COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 2010-2740F

LANCE DAVIS and CAROL GRAY,	)
	)
Plaintiffs	)
	)
v.	)
	)
	)
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS	)
	)
and	)
	)
SCOTT NIELSEN and THE LEVI-NIELSEN COMPANY, INC.,	)
	)
Defendants	)
	)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

On June 11, 2010, a Commissioner of the Department of Environmental Protection (DEP) issued a Final Decision on Reconsideration in a wetlands appeal under G.L. c. 131, s. 40 and 310 CMR 10.00 et seq., approving a Final Order of Conditions that allows construction of a 17-unit residential development in Amherst, Massachusetts.[1] In doing so, the DEP acted erroneously, arbitrarily, capriciously, and in excess of its

[1] The Plaintiffs have appealed both the Final Decision of the DEP Commissioner (dated May 11, 2010, and adopting the Presiding Officer's Recommended Final Decision, see AR 1933 and AR 1877, respectively), and her final Decision on Reconsideration (dated June 11, 2010 and adopting the Presiding Officer's Recommended Decision, see AR 1963 and AR 1959, respectively). These Decisions are referred to collectively as 'the Commissioner's Decisions" or "the Final Decisions."

statutory authority, and thus prejudiced the rights of the Plaintiff. The Plaintiffs' accompanying Motion for Judgment on the Pleadings is brought pursuant to Mass.R. Civ. P. 12(c) and Superior Court Standing Order No. 1-96, seeking relief pursuant to G.L. c.30A, s.14 (7)(a-g). The Plaintiffs seek a remand to the DEP for further proceedings and application of the Stormwater Management Regulations.

PROCEDURAL HISTORY

The subject of this appeal is a Final Order of Conditions (FOC)[2] issued on July 31, 2009, to Defendant Scott Nielsen ("developer") allowing construction of a 17-unit residential development on South East Street in Amherst ("locus" or "project locus"). The project locus abuts and contains wetland resources protected by the Massachusetts Wetlands Protection Act, G.L. c. 131, s.40 and 310 CMR 10.00 et seq., in particular, Bordering Vegetated Wetland (BVW) (both on and abutting locus) and a certified vernal pool (CVP) (located within the BVW abutting locus). The FOC arose from proceedings before the DEP in which the Plaintiffs and other Amherst residents had participated as a Ten Resident Group pursuant to G.L. c. 131, s.40 and 310 CMR 10.05. The Ten Resident Group was the Petitioner in the adjudicatory appeal giving rise to the Final Decisions.

As noted in the Recommended Final Decision, this appeal "has a long and convoluted history." AR 1879. The developer's Notice of Intent for construction of a 24-unit project was originally submitted on December 28, 2005. See AR 521; AR 775-781. The developer subsequently submitted plans dated November 16, 2006, to the Amherst Conservation Commission (ACC) for the 24-unit development. See AR 91.

[2] The DEP's proposed FOC was the subject of the hearing; it was affirmed by the Final Decisions and was formally issued on August 23, 2010. See AR 1965.

The ACC issued Order of Conditions on May 2, 2007, disallowing a portion of the proposed work under the Amherst Wetlands Protection Bylaw.[3] See AR 82-93; see also AR 76, 82, 211. The developer appealed the OOC (effectively a denial of its project) to Superior Court. See AR 76. It also appealed the OOC to DEP's Western Regional Office seeking a Superseding Order of Conditions (SOC). The Ten Resident Group (including Plaintiffs) also appealed the OOC to DEP. See AR 522. On February 13, 2008, DEP issued a SOC permitting the construction of a revised, 17-unit project. See AR 76; 96; 465; 523.[4] The Ten Resident Group appealed the SOC, seeking an adjudicatory hearing, on the grounds that it did not protect wetland resources on and adjacent to the project site. See AR 1-6;75.

On July 9, 2008, DEP moved to stay the administrative proceedings, noting that that although the SOC was based on different plans (dated February 7, 2008) than the plans reviewed by the ACC, the plans approved in the SOC could not be constructed under the local wetlands bylaw and the ACC's decision. DEP also argued that further administrative proceedings could not properly be held during the pendency of the Superior Court appeal, and noted that on July 9, 2008, the developer had submitted new plans to the ACC, "inherently conflict[ing]" with the SOC plans, demonstrating an intent to abandon the plans approved in the SOC. AR 76-78. Pursuant to the DEP's Motion

[3] In particular, a condition in the OCC provided that '[a] permanent 100-foot no-disturbance area shall be maintained from the delineated boundary of the vernal pool" located immediately adjacent to the project locus. See AR 76, 91-92.

[4] A Corrected Superseding Order of Conditions was entered on February 15, 2008 but the date of issuance remained February 13, 2008 under DEP policy. See AR 465-66.

and Department policies,[5] the Presiding Officer stayed the proceedings on August 22, 2008. AR 207.

On September 4, 2008, the ACC approved certain "revised" plans dated May 30, 2008, and issued an Amended Order of Conditions. See AR 255. The developer moved to lift the stay in the adjudicatory proceedings, and to substitute, in the DEP adjudicatory proceedings, the plan approved by the ACC. See AR 255. The motion to substitute was allowed by the Presiding Officer on October 24, 2008, and the "Revised Plan" (May 30, 2008) became the "plan of record." See AR 255-56.

The developer filed its pre-filed testimony on or about November 25, 2008. Exhibits to such testimony included the February 15, 2008 SOC, and expert testimony specifically referenced the SOC.[6] See AR 406. The developer also submitted modified plans dated July 31, 2008. On or about December 3, 2008 DEP filed a Motion for Clarification, noting that "[a]s the Revised Plan, dated May 30 has been made the formal plan of record, the issues for hearing must focus on that plan, dated May 30, 2008 and not the SOC." The Motion continued:

> "The SOC itself has lost any effect in that it approved plans which have been 'superseded' by the Revised Plan and supplemental information filed with the Applicant's Pre-filed Direct Testimony. DEP's Pre-filed Testimony will respond to the Revised Plan of Record, and the Supplemental Information included with the Applicant's PFDT. It will encompass the first review of the revised project, as there is no formal permit issued for the revised project."

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[5] Wetlands Program Policy 89-1, providing that the Department will stay administrative action on any Request for an Adjudicatory Hearing when the project has been denied under a local wetlands Bylaw, and Policy 88-3, "multiple filings" policy. See AR 76-77 and 209.

[6] See, e.g., AR 278 (Pre-filed direct testimony of Marc S. D'Urso)("It is my opinion that the SOC, as written, conditions the work sufficiently to ensure that the proposed stormwater management system is constructed and maintained so that it will perform as designed and, therefore, not cause adverse impairment to the CVP. . . ." The exhibits also included a "Revised Plan for DEP Appeal," dated July 31, 2008.

AR 486 (emphasis supplied).

DEP subsequently submitted the Prefiled Testimony of Mr. McCollum, a DEP Environmental Analyst (Wetlands and Waterways Program) opined, based on his review of the developer's prefiled direct testimony, that "the present project does not demonstrate compliance with [DEP's Stormwater Management] Policy." AR 509. He further stated that:

> "It is my professional opinion that the information as contained in the Notice of Intent as revised prior to the date of issuance of the SOC, and conditioned by the SOC, does document compliance with DEP Stormwater Management Policy, as provided for in the Stormwater Management Policy Handbook. However, the proposed project described in the Applicant's Pre-filed testimony, for the reasons stated above, does not document compliance with said Stormwater Management requirements.

AR 511.

Similarly, the prefiled testimony of Timothy McKenna and Byron Foulis, both DEP Environmental Analysts, Wetlands and Waterways, concluded that the new project design did not comply with DEP Stormwater Policy.[7] On November 26, 2008, in response to the above prefiled testimony, the developer filed yet another revised plan to DEP, referred to as "Second Revised Plan." AR 575. The developer's Rebuttal testimony of Marc D'Urso was submitted on January 2, 2009 attesting to the compliance of this "Second Revised Plan" with DEP Stormwater Management Policy. This "Second Revised Plan" contained changes to a detention basin near the BVW ("Pond 4P")

[7] Mr. McKenna concluded that the redesign would "result in draining ground water and will decrease the base flow of ground water to Certified Vernal Pool 3985." AR 526. He concluded that this would result in significant adverse impacts to BVW on the site, and the BVW's ability to function in a manner that protects the wildlife habitat interest. AR 527. Mr. Foulis concluded that "the revised project proposal now creates an adverse impact to the CVP" by the interception of groundwater which will result from the revised design of Pond 4P. AR 538.

including the incorporation of a retaining wall differing than one previously proposed, and raising the base elevation of the Pond . AR 576-77. The developer sought to have this plan substituted as the plan of record. See AR 638; 1712. Another version of the plans, dated January 2, 2009, was apparently submitted to DEP on or about that date.[8]

After reviewing the Rebuttal testimony of Mr. D'Urso and the January 2, 2009 plans, Mr. McCollum opined that the proposed retaining wall design did not include any geotechnical information detailing how the wall would contain the proposed volume of stormwater without failure of the wall and adjacent fill slope.[9] AR 648-649. On this basis, he concluded that the Second Revised Plan did not demonstrate compliance with Standard 2 of the Stormwater Management Policy. AR 649. Mr. Foulis, in Sur-Rebuttal testimony, similarly concluded that on this basis, the revised proposal did not meet the General Performance Standards of the Act. AR 643.

The developer then moved, with the assent of DEP, for another stay of proceedings to allow time "to resolve the . . . technical questions" raised in DEP's Sur-Rebuttal testimony. AR 639. The developer further stated that it had "thus demonstrated an intent not to proceed with the current plan of record by filing the Second Revised Plan." AR 638. The stay was allowed, AR 662. On March 4, 4009, the developer submitted a "Third Revised Plan" dated February 12, 2009, with supporting documentation, and filed a Motion to Substitute this "Revised Plan" as the plan of record.

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[8] Nevertheless, the later Sur-Rebuttal testimony of McCollum and Foulis refers to these January 2nd plans as the "Second Revised Plan," rather than the Third. See AR 646 and 643.

[9] Mr. McCollum stated that the result of the failure would be the collapse of the side slope and "discharge of an increased volume and rate of stormwater runoff- along with sediment – through the down gradient 100 ft Buffer Zone and into the Bordering Vegetated Wetland and vernal pool located 100 ft away. AR 648-49.

AR 677, 766. On June 5, 2009, the developer submitted a "compilation package" incorporating "the pertinent an updated information for the Strawberry Field project for the 17-unit Planned Unit Residential Development with last revisions submitted to the Department on February 12, 2009." AR 771. On July 5, 2009, DEP submitted a proposed Final Order of Conditions. AR 1574. The proposed FOC identified the "Final Approved Plans and Other Documents" as Sheets L0 through L4; L6 and L7 of "Strawberry Field, A Planned Unit Residential Development, South East Street, Amherst, Massachusetts," Final Revision Date June 5, 2009. AR 1574.[10]

On or about October 14, 2009, the Petitioner filed prefiled testimony of Gregory Newman, Patricia Gagnon, Thomas Tyning, and Bart Bouricius. AR 1603-1615.[11] In its accompanying Memorandum of Law, the Petitioner asserted the need for a hydrogeologic study and for an additional test pit, based on the testimony of the Petitioner's witnesses. AR 1587-98. The Petitioner specifically "request[ed] that the DEP order another test pit or install a monitoring well at the site of TP-6, or in the alternative, that the DEP require the applicant to allow Mr. Newman access to his land to oversee the digging of another test pity or installing of a monitoring well at that location." AR 1598. Both DEP (on November 13, 2009) and the developer (October 30, 2009) moved to dismiss the appeal on the grounds that the Petitioner had failed to sustain a case. AR 1642, 1716.

[10] These full-size plans are contained in the AR at Tab 43, following AR 896.
[11] The testimony was at the time unsigned. The developer and DEP moved to strike on this basis; AR 1621, 1643. The Petitioner subsequently submitted signed copies of the Prefiled testimony of Tyning, Newman, Gagnon and Bouricious. AR 1683-89. The testimony of Ms. Gagnon was ultimately struck by the Presiding Officer because she did not appear at the hearing. AR 1882, n.10; Tr. 55.

The developer submitted further prefiled testimony, including that of Mark Darnold dated November 4, 2009, opining with respect to the June 5, 2009 "compilation package." AR 1634. Mr. Darnold noted in particular that the "compilation package" "provides an updated Notice of Intent (NOI) for the project" AR 1637. DEP submitted further prefiled testimony reviewing and assessing the June 5, 2009 plans and compilation package . In testimony dated November 12, 2009 regarding "the information contained with the NOI, as revised to February 7 June 5, 2009," Mr. McCollum contrasted the "revised descriptions of the stormwater management system including revised plans" with the "initial information included with the NOI that was submitted to the Commission back on November 30, 2005. AR 1656.

On February 3, 2010, the Presiding Officer rescheduled the hearing from March 26, 2010 to March 12, 2010. On or about February 8, 2010, the Petitioner submitted a Motion for Access to Applicant's Land to Conduct On-Site Testing by Petitioner's Experts. AR 1753. The Petitioner also filed Supplemental Prefiled testimony of Gregory Newman. AR 1748. DEP and the developer objected to this testimony as untimely. AR 1763, 1777.

In a Pre-Hearing Order dated February 11, 2010, the Hearing Officer denied the Petitioner's Motion for Access; struck the Supplemental testimony of Mr. Newman; denied the motions by DEP and the developer to dismiss the appeal for failure of the Petitioner to state a case; and allowed the developer's March 12, 2009 motion to Substitute Plan. AR 1769. The parties were directed to brief the issue of which DEP storm water regulations applied to this case: the Stormwater Management Standards as set forth in the Stormwater Policy issued by the Department on November 18, 1996

("1996 Stormwater Policy") or the more stringent requirements of 310 CMR 10.05(6)(k) effective January 2, 2008 ("2008 regulations"). AR 1772; see also 1782.

The adjudicatory hearing was held on March 12, 2010. See Tr. 1 and AR 1882. In his Recommended Final Decision dated April 12, 2010, the presiding officer upheld the Final Order of Conditions. In so ruling, the Presiding Officer held that the 1996 Stormwater Policy, not the 2008 regulations, were applicable. AR 1887. The Commissioner adopted the Recommended Decision on May 11, 2010. AR 1933. In a Motion for Reconsideration, the Petitioner raised as error a number of rulings by the Presiding Officer, including application of the 1996 Stormwater Policy and the rejection of Mr. Newman's supplemental prefiled testimony. AR 1941-42. The Presiding Officer's Recommended Final Decision on Reconsideration (dated June 6, 2010), rejecting the Petitioner's arguments regarding the weight of the evidence and the legal issues raised, was adopted by the Commissioner on June 11, 2010. See AR 1959, 1963.

The Plaintiffs, members of the Petitioner Ten Resident Group, timely appealed the Final Decisions pursuant to G.L. c. 30A, s. 14. The approved Final Order of Conditions was issued by DEP on August 23, 2010. AR 1965. The FOC references the June 5, 2009 revision date of the project plans and "compilation submission," and describes the project as a 17-unit residential development. AR 1966, 1973.

ARGUMENT

Standard of Review

Judicial review of the OADR decision is pursuant to G.L. c. 30A. Under G.L. c. 30A, s.14, the Court may set aside an agency's decision if it determines that the "substantial rights of any party may have been prejudiced" because the agency decision is

in violation of constitutional provisions; in excess of the statutory authority or jurisdiction of the agency; based upon an error of law; made upon unlawful procedure; unsupported by substantial evidence; unwarranted by facts found by the court on the record as submitted; or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G.L. c.30A, s.14(7)(a)-(g); see also Arnone v. Comm'r of the Dep't of Social Services, 43 Mass. App.Ct. 33, 34 (1997). The Court's review is based upon the entire record developed before the agency. G.L. c. 30A, s. 14(g); Peterson v. Board of Assessors of Boston, 62 Mass.App.Ct. 428, 431 (2004).

I. The Presiding Officer erred in ruling that the 1996 Stormwater Policy, rather than the more stringent 2008 Stormwater Regulations, applies to this case

In the Recommended Final Decision, the Presiding Officer held that the 1996 Stormwater Policy, rather than the January 2008 stormwater regulations, applies to this project. AR 1887.[12] This was an error of law. As noted in the Decision, 310 CMR 10.05(6)(p) provides that projects "for which a Notice of Intent . . . has been filed prior to January 2, 2008 shall be managed according to the Stormwater Management Standards as set forth in the [1996] Stormwater Policy," rather than by the Stormwater regulations in effect since January 2008. However, in this case, the project for which the 2005 Notice of Intent was filed is not the same project that is the subject of the FOC (issued by the DEP in July 2009) and of the adjudicatory hearing by OADR in March of 2010. As detailed above, the project which commenced with the 2005 Notice of Intent[13] was

[12] The parties briefed this issue prior to hearing. The Petitioner renewed its request to have the 2008 regulations applied at the commencement of hearing, noting the developer was being permitted to substitute new plans postdating the effective date of the regulations Tr. 39.

[13] The 2005 Notice of Intent specified a project of 24 units. See AR 775. The project was later revised to consist of 17 units, its current configuration, due to a Land Court

repeatedly changed during the four and a half years during which the developer sought approval from DEP and the ACC. Accordingly, the project should have been reviewed by DEP and the Presiding Officer subject to the regulations effective in January 2008 – a date after which the project plan continued to change.

It is important to consider why the project underwent so many alterations: because the developer continued to submit plan after plan to DEP failing to conform to stormwater management requirements – even the less stringent requirements of the 1996 Stormwater Policy. See, e.g., AR 509, 526, 538 (testimony of McCollum, McKenna, and Foulis noting failure of July 31, 2008 plans to comply with Policy); AR 643, 649 (testimony of McCollum and Foulis noting failure of January 2, 2009 plans to demonstrate compliance).[14] The Department was not obliged to require the developer to

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decision holding the density of 24 units unlawful. Tr. 66. The developer seemed only too aware that any suggestion of a "new" Notice of Intent would trigger application of the 2008 regulations. Included in the "compilation package was "a revised WPA Form 3" that was described as having "been included for the Department's convenience and is in no way intended as a new permit application submission." AR 771.

The record contains further repeated references to a "revised" or "updated" Notice of Intent. See, e.g., McCollum testimony regarding "the information contained with the NOI, as revised to February 7 June 5, 2009," AR 498; Darnold testimony that the compilation package "provides an updated Notice of Intent (NOI) for the project" AR 1637. Where the developer continued, through February of 2009, to submit noncompliant plans to DEP, the agency should not have allowed endless "revisions" to spare the developer the requirement of filing a new Notice of Intent.

[14] The developer in fact submitted five different plans to DEP after the January 2008 effective date of the Stormwater regulations: May 30, 2008, July 31, 2008 (so-called "Second Revised Plan"); January 2, 2009; February 9, 2009 (so-called "Third Revised Plan"); and June 5, 2009 (contained in the "Compilation Package"). Only the last was found compliant with DEP Stormwater Policy. Had the developer submitted compliant plans prior to the effective date of the new regulations, January 2008, application of the 1996 Policy would be justified. That is, it is logical to provide vested rights protection to a developer whose plans comply with existing regulations at the time new regulations go

submit a new Notice of Intent for each iteration of the project plans. However, it was improper and inequitable for the Department to allow the developer to retain the benefit of the 1996 Policy well after the more stringent regulations had gone into effect, even as the developer continued to submit plans noncompliant with the 1996 Policy.

Moreover, it is apparent that the Department viewed the project as having changed to a degree that rendered both the original plans, and those upon which the SOC was based, moot. This became particularly acute as the proceedings approached the adjudicatory hearing. DEP analysts noted that the plans that they were reviewing in conjunction with the developer's prefiled testimony differed from earlier plans - and that the newer plans were noncompliant. See, e.g. AR 511, prefiled testimony of McCollum. Further, in a Motion for Clarification, the Department acknowledged that the project subject to the adjudicatory hearing was not the same project as that associated with the SOC, and noted that the plans and materials predating the developer's revised submissions were no longer relevant. The Motion stated:

> "The SOC itself has lost any effect in that it approved plans which have been 'superseded' by the Revised Plan and supplemental information filed with the Applicant's Pre-filed Direct Testimony. DEP's Pre-filed Testimony will respond to the Revised Plan of Record, and the Supplemental Information included with the Applicant's PFDT. It will encompass the first review of the revised project, as there is no formal permit issued for the revised project."

AR 486 (emphasis supplied). The subject of the adjudicatory hearing was the project defined by the "Compilation Package" submitted June 5, 2009 and containing project plans with that final revision date; as noted by the Department in the above-quoted Motion for Clarification, materials prior to that date had been superseded. AR 486.

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into effect. It is not reasonable or equitable to provide vested rights protection to a developer who submits nonconforming plans long after the regulations have changed.

Where the developer's June 2, 2009 Compilation Package was treated, essentially, as a "fresh start" – untethered from the earlier SOC and other materials – the Stormwater regulations then in effect should have been applied to the project, not the outdated 1996 Stormwater Policy that had been superseded by the regulations a year and a half earlier.

The question of which regulations apply is not a trivial one. The new regulations are more stringent than the 1996 Stormwater Policy, requiring more detailed and specific demonstrations that the project has been designed to mitigate potential impacts on resources protected under the Wetlands Protection Act.[15] Further, and equally significantly, under the 1996 Stormwater Policy, compliance with the Stormwater Management Standards was presumed to establish regulatory compliance under the Act. Under the 2008 regulations, there is no such presumption and the developer is required to make meet more specific regulatory requirements. This point – and its relevance to the instant case - was made clear by Mr. Foulis in his prefiled testimony: [16]

> "Were the revised project proposal to be submitted under the present regulations at 310 CMR 10.00, as revised to January 2, 2008, the Department's recent guidance document titled "Massachusetts Stormwater Handbook, Volume 3, Chapter 1, p. 17 would be applicable:
>
> 'Evaluate Where Recharge is Directed
>
> The infiltration BMP must be evaluated to determine if the proposed recharge location will alter a Wetland Resource Area by causing changes to the hydrologic regime. For example, if Watershed 'A' contains a vernal pool within a Bordering Vegetated Wetland, and the vernal pool is fed by groundwater, and runoff from Watershed 'A' is proposed to be directed to Watershed 'B' for infiltration, an evaluation is necessary to determine if redirecting the runoff will cause an alteration to the vernal pool. In such instances, Water Budgeting using the

[15] At the hearing, DEP's witness Mr. McCollum agreed that the new regulations require the use of newer, more accurate methods. Tr. 167; see also Tr. 165.
[16] Although Mr. Foulis did not testify at the hearing, the Presiding Officer allowed his prefiled testimony to be a part of the record. Tr.28.

> Thornthwaite method or equivalent must be employed. TR-20/TR-55 methods are not sufficient for water budgeting purposes." (emphasis added)
>
> Therefore, for a Notice of Intent submitted after January 2, 2008, the Department would require an applicant proposing modification such as that shown in the revised site plan to conduct a "water budgeting analysis" for the subject CVP using the Thornthwaite method, or suggest an acceptable equivalent. If such an analysis predicted change to the duration, frequency, periodicity, or maximum , minimum or mean depths of the water budget for the subject CVP, the position and design of 'Pond 4P' would have to change until such time as the water budget did not change.

AR 542-43 (emphasis supplied). Although the plans discussed by Mr. Foulis above were later revised, the point is clear: more in-depth analysis of the impact of project's stormwater management system is required under the 2008 regulations to ensure that alterations to protected resources do not occur.

Notwithstanding 310 CMR 10.05(6)(p), the 2008 regulations should have been applied in the adjudicatory proceedings, the subject of which was the DEP's July 31, 2009 Final Order of Conditions. Application of the 2008 regulations does not mean that the proposed project will not be built. It simply means that the development must be properly reviewed and conditioned to ensure the absence of change to resources protected by the Act – specifically, the BVW and the Certified Vernal Pool. It is for this reason that the Plaintiffs seek remand to DEP for review of the project under the 2008 regulations, so that any additional appropriate conditions may be imposed in the FOC.

II. The Presiding Officer erred in denying the Petitioner's request for entry on land,

In a Memorandum of Law submitted October 14, 2009, accompanying the Petitioner's Prefiled Testimony, the Petitioner requested, based on the testimony of its witnesses, that DEP order further testing on locus, or require the developer to allow the Petitioner's experts access to locus to conduct such testing. AR 1598. Specifically, the

prefiled testimony of Mr. Newman, an environmental consultant, engineer and certified Soil Evaluator, indicated that the developer's reliance on certain perc test data to determine soil permeability was incorrect, and that the soil permeability would be significantly lower than the estimate used in the developer's submittal, possibly by a factor of six or more. AR 1604. The developer's witness (Mr. D'Urso) admitted on cross-examination that there are more accurate measures of permeability than perc tests. Tr. 101. Mr. Newman's testimony further indicated that the developer's estimate of seasonal high water table was also inaccurate:

> "[T]he proposed plans indicate an estimated seasonal high water table ESHWT depth of 6.5-ft at the site of proposed Pond 1P, the site where groundwater recharge is proposed. The ESHWT is based on a soil evaluation at TP-6 that indicates a higher chroma at soil transitions above the ESHWT; these higher chroma strata may possibly indicate a more shallow water table. The rest of the site had reported ESHWT depths of 2.7-ft or less, consistent with the NRCS soil mapping for this site, Paxton PaC across the northern 2/3 of site. Since TP-6 is inconsistent with all the other test pits on site, and inconsistent with the NRCS soil mapping, I believe a confirming test pit or monitoring well should be installed at this location to ensure that the proposed groundwater recharge at proposed Pond 1P is possible."

AR 1605-6. Accordingly, the Petitioner specifically "request[ed] that the DEP order another test pit or install a monitoring well at the site of TP-6, or in the alternative, that the DEP require the applicant to allow Mr. Newman access to his land to oversee the digging of another test pity or installing of a monitoring well at that location." AR 1598.

On February 9, 2010, the Petitioner filed a Motion for Access to Applicant's Land to Conduct On-Site Testing by Petitioner's Experts. AR 1753. The Motion noted that "the Applicant has thus far stated that Petitioners were denied access to his land," and further that the Petitioner had requested access to locus for onsite testing in October of 2009 (see above). AR 1753. The Petitioner further noted prior errors or omissions by the

developer's experts in previous submissions. AR 1755. The Petitioner's Motion for Access was denied by the Presiding Officer in the February 11, 2010 Pre-Hearing order, referencing "all the reasons stated in the oppositions filed by. . . DEP and the Applicant." AR 1769. The objections voiced by DEP and the developer in their oppositions pertained to timeliness; prejudice; and failure to make such request for access to locus pursuant to 310 CMR 1.01(12)(c) and (d). See AR 1760-64, 1776-79. Where no prejudice would have accrued to the developer (or DEP) through the allowance of such motion, and where the Petitioner did not seek to delay the hearing in order to conduct such limited testing, the Presiding Officer erred or abused his discretion in denying the Petitioner's Motion for Access.

310 CMR 1.01(12)(c)(d), cited by DEP, does provide a formal procedure for a party to seek a motion to compel entry on land.[17] Admittedly, the Petitioner did not formally pursue this remedy, despite being denied access to the project site. However, the Petitioner did request in a pleading submitted in October of 2009 that the developer be compelled to allow entry on the project site by the Petitioner's experts, and did renew this request to the Presiding Officer in its February 9, 2010 motion. It is suggested that under

[17]"(c) "Resolution of Discovery Disputes. Prior to seeking an order to compel under 310 CMR 1.01(12)(d) or a protective order under 310 CMR 1.01(12)(e), parties must demonstrate through written documentation that they have in good faith attempted to resolve discovery disputes without the intervention of the Presiding Officer.

(d) Compelling Discovery. Parties may move to compel discovery where it is alleged that another party has not cooperated in good faith following attempts to conduct discovery that is not overly broad, unduly burdensome, and is reasonably calculated to lead to the discovery of relevant, admissible evidence. A motion to compel entry onto land or other property shall describe with reasonable particularity the land, other property, or portions thereof, to be inspected, shall identify with reasonable particularity the procedures incidental to the inspection which are to be performed, and shall specify a reasonable time, place and manner of making the inspection."

the more relaxed standards of administrative proceedings (as compared to those of the trial courts), the Petitioner's failure to comply with the strict requirements of the regulation should not have barred the grant of its motion. This is particularly true where the Petitioner did not seek to delay the hearing. At the time Petitioner filed its Motion for Access, the hearing was more than one month away, with sufficient time to conduct such testing prior to the hearing date of March 12, 2010. The developer and DEP would have had the opportunity to cross-examine the Petitioner's witnesses at the hearing regarding test methodology or results. Accordingly, no prejudice would have accrued to the developer from granting the Motion for Access. Finally, where the Wetlands Protection Act "was enacted to promote certain public interests," see Novak v. Department of Environmental Protection, 1996 WL 655782 (Mass.Super.Sept. 2, 1996) at 2, and where DEP regulations specifically provide for public participation through Ten Resident Groups, strict application of the discovery provisions to preclude the Petitioner's access to the project site it is not consistent with the purpose of the Act.

III. The Presiding Officer erred in striking the Supplemental Prefiled Testimony of Mr. Newman

On February 9, 2010, the Petitioner submitted the Supplemental Prefiled Testimony of Gregory Newman. AR 1748. This testimony was responsive to certain assertions made in the developer's Supplemental Motion to Dismiss. AR 1748-1852. The developer and DEP objected to this testimony as untimely and prejudicial. AR 1763, 1777-8. The Presiding Officer struck Mr. Newman's Supplemental Prefiled Testimony, referencing the objections of the developer and DEP, and stating that it was noncompliant with prior orders. As with the denial of the Petitioner's Motion for Access above, where there was no prejudice to the developer from the admission of such testimony into the

record, it was error or an abuse of discretion to strike Mr. Newman's Supplemental Prefiled Testimony.

Where Mr. Newman's Supplemental Prefiled Testimony was filed over one month prior to the hearing date, and where Mr. Newman had previously opined about certain defects in the developer's stormwater management system, there was no unfair surprise or prejudice posed to the developer by the Supplemental Testimony in preparing for the adjudicatory hearing. See Wong v. Hunneman Real Estate Corp. 2005 WL 3721861 at 1 and n.2 (Mass.Super. Dec. 23, 2005)(no unfair surprise in witness's testimony where defendants were aware of witness's opinions). Further, where Mr. Newman would be available for cross-examination at the hearing, the developer (and DEP) would have ample opportunity to address any issues raised in the Supplemental Testimony and to attack Mr. Newman's credibility, conclusions, and opinions. With respect to the question of timeliness, it is suggested, as above, that under the more relaxed standards of administrative proceedings, the Petitioner's failure of strict compliance should not have barred admission of the Supplemental Testimony. Ultimately, the Presiding Officer would assess the relative credibility of the witnesses, and to determine what weight to give their testimony. See Birundel v. Board of Registration in Medicine, 448 Mass. 1031, 1032 (2007). Accordingly, the additional information provided in Mr. Newman's Supplemental Testimony could simply have been considered by the Presiding Officer along with all other witness testimony without prejudice to the developer. Exclusion of this testimony was error or an abuse of discretion.

IV. The Prefiled and hearing testimony established the need for further analysis and testing to ensure proper conditioning of the project

As discussed above, the prefiled testimony of the Petitioner's witness Mr. Newman indicated that further testing (through additional test pits or monitoring wells) on the project site was necessary for accurate determination of soil permeability and the depth of the estimated seasonal high water table (ESHWT). Mr. Newman also concluded that "a hydrogeologic study could provide more appropriate tests of soil permeability." AR 1605. Such accurate determinations are critical to designing a stormwater management system that complies with DEP recharge requirements (as admitted by Mr. D'Urso, see Tr.82), and protecting the enumerated values of the Wetlands Protection Act: "to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries." See G.L. c. 131, s.40.

Further, the testimony of Petitioner's witness Thomas Tyning, a biologist, also indicated that a hydrogeologic study was necessary to design a conforming stormwater management system. Mr. Tyning's testimony indicated that the developer's stormwater management system was deficient in that it failed to take into account the volume, as well as the rate of discharge to BVW and the Certified Vernal Pool:

> "It is my understanding that the proposed stormwater management plan for this development would result in a change to the volume of water to the certified vernal pool and bordering vegetative wetland, while trying to maintain the current rate of water being channeled to these resource areas. The stormwater management plan is based on a premise that rate is the determining factor required to adequately protect the resource areas. However, the current science regarding vernal pools is that volume as well as rate, is important for wetland resource areas, particularly for sensitive ecosystems such as the certified vernal pool. Any change in water levels, in timing or volume, is a problem for vernal pool ecosystems."

AR 1608. Mr Tyning concluded that "the likelihood of an adverse impact to the vernal pool cannot be ascertained" without a hydrogeologic study. AR 1608.[18]

The testimony of Petitioner's witnesses above established the need for further analysis and testing – in particular, hydrogeologic study and additional test pits – in order to ensure that the proposed project will not result in adverse impact of BVW, nor impairment of the Certified Vernal Pool and the vernal pool habitat associated with the CVP. The additional data will allow the project to be conditioned through a revised FOC protecting the wetlands resources on and abutting locus.

CONCLUSION

The Final Decisions appealed by the Plaintiffs contain legal error justifying relief under G.L. c. 30A, in particular, the remand of this matter to DEP for further hearing or other proceedings applying the 2008 Stormwater regulations to the project; allowing entry on the project locus by Plaintiffs or their agents, or such other person deemed proper by DEP to conduct further testing; and, to the extent the matter is reheard by OADR, permitting the submission of further prefiled testimony on behalf of the Petitioner/Plaintiffs.

[18] The importance of having independent testing on the project site is clear from the record. As admitted at the hearing, the developer's experts had failed, in their delineation, to identify or even mention the vernal pool immediately adjacent to locus as a potential resource protected by the Act. Tr. 150-156. The developer's experts conducted their review in November and December of 2006 when, as admitted by DEP witness Mr. McKenna at trial, wildlife species associated with vernal pools would not be evident, as opposed the spring. Tr. 172-74. Further, the developer's experts failed to note the bank of an intermittent stream on property adjacent to the project locus. Tr.148-49; 156.

Respectfully submitted on behalf of the Plaintiffs
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DATED: December 10, 2010

CERTIFICATE OF SERVICE

I, Barbara Huggins, certify that on this day I served the above Memorandum upon all counsel of record by regular U.S. Mail, postage prepaid.

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Barbara Huggins

DATED: December 10, 2010