

Belmont Conservation Commission
19 Moore Road
Belmont, MA 02478

June 8, 2010

Clerk's Office
Middlesex Superior Court
200 Trade Center
Woburn, Massachusetts 01801

re: Belmont Conservation Commission v. Laurie Burt, et al.

Dear Sir:

Enclosed are

1. A complaint appealing a final decision of the commissioner of DEP under 30A MGL 14;
2. A civil action cover sheet; and
3. A motion requesting waiver of filing fees on the ground that plaintiff is a municipal body.

Very Truly Yours



Faustino A. Lichauco
Commissioner
Belmont Conservation Commission

PLAINTIFF(S)
Belmont Conservation Commission

DEFENDANT(S)
Laurie Burt, Commissioner of DEP, et al.

Plaintiff Atty Faustino A. Lichauco Type Defendant's Attorney Name _____
 Address 19 Moore Road Defendant Atty _____
 City Belmont State MA Zip Code 02478 Address _____
 City _____ State _____ Zip Code _____
 Tel. +1 (617) 993-2667 BBO# 633,998

TYPE OF ACTION AND TRACK DESIGNATION (See reverse side)

CODE NO.	TYPE OF ACTION (specify)	TRACK	IS THIS A JURY CASE?
E02	Appeal From Administrative Agency	G L c 30A - X Track	<input type="radio"/> Yes <input checked="" type="radio"/> No

The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS
 (Attach additional sheets as necessary)

A. Documented medical expenses to date:

1. Total hospital expenses	\$ _____
2. Total Doctor expenses	\$ _____
3. Total chiropractic expenses	\$ _____
4. Total physical therapy expenses	\$ _____
5. Total other expenses (describe)	\$ _____
Subtotal	\$ _____

B. Documented lost wages and compensation to date \$ _____
 C. Documented property damages to date \$ _____
 D. Reasonably anticipated future medical and hospital expenses \$ _____
 E. Reasonably anticipated lost wages \$ _____
 F. Other documented items of damages (describe) \$ _____
 G. Brief description of plaintiff's injury, including nature and extent of injury (describe) \$ _____

Total \$ 0

none

CONTRACT CLAIMS
 (Attach additional sheets as necessary)

Provide a detailed description of claim(s):

not applicable

TOTAL \$.....

PLEASE IDENTIFY, BY CASE NUMBER, NAME AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT

none

All hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods.[®]

Signature of Attorney of Record [Signature] Date: 6/7/2016
 A.O.S.C. 3-2007

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO : _____

Belmont Conservation Commission
Plaintiffs
v.
Laurie Burt, Commissioner of the Department of Environmental Protection; and AP Cambridge Partners II, LLC
Defendants

INTRODUCTION

1. This is an appeal under M.G.L. c. 30A, §§ 14(1) and (7)(c), (e) and (g)) from the Final Decision of the Commissioner of the Department of Environmental Protection (the “Department”) dated May 13, 2010, after an adjudicatory hearing, denying the Belmont Conservation Commission’s (the “Commission”) appeal of a Superseding Order of Conditions issued by the Department to allow construction of a 299 unit housing project in a flood-prone low lying area known as the Belmont Uplands.

THE SITE AND THE PROPOSED PROJECT

2. The Belmont Uplands is an environmentally significant area that serves an important flood-control function in the area where Belmont, Cambridge, and Arlington meet (hereafter, the Alewife basin).

3. AP Cambridge Partners II, LLC (the “Developer”) proposes to develop a 15.6 acre site by constructing five four-story buildings containing 299 housing units with parking spaces for 500-600 cars. The resulting pavement will prevent the Belmont Uplands from absorbing and slowly releasing rainfall into the adjacent Little Pond and Little River, thereby impairing the Uplands’ ability to regulate flooding in the Alewife Basin.
4. Flooding already occurs on a regular basis in the Alewife Basin. This flooding results in significant economic losses to residents of the area.
5. Flooding in the Alewife Basin already results in sewage backups, which cause deposition of human feces in people’s basements and yards, resulting in a public health hazard.

THE PARTIES

6. Plaintiff Belmont Conservation Commission is a municipal body established under 40 MGL 8C to enforce the Massachusetts Wetlands Protection Act (131 MGL 8), whose address is 19 Moore Street, Belmont, Massachusetts 02478.
7. Defendant AP Cambridge Partners II, LLC is a foreign limited liability company organized and existing under the laws of Delaware with its principal offices in Massachusetts at 395 Arsenal Street, Watertown, MA 02472. The name and address of the Resident Agent is Corporation Service Company, 84 State Street, Boston, Massachusetts, 02109.
8. Defendant Laurie Burt is Commissioner of the Massachusetts Department of Environmental Protection, an agency of the Commonwealth of Massachusetts, whose address is One Winter Street, Boston, Massachusetts 02108.

PRIOR PROCEEDINGS

9. On June 12, 2007, Developer filed a Notice of Intent (“NOI”) with the Commission describing its plans to construct a 299-unit housing complex with associated parking areas for 500-600 cars, utilities, and stormwater management facilities on 15.6 acres of the Belmont Uplands (the “project”).
10. The Commission opened a public hearing on the NOI on June 26, 2007, which was continued at Developer’s request on August 7, 2007, September 11, 2007, October 2, 2007, November 5, 2007, and December 4, 2007. The public hearing was closed at Developer’s request on December 4, 2007.
11. On December 21, 2007, the Commission issued an Order prohibiting the proposed project. The Order cited Developer’s failure to submit information to the Commission necessary for the Commission to perform its statutory duty in reviewing the project, pursuant to 310 CMR 10.05(6)(c). However, based on the limited information that was submitted, the Commission found that the proposed design of the project failed to promote the interests articulated in the Massachusetts Wetland Protection Act, and specifically failed to comply with the wildlife habitat requirements set forth at 310 CMR 10.60(1)(a) and 310 CMR 10.05(6)(b) and the Massachusetts Stormwater Management Policy.
12. On January 7, 2008, the Developer filed a Request for a Superseding Order of Conditions (“Request for SOC”) at DEP.
13. During her review, Rachel Freed, the DEP’s reviewing officer, asked the Developer for additional detailed technical information, much of which had been requested by the Commission but never provided by the Developer.

14. As a result of her review, the Developer significantly changed the project plans. Among these changes was the consolidation of three infiltration basins scattered throughout the site into one large basin near the site's center.
15. On October 31, 2008, Ms. Freed issued an SOC approving a project that was considerably both different from what the Commission reviewed, and that relied on analyses different from those reviewed by the Commission.
16. On November 11, 2008, the Commission filed an appeal of the SOC and requested an adjudicatory hearing by the Department.
17. Prior to the adjudicatory hearing, pre-filed testimony was submitted by two witnesses for the Commission, three witnesses for the Plaintiffs, one witness for the Department and three witnesses for the Developer. These witnesses appeared at the hearing. All but one, Scott Horsley, were examined extensively over four days.
18. The pre-filed testimony of the Commission's expert Scott Horsley demonstrated that the project failed to satisfy Stormwater Management Standard #3. After four days of hearings, Scott Horsley's testimony stood as the only unrebutted evidence.
19. The hearing proceeded for four days on March 10, 2009, April 3, April 27, and May 11, 2009, consisting of approximately twenty-one hours of testimony.
20. At the hearing, the Developer unsuccessfully attempted to exclude certain evidence establishing that the development would in fact cause the water level in an adjacent water body to rise during at least one type of storm event, thus contradicting the Developer's assertion that Stormwater Management Standard #2 had been met.

21. At the hearing, the Developer provided calculations (“2007 Report”) showing how the site, in its undeveloped state, would shed water.
22. At the hearing, the Commission provided the Developer’s earlier calculations (“2003 Report”) submitted in connection with an application for an Office Park on the same site.
23. The 2003 Report and the 2007 Report purport to describe the same undeveloped site.
24. Although they purport to describe the same site in its natural state, the 2003 Report and the 2007 Report draw significantly different conclusions about how well the site absorbs water.
25. At the hearing, the Developer asserted that sheet flow on the site was less than 50 feet.
26. In pre-filed testimony, the Developer asserted that to assume sheet flow in excess of 50 feet would be poor engineering practice.
27. In contrast to the Developer’s 2007 report, the Developer’s 2003 report assumes sheet flow in excess of 50 feet for the identical site.
28. By assuming only a 50 feet sheet flow in the 2007 Report, the Developer made it appear that the undeveloped site would shed more rapidly than it did in the 2003 Report. This made it easier for the Developer to attempt to meet Stormwater Management Standard #2
29. Post-Hearing Briefs were submitted by the parties prior to June 8, 2009.
30. On March 22, 2010, Ms. Roby issued her Recommended Final Decision, hereafter referred to as “Version 1”.

31. On March 22, 2010 Developer and the Department filed a joint motion to correct numerous errors in Version 1.
32. On April 2, 2010, Ms. Roby issued a Notice of Correction of Version 1. On April 22, 2010, Ms. Roby issued a Notice stating that Version 1 was “inaccurate,” that it had been “inadvertently transmitted” and that her Recommended Final Decision issued April 22, 2010 (“Version 2”) was the “accurate rendition.”
33. Despite the assistance provided by the Developer and the Department, Version 2 contains numerous factual errors.
34. Both Version 1 and 2 omit reference to exhibits and testimony adduced through four days of hearings with testimony by nine witnesses. Without explanation, the presiding officer indicated that her decision relied on her consideration of the pre-filed testimonies of witnesses and the documentary evidence referenced in their testimony, but not on the four days of oral testimony recorded by the court.
35. Both Versions 1 and 2 omit any reference to the rise in water level in Little Pond following a particular rainfall event.
36. Both Versions 1 and 2 omit any reference to the discrepancy between Developer’s 2003 Report and 2007 Report, both of which purport to describe the same land.
37. Both Versions 1 and 2 fail to draw any conclusion concerning Scott Horsley’s un rebutted testimony that Stormwater Management Standard #3 is not met.
38. On May 13, 2010, Commissioner Laurie Burt issued her Final Decision adopting one of Version 1 and 2. The DEP Commissioner provided no explanation for Ms. Roby’s failure to consider any of

the cross-examination testimony given at the four day hearing, or to address any of the deficiencies described above.

39. Copies of the Commissioner's one-page Final Decision and the Version 2, which Ms. Roby advises is the "accurate rendition," are attached hereto as Exhibit A.

COUNT I

THE DEPARTMENT'S DECISION FAILS TO COMPLY WITH 30A MGL 11(8) BECAUSE IT FAILS TO INCLUDE A DETERMINATION OF WHETHER A RISE IN THE LEVEL OF LITTLE POND IS MATERIAL TO PROTECTING THE ACT'S INTEREST IN FLOOD CONTROL

40. The Commission repeats and re-alleges the allegations in paragraph 1-39 .
41. Among the interests protected by the Wetland Protection Act is that of flood control.
42. Exhibit 35 shows Developer's own calculation of the extent to which water level at Little Pond will rise as a result of the proposed project.
43. Exhibit 35 shows that the rise in Little Pond's water level as a result of a 100 year storm will double after the project is built.
44. A material issue of fact exists concerning whether or not doubling the rise in water level in a pond that is already prone to flooding adjacent property will exacerbate the threat of flooding.
45. The foregoing material issue of fact is reasonably pertinent to whether or not the proposed development promotes the Wetland Protection Act's interest in flood control.
46. The Department's decision does not explain why doubling the rise in water level of Little Pond is believed to not exacerbate flooding.

47. Nowhere does the Department's decision even acknowledge the fact that by the Developer's own admission, the rise in water level at Little Pond will double as a result of the project.
48. Accordingly, the Department's decision cannot be regarded as being based on substantial evidence present in the whole record.
49. For the same reasons, neither Version 1 nor 2 comply with 30A MGL 11(8)'s requirement that the decision determine each issue of fact necessary for a decision.
50. By reason of the foregoing, the Department's omission of any consideration of Exhibit 35 or the oral testimony explaining the flooding impact thereof was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, and should be set aside pursuant to 30A MGL 14(7)(g).

COUNT II

THE DEPARTMENT'S DECISION FAILS TO COMPLY WITH 30A MGL 11(8) BECAUSE IT FAILS TO RESOLVE A CONTRADICTION IN THE APPLICANT'S STATEMENTS CONCERNING THE DRAINAGE CHARACTERISTICS OF THE UPLANDS IN THEIR NATURAL STATE

51. The Commission repeats and re-alleges the allegations in paragraph 1-39 .
52. Among the interests protected by the Act is that of flood control.
53. On April 16, 2003, the Developer released a report on how the Uplands, in their undeveloped state, shed rainwater ("2003 Report").
54. At least in part on the basis of the 2003 Report, the Department granted a permit for an office park.

55. On June 4, 2007, the Developer has provided another report on how the Uplands in their undeveloped state, shed rainwater (“2007 Report”).
56. Despite the fact that the two reports purport to describe the drainage characteristics of the same parcel of land, the 2003 Report and the 2007 Report differ substantially in their prediction of how the undeveloped Uplands shed rainwater.
57. The correct drainage characteristics of the Belmont Uplands in their natural state are essential to determining whether the proposed development contributes to the Wetland Protection Act’s interest in flood control.
58. At the hearing, the Developer’s witness was cross examined concerning the foregoing discrepancy.
59. A factual issue exists as to which (if any) of the 2003 Report and the 2007 Report correctly sets forth the drainage characteristics of the Uplands in their undeveloped state.
60. The Department’s decision does not resolve the foregoing issue of fact.
61. Not only does the Department’s decision fail to resolve the foregoing issue of fact, it does not acknowledge that the issue even exists.
62. As a result of the foregoing omission, the Decision fails to comply with 30A MGL 11(8)’s requirement that the decision determine each issue of fact necessary for a decision.
63. As a result of the foregoing omission, the Department’s decision is unsupported by substantial evidence, and should therefore be set aside pursuant to 30A MGL 14(7)(e).

64. By reason of the foregoing omission of any consideration of the contradiction between Developer's representations of the drainage characteristics of the undeveloped site, the Department's action is capricious, an abuse of discretion, and otherwise not in accordance with law, and should be set aside pursuant to 30A MGL 14(7)(g).

COUNT III

THE DEPARTMENT'S DECISION FAILS TO COMPLY WITH 30A MGL 11(8) BECAUSE IT FAILS TO EXPLAIN WHY UNREBUTTED TESTIMONY REGARDING THE DEVELOPMENT'S FAILURE TO COMPLY WITH STORMWATER MANAGEMENT STANDARD #3 LACKED CREDIBILITY

65. The Commission submitted Exhibit 1, the pre-filed testimony of Scott Horsley.
66. Scott Horsley's testimony clearly states that the Developer has not demonstrated that the proposed stormwater infiltration system can be constructed and operated in a manner consistent with Stormwater Management Standard #3.
67. Of all the pre-filed testimony at the hearing, only Scott Horsley's stood unrebutted.
68. The presiding officer appears to not have understood who Horsely was testifying for. The initial recommended final decision (Version 1) indicated that Scott Horsley testified for the Developer. Upon advise of the Developer and the Department, the presiding officer changed this to indicate that Horsley had testified for the intervenor. In fact, neither of these is correct. Horsley testified for the Commission.
69. In the Department's discussion of Horsley's testimony (page 36), the Department has ignored his ultimate conclusion, namely that the Developer has not demonstrated compliance with Stormwater Management Standard #3.

70. The confusion concerning who Horsley was actually testifying on behalf of, together with the perfunctory discussion of Horsley's testimony on page 6, and in particular the discussion of paragraphs 6 and 8, suggests that the presiding officer may not have grasped its significance, namely that as a result of excessive infiltration, the water table is likely to rise to the point where the required two foot separation between the bottom of a basin and the water table cannot be maintained.
71. The Department's decision fails to explain why Horsley's ultimate conclusion, namely that the Developer has failed to demonstrate compliance with Stormwater Management Standard #3, is disregarded.
72. The Department further fails to explain why more than doubling the annual recharge rate, as described in paragraph 8 of Horsley's testimony, would be consistent with Stormwater Management Standard #3, second sentence.
73. As a result of the foregoing omission, the Department decision is unsupported by substantial evidence of the whole record, and should therefore be set aside pursuant to 30A MGL 14(7)(e).
74. By reason of the foregoing omission of any consideration of the contradiction between Developer's representations of the drainage characteristics of the undeveloped site, the Department's action is capricious, an abuse of discretion, and otherwise not in accordance with law, and should be set aside pursuant to 30A MGL 14(7)(g).

WHEREFORE, the Commission asks that this Court enter an Order as follows:

1. Declaring that the Final Decision issued by the DEP is in excess of statutory authority, unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
2. Ordering that the Final Decision be vacated, and of no further force and effect;

3. Ordering the SOC issued by the Department be vacated and of no further force and effect;
4. Enjoining defendant from taking any action toward construction of any portion of the project on the Belmont Uplands;
5. Remanding the matter back to the Belmont Conservation Commission to provide the citizens of Belmont with an opportunity to review the new design in an open meeting.
6. Awarding the Commission their costs of suit; and
7. Granting the Commission such other and further relief as the Court deems just and proper.

Respectfully Submitted
Belmont Conservation Commission



Faustino A. Lichauco
Commissioner
19 Moore Road
Belmont, Massachusetts
02478
BBO 633998

Dated: June 8, 2010

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO : _____

<p>Belmont Conservation Commission Plaintiffs</p> <p>v.</p> <p>Laurie Burt, Commissioner of the Department of Environmental Protection; and AP Cambridge Partners II, LLC Defendants</p>

MOTION TO WAIVE FILING FEES

Plaintiff Belmont Conservation Commission requests a waiver of filing fees associated with the attached complaint.

Belmont Conservation Commission is a government body charged with enforcing the Wetland Protection Act on behalf of the town of Belmont, and ultimately on behalf of the Commonwealth. The Commission has identified certain deficiencies in the DEP decision and would like to draw attention to them, but lacks the means to do so.

No damages are being sought. The Commission seeks only equitable relief. In the interest of public policy, the Commission requests that the Court waive the filing fee.

Respectfully Submitted
Belmont Conservation Commission



Faustino A. Lichauco
Commissioner
19 Moore Road, Belmont, MA. 02478
BBO 633998

Dated: June 8, 2010