllister himself testified that there is routinely a pre-construction meeting to approve the construction schedule and that the local conservation commission is invited to that meeting. Hearing 1:53-1:55.

There is no doubt that the Site Plans provided by Mr. Berry contain errors. However, I find that these errors are easily spotted and will be remedied as a matter of course during the construction process. To deny the entire Project based on these errors would elevate form over substance, and I decline to recommend the Commissioner do so. However, I recommend that a Final Decision affirming the SOC require a revised Site Plan correcting these errors be provided to the Department for inclusion in a Final Order of Conditions.

2. The contribution of the driveway to the drainage system.

I find that neither the Petitioner nor the Applicants presented credible evidence describing precisely the effect that the LID technique will have on the post-development discharge rate. HydroCAD is a mathematical modeling software that runs calculations based on assumptions entered by the user. Faulty assumptions will lead to flawed conclusions, and here, both parties have proceeded on erroneous assumptions. The Petitioner’s model assumes that stormwater from “essentially the entire driveway” will flow down into the catch basin. McAllister RPFT, ¶ 29. However, I credit Mr. Berry’s testimony that he has utilized the country drainage technique in the past and that it has worked. Hearing 4:29. It makes intuitive sense that stormwater impacting a surface of minimal grade (here, 4%) will essentially “flatten” and spread out in significant part

to the sides of the road. Accordingly, I do not credit the Petitioner's calculations of pre- versus post-development runoff in Mr. McAllister's rebuttal affidavit. McAllister RPFT, ¶¶ 41-42.

The Applicants, on the other hand, assume that only a *de minimis* amount of stormwater from the driveway will contribute to the drainage system. Hearing 3:32, 3:40. The Applicant's HydroCAD model therefore does not consider *any* effect from the driveway at all. Hearing, 3:31, 4:43. I have reviewed the Applicants' HydroCAD model originally submitted to the Petitioner with the Applicants' Notice of Intent, and that model only provides post-development discharge rates. See Applicants' HydroCAD Model to Be Presented as Part of the Record (Dec. 7, 2023). The HydroCAD analysis submitted to the Department on November 13, 2019, in response to the Department's August 1, 2019, request for additional information¹¹ also provides only the post-development discharge rates. I find that the Applicant's assumption is likely overly optimistic, and that a non-trivial amount of water will find its way into the catch basin, but also that the drainage system is robust enough to handle the additional stormwater without materially increasing the discharge rate. See Berry PFT, ¶ 8 ("the Cultex is oversized and never reaches its maximum capacity in a 100-year storm"). The information provided by the Applicant was sufficient to convince the Department to issue the SOC. See SOC, p. 3 ("The proposed stormwater management features for the roadway extension meet the MA Stormwater Management Standards.... The project as currently proposed meets the performance standards under 310 CMR 10.05(6)(k)7[.] for stormwater management....").

Even if the Applicant's assumptions are faulty, the Petitioner ultimately has the burden of proof of showing that the Department reached the wrong conclusion. Carrigan, 2023 MA ENV

¹¹ The response to the request for additional information was produced with the Department's Basic Documents, although the Department's request itself was not.

LEXIS 23, *14-15. In assuming that the entire driveway will contribute to the proposed stormwater management system, its conclusions are unconvincing. I therefore defer to the Department's prior finding that the Project as proposed meets Stormwater Standard 2.

3. The effect of crowning on compliance with Stormwater Standard 2.

The parties also discussed in their testimony and whether crowning the driveway would reduce the amount of post-development drainage to the catch basin. The Petitioner testified that crowning the driveway would allow water to run off the sides of the road and reduce the impact on the drainage system. McAllister PFT, p. 2; Petitioner Post-Hearing Brief, pp. 8-9. The Applicants in their briefing stated that they do not object to crowning the road as a concession to the Petitioner's concern, Applicants Post-Hearing Brief, p. 6, and Mr. Berry conceded on cross-examination that crowning would reduce the amount of stormwater flowing into the extension. Hearing, 3:28. The Department strenuously objects to crowning the road, arguing that "[c]rowning the driveway could lead to shallow concentrated flow on the sides of the driveway, and possibly lead to rilling and gullyng, which would cause erosion near the wetland resource areas at the site." Department Post-Hearing Brief, p. 3. Mr. Berry agreed on cross-examination that crowning the road would create concentrated flow that could result in gullyng. Hearing 4:39. I credit Mr. Berry's testimony on this point, and I find that crowning would cause concentrated flow that in this instance would undermine the goals of the stormwater standards.

Regardless of its impact on the site, crowning is unnecessary because the preponderance of the evidence favors the Applicants' position that the LID technique will not increase post-development drainage to the catch basin. The Applicants have thus established that the Project complies with Stormwater Standard 2.

E. Compliance with 310 CMR 10.05(6)(k)3.

Stormwater Standard 3 states:

Loss of annual recharge to ground water shall be eliminated or minimized through the use of infiltration measures including environmentally sensitive site design, low impact development techniques, stormwater best management practices and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from the pre-development conditions based on soil type.

This Standard is met when the stormwater management system is designed to infiltrate the required recharge volume as determined in accordance with the Massachusetts Stormwater Handbook.

310 CMR 10.05(6)(k)3. The Petitioner's expert testified that stormwater on the driveway will flow into the extension and the catch basin. Hearing, 1:33. That stormwater will then overflow the proposed Cultex system and flow out into the nearby BVW. Hearing, 1:34. Because the wetland soil in the BVW is hydric and functions to hold water, that stormwater would be unavailable to recharge the groundwater. Hearing, 1:36. In contrast, the Applicants' expert testifies that his stormwater design will recharge the soil "to the greatest extent possible (likely 100%)". Berry PFT, ¶ 11.

During oral argument in this matter on December 20, 2023, the Petitioner conceded that compliance with Standard 3 is predicated on the same assumptions as the Applicants' compliance with Standard 2: if all of the stormwater on the driveway is flowing down into the extension and then into the catch basin, it necessarily is not contributing to recharge. And for this reason, the Petitioner also fails to meet its burden of proof on this standard. Given that most of the stormwater will fall to the sides of the driveway based on the country drainage design, it will not end up in the catch basin. It instead will drain onto the soil to the sides of the driveway, where it will recharge the groundwater. Additionally, as with Stormwater Standard 2, to the extent that the Petitioner's concerns arise out of the errors on the Site Plan, those will be corrected prior to construction and do not justify vacating the SOC.

Even if there is some uncertainty about how much of the stormwater on the driveway will end up in the catch basin, Standard 3 is less strict than Standard 2. It does not require that recharge under both pre- and post-development conditions remain the same, but merely that the post-development conditions "approximate" pre-development conditions. See 310 CMR 10.05(6)(k)3. It also explicitly requires that the Applicants utilize LID techniques, which they have done by implementing country drainage on the driveway. Hearing, 3:49.

As with Stormwater Standard 2, the Petitioner has not met its burden with respect to Stormwater Standard 3. Given that the Petitioner has failed to meet its burden to demonstrate that the Project fails to meet the stormwater standards, the Department was correct in issuing the SOC.

F. The Applicants' Motion to Allow Testimony from Mary Rimmer.

As discussed above, I issued an order to show cause asking the parties whether the evidence should be reopened to allow additional testimony regarding the Applicants' HydroCAD model. The Applicants subsequently filed a motion to receive testimony from their expert, Mary Rimmer, if necessary, which the Petitioner opposed. After reviewing the record, and given my analysis above, I find that "the credibility of a material witness is [not] necessary to the decision" and there is therefore no need to reopen the evidence. 310 CMR 1.01(14)(c). The motion is therefore denied.

G. The remedy available to the Petitioner.

While I have found that a preponderance of the credible evidence supports a finding that the Project meets the applicable Stormwater Standards, I nevertheless address the Petitioner's request that the case be remanded back to it for further consideration. Petitioner Post-Hearing Brief, p. 5. The regulations require that I "issue a recommended final decision," and that the Commissioner then "issue a final written decision consistent with 310 CMR 1.01(14)(b)." 310

CMR 10.05(7)(j)8. Based on this plain language, the Commissioner lacks the authority to remand a matter to a conservation commission. The Commissioner may only "remand a case to the Presiding Officer for the purpose of receiving new evidence or for additional recommended findings of fact or conclusions of law based upon the record or new evidence." 310 CMR 1.01(14)(e). There is no mechanism by which the Commissioner may remand to a conservation commission, and no recent decision evinces any authority to do so. See, e.g., Matter of Dana Rabecki, OADR Docket No. 97-020, Decision on Motions to Revise Issues for Adjudication and Modify Prehearing Conference Report (Aug. 15, 1997), 1997 MA ENV LEXIS 148, *13.


H. Mr. Speropolous' appeal.

Mr. Speropolous declined to submit pre-filed testimony and failed to appear at the hearing. I therefore recommend that the Commissioner enter a Final Decision dismissing his claims pursuant to 310 CMR 1.01(11)(2)f. ("When a party demonstrates a failure to prosecute the case or an intention not to proceed such as failing to respond to an order, the Presiding Officer may summarily dismiss a case *sua sponte*...").

VI. Conclusion.

For the foregoing reasons, I find that the Petitioner has not met its burden. I recommend that the Commissioner issue a Final Decision: (1) affirming the SOC but requiring the Applicants to file a Site Plan with corrected spot grades and elevations with the Department to be included as part of a Final Order of Conditions and (2) dismissing Mr. Speropolous' appeal for failure to prosecute.

Date: January 22, 2024



Patrick M. Groulx
Presiding Officer

NOTICE OF RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to MassDEP's 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 may file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

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