

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

October 12, 2023

In the Matter of
Wall Street Development
Corporation

OADR Docket No. WET-2021-040
DEP File No. SDA
Walpole, MA

RECOMMENDED FINAL DECISION

This appeal arises out of the issuance by the Massachusetts Department of Environmental Protection ("Department") to Wall Street Development Corporation ("Applicant") of a Superseding Determination of Applicability ("SDA") pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations at 310 CMR 10.00, *et seq.* The Department determined that the property at issue constituted a "historic mill complex" ("HMC") as defined in 310 CMR 10.04 and that it is exempt from the requirements for permitting in Riverfront Areas in accordance with 310 CMR 10.58(6)(k).

The Walpole Conservation Commission ("Petitioner") appealed the SDA to the Department's Office of Appeals and Dispute Resolution ("OADR").¹ In its appeal, the Petitioner alleged that the Department erred in applying the HMC exemption to the entirety of the Applicant's property.

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).

The parties have filed cross-motions for summary decision. I have reviewed the entire administrative record, which includes the Department's Basic Documents,² the parties' pre-filed testimony, and the parties' briefs.³ Additionally, on September 14, 2023, I conducted a site view. Based on all of the foregoing, I recommend that the Department's Commissioner issue a Final Decision affirming the determination in part and issue a Final Order that the historic mill complex is located as described below on page 28.

I. Procedural History.

This matter concerns a 3.63-acre parcel of land in Walpole located off of Pinnacle Drive and directly abutting the Neponset River⁴ ("Property"). Letter from Amy Kwesell, Esq., KP Law, to Walpole Conservation Commission, Re: Pinnacle Drive, Walpole, 1 (Sept. 6, 2021) (produced with the Department's Basic Documents). On October 13, 2020, the Applicant filed a Request for a Determination of Applicability ("RDA") with the Petitioner asserting that the Property qualified for an exemption under the Rivers Protection Act ("RPA"). Id. Petitioner's counsel advised the Petitioner that "the Applicant has not proven that the [HMC] exemption applies." Id. at p. 2. On September 14, 2021, the Petitioner found that the HMC exemption did not apply to the Property. Request for Superseding Determination of Applicability, p. 1 (produced with the

² "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).

³ On July 1, 2022, then-Commissioner Martin Suuberg received a letter from local legislators "respectfully request[ing] that OADR acknowledge and respond to [concerns raised by local residents] during their review of the site in question, and that this letter be included with the materials that are made available to the OADR Presiding Officer for their consideration as they review the case." That letter has been made part of the record of this appeal. I have made my findings and rulings in this Recommended Final Decision based on the undisputed material facts in the appeal and the governing environmental statutory and regulatory requirements.

⁴ This section of Neponset River is also referred to as "Bird Pond."

Department's Basic Documents). The Applicant therefore requested a Superseding Determination of Applicability ("SDA") from the Department on September 24, 2021. Id.

In making its superseding determination, the Department reviewed aerial photographs and Sanborn Maps⁵ and conducted a site visit. On November 17, 2021, the Department issued an SDA finding that the Property in its entirety "meets the regulatory definition of Historic Mill Complex...." SDA, p. 1 (produced with the Department's Basic Documents). It stated further:

In [the Department's] opinion, the subject property has been historically utilized for industrial and commercial purposes associated with the Bird & Son, Inc. East Walpole Plant. In addition, site observations made by Department staff of existing remnants of foundations, retaining walls, and a concrete bench structure along the pond edge further confirm the existence and extent of Historic Mill Complex on the site.

Id.

On November 30, 2021, the Petitioner filed its Appeal Notice in this matter. See Appeal Notice, p. 1 (Nov. 30, 2021). The Petitioner seeks to overturn the Department's determination because in the Petitioner's view "the Department and the Applicant have failed to produce sufficient evidence to meet their burden of [] proving the applicability of the Historic Mill Complex exemption." Id. at p. 2. In particular, the Petitioner alleges that the SDA "does not specify where the footprint of the area that allegedly was occupied by the Historic Mill Complex is located on the Property"; "cites no credible evidence supporting a conclusion that a Historic Mill Complex existed on the Property after 1946"; and "cites no evidence of any structures

⁵ According to the Library of Congress, Sanborn Maps are "a uniform series of large-scale maps, dating from 1867 to the present and depicting the commercial, industrial, and residential sections of some twelve thousand cities and towns in the United States, Canada, and Mexico. The maps were designed to assist fire insurance agents in determining the degree of hazard associated with a particular property and therefore show the size, shape, and construction of dwellings, commercial buildings, and factories as well as fire walls, locations of windows and doors, sprinkler systems, and types of roofs. The maps also indicate widths and names of streets, property boundaries, building use, and house and block numbers." Introduction to the Sanborn Map Collection, Library of Congress, <https://www.loc.gov/rr/geogmap/sanborn/san4a1.html> (last accessed Sept. 15, 2023).

associated with an Historic Mill Complex existing on the Property as of August 7, 1996." Id. at p. 3.

On March 25, 2022, the Petitioner filed its pre-filed testimony and a motion for summary decision. On April 25, 2022, the Applicant filed its pre-filed testimony, an opposition to the Petitioner's motion, and a cross-motion for summary decision. On May 6, 2022, the Applicant supplemented its filing with corrected plans. One of those plans is referred to as the "June 2021 Plan" and is attached hereto as Appendix A. The Department filed its pre-filed testimony and an opposition to the Petitioner's motion for summary decision on May 10, 2022. On June 1, 2022, the Petitioner filed rebuttal pre-filed testimony and a reply brief. On July 13, 2022, Attorney Rebekah Lacey of the Department E-mailed the OADR Case Administrator and stated: "The Parties have agreed that this matter be decided on the administrative record without a hearing, while recognizing the Presiding Officer's authority to order oral argument if deemed necessary to render the decision." See 310 CMR 1.01(13)(g).⁶

II. The Individuals Who Submitted Pre-Filed Testimony in Support of Parties' Cross-Motions for Summary Decision.

A. The Petitioner's Affiants.

1. Betsey Dyer.

Betsey Dyer is a member of the Walpole Conservation Commission and has been for approximately 12-15 years. Dyer PFT, ¶ 5 (Mar. 15, 2022).⁷ She is also an active member of the Walpole Historical Society. Id. at ¶ 6. She provides percipient testimony.

⁶ "Parties may elect to waive participation in a hearing and to submit their case upon the record. Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses."

⁷ 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. []". The Petitioner submitted its exhibits as a separate document and will be referred to as "Petitioner Ex. []"

2. Landis Hershey.

Landis Hershey is the Conservation Agent for the Petitioner. Landis PFT, ¶ 1 (Mar. 15, 2022). He provides percipient testimony.

3. Timothy F. Bailey, Jr.

Timothy Bailey is the current Fire Chief of the Town of Walpole and has been since 2005. Bailey PFT, ¶ 1 (Mar. 15, 2022). He provides percipient testimony.

B. The Applicant's Affiants.

1. John Hasenjaeger.

John Hasenjaeger is the owner of the Property. Hasenjaeger PFT, ¶ 1 (Apr. 25, 2022). He has developed several real estate projects in Walpole since 1996, *id.* at ¶ 7, and has owned the Property since 2000. *Id.* at ¶ 10. He provides percipient testimony.

2. Louis Petrozzi.

Louis Petrozzi is the president of Wall Street Development Corporation. Petrozzi PFT, ¶ 1 (Apr. 25, 2022). He performed research about the history of the Property. *Id.* at ¶¶ 9, 10. He provides percipient testimony.

3. Joyce Hastings.

Joyce Hastings is the President of GLM Engineering Consultants, Inc. ("GLM"). Hastings PFT, ¶ 1 (Apr. 22, 2022). The Applicant hired GLM to perform "engineering and surveying work related to the" Property. *Id.* at ¶ 3. She is a registered Professional Land Surveyor in the Commonwealth of Massachusetts and has performed land survey work both personally and as a supervisor. *Id.* at ¶ 2. She prepared the plans and overlays that the Applicant submitted. *Id.* at ¶¶ 5, 8. I find her qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See In the Matter of Jon L. Bryan, OADR

Docket No. DEP-04-767, Recommended Final Decision (July 25, 2005), 2005 MA ENV LEXIS 50, *9; Mass. Guide Evid. 702.

4. Paul McManus.

Paul McManus is the President of EcoTec Inc. ("EcoTec"). McManus PFT, ¶ 1 (Apr. 22, 2022). The Applicant hired EcoTec to "conduct evaluations, complete field delineations, and participate in regulatory evaluations by" the Petitioner and the Department at the Property. Id. at ¶ 7. He has more than 35 years of experience as a full-time environmental consultant and is a Senior Professional Wetland Scientist. Id. at ¶ 3. He has "consulted on and conducted field work and supervised the work of others in numerous aspects of environmental science, including wetland evaluation and mitigation planning, environmental impact assessment, wildlife habitat evaluation, and environmental permitting." Id. at ¶ 5. I find him qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

C. The Department's Affiants.

1. Maissoun E. Reda.

Maissoun Reda is an Environmental Analyst III with the Department. Reda PFT, ¶ 1 (May 10, 2022). They have been with the Department since April 2016. Id. They have a Master of Science degree in Soil Science from the University of Massachusetts. Id. at ¶ 4. Reda reviews Notices of Intent, site plans, and wetland resource area delineations; writes Superseding Orders of Conditions, Superseding Determinations of Applicability, and Superseding Orders of Resource Area Delineations in response to appealed decisions of municipal Conservation Commissions; and reviews 401 Water Quality Certifications. Id. at ¶ 2. I find them qualified "by knowledge, skill, experience, training, or education" to render expert testimony in this matter. See Bryan, 2005 MA ENV LEXIS 50 at *9; Mass. Guide Evid. 702.

III. Facts.

A. The Property prior to 1946.

The parties provide a fulsome history of the Property. Prior to its sale in 2000, the Property was owned at various times by members of the Bird family and their associated entities. Petrozzi, ¶¶ 9, 20. The Property was part of the East Walpole site of Bird and Son Company⁸ ("Bird and Son") and located along a portion of the Neponset River also known as Bird Pond. Id. The Massachusetts Historical Commission provides a concise history of the site:

The firm of Bird & Son is one of the few firms in continuous operation in Massachusetts from the early nineteenth century until [1986]. George Bird first started the production of paper in 1795 in the towns of Needham and Dover, and by 1812 had acquired the water power rights to this area of the Neponset River. Initial production was started slightly downstream from the [1986] plant, but by 1838 the site now known as the East Walpole plant was being used. The business has been owned and operated by the Bird family ever since, and has been the primary focus for the community of East Walpole.

The early production was limited to paper, including paper for the printing of U.S. currency in 1812. In 1824 the firm received its first of over two hundred patents related to the production of paper. By 1880 the firm had started the production of several types of cardboard boxes, and most significantly, the production of a building paper without tar in 1885. In 1886 they brought out their red rope roofing material (a waterproof building paper similar to roll roofing), and in 1888 hand block printed linoleum flooring. Thru [sic] the 1890's they continued to bring out new building material products culminating with the introduction of asphalt shingles in 1910.

Throughout the twentieth century Bird & Son has been a major producer and promoter of various asphalt based roofing and siding products. These products have heavily impacted our visual environment and have become universal cladding for many vernacular structures across the country. Thru the 1960's, the firm has continued to introduce innovative building products with the production of vinyl siding starting in 1963. During its twentieth

⁸ The Bird and Son Company is referred to in various sources as Bird and Son, Inc.; Bird and Son Company; Bird and Son Roofing and Siding Factory; the Bird Corporation; and other variations. They all refer to the same entity founded by Geroqe Bird and in existence from approximately 1812 to 1986.

century expansion the firm opened a number of other production plants across the country, but the East Walpole Site has always remained the headquarters.

...

Bird & Son also has significance in the development of progressive corporate labor relations. By the company's 125th birthday in 1920 there was an extensive program of social benefits for workers including a large Club House (located off the site), various athletic teams, a Credit Union a Library, a newspaper, and a Labor Bureau.

Id. at Ex. 1, p. 4.

The layout of the Property evolved over the years. According to the GZA GeoEnvironmental, Inc. ("GZA"), initial site investigation conducted in 1985, the paper mill burned down in 1867 but was immediately rebuilt. Petrozzi PFT, Ex. 20, p. 11. Steam power was introduced between 1878 and 1888 to supplant water power. Id. In 1880, the mill was again destroyed by fire and rebuilt. Petrozzi PFT, Ex. 6. "Approximately seven buildings at the Paper Mill Site were built between 1900 and 1919; another five buildings, characterized only as 'old,' probably also date to that period. Several more buildings were constructed in the 1920s...." Id.

One of the best resources available are the Sanborn Maps, which show the Property with the mill buildings that existed as of 1934. See Sanborn Map 2 (produced with the Department's Basic Document). Sanborn Map 2 is appended hereto as Appendix B. Additionally, the Applicants have provided two aerial photographs (both produced with the Department's Basic Documents): one from 1968 ("1968 Aerial") and another from 1978 ("1978 Aerial"), depicting the Property. Based on a comparison of the Sanborn Maps with the aerials, the Property contained the buildings identified as FX-3, DF-1, DF-3, and DF-23. Sanborn Map 2; 1965 Aerial; 1978 Aerial.

Bird and Son prided itself on providing recreation programs and facilities for its employees. Hasenjaeger PFT, ¶ 16. The Bird & Son Athletic Association, for example, was a

corporate organization formed to promote interest in sports and games. Id. Bird and Son provided facilities for baseball, tennis, and other sports for its employees. Id. One structure on the Property that may have been for that purpose is an approximately 25-foot diameter semi-circular concrete bench structure that has seating for individuals and a stairway running down the middle towards the water ("Bench"). Petitioner Ex. 11. Petitioner Ex. 11 shows that at one time the Neponset River ran up to the edge of the Bench, and that the Bench served as an entry point for swimmers to enter the water.

It is unclear from the record what precisely the Bench was used for and when. According to Ms. Dyer's research at the Walpole Historical Society, the Bench was constructed with the support of Charles Bird sometime in the 1910s and was used by local Boy Scouts around that time. Dyer PFT, ¶¶ 9-12 (citing Charles Bird, *Town Planning for Small Communities* (1917)). While the Bench may have been used by the Boy Scouts, there is no evidence that the Boy Scouts ever had an ownership interest in the Bench. Petrozzi PFT, ¶ 28. The Applicant disputes that third parties were permitted to use the Bench; Mr. Hasenjaeger testifies that the Bench was "created as a rest area for use by the employees of Bird & Son, Inc. during the work week, and for some availability for the employees and their families to enjoy and recreate," although his assertion that "we strongly emphasized to parents and [Boy Scouts] to never try to swim in any of the ponds in town, including Bird Pond," is based on his modern day experience. Hasenjaeger PFT, ¶ 20.

B. The Property after 1946.

After 1946, GZA's history of the Property states that two more buildings were constructed somewhere in the East Walpole site in 1949 and 1950. Petrozzi PFT, Ex. 20, p. 11. "In 1960, a three-story box manufacturing building with storage and office space was

constructed, and as recently as 1963, a one-story brick building was constructed for paper machinery and storage." Id. It is unclear whether these buildings were built on the Property.

Nevertheless, there is evidence of what was on the Property after 1946. The 1965 and 1978 aerials overlay the boundaries of the Property and the abutting parcels to show where the mill buildings were present on the Property. The buildings FX-3, DF-1, DF-3, and DF-23 on Sanborn Map 2 are clearly visible in the 1965 Aerial and 1978 Aerial. See Sanborn Map 2; 1965 Aerial; 1978 Aerial.

C. The Property on August 6, 1996.

Bird and Son ceased operations in 1985. Petrozzi PFT, ¶ 10. The last surviving building of the East Walpole site burned down on July 5, 1995, Petitioner Ex. 9, although this building was not on the Property. Hershey PFT, ¶ 13. There is little direct evidence of what remnants of the East Walpole site remained on the Property in 1996, such as an aerial photograph, although there is sufficient evidence in the record from which the state of the Property at that time can be inferred.

The June 2021 Plan shows what remnants remained on the Property from its time as part of the East Walpole site. See June 2021 Plan. As nothing has been constructed on the Property since Bird and Son's operations ceased, those remnants must have been part of the East Walpole site prior to 1996. Moreover, these building remnants correspond to the Sanborn Maps. See Sanborn Map 2; June 2021 Plan. I therefore conclude that the areas marked on the June 2021 Plan with flags BENCH-1 to BENCH-13, PAVE-1 to PAVE-10, FA1 to FA4, F1 to F7, B1 to B6, A1 to A2, and the structures marked "OLD FND WALL" and "EXISTING RETAINING WALL" were in the same locations as of 1996.

D. The Property today.

On September 14, 2023, I conducted a site visit at the Property. Far from its heyday as a bustling manufacturing center, the Property is now significantly overgrown and reclaimed by nature. As the topographical lines on the June 2021 Plan show, going down into the lot requires descending a steep and muddy embankment. Once on the site, I was able to observe the "OLD FOUNDATION" and the "OLD FND" structures on the Supplemental Plan, although in many instances it necessitated peering through foliage or scuffing aside dirt. These structures still exist but are relatively low to the ground. The "EXISTING RETAINING WALL" and "OLD FND WALL" on the southern side of the Property both extend up beyond ground height. I was also able to locate much of the area identified by the PAVE flags, although it was obscured by a layer of mud and brush.

While it is clear that the portion of the Property east of the PAVE flags contained identifiable buildings at one time, the western side is a forest. This is consistent with the 1965 Aerial and 1978 Aerial, each of which shows that area to have been forested at that time, and with Sanborn Map 2, which shows no structures.

Interestingly, Petitioner Ex. 11 is a photograph that shows the Bench as being up against the water. It is clear that the river has receded in the intervening century, because the Bench is now several yards from the shoreline and has been overgrown on virtually all sides. This is also consistent with the 1965 Aerial and 1978 Aerial, where the Bench is not visible below the tree canopy. It has long been in disuse, but it is not apparent how long. There was nothing in the vicinity of the Bench that suggested that it was part of the mill facilities to the east or that those buildings utilized the Bench after 1946.

IV. Issues in this appeal.

On January 25, 2022, the prior Presiding Officer in this matter conducted a Pre-Hearing Conference with the Parties (the Petitioner, the Department, and the Applicant). He issued a Pre-Hearing Conference Report and Order on January 28, 2022, identifying the issues in this appeal as follows:

1. For an Historic Mill Complex to be existing on the Property after 1946 must it have been in operation after that year pursuant to 310 CMR 10.04(Historic Mill Complex) and 310 CMR 10.58(6)(k)?
 - a. If the answer is yes, to what extent was there an Historic Mill Complex in operation after 1946?
2. Is there an Historic Mill Complex on the Property pursuant to 310 CMR 10.04(Historic Mill Complex) and 310 CMR 10.58(6)(k)?
 - a. If the answer is yes, what areas of the Property are occupied by an Historic Mill Complex pursuant to 310 CMR 10.04(Historic Mill Complex) and 310 CMR 10.58(6)(k)?

V. Analysis.

A. The applicable legal standards governing adjudication of the appeal.

1. The standard for summary decision.

310 CMR 1.01(11)(f) states, in relevant part,

Any party may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the adjudicatory appeal.... The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. A summary decision interlocutory in character may be made on any issue although there is a genuine controversy as to

other issues. Summary decision, when appropriate, may be made against the moving party....

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in Massachusetts courts, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit....

When a motion for summary decision is made and supported as provided in 310 CMR 1.01(11)(e), a party opposing the motion may not rest upon the mere allegations or denials of said party's pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.

This rule is "designed to avoid needless [evidentiary] adjudicatory hearings" in administrative appeals. In the Matter of SEMASS P'ship, OADR Docket No. 2012-015, Recommended Final Decision (June 18, 2013), 2013 MA ENV LEXIS 34, *12, adopted by Final Decision (June 24, 2013), 2013 MA ENV LEXIS 37; Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980) ("administrative summary judgment procedures" are appropriate to resolve administrative appeals without an adjudicatory hearing "when the papers or pleadings filed [in the case]... conclusively show... that [a] hearing can serve no useful purpose...").

The summary decision standard "mirrors the standard set forth in [Mass. R. Civ. P.] 56'... governing [summary judgment motions in] civil suits in Massachusetts trial courts." SEMASS P'ship, 2013 MA ENV LEXIS 34, at 14. Thus, "[a] party seeking a summary decision must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." Id. at 14-15. "If the moving party meets this burden, the opposing party 'may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits.'" Id.; 310 CMR 1.01(11)(f); cf. Mass. R. Civ.

P. 56(e); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant). In deciding a motion for summary decision, all reasonable inferences are drawn against the non-moving party. In the Matter of Town of Hopkinton, 2011 MA ENV LEXIS 88, *7 (citing King v. City of Boston, 71 Mass. App. Ct. 460 (2008), quoting Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996)).

2. The burdens of proof.

As the party challenging the Department's issuance of the SDA, the Petitioner has the burden of proof in this *de novo* appeal to produce credible evidence from a competent source to support its positions. In the Matter of David A. Bosworth Co., Inc., OADR Docket No. WET-2015-015, Recommended Final Decision (Feb. 17, 2016), 2016 MA ENV LEXIS 12, *23-24, adopted by Final Decision (Mar. 14, 2016); 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." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. 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 Carulli, Docket No. 2005-214, Recommended Final Decision (August 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 (October 25, 2006); In the 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).

3. Standard of review.

As the Presiding Officer in this appeal, my review of the Parties' evidence in support of their cross-motions for summary decision is *de novo*, meaning that my review is anew, irrespective of any prior determination of the Department in issuing the SDA. In the Matter of Kristen Kazokas, OADR Docket No. WET-2017-022, Recommended Final Decision (Aug. 29, 2018), 2018 MA ENV LEXIS 67, *9, adopted as Final Decision (Sep. 18, 2019), 2019 MA ENV LEXIS 93. As the Presiding Officer, I am "responsible ... for independently adjudicating [this] appeal[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." In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust, OADR Docket No. WET 2016-030, Recommended Final Decision (February 20, 2018), 2018 MA ENV LEXIS 7, *16, adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6. Also, it is well settled that "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 [the 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." In the Matter of Algonquin Gas Transmission, LLC, OADR Docket No. WET-2016-025, Recommended Final Decision (October 16, 2019), 2019 MA ENV LEXIS 106, *15, adopted by Final Decision, (October 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 bound by the Massachusetts Wetlands Protection Act.

B. An overview of the MWPA and Determinations of Applicability.

The Massachusetts Wetlands Protection Act and the Wetlands Regulations have as their purpose the protection of wetlands and the regulation of activities affecting "Areas Subject to Protection"⁹ that promote 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, and (8) protection of wildlife habitat. M.G.L. c. 131, § 40; 310 CMR 10.01(2). The Rivers Protection Act extends this protection to riverfront areas. See G.L. c. 131, § 40; 310 CMR 10.58.

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 hearing, if the conservation commission determines that the activities proposed will affect an area significant to one or more of the interests identified in the MWPA, then the conservation

⁹ An "Area Subject to Protection" is "any area specified in 310 CMR 10.02(1)," 310 CMR 10.04(Area Subject to Protection), which are the various wetlands identified in G.L. 131, § 40: "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...."

commission must issue an Order of Conditions. 310 CMR 10.06(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). However, under 310 CMR 10.58(6), "Notwithstanding the Provisions of 310 CMR 10.58(1) through (5), Certain Activities or Areas Are Grandfathered or Exempted from Requirements for the Riverfront Area: ... (k) Activities within an Historic Mill Complex."

C. The Definition of a Historic Mill Complex.

This appeal is grounded in the Rivers Protection Act, Chapter 258 of the Acts of 1996 ("RPA"), and whether the Department properly implemented the historic mill complex exemption in the RPA. In 1996, the RPA amended the MWPA and designated the Riverfront Area as a new protected resource area under the Wetlands Act. See 310 CMR 10.02(1). The purposes of the RPA are "to protect the private or public water supply; to protect the groundwater; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect fisheries." RPA, § 1. The RPA is not intended to diminish the protections and exemptions provided in G.L. c. 131 § 40. RPA, § 1.

When the legislature drafted the RPA it included Section 18, which defines when "historic mill complexes" are exempt from the Riverfront Area. See id.; 310 CMR 10.58(6)(k). Section 18 of the RPA specifically provides the following:

The riverfront area shall not include land now or formerly associated with historic mill complexes including, but not limited to, the mill complexes in the Cities of Holyoke, Taunton, Fitchburg, Haverhill, Methuen and Medford in existence prior to nineteen hundred and

forty-six and situated landward of the waterside face of a retaining wall, building, sluiceway, or other structure existing on the effective date of this act.

G.L. c. 131, § 40.

At the same time that the legislature enacted the RPA, it delegated to the Department the obligation to "adopt such regulations as are deemed necessary to carry out the purposes of this act." Rivers Act, § 4. Pursuant to this authority, the Department promulgated the following definition at 310 CMR 10.04(Historic Mill Complex):

Historic Mill Complex means the mill complexes in, but not limited to, Holyoke, Taunton, Fitchburg, Haverhill, Methuen, and Medford in existence prior to 1946 and situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure existing on August 7, 1996. An historic mill complex also means any historic mill included on the Massachusetts Register of Historic Places. An historic mill complex includes only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking areas, and driveways) constructed before and existing after 1946, used for any type of manufacturing or mechanical processing and including associated structures to provide water for processing, to generate water power, or for water transportation.

Later, Matter of 104 Stony Brook, LLC, OADR Docket No. WET-2017-021, Recommended Final Decision (May 21, 2018), 2018 MA ENV LEXIS 42, adopted as Final Decision (Jul. 17, 2018), 2018 MA ENV LEXIS 41 ("Stony Brook"), considered the question of whether the definition of an HMC in G.L. c. 131, § 40, is equivalent to the definition in 310 CMR 10.04(Historic Mill Complex). The Presiding Officer in that case determined that it was. Id. at *43.

D. Proving the Existence of an HMC.

Critical to this matter is the regulatory definition of an HMC. Accordingly, it is necessary to carefully break down the definition to determine what, exactly, an applicant must show. The definition identifies two separate analyses necessary to demarcate an HMC: the first is a "present

day" analysis that looks to what characteristics existed on the site in 1996 that also existed prior to 1946 (or that defers to the Massachusetts Register of Historic Places). The second is a historical analysis that narrows the footprint of the site to those areas that operated as part of the overall mill complex before and after 1946.

1. "Mill complexes in existence prior to 1946."

The first sentence of the definition defines an HMC as "the mill complexes in, but not limited to, Holyoke, Taunton, Fitchburg, Haverhill, Methuen, and Medford in existence prior to 1946 and situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure existing on August 7, 1996." 310 CMR 10.04(Historic Mill Complex). This case does not involve Holyoke, Taunton, Fitchburg, Haverhill, Methuen, or Medford, but those municipalities are merely exemplary and do not limit the applicability of the definition. Stony Brook, 2018 MA ENV LEXIS 42 at *35-36.

The first question is what is a "mill complex"? Words in a regulation are generally interpreted according to their common meaning. Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 286, 667 N.E.2d 869 (1996); see also, e.g., Doe, SORB No. 356197 v. Sex Offender Registry Bd., 99 Mass. App. Ct. 1105 (2020). A "mill" is "a building or collection of buildings with machinery for manufacturing." *Mill*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/mill> (last visited Aug. 25, 2023). A "complex" is a "building or group of buildings housing related units." *Complex*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/complex> (last visited Aug. 25, 2023). Thus, a "mill complex" is a structure or related group of structures containing machinery for manufacturing.

The last-antecedent canon of construction provides that the prepositional phrase "in existence prior to 1946" modifies the nearest reasonable antecedent, in this case, "mill complexes." See Hopkins v. Hopkins, 287 Mass. 542, 547 (1934) ("a modifying clause is

confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation"); Taylor v. Burke, 69 Mass. App. Ct. 77, 81 (2007). Accordingly, a mill complex must have been in existence prior to 1946 to qualify under the definition.

The next clause ("situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure") also modifies the phrase "mill complexes." This clause provides that the area considered part of the mill complex is that "situated landward" of an identifiable facade. In this context, the types of facades are retaining walls, buildings, sluiceways, or "other structures." 310 CMR 10.04(Historic Mill Complex). This clause demarcates the mill complex as being that on the "landward" side of the facade, meaning that any area between the facade and the river is specifically excluded from the mill complex.

With respect to the phrase "other structures," a "structure" in this context is defined as "something (such as a building) that is constructed." *Structure*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/structure> (last visited Aug. 25, 2023). That said, the associated-words canon suggests that "other structures" should be given a meaning related to the other elements of the list. See Commonwealth v. Gopaul, 86 Mass. App. Ct. 685, 688 (2007) ("[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (quoting Commonwealth v. Hamilton, 459 Mass. 422, 432 n. 12 (2011)). Considering the remainder of the list ("retaining walls, buildings, sluiceways"), such a structure does not have to be above the ground. In the case of a sluiceway, for example, the structure may be a depression in the ground, and retaining walls may be identifiable only as a footprint. An "other structure" must merely be some sort of permanent, human construction with a defined edge.

Lastly, the phrase "existing on August 7, 1996," by the last antecedent canon, refers to the façade itself. Thus, while the mill complex must have existed "prior to 1946," the *façade* by which the HMC is demarcated must have existed on August 7, 1996.

It is clear from the regulation that the façade of an HMC necessarily includes the space between discontinuous façades, because the definition anticipates that a "mill complex" may contain multiple, unconnected buildings. If "a strict reading of a statute leads to an absurd result[,] a deviation is justified so long as it 'preserves the substance of a statute rather than diminishes it.'" Dillon v. Massachusetts Bay Transp. Authy., 49 Mass. App. Ct. 309 (2000); see Brittle v. Boston, 439 Mass. 580, 585, 790 N.E.2d 208 (2003); Comm. v. Kneram, 63 Mass. App. Ct. 371, 376 (2005). It would make no sense that a developer would have to file a Notice of Intent to perform work on a strip of land not considered part of an HMC because two buildings had a road or walkway between them, but be able to build without restriction on the remainder. Such a reading would effectively nullify the exemption.

2. Mill Complexes on the Massachusetts Register of Historic Places.

The second sentence refers to an additional definition for an HMC: that it is on the Massachusetts Register of Historic Places ("MRHP"). This sentence does not apply in this matter, but it is worth noting that an HMC under this sentence is demarcated by the MRHP, not by the extant façades.

3. The footprint of the HMC.

If an HMC is identified in either of the preceding two sentences, the third sentence then carves out specifically what constitutes the HMC based on the history of the site:

An historic mill complex includes only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking areas, and driveways) constructed before and existing after 1946, used for any type of manufacturing or mechanical processing and including associated

structures to provide water for processing, to generate water power, or for water transportation.

310 CMR 10.04(Historic Mill Complex).

An HMC is limited to "the footprint of the area that is or was occupied by interrelated buildings." Id. "Interrelated" requires that the buildings have "a mutual or reciprocal relation." *Interrelated*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/interrelated> (last visited Aug. 25, 2023). Thus, the buildings must all have been part of the identified HMC and not, for example, owned by another entity or for a use other than the purpose of the HMC.

The phrase "that is or was..." modifies the nearest reasonable referent, in this case "the footprint." See Adelman v. Proskauer Rose LLP, 2023 Mass. Super. LEXIS 38, *33 (May 16, 2023) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."); see also Parm v. Nat'l Bank of Cal., N.A., 835 F.3d 1331, 1336 (2016). Thus, the interrelated buildings need not be existing at the time that the HMC is demarcated. Nevertheless, the footprint of those interrelated buildings must be identifiable by reference to the present site or historical sources.

The remainder of the sentence describes what constitutes "interrelated buildings." A parenthetical list describes "interrelated buildings" as "manufacturing buildings, housing, utilities, parking areas, and driveways." 310 CMR 10.04(Historic Mill Complex). While normally the term "buildings" would be interpreted by its ordinary meaning ("a usually roofed and walled structure built for permanent use (as for a dwelling)", *Building*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/building> (last visited Aug. 25, 2023)), the parenthetical list suggests that the term, in this context, has a broader meaning. See Comm. v. Thompson, 56 Mass. App. Ct. 719, 711 (2002) ("Unless otherwise defined, it is usual to interpret

the words [of a statute] as taking on their ordinary contemporary common meaning.' 2A Singer, Sutherland Statutory Construction § 47:28, at 352 (6th ed. 2000)." (Emphasis added)). "Utilities, parking areas, and driveways" are not usually understood to be "buildings" in the traditional sense of a walled and roofed edifice. The parenthetical therefore tells us that in this context, a "building" includes other human construction that identifies the "footprint" of the area. See Reda PFT, ¶ 11g.

The next clause, "constructed before and existing after 1946," tells us that the "interrelated buildings" must have been in existence both before and after 1946. Thus, a proponent must demonstrate that the building was constructed at some time prior to 1946 and that the same building existed at a time after 1946.

The regulation next instructs that the "interrelated buildings" must have been used for "any type of manufacturing or mechanical processing." In this context, manufacturing is "the process of making wares by hand or by machinery especially when carried on systematically with division of labor," or, put another way, "a productive industry using mechanical power and machinery." *Manufacturing, Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/manufacturing> (last visited Aug. 25, 2023). The broad definition of "building," taken in context with this requirement, suggests that the buildings do not need to be directly used in the manufacturing process but may assist in it, although they must bear some relationship to the production of goods. For example, they may be loading docks or driveways that are used as part of the manufacturing process, or even parking lots used by employees.

The manufacturing requirement does not have an explicit temporal requirement. If the site was *ever* used for manufacturing, however remotely in time, the site could qualify as an HMC.

Lastly, the definition extends the meaning of "interrelated buildings" to include "associated structures to provide water for processing, to generate water power, or for water transportation." 310 CMR 10.04(Historic Mill Complex). Because the clause is part of the same list of requirements for buildings, a proponent must still show that the "associated structure" existed both prior to and after 1946 and was used for some "type of manufacturing or mechanical processing."

As with the façades, the "footprint" is not strictly limited to just the buildings, but necessarily also includes interstitial space between them. See Dillon, 49 Mass. App. Ct. 309 (2000). It would make no sense for an HMC to be limited to the areas where buildings used to exist and requiring a notice of intent to perform work on the walkways and roads between buildings that may have been removed decades earlier. See Reda PFT, ¶ 11e.

4. Showing the existence of an HMC.

Taken all together, in order for an area to qualify as an HMC, a proponent must show that (1) a structure or group of structures used for manufacturing existed prior to 1946 and (2) there is an identifiable façade made up of retaining walls, buildings, sluiceways, or other permanent construction from those structures that existed as of August 7, 1996. The HMC is then identified as the landward side of the identified façade. Alternatively, the HMC may be identified by the MHRP.

Once the HMC is identified, the HMC is then limited to its identifiable "footprint." The proponent must demarcate the footprint of the HMC and show that (1) the footprint contains or once contained buildings (broadly defined to include not only walled and roofed edifices but also flat structures such as driveways and "associated structures" that utilized water for processing, power, or transportation), (2) the buildings had a function as part of the HMC (i.e., were "interrelated"), (3) the buildings existed prior to 1946, (4) the buildings existed after 1946, and

(5) the buildings were "used for any type of manufacturing or mechanical processing." If the proponent meets its burden, the demarcated footprint, including the spaces between those buildings, constitutes the HMC that is exempt under 310 CMR 10.58(6)(k).

E. Whether a mill complex must have been in operation after 1946 for it to qualify as an HMC.

310 CMR 10.04(Historic Mill Complex) does not explicitly impose a requirement that a building be "used for any type of manufacturing or mechanical processing" at any time after 1946. The phrase "mill complexes... in existence prior to 1946" states that the mill complex (meaning the building or collection of buildings used for manufacturing) must have existed and been in operation at some time prior to 1946, but not necessarily after. That said, there is no dispute that the eastern portion of the Property was used for manufacturing up until 1985. Petrozzi PFT, ¶ 10.

F. Whether there an HMC on the Property, and to what extent.

The June 2021 Plan has a red dashed line showing the area that the Applicant alleges is exempt as an historic mill complex. In determining the extent of the HMC on the Property, it is useful to break the property up into two sections: the portion of the Property that is approximately to the east of the eastern edge of the existing utility easement identified on the June 2021 Plan ("eastern portion"), and the remainder of the Property ("western portion").

1. The eastern portion.

The analysis proceeds in two steps. First is determining whether a structure or group of structures used for manufacturing existed prior to 1946, and then determining whether there is an identifiable façade made up of retaining walls, buildings, sluiceways, or other permanent construction in that mill complex that existed as of August 7, 1996. This is not difficult to do. The history of the site and the Sanborn Maps show that the East Walpole site was used for manufacturing. See Petrozzi, Ex. 1; Sanborn Map 2.

The June 2021 Plan (verified by my own observations during my site view) clearly demarcates the façades. First are the foundations marked by flags A1 to A2 and B-1 to B-10.¹⁰ Second is the larger, more complete foundation marked by flags F1 to F7. Lastly, there is an "other structure": the large pavement pad identified by the flags PAVE-1 through PAVE-10. The edge of the pavement pad closest to the water is a façade.

The Sanborn Maps confirm that the buildings making up the mill complex existed prior to 1946. See Sanborn Map 2. The aerial photographs likewise confirm that the façades existed in the 1960s and present day and were necessarily present on August 7, 1996. Everything landward of the façades that I have identified (and the space between them) is therefore a candidate for the HMC.

Turning to the second part of the analysis, the potential HMC is then limited by the historical analysis. I analyze whether (1) the footprint of the HMC contains or once contained buildings (broadly defined to include not only walled and roofed edifices but also flat structures such as driveways), (2) the buildings had a function as part of the HMC, (3) the buildings existed prior to 1946, (4) the buildings existed after 1946, and (5) that the buildings were "used for any type of manufacturing or mechanical processing." For this, the 1965 Aerial is most useful. Clearly, the footprint once contained buildings and human construction on the eastern portion of the Property. When compared with Sanborn Map 2, the buildings marked FX-3, DF-1, DF-3, and DF-23 on Sanborn Map 2 are clearly visible in the 1965 Aerial. These areas were part of the mill complex when they were depicted on the Sanborn Maps (before 1946) and in the 1965 aerial (after 1946). These buildings were undoubtedly interrelated with the remainder of the mill complex and used in the manufacturing process, because they were storehouses for finished

¹⁰ Even though some of these structures are not entirely on the Property, the definition does not require that the façades be on the Property.

products and abutted the train tracks that transported the goods for sale. See Sanborn Map 2.

Based on the aerial photographs and the Applicant's overlays, the footprint of the mill complex covered almost the entirety of the eastern portion of the Property. I therefore find that those areas of the eastern portion of the Property landward of the existing façades constitute the HMC.

2. The western portion of the Property.

The Applicant argues that the western portion of the Property is part of the HMC. Again, the analysis begins with the identification of façades. Given that the Property is so overgrown, the Applicant's surveyor was unable to locate any extant retaining walls, sluiceways, or other structures existing in 1996 that could be used to determine the landward starting point of the HMC except for the Bench. See June 2021 Plan. During my view of the Property, I was also unable to find any surviving structures other than the Bench.

The Applicant argues that the Bench is part of the HMC because it was used by Bird and Son for its employees. Hasenjaeger PFT, ¶ 20. The Petitioner argues that it was an unrelated structure because it was used by the Boy Scouts. Dyer PFT, ¶¶ 9, 11, 12. Because the Bench is the only surviving relic prior to 1946, the parties discuss its history and purpose in some detail. It appears to have once been part of Bird and Son's business, as it was on the Property, and employees at one time used the Bench for recreation. Hasenjaeger PFT, ¶ 20. Bird and Son owned the bench at all times, because while the Boy Scouts may have had some part in maintaining it, there is no indication that they ever had an ownership interest in it. Petrozzi PFT, ¶ 31; Hasenjaeger PFT, ¶ 20. Bird and Son installed a chain link fence around the Bench to keep the general public out. Hasenjaeger PFT, ¶ 21. It may be that the Bench, having been owned by Bird and Son and used for the benefit of its employees, is "another structure" that would qualify

as a façade.¹¹ I need not decide this issue, however, because the Applicant fails on the second part of the analysis.

Even if there was an identifiable façade more expansive than the Bench, the Applicant has not shown the footprint of buildings that existed both before and after 1946 on the Property. The Sanborn Maps are remarkably detailed but show no buildings on the western portion of the Property prior to 1946. See Sanborn Map 2. The next datapoint in the record is the aerial photograph from 1965, which shows the western portion of the Property almost entirely overgrown by trees (so much so that the Bench is obscured). See 1965 Aerial. There is nothing in the record from which I can infer that buildings on the western portion of the Property existed on January 1, 1947.¹² Accordingly, no part of the western portion of the Property meets the definition of an HMC.

3. The bounds of the HMC.

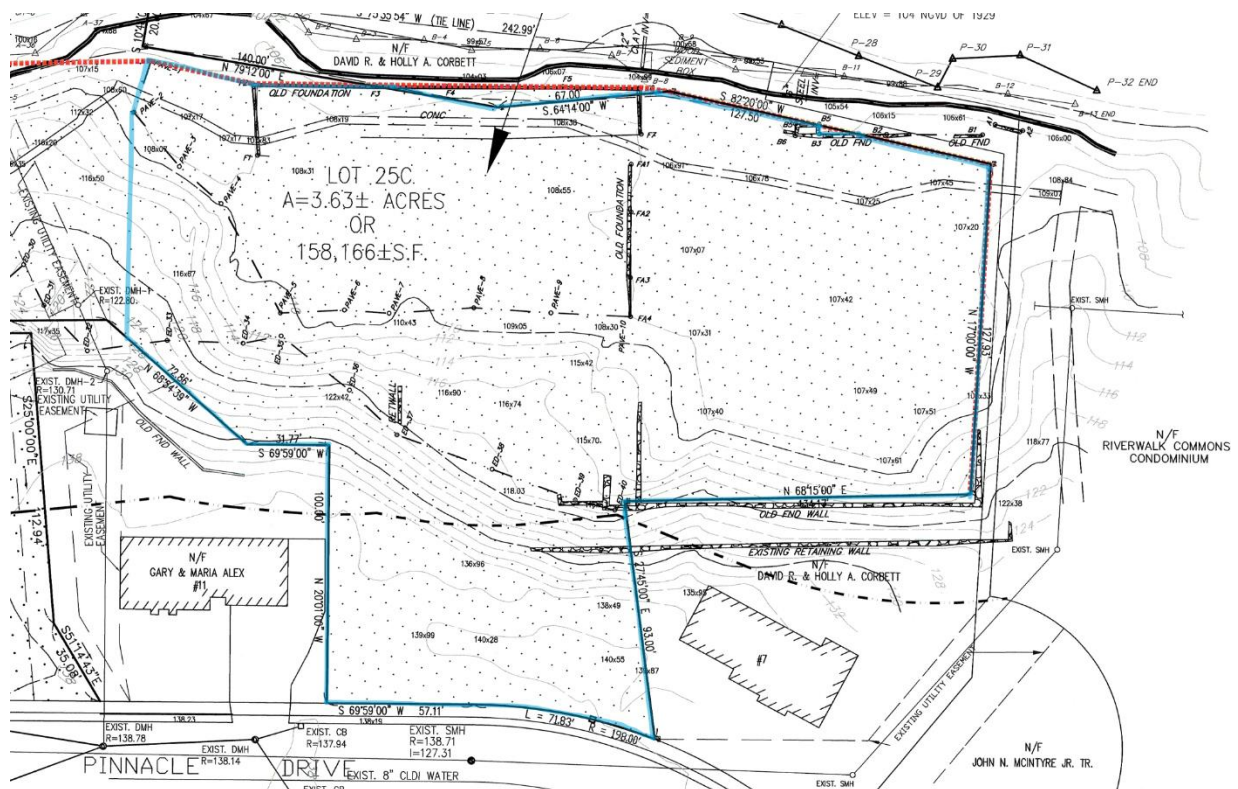
Based on the regulatory definition, the façades, and the footprint, the precise boundary of the HMC can be explicitly identified. The western bound of the HMC begins at flag PAVE-1. Make a straight line from flag PAVE-1 to flag PAVE-2. From flag PAVE-2, extend the line landward until it meets the Property's border with the land marked "N/F Gary & Maria Alex". From that point, follow the boundary of the Property easterly along the land marked "N/F Gary & Maria Alex", then along Pinnacle Drive, then along the boundary of the land marked "N/F David R. & Holly A. Corbett" until the boundary meets "OLD FND" between flags B2 and B3. From that point, move westerly to flag B3, then northerly to the eastern-most flag B5. From the

¹¹ To be sure, the determination that the Bench is a façade would only potentially exempt the land directly landward from it, which is a relatively narrow strip of land.

¹² It may be that the footprint of buildings DM-24, DM-25, and DM 26 would qualify as the footprint of an HMC to the extent that they are directly behind the Bench. However, those buildings are not on the Property and therefore beyond the scope of this decision.

easternmost flag B5, move in a straight line westerly towards flag F6 until the line meets the property boundary. Follow the boundary of the Property along the land marked "N/F Gary & Maria Alex" easterly until it meets the "OLD FOUNDATION" near flag F3. Then follow the "OLD FOUNDATION" westerly to F2 and then move westerly in a straight line to PAVE-1.

The outline of the HMC as I have just described is marked on the following plan excerpt in blue:



Two final observations are necessary: first, the definition of an HMC does not limit itself to the Riverfront Area as defined in 310 CMR 10.58(2)(a)3.. Thus, there may be areas of the HMC as I have identified it that are further than 200 feet from the mean annual high-water line, where no Notice of Intent is required. Second, this matter is limited to determining what of the HMC exists inside of the Applicant's boundary. I render no opinion on whether there exists an HMC on any other lands identified on the June 2021 Plan.

4. The parties' other arguments.

In light of the foregoing analysis, it is worthwhile to address some of the parties' other arguments in support of their respective motions for summary decision. First, the Petitioner reads the HMC exemption too narrowly. The Petitioners argue that the HMC requires that "the party asserting the Historic Mill Complex exemption bears the burden of proving that a 'mill complex' (i.e., 'only the footprint of the area that is or was occupied by interrelated buildings (manufacturing buildings, housing, utilities, parking areas and driveways')) existed as of August 7, 1996." Petitioner Memo., pp. 3-4 (citing Stony Brook, 2018 MA ENV LEXIS 42, at *15). The Petitioner then concludes that there is no HMC on the Property because "no remaining buildings related to a mill complex in existence as of 1946 stood on the Property or on any area near the Property as of July 5, 1995." Petitioner Memo., p. 4. This conclusion is incorrect and misreads Stony Brook. As discussed above, the question is not whether the buildings existed in 1996 but whether the *façades* existed. If they existed, then the footprint is determined by analyzing what buildings existed prior to and after 1946. The property in question in Stony Brook had no mill-related structures in the footprint: "the only evidence of a mill-related use in the Riverfront Area was a partial foundation of a corner of the Bigelow house in the Riverfront Area which may have been used for housing mill employees. But it is undisputed that it was not in existence as of August 7, 1996." Id. at *44. The property in Stony Brook therefore lacked identifiable *façades*.

The Petitioner also argues that "[i]mplicit in the statutory exemption is the notion that cities with old mill buildings that were still standing in 1996 may redevelop the footprint of those areas as needed in a modern economy." Petitioner Memo., p. 4. Again, the definition of an HMC is broader than applying only to buildings that have survived in an undisturbed state until 1996.

The Petitioner lastly argues that the HMC should be limited to the footprint of the mill complex and not include the western portion of the Property. Petitioner Memo., p. 7. This is

effectively what this decision does, and essentially for the reason that the Petitioner gives: that extant façades and the footprint of the mill complex do not extend into the western portion of the Property.

Turning to the Applicant, it errs in its argument that the Bench is part of the HMC. Applicant Memo., p. 13. It argues that the "Petitioner has attempted to discount this significant structure by disassociating it from the Bird Corporation." Id. The Applicant's argument misses that even if the Bench is "another structure", the footprint of the mill complex buildings does not extend behind it on the Property.

The Department argues that its analyst "determined that the subject property including the structures observed during the site inspection were part of the Historic Mill Complex known as the Bird Mill Complex." Dep't. Memo., p. 4 (quoting Reda PFT, ¶ 9). However, the Department applied the exemption to the western portion of the Property by not accounting for the lack of a footprint, as discussed on page 27. See Woods v. Executive Office of Communities and Development, 411 Mass. 599, 604-05 (1992) (statutory exceptions are to be narrowly construed).

VI. Conclusion.

For the reasons given above, I recommend that MassDEP's Commissioner issue a Final Decision affirming the determination in part and issue a Final Order that the historic mill complex is located as described above on page 28.



Patrick M. Groulx
Presiding Officer

Date: October 12, 2023

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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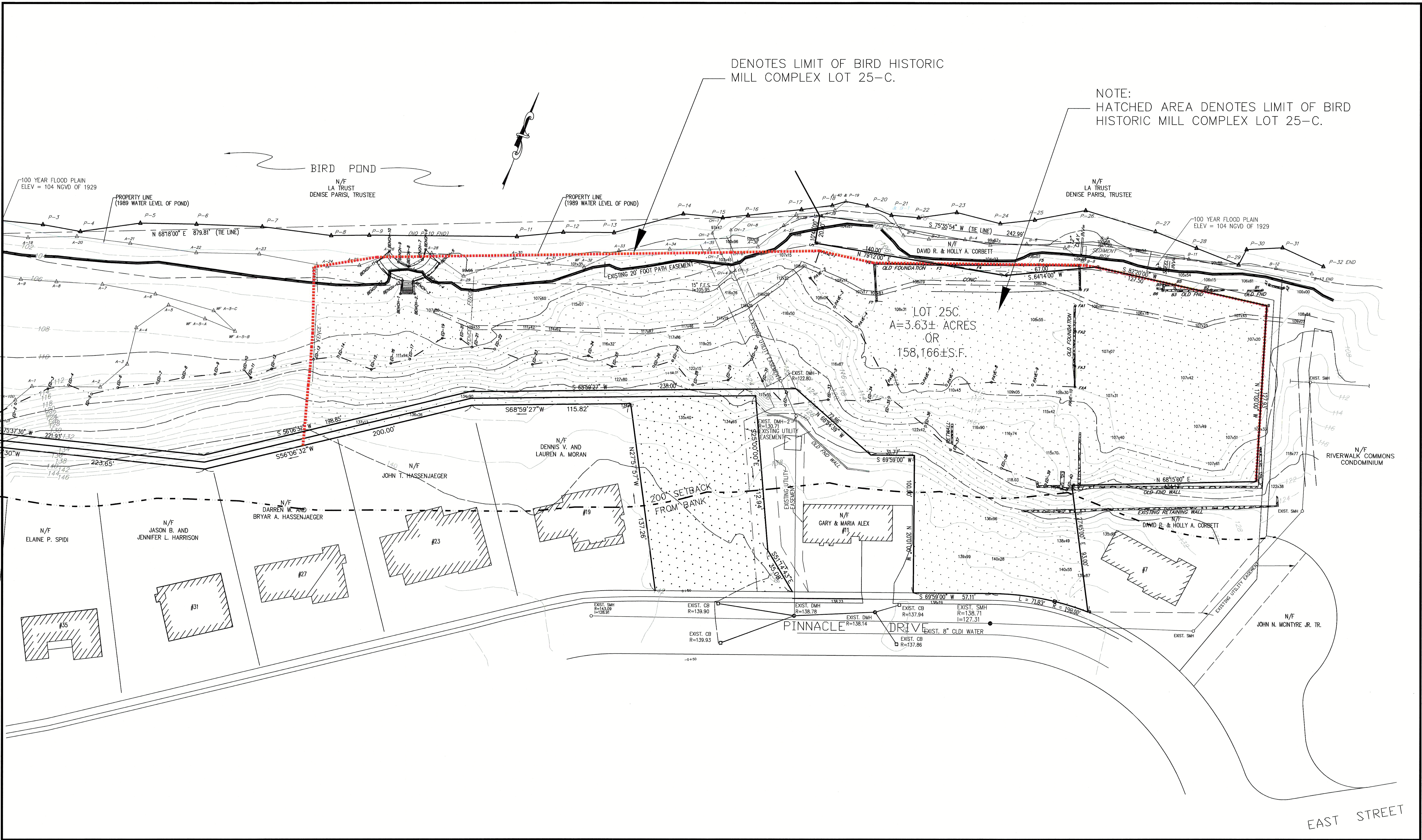
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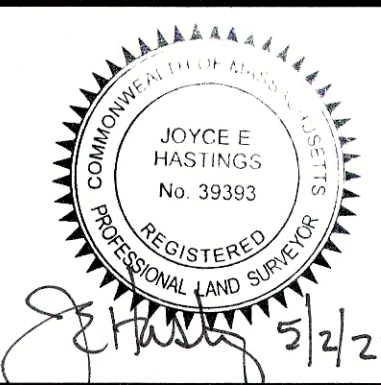
DENOTES LIMIT OF BIRD HISTORIC
MILL COMPLEX LOT 25-C.

NOTE:
HATCHED AREA DENOTES LIMIT OF BIRD
HISTORIC MILL COMPLEX LOT 25-C.




NOTE: IT SHALL BE THE RESPONSIBILITY OF THE CONTRACTOR TO VERIFY LOCATIONS AND ELEVATIONS OF EXISTING UTILITIES PRIOR TO COMMENCEMENT OF ANY CONSTRUCTION. DIGSAFE IS TO BE NOTIFIED 72 WORKING HOURS IN ADVANCE OF CONSTRUCTION. DIGSAFE 1-888-344-7233

REVISIONS		
No.	DATE	DESCRIPTION
1	8/5/2021	BIRD MILL COMPLEX
2	2/2/2022	BIRD MILL COMPLEX LIMITS
3	4/21/2022	BIRD MILL COMPLEX LIMITS
4	5/02/2022	BIRD MILL COMPLEX LIMITS



JOYCE E. HASTINGS
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PROFESSIONAL LAND SURVEYOR



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HOLLISTON, MA 01746
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www.GLMengineering.com

BIRD HISTORIC MILL COMPLEX
LOT 25C - PINNACLE DRIVE
WALPOLE, MASSACHUSETTS

PREPARED FOR:
WALL STREET DEVELOPMENT CORP.
P.O. BOX 272
WESTWOOD, MASSACHUSETTS 02090

JOB No.	16,895
DATE:	6/23/21
SCALE:	1"=30'
SHEET:	1 of 1
PLAN #:	27,571

CONFIDENTIAL
FACTORY
INSURANCE ASSOCIATION
HARTFORD, CONN.

BIRD & SON, INC.,
EAST WALPOLE PLANT,
EAST WALPOLE, MASS.
SCALE 1/4" = 50 FEET. SURVEYED JUNE 16, 1934.
Surveyed By E.L. Lisbon. Drawn By J.M. Carrier.

