COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NOs. 2010-2205 & 2010-2206
(consolidated)

COALITION TO PRESERVE THE BELMONT UPLANDS AND WINN BROOK NEIGHBORHOOD, et al.[1]

vs.

LAURIE BURT,[2] **AS SHE IS COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION & another**[3]

consolidated with

BELMONT CONSERVATION COMMISSION

vs.

LAURIE BURT,[4] **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION & another**[5]

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

The Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood, Friends of Alewife Reservation, Inc., and various Belmont residents (collectively, the "Coalition"), and the Belmont Conservation Commission ("Commission"), brought separate actions against the

[1] Friends of Alewife Reservation, Inc. ("FAR"); 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.

[2] Kenneth L. Kimmell has been substituted for Laurie Burt as the Commissioner of the Department of Environmental Protection.

[3] AP Cambridge Partners II, LLC.

[4] See footnote 2.

[5] AP Cambridge Partners II, LLC.

defendants, the Department of Environmental Protection ("DEP") and AP Cambridge Partners II, LLC ("AP Cambridge"), pursuant to G. L. c. 30A, challenging the DEP's approval of a superseding order of conditions ("SOC") under the Massachusetts Wetlands Protections Act, G. L. c. 131, § 40 (the "WPA"), for a proposed affordable housing development. The court consolidated the actions on August 25, 2010 (Gershengorn, J.). The Coalition and the Commission have both filed Motions for Judgment on the Pleadings. For the reasons discussed below, the Coalition's motion is **DENIED** and the Commission's motion is **DENIED** in part and **ALLOWED** in part.

BACKGROUND

The administrative record reveals the following. On June 12, 2007, AP Cambridge filed a Notice of Intent ("NOI") with the Commission to construct a 299-unit housing complex with associated parking areas, utilities, stormwater management facilities, grading, wildlife habitat mitigation, and compensatory flood storage areas (the "Project"). The Project is proposed on 15.6 acres of land located on Frontage Road and Acorn Park in Belmont and Cambridge (the "Property").[6] The Commission held public hearings on the NOI on June 26, 2007, August 7, 2007, September 11, 2007, October 2, 2007, November 5, 2007, and December 4, 2007. On December 21, 2007, the Commission issued an Order of Conditions ("OOC") denying the proposed Project. The Commission found that the proposed work did not comply with certain standards of the DEP's Stormwater Management Policy and certain provisions of the WPA's regulations and that the information submitted by AP Cambridge was insufficient to "describe the site, the work, and the effect of the work on the interests identified in [the WPA]."

On January 7, 2008, AP Cambridge filed a Request for Superseding Order of Conditions

[6] Approximately 13 of those acres are in Belmont.

("SOC") with the DEP. On October 31, 2008, the DEP issued an SOC approving the Project, subject to certain conditions.

The Commission appealed the DEP's SOC and the Coalition was permitted to intervene. At a Pre-Screening Hearing, the parties agreed that the presiding officer would resolve the following issues: (1) whether the Project meets the requirements of 310 CMR 10.57(4)(a), for alterations to Bordering Lands Subject to Flooding ("BLSF"), including the requirements of 10.60(3), for the restoration and replication of altered wildlife habitat; and (2) whether the Project's stormwater management system complies with 310 CMR 10.05(6)(b) and the Stormwater Management Standards outlined in 310 CMR 10.05(6)(k)-(q).[7]

Prior to the hearing, nine witnesses submitted written testimony. All of those witnesses testified at the hearing and eight of them were cross-examined. Thirty-seven exhibits were offered into evidence.

On April 2, 2010, Presiding Officer Beverly Coles-Roby ("Presiding Officer") issued a Recommended Final Decision recommending that the DEP dismiss the appeal and affirm the SOC.[8]

---

[7] Two other pre-determined issues, (1) whether the OOC issued by the Commission can be considered a denial for lack of information pursuant to 310 CMR 10.05(6)(c), and (2) whether the DEP complied with 310 CMR 10.05(6)(c) and if so, then did it comply with 310 CMR 10.05(7)(h)(3), were also decided by the Presiding Officer. The Presiding Officer's determinations with respect to those two issues were not raised by the parties in this appeal.

[8] The Presiding Officer originally issued her Recommended Final Decision on March 22, 2010. On March 30, 2010, AP Cambridge and the DEP filed a Joint Motion of Applicant and DEP to Correct Errata in Recommended Final Decision, setting forth corrections to errors they believed were contained in the decision. On April 2, 2010, the Presiding Officer issued a Notice of Correction of Typographical Errors in Recommended Final Decision setting forth her "own corrections only such as are necessary to a clear reading of my decision" along with her revised Recommended Final Decision. On April 22, 2010, the Presiding Officer further explained:

> "On March 22, 2010, an inaccurate version of the Recommended Final Decision in this matter was inadvertently transmitted to the parties. On that same date, I commenced

The Presiding Officer stated: "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." With regard to the relevant pre-determined issues, the Presiding Officer concluded that the Project meets the requirements of 310 CMR 10.57(4)(a), for alterations to BLSF, including the requirements of 10.60(3), for the restoration and replication of altered wildlife habitat and that the Project's stormwater management system complies with 310 CMR 10.05(6)(b) and 310 CMR 10.05(6)(k)-(q).

The Commissioner of the DEP adopted the Recommended Final Decision on May 13, 2010 and the Coalition and the Commission appealed pursuant to G. L. c. 30A. Neither the Coalition nor the Commission submitted a transcript of the proceedings for inclusion in the Administrative Record as required by Superior Court Standing Order 1-96. AP Cambridge submitted portions of the transcript.[9]

DISCUSSION

The party appealing an administrative decision pursuant to G. L. c. 30A, § 14 bears the burden of demonstrating its invalidity and that its substantial rights have been prejudiced. G. L. c. 30A, § 14(7); Healer v. Department of Envtl. Prot., 75 Mass. App. Ct. 8, 12-13 (2009). A court's

---

work on a corrected version of the document. On March 30, 2010, [the DEP and AP Cambridge] filed a 'Joint Motion of Applicant and DEP to Correct Errata in Recommended Final Decision.' On April 2, 2010, I issued the accurate rendition of my Recommended Final Decision which superseded the March 22, 2010, version."

[9] The Coalition's Motion to Strike the portions of the administrative record filed by AP Cambridge is denied. See Superior Court Standing Order 1-96 ("Any party seeking to defend the agency's decision as supported by substantial evidence or as not arbitrary or capricious, or is not an abuse of discretion shall have an affirmative obligation to provide the court with a copy of the transcript or portion thereof in support of its position.").

review of a hearing examiner's decision is narrow, i.e., is the decision unsupported by substantial evidence, arbitrary or capricious, or otherwise not in accordance with the law. G. L. c. 30A, § 14(7). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." Cobble v. Commissioner of Dep't of Social Servs., 430 Mass. 385, 390 (1999); G. L. c. 30A, § 1(6). The court must consider "the entire record and take into account whatever detracts from the weight of the evidence," but should not "make a de novo determination of the facts or draw different inferences from the facts found by the agency." Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 401 Mass. 347, 351 (1987).

In reviewing the board's decision, this court is "required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.'" Iodice v. Architectural Access Bd., 424 Mass. 370, 375-376 (1997), quoting G. L. c. 30A, § 14(7). See also Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595 (1992) (citations omitted) (noting that an administrative agency has "considerable leeway in interpreting a statute it is charged with enforcing"). "If [an] agency has, in the discretionary exercise of its expertise, made a 'choice between two fairly conflicting views,' and its selection reflects reasonable evidence, [a] court may not displace [the agency's] choice . . . even though the court would justifiably have made a different choice had the matter been before it de novo." Lisbon v. Contributory Ret. Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996) (citations omitted); see Embers of Salisbury v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988) (agency is regarded as "the sole judge of the credibility and weight of evidence before it"). However, "to the extent that an agency determination involves a question of law, it is subject to de novo review." Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass.

App. Ct. 470, 473 (1989) (citations and quotation omitted).

As a preliminary matter, the plaintiffs have waived any argument that the DEP's decision is unsupported by substantial evidence because they did not submit transcripts, or any portions thereof, from the hearings as required by Superior Court Standing Order 1-96. See Covell v. Department of Social Servs., 439 Mass. 766, 782 (2003) ("That a transcript must be submitted to support a claim that the evidence was insufficient is not some hypertechnical requirement, but a reflection of the fact that resolution of such a claim requires the reviewing court to see the entirety of the evidence that was presented."). Therefore, the review is limited to determining whether the DEP's decision is marred by legal error or is otherwise arbitrary, capricious, or an abuse of discretion. United Steelworkers v. Employment Relations, 74 Mass. App. Ct. 656, 661 (2009); cf. Covell, 439 Mass. at 783 (holding that department should prevail based upon inadequate record submitted by plaintiff but ultimately disposing of plaintiff's claims based upon sufficient evidence in the underlying record); Forman v. Director of Office of Medicaid, 79 Mass. App. Ct. 218, 223 n.5 (2011) (stating that because available record before the court "sufficiently demonstrates that the board's decision was supported by substantial evidence, we need not depend on [the failure to submit a transcript] to decide this case").

I. The Coalition's Arguments[10]

(1) Cross-examination testimony

The Coalition argues that the decision is based on unlawful procedure because the Presiding Officer failed to consider, and make findings with respect to, cross-examination testimony from the hearing. Specifically, the Coalition takes issue with the Presiding Officer's statement that she "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" and that she did not refer anywhere in her decision to testimony given at the hearing. The Coalition, however, has not submitted the transcripts from the hearing such that the court can determine what testimony, if any, the Presiding Officer allegedly ignored, and its significance. See Attorney Gen. v. Commissioner of Ins., 450 Mass. 311, 323 (2008) (plaintiff must show that substantial rights were prejudiced by absence of explicit discussion in decision); cf. Catlin v. Board of Registration of Architects, 414 Mass. 1, 6-7 (1992), citing G. L. c. 30A, § 14(7) (claim that board failed to review certain evidence; court reviewed evidence and found that it did not contain any information which might have produced a different result and therefore appealing party suffered no harm). It is ironic that the Coalition states that it did not request a transcript because "it is irrelevant to this appeal," but then cites numerous decisions which state that a reviewing court must consider the **entire**

---

[10] The Coalition and AP Cambridge briefly raise the issue of standing. As the case law indicates that once a party is permitted to fully participate in the administrative proceeding as an intervenor, it is aggrieved by an adverse decision and entitled to seek judicial review of the decision. Thus, the Coalition has standing. See generally Sturbridge Bd. of Health v. O'Leary, Civil Action No. 2008-1432 (Worcester Super. Ct. Feb. 4, 2009) (Kern, J.) (discussing case law); cf. Healer v. Department of Envtl. Prot., 73 Mass. App. Ct. 714, 719 n.6 (2009) (rejecting contention that plaintiffs lacked standing "for the reason, if no other, that the act provides that such claims may be brought by any ten residents of the town or city in which the land at issue is located"), citing G. L. c. 131, § 40, nineteenth par.

administrative record. See Coalition's Memorandum in Support of Motion for Judgment on the Pleadings, page 9.

(2) Wildlife replication plan

The Coalition contends that the decision was based on unlawful procedure because the Presiding Officer failed to make findings as required by G. L. c. 30A, § 11(8) to support her conclusion that AP Cambridge's wildlife replication plan complies with 310 CMR 10.60(3).[11] The court disagrees.

Julie Vondrak ("Vondrak") and Michael Howard ("Howard") testified on behalf of AP Cambridge that the Project's impact extended to only one resource area, BLSF. Pursuant to 310 CMR 10.57(4)(a)(3), work in those portions of BLSF found to be

> significant to the protection of wildlife habitat shall not impair its capacity to provide important wildlife habitat functions. . . . . [A] project . . . that (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be

---

[11] 310 Code of Massachusetts Regulations 10.60(3) states, in relevant part:

> Restoration and Replication Altered Habitat. Alterations of wildlife habitat characteristics beyond permissible thresholds may be restored onsite or replicated offsite in accordance with the following general conditions, and any additional conditions the issuing authority deems necessary to insure that the standard in 310 CMR 10.60 (1)(a) is satisfied:
>
> > (a) the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area"); . . .
> >
> > (c) the replacement area shall be located within the same general area as the lost area. . . . 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. . . .
> >
> > (d) interspersion and diversity of vegetation, water and other wildlife habitat 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 area; . . . .

> significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold, or altering vernal pool habitat, may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60.

Vondrak and Howard testified that there is a total of approximately 118,790 square feet of the lower floodplain that is likely to be significant to wildlife habitat.[12] Of this total, only 11,032 square feet (about 9%)[13] will be altered by the proposed work. The remaining 107.758 square feet (91%) will not be affected. Further, Vondrak and Howard conducted a wildlife habitat evaluation in accordance with 310 CMR 10.60 and DEP's 2006 *Wildlife Habitat Protection Guidance for Inland Wetlands*, which provides guidance on identifying important wildlife habitat features within impacted resource areas. Vondrak and Howard opined that the proposed lower floodplain alterations will not substantially reduce the capacity of the lower floodplain to provide important wildlife habitat functions because the important features identified in the wildlife habitat study are very common on the site, so that the number of habitat features lost is insignificant when compared to the number of similar habitat features that will remain in the approximately 91% of undisturbed lower floodplain. See 310 CMR 10.60(1)(a) (alterations become adverse when they substantially reduce site's capacity to provide certain important wildlife habitat functions).

Nonetheless, Vondrak and Howard stated that they designed the Project to comply with the general restoration and replication conditions of 310 CMR 10.60(3), including designing wildlife habitat replication and restoration areas that incorporate the habitat features to be impacted by work

---

[12] Howard testified that the Regulations divide the BLSF into two sections - the lower floodplain and the upper floodplain and that there is a regulatory presumption that wildlife habitat is significant only in the lower floodplain.

[13] Specifically, 8,390 square feet of BLSF will be altered and 2,642 square feet of BLSF will be temporarily altered by the Project.

in the lower floodplain. Specifically, approximately 15,896 square feet of wildlife habitat replication is being created to mitigate the approximate 11,032 square feet of lost features in the lower floodplain and an additional 17,840 square feet of habitat restoration and enhancement will be provided. See 310 CMR 10.60(3)(a). In addition, each replication area has a detailed planting plan to replicate the habitat functions in the altered areas. The replication areas were designed to incorporate important shelter and food producing native plant species (e.g., raspberry and blackberry brambles) that were identified in the impact areas. The planting plan also introduces several new native food and shelter producing species (e.g., gray dogwood, highbush blueberry, winterberry, etc.). Further, native species within the impact areas (e.g., red maple, silver maple, and grey birch) are incorporated into the replication design to reflect and build on existing conditions. See 310 CMR 10.60(3)(d).

The Presiding Officer credited the testimony of Howard and Vondrak because of their "numerous reports based on calculations accepted as standard industry practice."[14] The Presiding Officer concluded that their analysis combined with the SOC's Special Conditions, indicates that the Project complies with the requirements of 310 CMR 10.60(3). Thus, the Presiding Officer made adequate findings to support her conclusion that AP Cambridge's wildlife replication plan complies with 310 CMR 10.60(3).

---

[14] The Presiding Officer did not credit any of the witnesses presented by the Coalition and/or the Commission. The Presiding Officer found that Charles Katuska's testimony - that work within the 100-foot buffer zone to bordering vegetated wetlands ("BVW") will directly and adversely impact the protection of wildlife habitat interests - did not meet the required burden because it "leans heavily on the significance of the upper flood plain" and there is no regulatory presumption of protection of wildlife habitat in such areas. The Presiding Officer also did not credit the testimony of Ellen Mass, president of FAR, because it lacked supporting data. Finally, she did not credit the testimony of Patrick Fairbain because he did not undertake a wildlife evaluation of the site.

(3) Regulations

The Coalition contends that the Presiding Officer misconstrued the regulations and ignored significant wildlife habitat issues.[15] The Coalition raises four issues:

a. Upper floodplain

The Coalition argues that the Presiding Officer committed an error of law by not finding an additional 5,440 square feet on the upper floodplain significant to wildlife habitat. Nothing in the regulations, however, requires the DEP to find that land in the upper floodplain is significant to the wildlife habitat interests protected by the WPA. The regulations specify that the only BLSF presumed to be "significant to the protection of wildlife habitat" are "areas on the ten year floodplain or within 100 feet of the bank or bordering vegetated wetland" (i.e., the lower floodplain). 310 CMR 10.57(1)(a)(3); see also 310 CMR 10.57(3) ("Where a project involves removing, filling, dredging or altering of [BLSF] the issuing authority shall presume that such an area is significant to, and only to, the respective interests specified in 310 CMR 10.57(1)(a) and (b)."). The Coalition cites to the Preface to Wetlands Regulations to Protection of Wildlife Habitat, 1987 Regulatory Revisions ("Preface"), which it attached to its Memorandum in Support of Motion for Judgment on the Pleading. In the Preface, the DEP explains its creation of presumptions of significance. For floodplains, the DEP determined that a presumption of significance for wildlife habitat was warranted only for the lower floodplain, but that "'[i]mportant' floodplain habitat on the upper floodplain may also be protected on a case by case basis where evidence of its existence has been demonstrated, though this area is not presumed to be significant to the protection of wildlife habitat."

[15] As discussed above, the Coalition has waived any substantial evidence argument by failing to submit the transcript. In addition, the court is unable to evaluate any cross-examination testimony because the Coalition did not supply it.

As there is no regulatory presumption for the protection of wildlife habitat interests in the upper floodplain, the Coalition's argument that the Presiding Officer should have considered the effect of the Project on the 5,440 square feet of the upper floodplain is nothing more than an argument that the Presiding Officer should have believed the Coalition's expert testimony over the DEP's expert testimony. As stated above, the court will not disturb the Presiding Officer's credibility choices. Embers of Salisbury, Inc., 401 Mass. at 529; see also Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Sitting Bd., 457 Mass. 663, 691 (2010) (court defers to agency's "reasonable reading" of its own rules).

b. Lower floodplain

The Coalition contends that the Presiding Officer committed an error of law by approving a wildlife replication plan that replaces only 8,930 square feet of wildlife habitat instead of the 11,032 square feet of BLSF that is significant to wildlife habitat and that will be temporarily or permanently altered by the Project. The Presiding Officer found that 11,032 square feet of the lower floodplain that is likely to be significant to wildlife habitat will be altered by the Project. See footnote 13. In addition, the DEP found that "at least 15,896 square feet of wildlife habitat replication" shall be provided. Thus, the DEP's decision satisfies the requirement in 310 CMR 10.60(3)(a) that "the surface of the replacement area to be created ('the replacement area') shall be equal to that of the area that will be lost ('the lost area')."

c. No adverse effects

The Coalition contends that the Presiding Officer committed an error of law because it did not address the "no adverse effects on wildlife habitat" requirement in 310 CMR 10.57(4)(a)(3). See 310 CMR 10.57(4)(a)(3) (requiring that work in portions of BLSF found to be significant to

protection of wildlife habitat shall not impair its capacity to provide important wildlife habitat functions). Specifically, a project that

> (cumulatively) alter(s) up to 10% or 5,000 square feet (whichever is less) of land in this resource area found to be significant to the protection of wildlife habitat, shall not be deemed to impair its capacity to provide important wildlife habitat functions. Additional alterations beyond the above threshold . . . may be permitted if they will have no adverse effects on wildlife habitat, as determined by procedures contained in 310 CMR 10.60.

310 CMR 10.57(4)(a); see 310 CMR 10.60(1)(a) (alterations become adverse when they substantially reduce site's capacity to provide certain important wildlife habitat functions). As the Project will alter 11,032 square feet of wildlife habitat in the lower floodplain, the Presiding Officer had to determine that the alterations will have no adverse effects on wildlife habitat, by following the procedures contained in 310 CMR 10.60. As discussed above, the Presiding Officer credited the testimony of Vondrak and Howard, who both testified that the wildlife replication area complies with the requirements 310 CMR 10.60(3).

d. Performance Standards

The Coalition contends that the Presiding Officer committed an error of law by approving a wildlife replication plan that fails to meet the performance standards in 310 CMR 10.60(3)(a), (c), and (d). As discussed above, the Presiding Officer credited the testimony of Vondrak and Howard, who both testified that the wildlife replication area complies with the requirements 310 CMR 10.60(3).[16]

---

[16] In arguing that the Project failed to meet the requirement of 310 CMR 10.60(3)(c), the Coalition argues that the "lost areas" are farther away from the public roadway than the "replacement areas." 310 Code of Massachusetts Regulations 10.60(3)(c) requires, however, that "[i]n the case of [BLSF] the replacement area shall be located approximately the same distance from the **water body or waterway** as the lost area. . . ." (emphasis added).

II. The Commission's Arguments

The Commission argues that the final decision violates G. L. c. 30A, § 11(8) because it is not "accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision." Specifically, the Commission contends that the DEP failed to (1) make any findings concerning exhibit 35; (2) make any findings concerning the discrepancy between the 2003 and 2007 drainage reports; and (3) properly consider testimony.

Section 11(8) requires an agency to make "subsidiary findings of fact on all issues relevant and material to its decision and to explain its reasons for reaching the conclusion(s) that it has based on those subsidiary findings." Fender v. Contributory Ret. Appeal Bd., 72 Mass. App. Ct. 755, 760 (2008). Although an agency must review all the evidence in the record, "it need only *record* findings which were necessary for it to decide the issue and provide the courts with a basis for judicial review." Catlin, 414 Mass. at 6 (emphasis in original); see Hingham v. Department of Telecomms. & Energy, 433 Mass. 198, 207 (2001) (agency must make all findings necessary to its decision but need not make detailed findings of all evidence presented to it, as long as its findings are sufficiently specific to allow for meaningful review); Box Pond Ass'n v. Energy Facilities Sitting Bd., 435 Mass. 408, 418 (2001) (agency need not refer to all evidence in its decision).

(1) Exhibit 35

Stormwater Management Standard 2 requires that stormwater management systems be designed so that post-development peak discharge rates do not exceed pre-development peak discharge rates. Specifically, controls must be developed for the 2-year and 10-year 24-hour storm events and the 100-year 24-hour storm event must be evaluated to demonstrate that there will not be increased flooding impacts offsite. See 310 CMR 10.05(6)(k)(2).

In determining that the Project complies with Stormwater Management Standard 2, the Presiding Officer relied on David Albrecht's ("Albrecht") testimony. Albrecht testified that based on the SOC's approved stormwater management design, the post-development peak rates of discharge at the points of analysis for the design storms (2-year, 10-year, 25-year, and 100-year) do not exceed the pre-development peak rates of discharge. In addition, Albrecht stated that the Project will not increase off-site flooding impacts in the 100-year 24-hour storm event.[17]

The Commission contends that if the Presiding Officer considered Exhibit 35, she would have realized that the proposed development would increase flooding in nearby homes. Exhibit 35 shows that in a 100-year storm event, runoff from the Project would raise the level of Little Pond by 1/8 of an inch.[18] There is nothing in the record, however, which supports the Commission's contention that the rise of the level of Little Pond will increase flooding in nearby homes. In fact, when asked about Exhibit 35 at the hearing, Albrecht testified that the added volume into Little Pond during the 100-year storm event would not impact the people living around Little Pond because "the water, the additional volume generated from the proposed project will discharge into Little Pond and Little River and be downstream long before the 100-year storm, the 100-year flood event happens . . . . Everything is up – everything is in and it's downstream and gone."[19] The Presiding Officer

---

[17] The court acknowledges that the Presiding Officer did not specifically state Albrecht's conclusion that the Project will not increase off-site flooding impacts in the 100-year 24-hour storm event.

[18] The Commission contends that Exhibit 35 shows that in a 100-year storm event, the developed site would cause 22% more runoff to enter Little Pond than the undeveloped site.

[19] Albrecht also refers back to his earlier response where he stated: "[O]ur water is in Little Pond or Little River so much sooner than water elsewhere in the system that it's downstream and gone. So when we talk about 100-year flood events and a 100-year storm from our site, our site enters Little River and is gone long before this starts to rise to the 100-year flood

credited Albrecht's testimony, including his determination that there would not be a post-development increase in off-site flooding impacts in the 100-year 24-hour storm event. This is consistent with his testimony regarding Exhibit 35 - that the added volume into Little Pond from the development would not impact the people living around Little Pond in the 100-year storm event. Thus, the Commission has failed to show that its substantial rights were prejudiced by the absence of an explicit discussion of Exhibit 35 in the DEP's decision. See Attorney Gen., 450 Mass. at 323; Box Pond Ass'n, 435 Mass. at 418 (agency need not refer to all evidence in its decision); Catlin, 414 Mass. at 6 (decision by agency "not to refer in a decision to a particular piece of evidence does not imply the failure to consider that evidence when ruling on the issue").

(2) 2003 and 2007 drainage reports

The Commission contends that the Presiding Officer failed to make factual findings regarding the discrepancy between a 2003 drainage report, filed when AP Cambridge sought permission to build an office park on the property, and the 2007 drainage report submitted for this Project. The 2003 drainage report, however, was not part of the record before the DEP nor has the Commission sought to present it as additional evidence before the court. See G. L. c. 30A, § 14(5) (review shall be confined to the record unless irregularities in procedure are alleged); David v. Commissioner of Ins., 53 Mass. App. Ct. 162, 165 (2001). The Commission claims that it raised the discrepancy at the hearing and again in its post-hearing brief and thus, the Presiding Officer should have addressed the issue. The Commission, however, has not submitted the transcripts from the hearing, such that the court can evaluate any such testimony regarding the 2003 drainage report. See Attorney Gen., 450 Mass. at 323 (plaintiff must show that substantial rights were prejudiced by absence of explicit

---

elevation."

discussion in decision); cf. Catlin, 414 Mass. at 6-7, citing G. L. c. 30A, § 14(7) (claim that board failed to review certain evidence; court reviewed evidence and found that it did not contain any information which might have produced a different result and therefore appealing party suffered no harm). Further, the Presiding Officer fulfilled her obligations under G. L. c. 30A, § 11(8) to state the reasons for accepting the 2007 drainage report. Specifically, she credited the testimony of Albrecht who described the methodology used in producing and the results obtained from the 2007 drainage report. The DEP is not required to address each and every theory relied on by the Commission. See Weinberg v. Board of Registration in Medicine, 443 Mass. 679, 687 (2005); cf. Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 315-316 (1981) (holding that board's failure to rebut objections to recommended decision not error because G. L. c. 30A, § 11(8) does not specifically require that objections to recommended decision be answered).

(3) Testimony

a. Scott Horsley. Stormwater Management Standard 3 states that "loss of annual recharge to groundwater should be minimized through use of infiltration measures to the maximum extent practicable. The annual recharge from the post-development site should approximate the annual recharge from pre-development or existing site conditions, based on soil types." See 310 CMR 10.05(6)(k)(3). In discussing whether the Project complies with Stormwater Management Standard 3, the Presiding Officer cited to Rachel Freed's ("Freed") ultimate decision that the Project complied with Standard 3. Then the Presiding Officer discussed Albrecht's testimony with regard to Stormwater Management Standard 3. However, she abruptly cut off her recitation of Albrecht's testimony without stating what conclusions Albrecht made. Later in her decision, the Presiding Officer discussed the testimony of Scott Horsley ("Horsley"), who testified on behalf of the

Commission,[20] once again abruptly cutting off that discussion and not accurately stating his conclusions. That is the extent of the Presiding Officer's discussion with respect to Stormwater Management Standard 3. The Presiding Officer never explained whose testimony she credited or why.

"It is for the agency, not the courts, to weigh the credibility of witnesses and to resolve factual disputes" and "a court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Embers of Salisbury, Inc., 401 Mass. at 529. However, a reviewing court may vacate an agency's decision if the decision provides no means of analyzing the agency's assessment of credibility. Fisch v. Board of Registration in Medicine, 437 Mass. 128, 138 (2002); New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 470-471 (1981) ("[E]vidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason."); cf. Pollard v. Conservation Comm'n of Norfolk, 73 Mass. App. Ct. 340, 349 n.10 (2008) (setting out reasons why agency may reject expert's opinion). The purpose of the rule is to guard against arbitrary rulings by administrative agencies. Pollard, 73 Mass. App. Ct. at 349.

Here, the Presiding Officer's findings do not permit a meaningful review of whether the Project complies with Stormwater Management Standard 3. See id. at 350. "While [a court] can conduct a meaningful review of 'a decision of less than ideal clarity if the agency's path may reasonably be discerned,' we will not 'supply a reasoned basis for the agency's actions that the agency itself has not given.'" Costello v. Department of Pub. Util., 391 Mass. 527, 535-536 (1984),

---

[20] The Presiding Officer mistakenly states that Horsley testified on behalf of the Intervenors.

quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285-286 (1974). The Presiding Officer's decision has left the court "unable to determine with any reasonable degree of certainty that its decision was arrived at with fairness and without predisposition" with respect to Stormwater Management Standard 3. Pollard, 73 Mass. App. Ct. at 351; Robinson v. Contributory Ret. Appeal Bd., 20 Mass. App. Ct. 634, 641 (1985) (more complete findings on issue are required for appropriate judicial review).

Thus, the case is remanded to the DEP for further and more complete findings on the limited issue of whether the Project complies with Stormwater Management Standard 3.[21]

b. David Webster. The Presiding Officer also set forth the testimony from the plaintiffs' witness, David Webster ("Webster"). Based on his observations of the site on November 15 and 16, 2007 and December 12, 2008, Webster concluded that "the pre-development peak discharge rate is essentially zero, and this is sufficient to conclude that the calculated post-development peak discharge rate exceeds the pre-development peak discharge rate and that the flood-related interests of the Wetlands Protection Act are not protected."

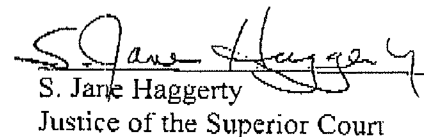
The Presiding Officer stated that she credited Albrecht's testimony over Webster's because Webster's conclusions were based on his observations from brief visits to the sites during atypical storm events and his testimony "speculates without the benefit of supporting data." As the Presiding Officer stated her reasons for crediting Albrecht's testimony over Webster's testimony, the court will not disturb that choice. See Pollard, 73 Mass. App. Ct. at 349 n.10 (citations omitted)

[21] The court notes that contrary to the Commission's contention, Horsley's testimony is not "uncontradicted"; it is specifically contradicted by Albrecht's testimony that the Project complies with Stormwater Management Standard 3. In Pollard, the plaintiff's evidence was "uncontradicted" because no other party presented evidence. 73 Mass. App. Ct. at 346.

("[C]onflicting expert evidence is but one basis upon which an agency might justifiably decline to credit one expert's opinion. An agency may justifiably reject an expert's opinion on the basis of facts in the record that make the rejection of the expert evidence reasonable, including facts of a nontechnical nature. . . . Other instances in which an agency may reasonably reject an expert's opinion are where there are flaws in the methodology or assumptions upon which the opinion depends or where the opinion is based upon conjecture or guesswork.").

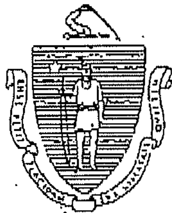
ORDER

For the reasons discussed above, it is hereby **ORDERED** that the Plaintiff's, Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood, Motion for Judgment on the Pleadings be **DENIED** and that the Plaintiff's, Belmont Conservation Commission, Motion for Judgment on the Pleadings be **ALLOWED** only as to whether the Project complies with Stormwater Management Standard 3 and **DENIED** in all other respects. The case is **REMANDED** to the Department of Environmental Protection for further and more complete findings on the limited issue of whether the Project complies with Stormwater Management Standard 3. The decision of the Department of Environmental Protection is **AFFIRMED** in all other respects.



S. Jane Haggerty
Justice of the Superior Court

Dated: December 12, 2011



The Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
200 TRADE CENTER, 2ND FLOOR
WOBURN, MA 01801
781-939-2700

Fax: 781-939-0872

MICHAEL A. SULLIVAN, ESQ.
CLERK/MAGISTRATE

MATTHEW DAY, ESQ.
FIRST ASSISTANT CLERK/MAGISTRATE

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 617-310-9831

TO: Julie Pruitt Barry, Esq.

FROM: Middlesex Superior Court – Arthur DeGuglielmo Assistant Clerk 781-939-2757

DATE: Dec. 14, 2011

Pages:__________ including this cover sheet

COMMENTS: