COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO

Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood; Friends of Alewife Reservation, Inc.; Stanley Dzierzeski, Stephanie Liu, Gerard Natoli, Alberta Natoli, Elaine Agrillo, Charles Agrillo, Sandra Ann Johnson, John McGurl, Richard Longmire, Marina Entin Pesok, Ronald Kerins and Roula Kerins.

Plaintiffs

v.

Laurie Burt, as she is Commissioner of the Department of Environmental Protection; and
AP Cambridge Partners II, LLC

Defendants

COMPLAINT

INTRODUCTION

1. This is an appeal under M.G.L. c. 30A, §§ 14(1) and (7)(c), (e) and (g)), M.G.L. c. 214, §7A, and M.G.L. c. 231A, §1 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 (the "SOC") issued by the Department to allow construction of a 299 unit housing project on the Belmont Uplands, a unique natural resource area in the Town of Belmont, Massachusetts. The Presiding Officer at the adjudicatory hearing allowed the Plaintiffs Motion to Intervene in the proceeding. The SOC overruled the Commission's decision denying the project for failure to protect the

interests protected by the Wetlands Protection Act, M.G.L. c.131, §40. The Commission found that the project site is significant to (a) groundwater supply, (b) fisheries, (c) storm damage prevention, (d) prevention of pollution, (e) flood control, and (f) protection of wildlife habitats.

THE SITE

2. The Belmont Uplands is an environmentally significant area with a large Silver Maple Forest, wetlands, floodplains and habitats for many diverse species of animals and birds. The Forest has been designated by the State as a "small river flood plain forest," and serves to absorb and retain stormwaters. The Belmont Uplands are surrounded by flooding sources - Little Pond on the west, Little River on the south, an intermittent stream along Frontage Road on the north and a 10 acre marsh across Acorn Park Drive on the east. During many storms the entire lower floodplain is flooded and the animals living there are driven higher on the site seeking refuge in the upper floodplain and uplands. Many animals and birds require both wetlands and uplands for their habitats.

THE PROPOSED PROJECT

3. AP Cambridge Partners II, LLC (the "developer") proposes to develop a 15.6 acre site on the highest part of the Belmont Uplands, 3 acres of which are located in Cambridge, by constructing five four-story buildings containing 299 housing units with parking spaces for 500-600 cars which will destroy a large portion of the Silver Maple Forest, significant wildlife habitats, wetlands and other important interests protected by the Act. The development will deprive animals and birds of their habitats on the Belmont Uplands with no place to relocate and

cause flooding of the nearby houses where the Plaintiffs live. The project also will eliminate most of the stormwater storage capacity of the site and thereby increase the flooding of the homes around Little Pond in which many of the Plaintiffs live.

JURISDICTION

4. This Court has jurisdiction over the subject matter under M.G.L. c. 30A, §§14(1) and (7)(c), (e), and (g), M.G.L. c. 214, §7A and M.G.L. c. 231A, §1.

5. M.G.L. c.214, §7A (Massachusetts Environmental Citizens Suit Statute) provides that the Superior Court has jurisdiction over a civil action brought by not less than ten persons domiciled in the Commonwealth to enjoin any person causing or about to cause damage to the environment in violation of a statute, the major purpose of which is to prevent damage to the environment. The term "damage to the environment" is defined to mean "destruction, damage, or impairment to any natural resources [including]…water pollution…destruction of wetlands, open spaces, natural areas." The major purpose of M.G.L. c. 131, §40 (the Massachusetts Wetlands Protection Act) is to prevent damage to the environment, including water pollution, flooding, storm water damage, loss of wetlands functions and destruction of wildlife habitats. Plaintiffs have good cause to believe that damage to the interests protected by the Act is occurring or is about to occur on the Belmont Uplands caused by the defendant A.P. Cambridge Partners II, LLC, including tree cutting, wetlands filling, and other measures destructive of the natural resources in preparation for construction of 299 housing units.

6. Plaintiffs allege, pursuant to M.G.L. c. 231A, §1 (Declaratory Judgment Statute) that an actual controversy has arisen between the parties regarding the development of the Belmont Uplands as hereinafter more specifically alleged.

THE PARTIES

7. The Coalition to Preserve the Belmont Uplands is an unincorporated organization, with offices at 74 Statler Road, Belmont, MA. 02478, whose membership includes the individual Plaintiffs as set forth in paragraph 5. The mission of the Coalition is to preserve the Belmont Uplands in its natural condition to provide storm water absorption, flood prevention, habitats for many varieties of animals, birds and fish, and an environment in which the largest Silver Maple Forest in the Boston area can thrive. The Coalition is dedicated to working with public agencies and other interested parties to preserve and maintain this valuable and unique environmental area in the midst of dense urban development. Stanley Dzierzeski, a retired Lt. Col. Corps of Army Engineers and resident of Belmont, is Chairman of the Coalition.

8. Friends of Alewife Reservation, Inc. (FAR) is a non-profit corporation, organized and existing under the laws of the Commonwealth of Massachusetts, with offices at 186 Alewife Brook Parkway, Cambridge, MA 02138, dedicated to the preservation and enhancement of the natural environment of the 115 acre Alewife Reservation, which contains diverse wildlife, natural vegetation and water bodies. The Reservation is ecologically connected to the Belmont Uplands. FAR acts as a stewarding group, and has thoroughly investigated, studied, evaluated, and monitored the vegetation, wildlife habitats, and water resources in and on the

Reservation, and has made available reports and other materials related to these activities to interested persons and organizations. School groups, environmental organizations, and interested residents visit the area frequently for ecological learning. Ellen Mass is President of FAR.

9. The individual Plaintiffs are domiciled in the Commonwealth and they own property where they live in the Town of Belmont near the project site at the following addresses: Stanley Dzierzeski, 74 Statler Road, Stephanie Liu, 49 Oliver Road, Gerard and Alberta Natoli, 99 Oliver Road, Charles and Elaine Agrillo, 39 Gilmore Road, Sandra Ann Johnson, 105 Oliver Road, John McGurl, 9 Staunton Road, Richard Longmire, 58 Statler Road, Marina Entin Pesok, 57 Oliver Road, and Ronald and Roula Kerins, 27 Sandrick Road. All of the Plaintiffs are aggrieved by the Commissioner's decision because of the adverse impacts the project will have on their interests, including increasing stormwater runoff from the project site, causing flooding of their properties, overloading the sewer system resulting in sewage backups in their basements, and loss of visual enjoyment of the Belmont Uplands ecosystem with its unique Silver Maple Forest and habitats for many species of birds and animals.

10. AP Cambridge Partners II, LLC is a foreign limited liability company organized and existing under the laws of Delaware with its principal offices at 700 South Henderson Road, King of Prussia, Pennsylvania 19406 with offices in Massachusetts at 395 Arsenal Street, Watertown, 02472. The name and address of the Resident Agent is Corporation Service Company, 84 State Street, Boston, MA 02109.

11. 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, MA 02108. The Northeast Regional Office of the Department is at 205B Lowell Street, Wilmington, Massachusetts, 01887.

STATUTORY AND REGULATORY FRAMEWORK

12. The Wetlands Protection Act, M.G.L. c.131, §40 (the "Act") specifies the interests to be protected, including flood control, storm damage, pollution of water bodies, and preservation of wildlife habitat and sets forth a procedure to ensure that these interests are protected. The resource areas covered by the Act include: Land Subject to Flooding and Bordering Land Subject to Flooding ("BLSF"). BLSF is land bordering a water body that floods when the water overflows the banks of the waterbody. BLSF is presumed to be significant to flood control and storm damage prevention and the lower portion (up to the 10 year flood level) is presumed to be significant to wildlife habitats. The upper floodplain (from the 10 year to the 100 year floodplain) also is considered important to wildlife habitat if it is shown that it contains the same wildlife habitat features as the lower floodplain.

13. In 1987 "wildlife habitat" was added to the Act as a protected interest when the habitat exists within a designated resource area. The term "wildlife habitat" is defined in the Act to mean: "those resources areas which due to certain physical characteristics, provide 'important' wildlife habitat functions (*i.e.* 'important food, shelter, migratory or overwintering areas, or breeding areas for

wildlife')." The Department's Wetlands Regulations, 310 CMR §10.60(1)(a) and §10.57(4)(a)3, provide that if a project will alter more than 5,000 sf of the lower floodplain of BLSF, such alterations "may be permitted only if they will have no adverse effects on wildlife habitats." The lower floodplain of BLSF is presumed to be significant to the protection of wildlife habitat because the natural features that provide important wildlife functions (*i.e.* "food, shelter, migratory or overwintering areas, or breeding areas for wildlife") typically exist in that area. The Preface to the Wildlife Habitat Regulations (310 CMR 10.00 Appendix V, D. para. 4) provides that important wildlife habitat on the upper floodplain also is subject to protection "when evidence of its existence has been demonstrated." The evidence at the adjudicatory hearing demonstrated that important wildlife habitat exists on the upper floodplain of BLSF, 5,440 sf of which the project will alter, in addition to 11,032 sf of significant wildlife habitat in the lower floodplain, totaling 16,472 sf on the project site.

14. The Department's Wetlands Regulations, 310 CMR 10.60(3) require that the project provide Wildlife Replication Areas to replace the Wildlife Habitat Impact Areas altered by the project at least as large as the lost areas which meet the following performance standards:

> "…shall be located within the same general area as the lost area and, 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."

and that:

> "interspersion and diversity of vegetation, water and other wildlife characteristics of the replacement area as well as its location relative to neighboring wildlife habitats, shall be similar to that of the

> lost areas insofar as necessary to maintain the wildlife habitat functions of the lost areas."

15. The Department's "Wildlife Habitat Protection Guidance for Inland Wetlands" requires the developer to prepare a wildlife habitat evaluation of the wildlife habitat "for the portion of the resource area that will be altered by the proposed activity." Both the lower and upper floodplains of BLSF will be altered by the proposed project.

16. 310 CMR 10.05(6)(c) provides, "If the conservation commission finds that the information submitted by the applicant is not sufficient to describe the site, the work or the effect of the work on the interests identified in M.G.L. c.131, §40, it may issue an Order prohibiting the work."

PRIOR PROCEEDINGS

17. .On June 12, 2007, the 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").

18. The Commission opened a public hearing on the NOI on June 26, 2007 and the hearing was continued at the developer's request on August 7, 2007, September 11, 2007, October 2, 2007, November 5, 2007, and December 4, 2007. Testimony by several technical experts retained by the Commission, the developer, and the Plaintiffs was provided at the hearing. The public hearing was closed at the developer's request on December 4, 2007.

19. On December 21, 2007, the Commission issued an Order prohibiting the proposed project. The Order cited the 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 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.

20. On January 7, 2008, the developer filed with the Department a Request for Superseding Order of Conditions ("Request for SOC").

21. By letter to the parties dated January 28, 2008, Rachel Freed, the Department's reviewing official responsible for deciding the appeal, described the review process and advised that "Mass DEP will be delaying the site visit…when the weather conditions allow better viewing, a field investigation will be scheduled..." A site visit was never scheduled. The Presiding Officer erroneously stated in her Decision that Ms. Freed advised that "she would not conduct a site visit and would proceed with a technical review of the site." During her review, Ms. Freed made three written requests to the developer for additional detailed technical information which she said "is necessary for MassDEP to complete our review and proceed with preparation of a Superseding Order of Conditions." The additional information resulted in significant redesign of to the project plans. Much of the information requested by Ms. Freed had been requested by the Commission but not provided by the developer.

22. Finally on October 31, 2008, more than ten and one-half months after the appeal was filed, the Department, acting through Ms. Freed, issued an SOC

approving the project, with conditions. Ms. Freed's covering letter said: "The applicant has made a number of revisions, particularly to the layout and details of the stormwater design."

23. On November 11, 2008, the Commission filed an appeal of the SOC and requested an adjudicatory hearing by the Department. The Plaintiffs filed a Motion to Intervene which was allowed by the Presiding Officer, Ms. Beverly Coles-Roby.

24. 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 and were examined extensively over four days.

25. The pre-filed testimony of Plaintiffs' expert wildlife habitat witnesses demonstrated that (1) the developer's wildlife habitat evaluation was materially incomplete because it failed to include the upper floodplain of BLSF where the evidence showed the same wildlife habitat features existed as identified by the developer's experts as existing on the lower floodplain, (2) the developer's Wildlife Habitat Plan approved by the Department was materially incomplete because 2,642 sf of a wildlife habitat area in the lower floodplain that will be altered by the project was omitted and first shown on a plan dated February 9, 2009 submitted during the adjudicatory hearing, (3) the developer's Wildlife Habitat Replication Plan approved by the Department failed to show replication areas equal in size and location to the Wildlife Habitat Impact Areas destroyed or otherwise altered by the project on both the lower and upper floodplain of BLSF,

and (4) the developer's Wildlife Habitat Replication Plan approved by the Department failed to provide the same quality and quantity of wildlife habitat features as the Wildlife Habitat Impact Areas destroyed or otherwise altered by the project as required by the performance standards of the regulations.

26. At the beginning of the hearing on March 10, 2009, Ms. Roby announced that she would maintain a record of the hearing by means of a tape recorder from which a written transcription could be prepared. Plaintiffs requested permission to video tape the hearing, which Ms. Roby denied. Plaintiffs then sought permission to make an audio tape recording of the hearing. The Department's attorney strongly objected to this request arguing that there could be only one record of the hearing which would be the official tape recording made by Ms. Roby. The Plaintiffs' attorney observed that a second recording could be useful as a back-up in the event any portion of Ms. Roby's recording was not available or suitable for transcription. The Department's attorney again strongly objected, contending there was no reason to believe there would be any problems with Ms. Roby's recording and that two recordings of the hearing could result in different written transcripts causing confusion and controversy. Ms. Roby agreed with the Department and ruled that the Plaintiffs could not record the hearing in any manner.

27. The hearing then proceeded for four days on March 10, 2009, April 3, April 27, and May 11, 2009, consisting of approximately twenty-one hours of testimony.

28. During the examination of Ms. Vondrak, the developer's wildlife expert, the Commission's attorney sought to introduce into evidence and question the witness on an email she sent to the Director of the Cambridge Conservation Commission reporting on conversations she had with Ms. Freed, the DEP Case Officer reviewing the developer's appeal, regarding strategy for the Department's issuance of an SOC in conjunction with action by the Cambridge Conservation Commission on the portion of the project in Cambridge. The attorney for the Department objected to the introduction of the email and any questions regarding the email. Ms. Roby sustained the objection.

29. At the hearing, the pre-filed testimony of Plaintiffs' expert wildlife habitat witnesses was not challenged by the developer or the Department. Through the extensive four-day cross-examination and redirect examination of the developer's wildlife habitat expert witnesses, Ms. Freed, and the Presiding Officer's own examination of one of the Plaintiffs' wildlife habitat experts, the deficiencies in the developer's wildlife habitat plans and the Department's errors in approving them were substantiated. Based on all the evidence, the Plaintiffs showed by a preponderance of the credible evidence that the project will adversely affect the wildlife habitats in both the lower and upper floodplain of the BLSF, a resource area protected by the Act, and that the replication areas are inadequate in quantity and quality to meet the performance standards of the regulations.

30. Post-Hearing Briefs were submitted by the parties prior to June 8, 2009.

31. On August 19, 2009, Ms. Smallcomb, the Assistant Case Officer, advised the parties that Ms. Roby would issue her Recommended Final Decision by the

end of the month. The Decision was not issued as scheduled or at any time in 2009. On February 18, 2010, Ms. Anne Hartley, the Case Administrator, advised that the Recommended Final Decision would be issued by March 10, 2010. This date also passed with no Final Decision being issued. Finally on March 22, 2010, nine months after the hearing was completed, and on the day Ms. Roby was transferred from the Office of Appeals and Dispute Resolution to the General Counsel's office, Ms. Roby issued her Recommended Final Decision, in which she said: "Based on the discretion accorded me by G.L. c.30A, §11(2) and 310 CMR 1.01(13)(h)(1), I have considered the sworn pre-filed testimony of the parties respective witnesses and the documentary evidence referenced in their testimony to make my findings and recommendations in this Final Decision." Nothing in the authority Ms. Roby cited gives her the discretion to ignore the four days of cross-examination of the witnesses who filed written testimony before the hearing and base her decision solely on the pre-filed written testimony. To do so is to leave unchallenged the pre-filed testimony which is fundamentally unfair to the cross-examining parties. The right of cross-examination is a basic right in trial procedure.

32. On March 30, 2010, the Department and the developer filed a "Joint Motion to Correct Errata in Recommended Final Decision," setting forth numerous changes to the Final Decision. Plaintiffs and the Commission filed Oppositions to the Motion.

33. On April 2, 2010, Ms. Roby issued a Notice of Correction of her March 22, 2010 Decision, including all of the changes the Department and the developer

urged her to make and additionally making her “corrections” which she said “are necessary to a clear reading of my decision.” All of these changes and “corrections” were set forth in a second Recommended Final Decision dated April 2, 2010. On April 22, 2010, Ms. Roby issued a Notice stating that her March 22, 2010 Decision was “inaccurate” and had been “inadvertently transmitted” and that her April 2, 2010 Decision was the “accurate rendition.” However, the April Decision still contained many errors, including confusion as to which witnesses testified for which parties. The so-called “accurate” decision was based solely on the pre-filed testimony and exhibits, with no reference to the four days of the hearing at which the witnesses were extensively cross-examined on their pre-filed written testimony.

34. In neither the “inaccurate” nor the “accurate rendition” of her Recommended Decision did Ms. Roby make any reference to the extensive testimony on cross-examination of the developer’s expert wildlife habitat witnesses or to Ms. Freed’s testimony regarding the wildlife habitat issues raised by Plaintiffs as set forth in paragraph 25 hereof. Instead, after describing in detail the qualifications of all the witnesses as shown on their resumés, she concluded, based solely on the pre-filed testimony of the developer’s witnesses, who she identified as Albrecht, Howard and Vondrak, and without considering the cross-examination of these witnesses: “the likelihood that the project complies with [citing some of the regulations applicable to protection of wildlife habitats] rises to a level meriting some weight.” She did not indicate what level the written testimony of these witnesses reached or the weight she gave to their testimony.

However, she could not have assigned any weight to the testimony of Mr. Albrecht, an engineer, who offered no testimony on the wildlife habitat issues. In neither version of her Decision did Ms. Roby include a determination of each issue of fact or law necessary to support her Decision as required by M.G.L. c. 30A, §11(8).

35. On May 13, 2010, Commissioner Laurie Burt issued her Final Decision adopting Ms. Roby's Recommended Final Decision without identifying which of the two versions she was adopting. The Commissioner provided no explanation for Ms. Roby's failure to consider any of the cross-examination testimony given at the four day hearing, to address any of the wildlife habitat issues raised by Plaintiffs, and to account for Ms. Roby mistaking Mr. Albrecht as a witness for the developer on the wildlife habitat issues, when his engineering experience was focused on flooding and other water issues. Copies of the Commissioner's one-page Final Decision and the Presiding Officer's April 2, 2010 Recommended Final Decision, which Ms. Roby advises is the "accurate rendition," are attached hereto as Exhibit A.

36. After the first day of the hearing in March, 2009, Plaintiffs' attorney arranged with Ms. Smallcomb to obtain copies of three tapes which she represented to be all of the tapes for that day. Plaintiffs' attorney placed the tapes in a file without listening to them. In November, 2009, Plaintiffs' attorney asked Ms. Smallcomb about obtaining copies of the tapes for the remaining three days of the hearing to which. Ms. Smallcomb replied that there were three tapes. Plaintiffs' attorney assumed that these were the same three tapes that he

previously obtained and asked Ms. Smallcomb about the additional tapes. Ms. Smallcomb said there were only three tapes. Thereafter, she did not reply to several emails and telephone calls inquiring about the missing hearing tapes.

37. After Ms. Roby issued her Recommended Final Decision on March 22, 2010, the Plaintiffs' attorney again raised the issue of the missing tapes. Case Administrator Hartley responded by advising that the three tapes identified by Ms. Smallcomb were in fact tapes of another proceeding and that she had in her office eight tapes (8) of the hearing in this case that she received from Ms. Roby, each of which was marked as containing one hour of recording. Plaintiffs attorney pointed out to Ms. Hartley that the hearing was held over four days covering at least twenty-one hours and therefore many hours of the hearing appeared to be unaccounted for. Ms. Hartley responded that there were no additional tapes and she had no further information.

38. On May 20, 2010, Plaintiffs obtained from the Department's duplicating service a DVD which was represented as including the eight (8) tapes delivered by Ms. Hartley. The receipt for the DVD indicated a total running time of fourteen (14) hours, instead of eight hours as indicated on the tapes. Plaintiffs' preliminary review of this DVD indicates that it pertains to the second, third, and fourth days of the hearing. However, Plaintiffs have made no assessment of the completeness or sound quality of the DVD. Plaintiffs attorney's assistant then listened to portions of the three tapes Plaintiffs obtained in March, 2009 and determined that they appear to pertain to the first day of the hearing in this case. Plaintiffs' attorney so advised Ms. Hartley and returned the three tapes to her.

COUNT I

(The Applicant's Wildlife Habitat evaluation was materially incomplete by omitting the upper floodplain of BLSF.)

39. Plaintiffs repeat and reallege the allegations in paragraph 1-38 hereof as though fully set forth herein at length.

40. The regulations require that the developer prepare a wildlife habitat evaluation for the entire resource area, which in this case was BLSF. However, the developer's wildlife habitat consultant only prepared an evaluation for the lower floodplain of BLSF.

41. The developer and the Department agreed that the amount of important wildlife habitat that the project will alter is 11,472 sf in the lower floodplain and 5,440 sf in the upper floodplain. The Presiding Officer made no finding of the amount of wildlife habitat on the upper floodplain the project will destroy, but she dismissed this issue by asserting that whatever the amount it was insignificant in comparison with the total wildlife habitat.

42. The developer's wildlife habitat experts testified that the same significant wildlife habitat features that exist on the lower floodplain also exist on the upper floodplain. Notwithstanding these findings, the developer refused to conduct a wildlife habitat evaluation of the upper floodplain, although the Commission requested in writing that the developer do so.

43. Although Ms. Freed testified that she had knowledge that the Commission had requested the developer in writing to provide an evaluation of the project impacts on wildlife habitats in the upper floodplain of BLSF and that her usual

procedure was to require project proponents to comply with requests of conservation commissions, she provided no reason for not doing so in this case.

44. By refusing to conduct a wildlife habitat evaluation of the impacts of the project on the wildlife habitats in the upper floodplain of BLSF, the developer's analysis of the actual impacts of the project on wildlife habitats was woefully incomplete.

45. The Presiding Officer erred in holding that an evaluation of the wildlife habitat of the upper floodplain of BLSF was not required because the 5,000 sf of wildlife habitat that the project will alter is "a small percentage of the site."

46. By reason of the foregoing, the Department improperly approved the developer's Wildlife Habitat Impact Areas Plan which did not include an evaluation of the project impacts on the wildlife habitats in the upper floodplain of BLSF. The Presiding Officer's decision upholding the Department's action was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT II

(The Department approved an inaccurate Wildlife Habitat Impact Area Plan for the lower floodplain.)

47. Plaintiffs repeat and reallege the allegations in paragraph 1-38 hereof as though fully set forth herein at length.

48. The Wildlife Habitat Impact Area Plan for the lower floodplain of BLSF submitted by the developer and approved by the Department stated that the total Wildlife Habitat Impact Area on the lower floodplain is 8,830 sf. However, the approved plan did not include an additional 2,642 sf of Wildlife Habitat in the

lower floodplain that the project will alter. This additional area was first identified as Impact Area E on a Wildlife Habitat Impact Area Plan submitted by the developer's wildlife habitat expert during the adjudicatory hearing, which impact area was not indicated on any wildlife habitat document submitted to the Commission. Thus, the actual total Wildlife Habitat Impact Area the project will alter in the lower floodplain was 11,472 sf. The Department's reviewing officer, Rachel Freed, admitted on cross-examination that the additional 2,642 sf marked Area E on the revised plan was a 30% increase in the total wildlife habitat area in the lower floodplain that the project will alter. However, Ms. Freed called this increase a "minor adjustment" and said there was no need to amend the SOC because the inaccurate 6/23/08 approved plan was the "official plan" that governed the project.

49. The Department's issuance of the SOC based on of the grossly inaccurate 6/23/08 Wildlife Habitat Impact Area Plan on the lower floodplain of BLSF was improper and the Presiding Officer's decision upholding the Department's action was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT III

(Failure to meet performance standards for replacing altered wildlife habitats with an equal amount of replication area)

50. Plaintiffs repeat and reallege the allegations in paragraphs 1-38 hereof as though fully set forth herein at length.

51. The performance standards require that the Wildlife Habitat Replication Areas be equal to or greater than the size of the Wildlife Habitat Area altered by the project.

52. The developer's Wildlife Habitat Replication Area Plan shows that the total replacement area will be 15,896 sf whereas the Wildlife Habitat Area altered is 16,912 sf (11,472 sf in the lower floodplain and 5,440 sf in the upper floodplain), which is 1,016 sf greater than the total Replication Area.

53. The Department's issuance of the SOC based on a Wildlife Habitat Plan that did not provide the amount of Wildlife Habitat Replication Areas as required by the performance standard was improper and the Presiding Officer's decision upholding the Department's action was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT IV

(Failure to meet performance standard that replication area have the same features as the destroyed areas)

54. Plaintiffs repeat and reallege the allegations in paragraphs 1-38 hereof as though fully set forth herein at length.

55. The Department's Regulations, 310 CMR 10.60 (3) require that the Replication Areas be located in the same proximity to the waterways as the destroyed habitat areas and that they contain the same type and quality of wildlife habitat features as the wildlife habitat features destroyed or otherwise altered by the project. The wildlife habitat replication areas do not meet the

performance standard in the following respects:

a. Wildlife Habitat Areas B and D as shown on the plan are located about 500 feet from Replication Areas 1 and 3 on opposite sides of the project site and therefore are not in the “same general area” as the lost areas. Nor do the Replication Areas meet the requirement that the replacement area be “approximately the same distance from the water body or waterway as the lost areas.” Wildlife Impact Areas B and D are located about 240 feet and 320 feet, respectively, from Little River, whereas Replication Areas 1 and 3 are located 880 feet and 440 feet, respectively, from Little River.

b. The existing open wildlife flight corridor for birds between uplands and wetlands is not replicated by the replacement areas that are located adjacent to four five-story buildings that will obstruct the free passage of wildlife through the area that they now enjoy.

c. The darkness and quiet provided by the Silver Maple Forest for many avian species is not replicated in the replacement area located near the 299 housing units in five four-story buildings with associated parking lots and walkways that will emit bright lights that are detrimental to the survival of the wildlife in their habitats.

56. The Presiding Officer did not address any of the deficiencies in the Replication Plan as identified in paragraph 55 hereof. At the hearing, the Plaintiffs presented evidence through their witnesses and as elicited from the developer’s witnesses and Ms. Freed on cross-examination showing that the Wildlife Habitat Replication Plan did not meet the performance standards. The

Presiding Officer did not refer to any of this evidence in her Decision, but simply asserted that: “Cambridge Partners’ replication plan is powerful evidence of compliance with applicable regulations.”

57. The Department’s issuance of an SOC based on a Wildlife Habitat Replication Plan that does not meet the performance standards was improper and the Presiding Officer’s decision upholding the Department’s action was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

COUNT V

(Procedural Irregularities)

58. Plaintiffs repeat and reallege the allegations in paragraph 1-38 as though fully set forth herein at length.

59. The Presiding Officer erred in failing to give any consideration to the cross-examination testimony of the developer’s witnesses and Ms. Freed given over the four-day hearing at which information was elicited supportive of the Plaintiffs’ case, which together with the evidence presented by Plaintiffs through their own expert witnesses demonstrated by a preponderance of the evidence that the developer’s plans do not protect the wildlife habitat interests of the Act.

60. The Presiding Officer erred in holding that there is a “likelihood that the project complies” with the standards for protection of wildlife habitats based solely on the pre-filed written testimony of three of the developer’s witnesses, one of whom did not even testify regarding wildlife habitats, which testimony she found merits only “some weight.” In so doing, the Presiding Officer impermissibly

gave no consideration to the extensive cross-examination testimony of the developer's witnesses at the hearing.

61. The Presiding Officer's finding that the testimony of the developer's experts on the issue of whether the Wildlife Habitat Plan complies with the regulatory requirements merits "some weight" does not meet the "substantial evidence" standard, and therefore, the Presiding Officer's decision that the Plan meets the requirements is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

62. The Decision does not include a determination of each issue of fact or law necessary to the Decision and therefore does not comply with M.G.L. c.30A, §11(8).

63. The Presiding Officer erred in excluding questions regarding the improper communications between an expert witness for the developer and the Department official responsible for deciding the developer's appeal of the Commission's Order. Such communications during the time the case was being reviewed by the Department official who issued the SOC had the appearance of impropriety and suggested a relationship between the decision-maker and one party to the proceeding that could be prejudicial to an impartial decision by the Department.

64. Plaintiffs cannot determine at this time whether the Presiding Officer maintained a full and comprehensible record of the hearing. If the Department is unable to provide such a record, Plaintiffs will be deprived of the ability to provide a full transcript of the record to this Court as required by Superior Court Standing

Order 1-96.2 when, as here, Plaintiffs are alleging that the Department's decision is unsupported by substantial evidence and is arbitrary, capricious, and an abuse of discretion.

65. The Presiding Officer erred in denying Plaintiffs requests made before any testimony was given to provide a back-up record of the hearing from which a transcript could be prepared in the event the Presiding Officer's recording was insufficient for preparation of a full and accurate transcript of the hearing.

66. For the foregoing reasons, the Presiding Officer's Recommended Final Decision and the Commissioner's adoption of that Decision as her Final Decision were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

WHEREFORE, Plaintiffs pray that this Court enter an Order as follows:

1. Declaring that the Final Decision issued by the Commissioner of the Department of Environmental Protection adopting the Recommended Decision of the Presiding Officer 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 Commissioner's Final Decision adopting the Presiding Officer's Recommended Final Decision be vacated, and of no further force and effect;

3. Ordering the Superceding Order of Conditions issued by the Department on October 31, 2008 be vacated and of no further force and effect;

4. Ordering a speedy completion of the pleadings, preparation of the administrative record and issuance of a final decision;

5. Enjoining defendant AP Cambridge Partners II, LLC from taking any action toward development of the project site, including tree cutting, wetlands filling, and other land clearing activities in preparation for construction of the 299 unit housing project or any portion thereof,

6. Awarding Plaintiffs their costs of suit, including reasonable expert witnesses and attorney's fees; and

7. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully Submitted
Plaintiffs, by their counsel

_____
Thomas B. Bracken
BBO# 052920
33 Mt. Vernon Street
Boston, MA 02108
(617) 742-4950

Dated: June 10, 2010