COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX, ss. SITTING, 2012

A.C. 2012-P-0526

COALITION TO PRESERVE THE BELMONT UPLANDS
AND WINN BROOK NEIGHBORHOOD, et al.

Plaintiffs-Appellants

v.

LAURIE BURT, as she is COMMISSIONER OF THE
DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.

Defendants-Appellees

ON APPEAL FROM JUDGMENT
OF THE SUPERIOR COURT

REPLY BRIEF
OF PLAINTIFFS-APPELLANTS

Thomas B. Bracken
BBO# 052920
33 Mount Vernon Street
Boston, MA 02108-1420
(617) 742-4950
thomasbracken@earthlink.net

Counsel for Plaintiffs-
Appellants

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1. Plaintiffs have standing to pursue this appeal

Although the lower court judge ruled that Plaintiffs have standing to appeal, defendants claim that the SJC decision in Sturbridge v. Board of Health of Southbridge, 461 Mass. 548 (2012), gives them grounds for challenging Plaintiffs' standing. It does not. In Sturbridge, supra at 555, the SJC noted that the judge held plaintiffs to be "aggrieved persons" because they had been afforded full party status in the board's proceedings and were entitled automatically to bring an action for judicial review of the board's decision. The SJC noted that the proceeding before the board was not adjudicatory, and that the "automatic party status" rule in the applicable regulations.

> "...presumably is designed to enable the board to receive relevant information about environmental impacts of proposed siting decisions from a broad array of persons."

The Sturbridge decision is inapposite to the case at bar which involves a decision resulting from an adjudicatory hearing in which the hearing officer allowed Plaintiffs' Motion to Intervene (A. 223)[1], noting that the grounds for the Motion were that they "are persons or entities substantially and

[1] References to A. are to the Appendix (vols. I-III) filed on July 30, 2012 in this case. References to Add. are to the Addendum to the Blue Brief. References to Add.-1 are to the Addendum hereto.

specifically affected by this proceeding." (A. 224) However, they do not base their standing solely on their participation in the hearing. The lower court judge (Add. C, p. 7, fn. 10) based her ruling in part on this Court's decision in Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 719, fn. 6 (2009), which the judge described as:

> "rejecting contention that plaintiffs lacked standing 'for the reason, if no other, that such claims may be brought by any ten residents of the town or city in which the land at issue is located.' G.L. c. 131, §40, nineteenth par." (Add. C, p. 7, fn. 10)[2]

Plaintiffs brought this action under G.L. c. 30A, §14(1) and G.L. c. 214, §7A, the latter of which provides that "not less than ten persons domiciled within the commonwealth" may bring an action to prevent "damage to the environment," caused by violation of an environmental statute, which in this case is the Wetlands Protection Act (the "Act"). The developer mistakenly claims that "standing under G.L. c. 214, §7A does not extend to appeals of agency decisions" (brief, p. 24), misciting Enos v. Secretary of Environmental Affairs, 432 Mass. 132 (2000). While

[2] The provisions of G.L. c. 131, §40, para. 19 now are contained in para. 30, which provides in part:

> "Any court having equity jurisdiction may restrain a violation of this section upon the petition of...ten residents of the commonwealth under the provision of section seven A of chapter two hundred and fourteen."

the SJC held in Enos that plaintiffs do not have standing to bring suit directly against the Secretary for an alleged violation of MEPA, G.L. c. 214, §7A confers standing for nearby property owners to bring suit against the party that is violating an environmental statute. Enos, supra at 142. Likewise, in City of Boston v. Massachusetts Port Authority, 364 Mass. 639, 646 (1974), an action brought under G.L. c. 231A and c. 214, §10A (now 7A) to enjoin construction of a facility at Logan Airport, the SJC said:

> "We hold that the present bill is sufficient to invoke the jurisdiction of the Superior Court under Section 10A. The legislative intent underlying that provision is broadly stated in the title under which it was enacted: 'An Act establishing a cause of action in behalf of certain persons and political subdivisions for the purpose of protecting the natural resources and environment of the commonwealth.' St. 1971, c. 732."

The SJC affirmed its Boston decision in Cummings v. Secretary of Environmental Affairs, 402 Mass. 611, 615 (1988). The developer goes further afield, claiming there can be no violation of the Act because the Commissioner has approved the project. That is precisely the issue to be decided by this Court. Indeed, under the developer's analysis, M.G.L. c. 214, §7A would be a toothless tiger since no action would lie challenging any final decision of a department. This is not the case as shown by the SJC decisions

cited above. In addition, the developer claims that the Plaintiffs failed to meet the notice requirement of §7A. (brief, p. 26) However, the lower court (Kern, J.) ruled that Plaintiffs had the right to amend their complaint to perfect their §7A claim by alleging that advance notice had been given. (A. 72, 89)

Plaintiffs also rely on the well-established rule that "persons aggrieved" as used in G.L. c. 30A, §14 have standing to appeal a final decision of the DEP Commissioner. The individual plaintiffs are aggrieved because the DEP decision allows the developer to cut down over 100 mature trees, remove vegetation and fill wetlands, thereby destroying wildlife habitats and diminishing the ability of the site to absorb stormwater, resulting in increased flooding of the low-lying houses around Little Pond, where many of the Plaintiffs live, and increasing sewage backups in their basements due to the overloaded sewer system. The Belmont Board of Appeals recognized these problems in its decision on the developer's permit application, reporting:

> "One of the gravest issues presented by the Project is the sewage it will generate in light of the existing sewage problems in the area during storm events...Numerous residents, particularly from Oliver Road[3] and Frost Road,

[3] As alleged in Plaintiffs' Complaint, (A. 24, 28, para. 9), Plaintiffs Liu, Natoli, Johnson and Pesok live on Oliver Road across the Pond from the project.

> testified to backups over the past few years from personal experience." (A. 1532)

In an effort to mitigate these potential impacts, the Board imposed Condition 27b, which provides that "Prior to the issuance of the Building Permit, the Applicant shall make a good faith application to the City of Cambridge for a connection to the Cambridge municipal wastewater system." (A. 1546) The Conservation Commission also found that houses in the low lying area around Little Pond have experienced flooding and sewer backups (A. 113) and that increased floodwaters caused by the project will include pollutants. (A. 147-153)[4] The project also will deprive Plaintiffs of their enjoyment of seeing the wildlife that inhabits the project site. See Affidavits of Plaintiffs' wetlands experts Charles Katuska (A. 1675) and Patrick Fairbairn (A. 1668); Miriam Weil, previous Chair of the Belmont Conservation Commission. (A. 1683, 1685-7); and Ellen Mass, President of Friends of Alewife Reservation. (A. 1679)

The developer does not dispute the allegations as to where Plaintiffs live. (See Answer, A. 53-54, para. 9) An aerial map of the area at issue shows the proposed five buildings in the project near Little Pond with the houses on Oliver Road along the west side of the Pond. (A. 1444)

[4] This Court should give deference to these findings as the SJC has held that conservation commissions have expertise in matters under their jurisdiction. See Jepson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81, 91 fn. 13 (2008).

The Suffolk Superior Court found in Coalition to Preserve the Belmont Uplands, et al. v. Burt,[5] et al., C.A. No. SUCV-2009-04343 (Fahey, J.) that the Plaintiffs in this action had standing to challenge a decision of the DEP Commissioner under the Tidelands Act, G.L. Chapter 91. (Add.-1, A) The judge ruled that Plaintiffs' interests in the decision were protected by Chapter 91 as well as Article 97 of the Massachusetts Constitution, which guarantees the public's rights to "the natural, scenic, historic, and aesthetic quality of their environment..." (Add.-1 A, 5-7) Plaintiffs' interests also are protected by the Wetlands Protection Act.[6]

Thus, the Plaintiffs have standing to pursue this appeal under G.L. c. 131, §40, para. 30, and G.L. c. 214, §7A, and as "persons aggrieved" under G.L. c. 30A, §14 who are affected in a way special to them which does not similarly affect the general population of Belmont.

2. Plaintiffs were not obligated to submit a transcript of the adjudicatory hearing to pursue their claims.

Defendants wrongly assert that Plaintiffs were obligated under Standing Order 1-96 to submit a transcript of the adjudicatory hearing to the lower

[5] Laurie Burt was the former Commissioner of the DEP.
[6] See Healer, supra at 716 and Southern New England Association of Seventh Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 706 (1986)

court in order to raise their claims for judicial review. However, Standing Order 1-96 does not require a transcript for the claims Plaintiffs are raising, as discussed by Plaintiffs in their blue brief. (pp. 27-29) Moreover, Plaintiffs' claims are based solely on the pre-filed testimony and written decisions, with no reliance on the oral testimony at the hearing.

3. Plaintiffs were denied their due process right to conduct meaningful cross-examination of witnesses and have their testimony considered.

DEP claims (p. 37) that Plaintiffs' right to conduct meaningful cross-examination was satisfied by the fact that Ms. Roby heard the testimony because "she had presided over a four-day hearing at which witnesses testified." Whether she heard the testimony or not, Ms. Roby's identification of the evidence she considered, which is prefaced by the statement: "Based on the discretion accorded to me..." (Add. D, 9), indicates that she considered only the evidence she said she considered and that she believed she had discretion to ignore the live testimony.[7]

[7] The discretion accorded a hearing officer cited by Ms. Roby allows the hearing officer to weigh the evidence and exclude unduly repetitious evidence. However, Ms. Roby did not weigh the evidence elicited at the hearing, she simply ignored it. The cited authority does not give her discretion to ignore wholesale all the live testimony given over a four-day period.

The developer made the astonishing assertion in its brief (p. 32) that Ms. Roby's action of "discrediting the testimony of the Coalition's witnesses" is evidence that she considered the cross-examination testimony. However, based on her own statement, Ms. Roby discredited the testimony of Plaintiffs' witnesses before the hearing even began, without recourse to the live testimony. (Add. D, pp. 18-19)[8]

DEP also advances a legally unsupportable defense of Ms. Roby's omissions (brief, p. 40), asserting that since Plaintiffs had the burden of proof and Ms. Roby indicated she did not find their pre-filed testimony persuasive, she was not required to consider any cross-examination testimony elicited from the developer's and DEP's witnesses.[9] DEP's narrow view of the purpose of cross-examination testimony is contrary to Massachusetts and Federal practice. See Vol. 19, §611.2, Mass. Practice Series, Evidence, Young, et al.

[8] Ms. Roby discounted Katuska's testimony because she erroneously found that it "leans heavily on the significance of the upper floodplain." (Add. D, 18).

[9] The DEP's limited and dismissive view of the value of cross-examination is revealed on p. 40 of its brief by the statement that "Ms. Roby had no obligation to discuss the cross-examination testimony that was, as one would expect it all to be, consistent with the witnesses' pre-filed testimony." DEP has not disclosed how it can state with certainty that the cross-examination testimony merely confirmed the pre-filed testimony, without access to a transcript, which DEP points out was not submitted to the lower court.

> "In Massachusetts any witness who testifies in a cause is sworn generally in the suit, and that witness' testimony may not be restricted only to those facts or such parts of the case as the party calling that witness elects. The effect of this rule is that a witness, called by one party for any particular purpose, may be cross-examined by the other party on any relevant matter. The scope of cross-examination is limited only by showing of prejudice to a party from too narrow a restriction or too great a breath of inquiry. Thus, a party to a lawsuit in the courts of Massachusetts may put in evidence to support his own affirmative case by the cross-examination of witnesses called by an adversary." (emphasis added)

In Roche v. Mass. Transportation Authority, 400 Mass. 217, 222 (1987), the SJC quoted from The Ottawa, 70 U.S. (3 Wall.) 268, 271 (1865):

> "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection..."

In Alford v. United States, 282 U.S. 687 (1931), the Court explained:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner... Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (citations omitted)"

Thus, the rule of cross-examination in Massachusetts and Federal Courts specifically allows the opposition an opportunity to challenge the direct testimony of

adverse witnesses and to elicit testimony from them in support of their own case. Implicit in this rule is that the testimony will be considered. Therefore, it was improper for Ms. Roby to ignore the cross-examination testimony even if she had already made up her mind that the Plaintiffs' pre-filed testimony was lacking and that she planned to rely solely on the pre-filed testimony of the developer's witnesses. DEP's narrow view of the role of cross-examination testimony makes a mockery of the adjudicatory hearing procedure and resulted in a denial of substantial justice to Plaintiffs that prejudiced their interests.

4. Ms. Roby did not make adequate findings to support a conclusion that the requirements for wildlife habitat replication areas have been satisfied.

DEP claims that the requirement in 310 CMR 10.57(4)(a).3 (Add. G, p. 11) that alterations beyond the permissible threshold[10] of significant wildlife habitat, will have "no adverse effects on wildlife habitat" can be satisfied by a wildlife replication plan as provided in 310 CMR 10.60(3). Even accepting DEP's claim, the developer's replication plan does not satisfy the requirements of 310 CMR 10.60(3), and Ms. Roby did not make any findings to support a conclusion that it does. The regulation provides (Add. G, 14):

[10] The permissible threshold is 10% or 5,000 sf of significant wildlife habitat, whichever is the lesser. See 310 CMR 10.57(4)(a).3. (Add. G, p. 11)

> "Alterations of wildlife habitat characteristics beyond permissible thresholds may be restored onsite or replicated offsite in accordance with the following general conditions..." (emphasis added)[11]

The five general conditions that must be met are set forth in subparagraphs (a) through (d). While Ms. Roby purported to make findings regarding conditions (a) and (d), she did not even purport to make findings that conditions (b) and (c) have been satisfied. These conditions provide:

> "...(b) the elevation of groundwater relative to the surface of the replacement area shall be approximately equal to that of the lost area;
>
> (c)...In the case of bordering land subject to flooding, the replacement area shall be located approximately the same distance from the water body or waterway as the lost area..."

In its brief, DEP claimed that "detailed" findings of fact are not required to support compliance with 310 CMR 10.60(3). (pp. 46-47) This claim is inconsistent with DEP's statement that an issue for determination in the adjudicatory proceeding is "[w]hether the project meets the requirements of 310 CMR 10.57(4)(a) including the requirements of 310 CMR 10.60(3)." DEP now attempts to denigrate this issue by calling it a "subsidiary issue," the resolution of which does not require "detailed" findings of fact. (brief, p. 47)

[11] Ms. Vondrak stated in her pre-filed testimony that: "We designed the project to comply with the general restrictions and replication conditions for altered habitat in 310 CMR 10.60(3)." (A. 1113, para. 19)

However, 310 CMR 10.60(3) does not provide discretion to the applicant or DEP to pick and choose which of the general conditions to comply with and which to ignore. M.G.L. c. 30A, §11(8) provides that the decision shall include a "determination of each issue of fact or law necessary to the decision" and the cases do not suggest a lesser requirement for findings of "subsidiary issues." See, e.g., School Committee of Chicopee v. Mass. Commission Against Discrimination, 361 Mass. 352, 354 (1972), in which the SJC said:

> "[T]he statute governing administrative proceedings requires that a determination be made as to each fact of law necessary to the administrative agency's decision."

It was necessary for Ms. Roby to make specific findings that each of the five general conditions were satisfied in order to conclude that the requirements of Section 10.60(3) were met.

DEP then offered a back-up position (pp. 46-47 of brief), claiming that nonetheless Ms. Roby provided "ten pages of supportive factual findings." (Add. D, 28-38) However, while Ms. Roby did reference some findings, there are no findings in her decision on which the Court could have relied to support a conclusion that the plan complies with conditions (b) and (c). Ms. Roby's references to Vondrak's testimony focuses on her description of the new plantings for

the replication areas (Add. D, pp. 21-22), which is not relevant to conditions (b) and (c) that relate to the distance of groundwater and water bodies from the replication areas in relation to the lost areas. As to Howard's testimony, Ms. Roby found he reported on procedures to oversee the work of creating the replication areas (Add. D, p. 24), without indicating that the location of these areas complies with conditions (b) and (c).

Although the developer boldly asserts in its later filed brief (p. 43) that all five conditions have been met, it does not point to any findings that support such a claim. As to condition (c), the developer simply quotes the language of paragraph (c), without alluding to any findings that the condition has been satisfied. Instead, the developer inferred that conditions in DEP's SOC were the "additional conditions" contemplated in 310 CMR 10.60(3). (brief, p. 43) Although 310 CMR 10.60(3) provides that "additional conditions" may be imposed "to ensure that the standard in 310 CMR 10.60(1)(a) is satisfied," the additional conditions do not supersede or replace the five general conditions; they merely supplement the general conditions as necessary to meet the standard in 310 CMR 10.60(1)(a).[12]

[12] The standard in 310 CMR 10.60(1)(a) (Add. G, p. 13) is that alterations of wetlands above the thresholds

Recognizing the failure of Ms. Roby to make findings regarding conditions (b) and (c), DEP takes another tack, claiming (p. 48 of its brief) that Plaintiffs waived their claim that the replication plan does not meet the regulatory requirements because they did not raise the issue in a timely manner. DEP's new tack is of no avail. In his pre-filed testimony, Plaintiffs' wildlife habitat expert Charles Katuska pointed out that the developer failed to provide sufficient information showing that the groundwater levels in the replication areas were the same with respect to the ground water levels at the lost areas as required by condition (b). (A. 297, first para.) The Conservation Commission specifically found that condition (b) was not met because "the groundwater in the applicant's replication areas appears to be much lower relative to the surface of the replacement area than groundwater in the lost areas." (A. 166; §5.10.5 and A. 120)

Finally, DEP offers the fatuous argument (brief, p. 48) that Plaintiffs could not have raised the issue

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"...may be permitted only if they will have no adverse effects on wildlife habitat." Neither the developer's or DEP's witnesses provided any evidence that the alterations of the significant wildlife habitat on the lower floodplain would have "no adverse effects on wildlife habitat" as defined in 310 CMR 10.60(1)(a). Instead, defendants relied solely on the replication plan to satisfy the "no adverse effects" requirement, which it failed to do.

of non-compliance with condition (b) because the judge did not cite it in her list of required conditions on page 8, fn. 11 of her decision. (Add. C, p. 8) The judge's failure to cite condition (b) likely was because Ms. Roby failed to find any evidence to contradict the Commission's finding that condition (b) had not been satisfied.

As to condition (c), which requires that replication areas in BLSF be approximately the same distance from water bodies as the lost areas, Plaintiffs alleged in their Complaint the reasons the developer's replication plan fails to comply with this requirement. (See A. 30, para. 14; A. 44, para. 55a)

Thus, Plaintiffs adequately raised the plan's failure to comply with conditions (b) and (c) in a timely manner. Despite the lack of findings to support a conclusion that these conditions were met, Ms. Roby concluded:

> "When their [the developer's experts'] analysis is combined with the SOC's Special Conditions, the <u>likelihood</u> that the project complies with 310 CMR 10.57(4)(a) including the requirements of 310 CMR 10.60(3) rises to a level meriting <u>some weight</u>." (emphasis added) (Add. D, 27-28)

The judge apparently recognized that this conclusion failed to refer to any findings and was too equivocal to constitute a proper conclusion, and therefore, she rephrased the conclusion by adding a reference to findings, that Ms. Roby did not make, and eliminating

the qualifying words "likelihood" and "some weight." (See Add. C, p. 10) However, the judge's rephrasing did not refer to any specific findings Ms. Roby made to support her conclusion.

In rephrasing Ms. Roby's qualified, unsupported conclusion and attributing findings to Ms. Roby that she did not make, the judge ignored the decisions of this Court cautioning judges not to make findings that the agency itself has not made. See, MIT v. Department of Public Utilities, 425 Mass. 856, 871 (1997), and other cases discussed in Plaintiffs' blue brief (pp. 23, 41-42).

5. Ms. Roby and the judge made an error of law by concluding, that the wildlife habitat on the upper floodplain of BLSF is not significant and subject to protection.

310 CMR 10.57(4)(a).3 provides that work in BLSF "found to be significant to the protection of wildlife habitat shall not impair the capacity to provide important wildlife habitat functions," whether the significant habitat is in the lower or upper floodplain. (Add. G, 17) The Preface to the Wetlands Regulations explains that a presumption of significance is only warranted for the lower floodplain,[13] but that significant wildlife habitat on

[13] Although this presumption is rebuttable, the developer's experts Vondrak and Howard agreed that the wildlife habitat on the lower floodplain is significant. (A. 1290-91; 1115-17)

the upper floodplain may also be protected on a case-by-case basis "where evidence of its existence has been demonstrated...to be significant to the protection of wildlife habitat." (Add. G, Preface, Part V, Section D, p. 24, 1st full para.)

In its brief (pp. 30-31) DEP misreads the Preface to mean that it is "entirely discretionary" with DEP as to whether or not to regulate important wildlife habitat in the upper floodplain that is shown to be significant to important wildlife habitat functions. However, DEP ignores the purpose and wording of the Preface, which is to provide an explanation of the rationale for the wildlife habitat regulations and in particular the reasoning behind the decision to afford a presumption of significance to wildlife habitat in the lower floodplain and not to the upper floodplain. However, nothing in the Preface suggests that it is discretionary with DEP to waive compliance with 310 CMR 10.57(4)(a).3 when it is demonstrated, unaided by any presumption, that the wildlife habitat features on the upper floodplain are similar to those features on the lower floodplain that are presumed by regulation to be significant to providing important wildlife habitat functions (310 CMR 10.60(2)(d)).

Backing off its dismissive approach to the Preface, DEP claims in its brief (pp. 32-33) that Plaintiffs have not demonstrated that the wildlife

habitat "features" that render wildlife habitat "significant" on the lower floodplain are also found on the upper floodplain. However, this demonstration was adequately made by the developer's own wildlife habitat experts. (Vondrak and Howard) Ms. Roby found that Vondrak determined that the "habitat features" on the lower floodplain that she determined to be significant to wildlife habitat "are common on the site." (Add. D, 21)[14] Likewise, Ms. Roby found that Howard testified: "The important habitat features identified in the study area are very common on the site." (Add. D, 23)[15] Therefore, it follows that when habitat features on the upper floodplain exist that are the same as wildlife habitat features on the lower floodplain that render the wildlife habitat "significant," these features also are indicative of significant wildlife habitat on the upper floodplain.

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[14] In her pre-filed testimony, Vondrak stated: "The important features identified in the study areas...are very common to both the wetland resource areas and upland areas on the Property." (A. 1116, para. 18)

[15] Mr. Howard identified the important features as "standing dead trees, burrowable soils, dense herbaceous cover, certain food producing shrubs, and large woody debris on the ground surface..." (Add. D, 23; A. 364, para. 14) Plaintiffs' wildlife habitat expert Charles Katuska agreed with Mr. Howard stating in his pre-filed testimony that the "upper floodplain on the project site contains significant wildlife habitat features as embodied in the plant community, soil composition and structure, topography, proximity to water bodies, waterways and other characteristics." (A. 294, par. 16)

Thus, in the this case there is evidence that wildlife habitat on the upper floodplain is subject to protection under 310 CMR 10.57(4)(a).3. (See Blue Brief, pp. 34-42).

In view of Ms. Roby's finding, based on Vondrak's and Howard's testimony, that 5,440 sf of significant wildlife habitat exists on the upper floodplain (Add. D, 11), it was an error of law for the judge to conclude that the wildlife habitat on the upper floodplain is not subject to regulation under 310 CMR 10.57(4)(a).3 because there

> "is no regulatory presumption for the protection of wildlife habitat interest in the upper floodplain," (emphasis added)

even when evidence shows that features that render wildlife habitat significant exist there that are similar to the features on the lower floodplain. (Add. C, 12)

6. The developer is not entitled to an award of attorneys fees and costs.

The developer inappropriately asserts a claim for an award of "double its reasonable attorneys fees and costs." Such a claim is not properly raised in this Court as it has already been raised and is pending in the lower court. On March 30, 2012, the developer served a Motion for Award of Costs and Attorneys Fees against Plaintiffs. (Lower court docket, 10-2205, Paper No. 26) In opposition, Plaintiffs served a

Special Motion to Dismiss under the Anti-SLAPP Suit Act and requested attorneys fees incurred in defending against the developer's action taken to intimidate Plaintiffs from asserting their constitutional right to seek redress of their grievances in Court. (Docket, Paper No. 25) Both of these Motions are pending in the lower court. The developer should not be allowed to pursue its attempts to intimidate Plaintiffs in this Court.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Plaintiffs' opening (blue) brief, Plaintiffs request this Court to vacate the lower court's Order and remand the matter to DEP for proceedings in conformance with this decision.

Respectfully Submitted
Plaintiffs-Appellants,
by their attorney

/s/ Thomas B. Bracken

Dated: October 4, 2012 Thomas B. Bracken

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Respectfully Submitted
Plaintiffs-Appellants,
by their attorney

Dated: October 4, 2012 Thomas B. Bracken

Certification Pursuant to Rule 16(k) of Rules of Appellate Procedure

Comes now Thomas B. Bracken, counsel for Plaintiffs-Appellants, and certifies that the foregoing Reply Brief complies with:

> "the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers)."

/s/ Thomas B. Bracken

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Thomas B. Bracken
BBO #052920
33 Mount Vernon St.
Boston, MA 02108-1420
(617) 742-4950
thomasbracken@earthlink.net

Counsel for Plaintiffs-Appellants

Dated: October 4, 2012

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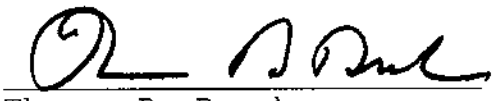

Thomas B. Bracken
BBO #052920
33 Mount Vernon St.
Boston, MA 02108-1420
(617) 742-4950
thomasbracken@earthlink.net

Counsel for Plaintiffs-Appellants

Dated: October 4, 2012

ADDENDUM

Notif'd

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-4343-B

Notice sent
8/17/2010
J. P. B.
N. Mc. & F.
T. B. B.
K. W. S.

COALITION TO PRESERVE THE BELMONT UPLANDS et al.

vs.

(sc)

LAURIE BURT, as she is COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, and AP CAMBRIDGE PARTNERS II, LLC

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Petitioners, Coalition to Preserve the Belmont Uplands et al. ("Petitioners"), challenge a decision by the defendant, Massachusetts Department of Environmental Protection ("MassDEP" or the "Department"), that G. L. c. 91 and 310 Code Mass. Regs. §§ 9.00 (the "Waterways Regulations") do not provide jurisdiction over the Property at issue in the case. Petitioners challenge the Department's Negative Determination of Applicability ("NDA"), claiming that it was error. A review of the record fails to support Petitioners' contentions, and its Motion for Judgment on the Pleadings is therefore **DENIED**. Respondents' Cross-Motions for Judgment of Affirmance are **ALLOWED**.

1 Stanley Dzierzeski, Stephanie Liu, Gerard Natoli, Alberta Natoli, Elaine Agrillo, Charles Agrillo, Sandra Ann Johnson, John McGurl, Richard Longmire, Marina Entine Pesok, Ronald Kerins, and Roula Kerins.

BACKGROUND

The record reveals the following facts. The Coalition is an organization consisting of individuals who own property in and around the Belmont Uplands. Petitioners, made up of the Coalition along with individual members thereof, seek to preserve the natural condition of the land. Petitioners' Brief at 3. The contested property (the "Property") is located in Belmont, near Little Pond and the terminus of Route 2 where there is an off-ramp into the Alewife MBTA Station. A. R. at 1080. The Property owner, AP Cambridge Partners II, LLC, has proposed to construct a multi-unit residential development on the Property. A. R. at 1080. On July 11, 2007, Petitioners made a written request for a determination that the Property is subject to jurisdiction under G. L. c. 91, which would require the Property owner to obtain a license before building. A. R. at 4, 319-45, 1080. On March 3, 2008, the Department issued a Negative Determination of Applicability ("NDA"), finding that the Property did not meet the statutory and regulatory definition of "Tidelands," and therefore did not fall under the statute's jurisdiction. A. R. at 4-5. On March 20, 2008, the Petitioners appealed, challenging the Department's NDA and claiming that the Property does constitute "Tidelands" as defined by 310 Code Mass. Regs. §§ 9.00. A. R. at 436-39, 1080.

The definition of "Tidelands" provides for jurisdiction under G. L. c. 91 not only over waterways that currently are influenced by daily tidal flows, but also over lands that were once influenced by daily tidal flows and have since been filled. See 310 Code Mass. Regs. §§ 9.00. All parties agree that Upper Mystic River System, which includes the Little River, is no longer subject to any tidal flows, as the Amelia Earhart Dam blocks the incoming tide. A. R. at 1083. In fact, the record indicates that the Little River has been free from such flows since 1908 when

the Craddock Dam was constructed in Medford. A. R. at 1081; A. R. at 161-62 (Kaiser Direct. p. 4-5, para. 6). Furthermore, the record indicates that the current location of the Little River, which does not now flow through any portion of the Property, is different from its historical location, as it was relocated by the Metropolitan Park Commission in 1910. See A. R. at 975 (Aerial Map of Relocated Little River and Alewife Brook, Ex. 30); A. R. at 162 (Kaiser Direct, p. 5, para. 8). Therefore, since all parties agree that the river is not currently tidal, arguments focus on whether the historical portion of the Little River flows through the Property, and more importantly, whether any such flow is "Tidelands" as defined in 310 Code Mass. Regs. §§ 9.00. See A. R. at 1081.

Because the contested issue pertains to tidal influence on a river portion that no longer exists due to its relocation, a dearth of information exists regarding measurement of historical tidal influence. A. R. at 1082, 1084. All expert witnesses in this matter agreed that the most relevant and correct information to rely on in determining whether the Property constitutes "Tidelands" is the Report on Improvement of the Upper Mystic River and Alewife Brook by means of Tide Gates and Large Drainage Channels, by John R. Freeman, Civil Engineer, September 21, 1904 (hereinafter referred to as the "Freeman Report"), A. R. at 441-520, an independent study conducted, in part, to gain a detailed understanding of the tidal influence on the entire Upper Mystic River System. See id.

On February 25, 2009, the Department held an adjudicatory hearing to address the issues that the Petitioners raised on appeal. Id. The Department determined that the historic course of the Little River likely flowed through a portion of the Property, a finding that favors Petitioners. A. R. at 1081, 1083-86. However, the Department found that the Property was not subject to

jurisdiction under G. L. c. 91 because the flow was not "Tidelands" as defined in the statute and corresponding regulations. See A. R. at 1090.

Specifically, the Presiding Officer, Ms. Laurel Mackay, found that, due to the limited indirect evidence regarding tidal influence on the Upper Mystic River System before construction of the Craddock Dam in 1908, the best evidence to rely on is the Freeman Report of 1904; all experts concur in this assessment. A. R. at 1082, 1088-89. She also found that "[a]ll parties agreed that it was the mean daily high water mark that would signify jurisdiction." A. R. at 1092. Relying on the Freeman Report, Ms. Mackay found that "[o]ne can reach only one reasonable conclusion from reviewing Mr. Freeman's discussions of tidal influence in the Little River, namely, that there was no daily tidal influence but merely influence during extreme astronomical or storm tide events." A. R. at 1090. She gave particular weight to water elevation readings from tide curves in the Freeman Report, which were taken at Hill Road in Belmont, which is "almost precisely where the Little River crossed the Property at issue." A. R. at 1091. These tide curves, as concluded by Ms. Mackay, "showed no change in elevation in the Little River at Hill Road during a complete tide cycle in Boston Harbor." Id. The Presiding Officer found this data to be "particularly significant" because, on the date recorded, there was an exceptional spring tide in Boston Harbor. Id. Therefore, she concluded, "if the Little River at the Property location at Hill[] Road was not changed by a higher than mean high tide, then the Little River would not have been influenced by daily tides and the mean high water mark could not have reached into the Little River at the location of the Property at issue." Id.

Dr. Stephen Kaiser, expert for the Petitioners, constructed a theory that the mean high water mark did reach the Little River at the time of the Freeman Report. A. R. at 1093. His

theory relied on the idea that possible man-made obstructions in the river system caused head-loss that precluded the daily tides from reaching the property. Id. Upon review of the record, Ms. Mackay found that Dr. Kaiser's theory "was not supported by sufficient evidence in the record or by a foundation of established scientifically appropriate methods," and therefore, did not meet the evidentiary standard set forth in G. L. c. 30A, §11. A. R. at 1100.

Upon conclusion of the adjudicatory hearing, the presiding officer recommended a decision that the Property is not subject to Chapter 91 jurisdiction because "the daily mean high water mark did not reach into the historic portion of Little River which crossed the Property." A. R. at 1101. The Department Commissioner adopted this recommendation. A. R. at 1105. Petitioners moved for reconsideration, which was denied. A. R. at 1135-36, 1139. Petitioners then filed this action seeking judicial review of the Department's decision.

DISCUSSION

Petitioners bring an appeal under G. L. c. 30A challenging a determination by the Department that the building site at issue is not "tidelands" and is thus not subject to jurisdiction (and, therefore, licensing requirements) under G. L. c. 91. Petitioners contend that the site at issue does constitute "tidelands" and that the Department erred in its contrary determination.

I. STANDING

The initial challenge of respondent, AP Cambridge Partners II, LLC, is that Petitioners lack standing to bring an appeal of the Department's decision before this court. This court disagrees. G. L. c. 30A §14 provides in relevant part that "any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof..." The

SJC has held that the phrase "person... aggrieved" is not to be given a narrow construction and, instead, should be read to incorporate a broad, though not limitless, array of interests and injuries. See Shaker Cmty., Inc v. State Racing Comm'n, 346 Mass. 213, 216 (1963).

Petitioners, seeking review of an NDA pursuant to G. L. c. 91 and 310 Code Mass. Regs. § 9.02, were aggrieved by an unfavorable final decision of the Department. The Waterways Regulations define a "person... aggrieved" for the purposes of a review of an agency decision regarding G. L. c. 91 as "any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A." 310 Code Mass. Regs. § 9.02. While abutters to land affected by licensing decisions are not granted automatic standing to challenge agency decisions, they shall be granted standing if concrete interests will be affected by the licensing decision. See Higgins v. Dep't of Envtl. Prot., 64 Mass. App. Ct. 754, 755-57 (2005).

M.G.L. c. 91 and its implementing regulations were enacted for the very purpose to "protect and promote the public's interest in tidelands" and to "foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment under Article XCVII of the Massachusetts Constitution." 310 Code Mass. Regs. § 9.01.

Therefore, a licensing decision that allows the construction of such a large development so close to Petitioners' land without the requirement to obtain a license infringes on these rights. Petitioners may not only lose the enjoyment of many of the rights listed in §9.01, but may also suffer economic losses from a decrease in property values. Such concrete losses are far more

tangible than those in Higgins, and are different in both kind and magnitude from those experienced by the general public. See 64 Mass. App. Ct. at 755-57. Therefore, this court finds that Petitioners are "aggrieved," and have the right to appeal under G. L. c. 30A § 14.

II. ANALYSIS

A) Standard of Review

Pursuant to G. L. c. 30A, a court may reverse, remand, or modify an agency decision if the substantial rights of any party have been prejudiced because the agency's decision violated constitutional provisions or was not supported by substantial evidence. G. L. c. 30A, § 14(7) (2005). Under the substantial evidence test, the court determines "whether, within the record developed before the administrative agency, there is such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988), citing Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971) (discussing substantial evidence test); see also G. L. c. 30A, §1(6) (defining substantial evidence). If there is substantial evidence, the court must affirm the agency's decision "even though [it] might have reached a different result if placed in the position of the agency." Seagram Distillers Co., 401 Mass. at 721, citing School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978). Judicial review is confined to the administrative record. G. L. c. 30A, § 14(5).

In reviewing an agency decision, the court must give due weight to the experience, technical competence, and specialized knowledge of the agency, and may not substitute its own judgment for that of the agency. G. L. c. 30A, § 14(7); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Southern Worcester County Reg'l Vocational Sch. Dist. v. Labor

Relations Comm'n, 386 Mass. 414, 420-21 (1982). The court "must apply all rational presumptions in favor of the validity of the administrative action," Consolidated Cigar Corp. v. Department of Pub. Health, 372 Mass. 844, 855 (1977), and may not engage in a de novo determination of the facts. Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 401 Mass. 347, 351 (1987). The party appealing an administrative decision under G. L. c. 30A bears the burden of demonstrating its invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

B) Application

Petitioners make no specific argument that the Presiding Officer's determination was arbitrary and capricious, an error of law, or unsupported by substantial evidence; rather, Petitioners simply argue that the Presiding Officer erred in issuing the NDA. However, the record demonstrates that the Presiding Officer made a reasoned determination from the record: (1) that the mean high water mark ("MHWM") never reached the Little River at the Property's location and (2) that the contrary theories of Petitioners' expert are unsubstantiated.

Petitioners first argue that the agency erred by failing to take into account the expert testimony of Dr. Kaiser and Dr. Wall that the tidal effect at the property could have been as much as two feet when calculating for the effects of manmade structures on the tidal flow. See Petitioners' brief at 12-18. However, the agency made a clear determination based on the record that this evidence was not reliable because it was not supported by sufficient evidence or based on scientifically appropriate methods. A. R. at 1093-1100. Specifically, the Presiding Officer found that Dr. Kaiser relied on a very small and potentially unrepresentative data set, could not justify this approach, and even admitted that he did not employ any accepted engineering or

scientific methodologies for estimating the historic high water mark. See id. at 1093-95. Furthermore, the Presiding Officer found Dr. Kaiser's assumptions regarding the likely existence of flow-restrictive structures was speculation without support from the evidence. See id. at 1096-1100. Finally, she found that Dr. Kaiser's reliance on FEMA calculations to estimate the "head loss" from bridges was not valid for comparison because FEMA's calculations are for flood events, which are far higher in water-level and velocity than normal tidal variation. See id. at 1095-96.

In fact, evidence exists in the record that discredits Dr. Kaiser's conclusions regarding the influence of structures on ordinary tidal flow. For example, in finding that the high water mark reached the Property at issue at some point in history, Dr. Kaiser assumes that there must have been a weir, made up of flow-restricting flashboards or "stop logs" at the Arlington/Lexington Branch Railroad Bridge. See A. R. at 171 (Kaiser Direct, p. 14, para. 30). Dr. Kaiser makes this assumption because his analysis of the tide curves shows (after Dr. Kaiser's adjustment to incorporate FEMA flood data) that there is a discrepancy between the 1.7 feet of tidal variation at the Massachusetts Avenue Bridge and the complete lack of tidal variation at the Property. See A. R. at 825-28 (Kaiser Hearing Testimony, p. 33-43). However, the validity and value of this assumption is questionable, as Dr. Kaiser himself admits that this discrepancy in tidal variation could have been the result of natural conditions such as variations in bottom elevations, rather than a hypothetical man-made structure. See A. R. at 832 (Kaiser Hearing Testimony, p. 60-61).

Also, there is no evidence in the record that directly supports Dr. Kaiser's assumption of any such structure's existence. The Freeman Report indicates that flashboards on the bridge

were likely only in use between 1870 and 1887. A. R. at 462 (Freeman Report, p. 33). Therefore, any weirs would have had no influence on tidal flow when the Freeman Report data – the data upon which Dr. Kaiser relies – was taken. See id. Furthermore, there is no notation of flow restrictions in the Pierce Plan, which is a detailed survey map that was published as part of the Freeman Report. See A. R. at 523. Mr. Daylor testified that there is no indication of any flow-restricting structure in the Pierce Plan, which is significant evidence that none existed, as the main goal of the Pierce Plan was to locate and identify features of the river that affect hydraulic flow. See A. R. at 874 (Daylor Hearing Testimony, p. 228, lns. 2-17). In fact, Dr. Kaiser admits that it is "most unusual" that there are no indications of any flow restrictions in the Pierce Plan. See A. R. 835 (Kaiser Hearing Testimony, p. 70-71).

Finally, the Freeman Report also provides direct evidence that the existing structures in place in the Upper Mystic River did not restrict water flow. This evidence directly contradicts Dr. Kaiser's hypothetical theory that man-made structures created sufficient head loss to prevent the daily tides from reaching the Property. Specifically, the Freeman Report concludes that "the more expansive of the existing bridges over Alewife Brook... would not seriously obstruct the flow." A. R. at 454 (Freeman Report, p. 16). Furthermore, Mr. Daylor notes that Freeman's conclusions were in regard to relatively fast-moving freshwater outflows and therefore, it is fair to conclude that any existing bridges would have had even less of an effect on much slower moving tidal inflows, if any were present. See A. R. at 235 (Daylor Direct, p. 15, para. 3). In other words, the evidence relied on by all experts as the most conclusive study of tidal influence on the Upper Mystic River System suggests that man-made structures would have virtually no effect on tidal flow in the Little River.

The Presiding Officer's conclusions regarding Dr. Kaiser's testimony are supported by the record and by the testimony of the other experts, who discredit and provide contradictory evidence regarding Dr. Kaiser's findings. Under the deferential standard of review required by G. L. c. 30A, this court will not second guess such a factual determination by the reviewing agency regarding the credibility of witness testimony. See Ingalls v. Board of Registration of Medicine, 445 Mass. 291, 302 (2005).

Next, petitioners argue that the agency erred in concluding that the Property was not "Tidelands." Petitioners' Brief at 8. Petitioners state that the Presiding Officer concluded that there was 1-2 inches of historical tidal variation at the site and therefore, because the law does not have a minimum requirement for the extent of tidal variation, it was error to conclude that Chapter 91 did not apply. Petitioners' Brief at 12-13. However, Petitioners mischaracterize both the legal standard and the Presiding Officer's findings.

The statute defines tidelands[2] as "present and former submerged lands lying below the mean high water mark." G. L. c. 91, §1. The statute can apply to both lands that are currently below the MHWM and those that were below that mark at a former time. In the latter scenario, the one relevant in the present case, the mean high water mark, which is characterized as the "historic high water mark," is defined as "the high water mark which existed prior to human alteration of the shoreline..." 310 Code Mass. Regs. § 9.02.

It is important to note that historically submerged lands are only "tidelands" for purposes of the statute if the average or mean historic high water mark reached into the Property at issue at some point in time. See id. The statute specifies that the average high water mark should be calculated using the average of all recorded high tide levels (twice daily) over a 19-year metonic

2 See generally Arno v. Commonwealth, 2010 WL 2978092 at p.4 (August 2, 2010).

cycle, as established by the National Ocean Survey of the U.S. Department of Commerce. Id. However, since 19-year tide cycle data is not available for historical tidelands that have since been filled, the regulations allow for the use of "topographic or hydrographic surveys, previous license plans, and other historic maps or charts." See id. The Presiding Officer correctly notes this standard in her final decision. See A. R. at 1087, n2.

First, Petitioners confuse the legal standard. In their brief, Petitioners repeatedly mention that the historical course of the Little River was "tidal," referencing the fact that water levels were shown to have risen slightly during extreme tidal events. Petitioners' brief at 9, 11-13. Petitioners rely on the idea that the Property is filled tidelands, which is defined as "former submerged lands and tidal flats which are no longer subject to **tidal action** due to the presence of fill." (Emphasis added.) 310 Code Mass. Regs. § 9.02.

However, Petitioners take the phrase "tidal action" out of context. "Flowed Tidelands" and "Filled Tidelands" are subsets of the broader category of "Tidelands," as defined in the statute and the regulations. See G. L. c. 91, § 1; 310 Code Mass. Regs. § 9.02. "Tidal action" is given no definition of its own, but is simply a phrase that qualifies and is subject to the definition of "Tidelands" as promulgated by G. L. c. 91, § 1 and 310 Code Mass. Regs. § 9.02. In other words, "Tidelands" means lands which the MHWM reaches, and "lands… subject to tidal action" should be construed to mean the same. See G. L. c. 91, § 1; 310 Code Mass. Regs. § 9.02. Therefore, the statute requires that "subject to tidal action" be read to mean "lying below the mean high water mark," rather than some different definition that Petitioners wish to assign it. See A. R. at 247 (Strysky Direct, p. 6, para. 10).

Thus, simply because there may be 1-2 inches of tidal variation at some point in time,

does not mean that the property is "Tidelands," as defined by the statute. See G. L. c. 91, § 1; 310 Code Mass. Regs. § 9.02. Rather, to classify as "Tidelands," there must have been enough regular tidal variation such that the average or mean high water mark reached into the Property at some point in history. See id. The record does not provide substantial evidence to support such a proposition.

More importantly, Petitioners mischaracterize the factual findings of the Presiding Officer. Ms. Mackay found that the evidence establishes that 1-2 inches of tidal variation may have been found in the *Little River* during extreme tidal events, but *could not be found* at the Property itself. A. R. at 1090. Specifically, Ms. Mackay found that a reading taken at Hill Road in Belmont, an area that is almost precisely where the historical portion of the Little River crossed the Property, showed no change in water level during a complete tide cycle, even during exceptional tides. A. R. at 1090-91. This evidence is taken directly from a "tide curve" chart in the Freeman Report, which the parties have agreed is the most complete source of evidence regarding tidal influence in the Little River. A. R. at 521 (Freeman Report, Appendix No. 1).

In other words, the record reflects that the Presiding Officer actually found that there was "no daily tidal influence but merely influence during extreme astronomical or storm tide events." A. R. at 1090. Thus, "the mean high water mark could not have reached into the Little River at the location of the Property at issue." A. R. at 1091. This conclusion, which has a reasonable basis in the record, directly contradicts Petitioners' assertion that there was 1-2 inches of tidal variation at the Property. See Petitioners' Brief at 11-12.

The agency's determination is supported by substantial evidence in the record and does not rely on an incorrect understanding of the law. The Department made a clear determination

that there is no evidence in the record that the MWWM reached the Property and that the theories posited by the Petitioners' expert are not supported by either substantial evidence or accepted scientific methodology. Based on the available evidence, which points to the conclusion that the MHWM did not reach the Property, the Department correctly concluded that the Property does not fall under Chapter 91 jurisdiction.

III. LANDLOCKED TIDELANDS

Furthermore, because the Department did not err in its determination, it is not necessary for the court to determine whether the property falls into the landlocked tidelands exception provided in 310 Code Mass. Regs. § 9.04.

IV. ORDER

Based on the foregoing, Petitioners' Motion for Judgment on the Pleadings is **DENIED**. The Commissioner's Opposition to Plaintiff's Motion for Judgment on the Pleadings and Request for Entry of Judgment in Favor of the Defendants is **ALLOWED**. AP Cambridge Partners II, LLC's Opposition to Plaintiff's Motion for Judgment on the Pleadings and Cross Motion for Judgment on the Pleadings is also **ALLOWED**. The final decision of the Commissioner of the Massachusetts Department of Environmental Protection is **AFFIRMED**, and the Negative Determination of Applicability issued by the Department on March 3, 2008 is upheld.

Elizabeth M. Fahey
Associate Justice of the Superior Court

DATED: August 16, 2010