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

BRIEF FOR PLAINTIFFS-APPELLANTS

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2. Whether the lower court judge erred in ruling that Plaintiffs were required by Standing Order 1-96 to submit a transcript of the hearing testimony to the Court, even though (1) Plaintiffs are not claiming that the decision was unsupported by substantial evidence and therefore is not required by Standing Order 1-96, (2) G.L. c. 30A, §14(4), under which the case was brought, requires the agency to provide a transcript of the hearing, not the appellant and (3) DEP officials misled Plaintiffs as to the availability of the audio tapes of the hearing from which a transcript could be made through the confusing and conflicting information given to Plaintiffs' attorney by DEP officials.
3. Whether the lower court judge erred in holding that the Presiding Officer properly credited the pre-filed written testimony of the developer's expert

witnesses while ignoring the cross-examination testimony of those witnesses which challenged their credibility.

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5. Whether the decisions of the Presiding Officer and lower court judge contain errors of law in concluding that Regulation 310 CMR 10.57(4)(a), which provides that alterations of important wildlife habitat areas on the lower floodplain of Bordering Land Subject to Flooding (BLSF) that are above a specific threshold shall have "no adverse effects" on wildlife habitat, is inapplicable to the developer's project because the amount of habitat altered by the project was deemed "insignificant" by the developer's experts, even though the amount of important wildlife habitat altered will exceed the regulatory threshold;
6. Whether the decisions of the Presiding Officer and the lower court judge contain errors of law in concluding that the wildlife habitat on the upper floodplain is not subject to protection, even though the evidence showed that the wildlife habitat on the upper floodplain of BLSF is similar to the

significant wildlife habitat on the lower floodplain of BLSF; and

7. Whether the lower court judge erred in holding that the developer's plans for replicating the wildlife habitat altered by the project satisfied the requirements of 310 CMR 10.60(3) when the Presiding Officer found that only one of the four conditions for such a plan had been met.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

This is an appeal under the Administrative Procedure Act, G.L. c. 30A, §14 and the Citizens Environmental Suit Act, G.L. c. 214, §7A from the final decision of the Commissioner of the Department of Environmental Protection (the "DEP") adopting the recommended decision of the Presiding Officer, issued after a four-day adjudicatory hearing at which witnesses of the developer and DEP were cross-examined, but whose testimony the Presiding Officer and the Commissioner did not consider in rendering their decisions. Plaintiffs claim that the Presiding Officer's recommended decision and the Commissioner's decision adopting without question the Presiding Officer's recommended decision were based on unlawful procedures, including (1) denial of Plaintiffs per se due process right to conduct meaningful cross-examination, (2) failure of the decision to contain adequate subsidiary findings to

support the ultimate findings and (3) failure of the decision to properly assess the credibility of witnesses. Plaintiffs also claim that the decisions are based on errors of law in misapplying the Wetlands Regulations.

The decision allows AP Cambridge Partners II, LLC (the "developer") to construct five four-story buildings with 299 housing units and parking spaces for 500-600 cars on the Belmont Uplands, an undeveloped natural area adjacent to Little Pond and the Little River in the Town of Belmont that consists of a rare Silver Maple Forest, vegetation, wetlands and floodplains which provide habitats for many diverse species of animals and birds. This project will destroy a large portion of the natural resources on the Belmont Uplands, including the habitats of many species of wildlife, thereby depriving the individual Plaintiffs of their enjoyment in seeing the wildlife that inhabit the Uplands. (Aff't. of Charles Katuska, Aff't. of Patrick Fairbairn and Aff't. of Ellen Mass, A. 1668-82) The project will also increase flooding of the houses around Little Pond where many of the Plaintiffs live and increase sewage backups in their basements due to the Town's already overloaded sewage system. (A. 1532-33, ZBA Decision, paras. 9, 12)[1] The

[1]References to A. are to the Appendix (three volumes) filed herewith, the large photograph (A. 1444) marked Exh. 13 at the hearing shows Little Pond and the Silver

Belmont Conservation Commission (the "BCC") denied the project for failure to protect wildlife habitat and to prevent flooding from stormwater and sewage backups, which interests the Wetlands Protection Act, G.L. c. 131, §40 (the "Act") seeks to protect and prevent.

2. COURSE OF PROCEEDINGS

On June 12, 2007, the developer commenced proceedings under the Act by filing with the BCC a Notice of Intent ("NOI") (A. 911-938) to construct the project in an area subject to the jurisdiction of the Act. The BCC held a public hearing that extended over a six-month period at which technical experts for the developer, the BCC and the Coalition provided testimony on the impacts of the project on the natural resources. On December 21, 2007, the Commission issued an Order denying the project because the developer failed to show that the project would protect several specified interests of the Act, including protection of wildlife habitat and protection of nearby houses from flooding and stormwater runoff. The developer appealed to the DEP, which issued a Superseding Order of Conditions (SOC) on October 31, 2008 approving the project based on revised plans. (A. 178) The BCC filed an appeal and requested an adjudicatory hearing in which Plaintiffs were allowed to intervene. (A., 223-4) Prior to the

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Maple Forest as they now exist and Exh. 14 (A. 1445) depicts the proposed housing development on the site.

hearing, written testimony of nine witnesses was submitted. The Presiding Officer, Beverley Coles-Roby, issued an Order in which she said the purpose of the adjudicatory hearing was for the parties to cross-examine the witnesses on their pre-filed testimony. (A., 236) Plaintiffs and the BCC extensively cross-examined the developer's and the DEP's four witnesses. However, the developer and DEP made a strategic decision not to cross-examine the Plaintiffs' expert wildlife habitat witnesses and the BCC's expert hydrologist witness.

After more than ten months on March 22, 2009, Ms. Roby issued a recommended decision in which she made clear that she considered only the pre-filed written testimony of the witnesses and exhibits and gave no consideration to the live cross-examination testimony. (A., 1361, 1369) On April 2, 2009, Ms. Roby retracted her decision (which she said was incorrect and mistakenly released) and issued what she called a "corrected" decision which included changes the DEP and the developer requested. (Add. D and A. 1405-08, 1418-19) In her second decision, Ms. Roby confirmed that she considered only the written pre-filed testimony and that she gave no consideration to the live testimony at the hearing. (Add. D, p. 9)

Thereafter, DEP Commissioner Burt[2] issued her final decision adopting Ms. Roby's recommended decision, without providing an explanation for Ms. Roby's failure to consider any of the cross-examination testimony, to make subsidiary findings to support her ultimate findings and to properly assess the credibility of the witnesses.

3. DISPOSITION IN THE COURT BELOW

Plaintiffs and the BCC filed separate complaints in Middlesex Superior Court appealing the DEP Commissioner's decision which cases were consolidated. (A. 68) As the time approached for the DEP to file the Administrative Record, as required by M.G.L. c. 30A, §14(4), counsel for the DEP submitted to the parties a draft Assented-to Motion to extend the time to file the Record due to administrative problems in assembling the documents. The DEP counsel said nothing about the need for appellants to provide a transcript of the hearing. The parties assented to the motion which the Court allowed. (A. 69-71) On October 21, 2010, the DEP filed the Administrative Record which DEP's counsel did not indicate was incomplete in any respect, although no transcript of the hearing was included. At various times during the proceedings, the defendants' attorneys' asserted that Plaintiffs were required under Standing

[2] Commissioner Burt was replaced by Kenneth Kimmell and substituted as a defendant on February 24, 2011. (A., 1598-1600)

Order 1-96 to submit to the Court a transcript of the hearing, although Plaintiffs were not claiming that the decision was unsupported by substantial evidence, the only circumstances under which Standing Order 1-96 requires appellants to provide a transcript. The Plaintiffs and the BCC filed Motions for Judgment on the Pleadings. On March 2, 2011 the lower court (Haggerty, J.) conducted a hearing on the Motions, and nine months later on December 12, 2011, Justice Haggerty issued a Memorandum of Decision and Order (Add. C,[3] A. 1632) in the consolidated cases pursuant to which the judge remanded the Commission's case to DEP for further findings and clarification of Ms. Roby's confused decision regarding the project's failure to comply with DEP's Stormwater Management Standard requiring the annual recharge rate post-development to be approximately the same as the pre-development rate. As to Plaintiffs' case, the judge ruled that, by reason of Plaintiffs' failure to submit a transcript of the hearing testimony, Plaintiffs had waived their claim that Ms. Roby's decision was based on unlawful procedures by her failure to consider the testimony. On December 20, 2011 Plaintiffs filed a Notice of Appeal of the judge's December 12 Order. (A. 1657-59) On December 22, 2011, the lower court entered judgment (A. 1655-66) dismissing Plaintiffs' Complaint, from which Plaintiffs

[3] References to Add. are to the Addendum hereto.

filed a Notice of Appeal (A. 1688), which was docketed in this Court on March 27, 2012 in the name of Plaintiff Dzierzeski. This Court entered an Order on April 7, 2012 allowing Plaintiffs' Motion to Waive the additional docketing fees for the other Plaintiffs.

On December 22, 2011 Plaintiffs filed in the lower court a Motion for Stay and Injunction Pending Appeal pursuant to M.G.L. c. 231, §117 and M.R.A.P. 6(a). (A. 1661) On January 27, 2012, Justice Haggerty issued an Order denying Plaintiffs' Motion on the same grounds as set forth in her December 12 decision. (A. 1690) She did not address the irreparable harm issues raised by Plaintiffs. On February 2, 2012 Plaintiffs filed a Notice of Appeal of Judge Haggerty's Order pursuant to G.L. c. 231, §118 and M.R.A.P. 6 to a Single Justice of this Court. (A. 1691-94) On February 27, 2012, the Single Justice (Agnes, J.) issued an Order, without a hearing, denying Plaintiffs' Motion (A. 1695), without addressing the lower court judge's ruling that, by not submitting a transcript of the hearing, Plaintiffs waived their claims of unlawful procedures. (A. 1724) On March 26, 2012, pursuant to Rule 6 of M.R.A.P., Plaintiffs filed a Notice of Appeal of the Single Justice's Order to the full Court. (A. 1724-25) On April 9, 2012, pursuant to Plaintiffs' Motion, this Court entered an Order consolidating the appeal of the Single Justice's Order (Agnes, J.) with the appeal of the lower

court's decision on the merits. (A. 1727) Plaintiffs' arguments on the issue of irreparable harm are contained in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order submitted to the full Court on May 3, 2012 which arguments are not repeated in this brief.

The Commissioner appointed Ms. Roby, the Presiding Officer at the hearing, as the presiding officer for the remand proceeding, although she no longer was a judge in the DEP's Office of Appeals and Dispute Resolution or employed elsewhere by DEP. On March 28, 2012, the Commissioner issued a Final Decision on Remand adopting the recommended decision of Ms. Roby. On March 29, 2012, the BCC filed a Motion for Reconsideration based on the impropriety of Ms. Roby acting on the remand and requesting that she recuse herself from the proceeding. On May 4, 2012, Ms. Roby issued a recommended decision on the BCC's Motion for Reconsideration declining to recuse herself and affirming her original findings which the judge found inaccurate, incomplete and confusing. (Add. C, 17-18) Commissioner Kimmell issued his Final Decision on Reconsideration on the same day adopting Ms. Roby's recommended decision. On June 21, 2012, the BCC filed a Motion to Remand to the DEP the Commissioner's Final Decision on Remand based on Ms. Roby's contradictory findings in her recommended decision and

errors of law. The Court had not acted on the BCC's Motion as of the time this brief was filed.

4. STATEMENT OF FACTS

The Belmont Uplands is an environmentally significant area consisting of a unique Silver Maple Forest, wetlands, floodplains and wildlife habitats for many diverse species of animals and birds. The Forest has been designated by the Commonwealth as a "small river flood plain forest" which, along with the vegetation on the site, serves to absorb and retain stormwaters, thereby mitigating flooding of nearby homes where many of the Plaintiffs live. (A. 277, Fairbairn Pre-Filed Testimony; A. 1668) The Belmont Uplands are surrounded by flooding sources – Little Pond on the west, Little River on the south, an intermittent stream on the north and a marsh on the east that adjoins the 115 acre Alewife Brook Reservation. (A. 1679-80, Mass Aff't., para. 1; A. 348, Mass Pre-Filed Testimony; A. 278-9, Fairbairn Pre-Filed Testimony; Map, Exh. 13, A. 1444; Aerial photo, Exh. 14, A. 1445) During storms the entire lower floodplain on the Belmont Uplands is flooded and the animals living there are driven higher on the site seeking refuge in the upper floodplain. (A. 278-282, Fairbairn Pre-Filed Testimony, paras. 4-5, 8; A. 1672, Fairbairn Aff't., para. 6) The Belmont Uplands and the adjoining Alewife Brook Reservation are ecologically interconnected and comprise the largest

natural resource for wildlife habitat in the Boston area. (Mass Aff't., para. 3-5, A. 1680-82)

Plaintiff Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood[4] consists of the individual Plaintiffs and other residents of Belmont who live near Little Pond. The Plaintiffs enjoy views across the Pond of the Silver Maple Forest (Liu Aff't. submitted to this Court on 5/17/12 with Motion for Reconsideration of Order of Single Justice (Trainor, J.); A. 27-28, Complaint, paras. 7, 9) and enjoy seeing the many species of birds and animals who live there. Plaintiff Friends of Alewife Reservation is a non-profit organization dedicated to the preservation and enhancement of the wildlife existing on the Reservation and Belmont Uplands. (A. 347, Mass Pre-Filed Testimony, paras. 1-2; A. 27, Complaint, para. 8)

In issuing a Chapter 40B Comprehensive Permit to the developer, the Belmont Board of Appeals recognized that the housing project would have negative impacts on the environmental resources of the Belmont Uplands and the residential properties around Little Pond. (A. 1532, para. 9; A. 1536-37, paras. 30-31) However, the Board found that since the Town had not met the statutory goal for "affordable housing" (A. 1531) it was constrained to

[4] The Coalition has been reorganized under M.G.L. c. 180 under the name "Coalition to Preserve the Belmont Uplands and Winn Brook Neighborhood, Inc," the Articles of Organization for which were approved by the Secretary of the Commonwealth on July 12, 2012.

issue the permit. Indeed, the project site would not seem appropriate for affordable housing since it is not close to public transportation, schools or stores that service residential needs. Nor is there adequate capacity in the Town's sewer system in that area to accommodate the increased waste water from the project. (A. 1532, para. 9, 1536-37, paras. 30-31) The Chapter 40B decision contains a Condition (No. 27b) that the developer make a good faith effort to obtain permission from the City of Cambridge to allow the project to tie into the Cambridge sewer system. (A. 1546) Although discussions have taken place with Cambridge officials, no agreement has been reached. However, on June 12, 2012 the DEP issued a permit allowing the project to connect to the Belmont sewer system through the State's collection system.

ARGUMENT

Summary of Argument

Plaintiffs claim that the Presiding Officer violated their per se due process of law right to conduct meaningful cross-examination at the hearing, including having the testimony considered by the agency. (pp. 18-24) Ms. Roby's inadequate assessment of the credibility of the witnesses based solely on the pre-filed testimony of the developer's witnesses, without considering their cross-examination testimony and presumably without observing their demeanor during their

cross-examination, thereon inadequately assessing their credibility further deprived Plaintiffs of their per se due process right to have the credibility of witnesses properly assessed. (pp. 29-42) Ms. Roby did not even adequately assess the credibility of the pre-filed testimony of the developer's witnesses, but simply asserted that she "credited" their opinions because they were based on the "numerous reports" and calculations cited therein without identifying any portion of the reports and calculations that supported their opinions and conclusions. (pp. 32-42) Ms. Roby also failed to make adequate subsidiary findings to support the ultimate findings as she was required to do. (pp. 32-42) Furthermore, Ms. Roby couched her ultimate findings / conclusions with qualifications that rendered them inconclusive, such as that there only is a "likelihood" that the project complies with the relevant regulations and that the developer's witnesses testimony together with her unidentified standard of review, "inclined" her in the direction of their conclusions, which qualifications undermined Ms. Roby's conclusions that the project complies with the regulations issued to protect wildlife habitat. (pp. 33-40) The judge's efforts to make subsidiary findings and definitive conclusions which Ms. Roby did not make, improperly usurped the role of the agency and placed the court in the improper role of having to conduct a de novo

proceeding based on an incomplete record with no assistance from the agency hearing officer. (pp. 40-42) These procedural violations rendered the hearing a sham.

A transcript of the hearing testimony still would have required the reviewing court to conduct a de novo proceeding without the benefit of the agency making a proper assessment of the credibility of witnesses, and making subsidiary findings to support the ultimate findings, which the Courts have held the reviewing judge may not properly do. (pp. 40-42) The lower court judge erred by ruling that, because the Plaintiffs did not provide the Court with a transcript of the hearing testimony, they waived all their claims of unlawful procedures, including the failure of the decision to properly assess the credibility of witnesses and to make subsidiary findings to support the ultimate findings. (pp. 42-49)

Ms. Roby's and the judge's ultimate conclusions also were based on errors of law resulting from misapplying the Wetlands Regulations applicable to (1) the protection of significant wildlife habitat areas by assuring that the project alterations would have "no adverse effects on wildlife habitat" as required by 310 CMR 10.57(4)(a), (2) providing protection to the wildlife habitat on the upper floodplain which was similar to the habitat on the lower floodplain and (3) providing replication areas to replace the areas altered

by the project that met the conditions of 310 CMR 10.60(3). The judge's decision contained the same errors of law as the agency decision, with additional errors made in the judge's improper effort to correct Ms. Roby's errors and omissions. (pp. 42-49)

STATUTORY AND REGULATORY AUTHORITY

The Wetlands Protection Act, M.G.L. c. 131, §40 seeks to regulate work in wetlands in order to prevent flooding and stormwater damage and to protect wildlife habitat. "Wildlife habitat" was added to the Act, para. 18 in 1987 as a protected interest when located on a designated water-related "resource area." Much of the project site is on a water-related resource area called Bordering Land Subject to Flooding ("BLSF") which is defined at 310 CMR 10.57(1)(a). BLSF is divided into the lower floodplain (the area within 100 feet of the bank of the water body or the statistical 10-year frequency flood area (whichever is further from the water body) and the upper floodplain (the area from the lower floodplain to the furthest extent of the 100-year frequency storm area). (See 310 CMR 10.57(1)(a)3., BLSF definition, Add. G, pp. 8-9; and 10.57(2)(a)(3) and (4), floodplain definitions, p. 10; and Preface to the Wildlife Habitat Regulations, Add. G, p. 24, para. 2)

Although the defendants continue to claim that the development is an "affordable housing" project and therefore should be given favorable treatment in this

proceeding, in addition to the waiver of zoning and other local land use laws that already have been provided to the developer, the fact is that only 20% of the 299 units are designated "affordable," the remaining 240 units will be rented at market level rates. In any event, this Court held in Healer v. DEP, 73 Mass. App. Ct. 714, 716-7 (2009) that the use of a project is not relevant to the concerns of the Wetland Protection Act, stating that the Act:

> "was created to protect wetlands from destructive intrusion... and that it has no concern for particular land uses and if a parcel is properly described as wetlands all use is barred... without regard for the type of use intended."

See also, Southern New England Association of Seventh Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 706 (1986) where this Court said:

> "The Wetlands Protection Act, G.L. c. 131, §40, has no concern for particular land uses. That act has the broader purpose of protecting wetlands from the destructive intrusion usually associated with Twentieth Century development."

Therefore, this Court should not consider the purpose of the project as the defendants have continuously urged the lower court to do and instead consider whether the project protects the interests of the Act and whether the agency proceedings were conducted in accordance with proper procedures.

1. The Presiding Officer's failure to consider the hearing testimony in reaching her decision denied the Plaintiffs their *per se* due process of law right to conduct meaningful cross-examination and thereby rendered the hearing a sham.

The Administrative Procedure Act, G.L. c. 30A, §11 provides that the agency "shall conduct adjudicatory proceedings in compliance with the following requirements:

> "(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence."
>
> * * *
>
> "(4) All evidence...shall be…made a part of the record in the proceeding and no other factual information or evidence shall be considered..."

Ms. Roby stated in her Revised Scheduling Order that: "I will conduct an evidentiary or Adjudicatory Hearing...the purpose [of which] is the cross-examination of individuals ("witnesses") who have filed Pre-Filed Testimony..." (A. 239), clearly indicating that she recognized cross-examination of the witnesses who submitted written pre-filed testimony would be allowed and implying that the testimony would be considered in reaching a decision. Indeed, the statutory right to cross-examine witnesses assumes that the agency will consider the testimony. If the hearing officer disregards the testimony, this statutory right is rendered meaningless. Moreover, the requirement that the record on appeal contain "all evidence in the record"

and that no evidence outside the record shall be "considered" assumes that all evidence in the record will be considered. However, Ms. Roby did not consider the cross-examination testimony, stating at the outset of her decision:

> "Based on the discretion accorded to 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 Recommended Final Decision." (Add. D, 9)

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.[5] Neither the authority she cited nor any other authority provides the hearing officer

[5] There is no explanation why Ms. Roby did not consider the hearing testimony since she purported to have tape recorded the entire hearing. Even if the tapes were misplaced, incomplete or unintelligible, which seems probable in view of the confusing and conflicting information DEP officials gave Plaintiffs' attorney in response to his numerous requests for copies of all the tapes, (See Bracken Aff't., paras. 3-5, A. 1665-67) Ms. Roby could have reviewed the copious notes that she appeared to be taking at the hearing. Moreover, since Ms. Roby was in the room when the testimony was being given, she can be presumed to have heard the testimony and could have considered her recollection of it. In any event, the Plaintiffs had no obligation to provide Ms. Roby with a transcript of her tapes, nor to provide the Court with a transcript under Standing Order 1-96 since Plaintiffs were not claiming that the decision was unsupported by substantial evidence.

with discretion to discard wholesale all cross-examination testimony.[6] Ms. Roby's limited consideration of the record is made clear in her decision where she listed the evidence she considered, which did not include the live testimony. (Add. D, 7-8) Nowhere in her entire 40-page decision does Ms. Roby refer to the witnesses' live testimony at the hearing. Ms. Roby's statement of what she considered is in striking contrast to her decision In Matter of Craig Campbell, OADR, Docket No. 007-099 (2010), issued the same day as her Belmont decision. In Campbell, Ms. Roby stated:

> "Based on the discretion accorded to me by G.L. c. 30A, §11(2) and 310 CMR 1.01(13)(h)(1), I considered the sworn pre-filed and live testimony given by the parties' witnesses, and the documentary evidence to make my findings and recommendations." (emphasis added) (A. 1610)

In her Campbell decision, Ms. Roby made numerous citations to both "Pre-Filed Testimony" and to the "Adjudicatory Hearing" testimony. (A. 1601-31) This was in contract to her Belmont decision in which Ms. Roby referred only to the pre-filed testimony and exhibits. Ms. Roby's statements in these two cases of what she considered show that she intentionally excluded "live testimony" in the list of documents she said she

[6] While this Court said in Hingham v. Department of Telecommunications and Energy, 433 Mass. 198, 207 (2001), that the agency "need not make detailed findings of all evidence presented to it," there is nothing in that decision to suggest that the agency may ignore wholesale all evidence presented at the hearing.

considered in her Belmont decision, which exclusion was not simply an oversight as defendants contend.[7] By ignoring the live cross-examination testimony in the case at bar, Ms. Roby left unchallenged the written testimony of the developer's witnesses, thereby effectively rendering the Plaintiffs' cross-examination of the developer's witnesses a sham.

The Courts have held that the Massachusetts and Federal Administrative Procedure Acts require both the agency and the court to consider the entire record, including testimony given at the hearing. In Friends of Edgartown Great Pond v. DEP, 446 Mass. 830, 845 (2006), the SJC recognized that the agency must consider the hearing evidence, finding that the agency hearing complied with the Administrative Procedure Act requirements because "the record illustrates that over the course of the five-day hearing, the administrative law judge carefully considered all of the relevant evidence." In the case at bar, the record illustrates that the hearing officer did not consider any of the

[7] The DEP made the baseless assertion in the lower court that if Ms. Roby had used the words "live testimony" in conjunction with the material she said she considered in her Belmont decision, Plaintiffs would have found the decision "unobjectionable." This is not true. If she had used these words and then failed to cite any of the evidence elicited during cross-examination and to make subsidiary findings to support her ultimate conclusions, to properly assess the credibility of the witnesses and to properly apply the regulations, the Plaintiffs still would have found the decision "objectionable."

evidence from the four-day hearing. See also, Caitlin v. Board of Registry of Architects, 414 Mass. 1, 6 (1992), where the SJC stated "an agency's adjudicatory body must review all the evidence in the record..." In Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966), the Court said that the Administrative Procedure Act "directs that the court's determinations are to be made upon consideration of the entire record" and that: "we agree with the view taken by the Supreme Court construing a similar clause in the Federal Administrative Procedure Act," citing Universal Camera Corp. v. Labor Board, 340 U.S. 474 (1951), in which the Supreme Court held that the Board's findings must be supported by substantial evidence "on the record considered as a whole" and that the Board and the Court must review the "entire record." See, supra at 488 and holding no. 2 in syllabus. To the same effect, see, Loza v. Apfel, Commissioner of Social Security, 219 F. 3d. 378, 389, 394. (5th Cir. 2000) where the Court said: "...it is clear that the ALJ must consider all the record evidence and cannot 'pick and choose' only the evidence that supports his position;" and Garfield v. Schweiker, 732 F. 2d 605, 609 (7th Cir. 1984) where the Court stated the ALJ's "written decision should contain, and his ultimate determination must be based upon, all of the relevant evidence in the record."

The basic premise of all these cases is that an agency decision must be based on the whole agency record, including the adjudicatory proceedings, so that the Court can properly conduct its review of the entire administrative record. Otherwise, as in this case, the Court would be required to conduct a trial de novo based on live testimony of the witnesses to be heard by the judge who would be required to make findings of fact and to assess the credibility of the witnesses. However, such a proceeding is beyond the scope of judicial review of administrative decisions, which the lower court judge in her decision recognized was not appropriate, stating:

> "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)." (App. D, p. 5)

See also, Universal Camera, supra at 488, Andrews v. Civil Service Commission, 446 Mass. 611 (2006) at 615-616 (2006); and She Enterprises, Inc. v. State Building Code Appeals Board, 20 Mass. App. Ct. 270, 273 (1985).

The statutory right to cross-examine witnesses as provided in G.L. c. 30A, §11(3) assumes that the hearing officer will consider the testimony. If, as here, the hearing officer disregards the live testimony, this statutory right is rendered meaningless. In Palmer v. Rent Control Board of Brookline, 7 Mass. App. Ct. 110

(1979), FAR denied, 377 Mass. 921, this Court stressed the importance of cross-examination in administrative proceedings, stating:

> "Section 11(3) of our State Administrative Procedure Act incorporates protections similar to those accorded by its Federal counterpart. We find it instructive that in addition to the plain statutory language in our act conferring a right to examine and cross-examine, the right to cross-examination has been afforded a high premium in the Federal antecedent to our statute, and we have no difficulty in concluding that the Board's denial in this case of the landlord's right to examine the investigator as to the contents of her reports... amounted to a serious violation of the right accorded to a party by G.L. c. 30A, §11(3)." (Id. at 116)

An agency's failure to give consideration to the cross-examination testimony, as in the case at bar, is tantamount to excluding such testimony entirely. The proper remedy under the circumstances of this case is to vacate the lower court's judgment and remand the case to that court with directions to remand the matter to the Commissioner of the DEP as was done by this Court in Palmer and Fisch v. Board of Registration of Med., 437 Mass. 128, 138 (2002).

2. A transcript of the hearing was not necessary for Plaintiffs to pursue their due process claims.

Although the lower court judge noted the cases holding that both the agency and the reviewing court must consider all the evidence in the record, she nonetheless concluded that because Plaintiffs did not file a transcript of the hearing "such that the court

can determine what testimony, if any, the Presiding Officer ignored" (Add. C, p. 20), Plaintiffs waived their due process claims. However, a written transcript was not required to show that Ms. Roby ignored all the live testimony at the hearing, as she made clear in her decision. Moreover, Standing Order 1-96, on which the judge relied, requires that a transcript be submitted to the court by the appellant only when alleging that the decision is not supported by substantial evidence, which is not the basis of Plaintiffs' claims. Instead, Plaintiffs claims are that the decision is based on unlawful procedures, including (1) the per se denial of their due process right to conduct meaningful cross-examination and to have the testimony considered by the agency, (2) failure of the decision to contain subsidiary findings to support the ultimate findings and conclusions and (3) the inadequate assessment of the credibility of the witnesses by relying solely on pre-filed testimony of the developer's witnesses and ignoring their cross-examination testimony. Moreover, M.G.L. c. 30, §14(4) under which Plaintiffs filed their appeal, does not require the appealing party to provide a transcript of the hearing to the reviewing court. This Section provides:

> "(4) The agency shall, by way of answer, file in the court the original or a certified copy of the record of the proceeding under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the

> agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties.

As the time for filing the Administrative Record was approaching, the DEP counsel sought Plaintiffs' assent to a Motion to extend the time to file the Record due to administrative problems. The DEP's counsel did not request that Plaintiffs or the BCC take any action in connection with the filing of a transcript which M.G.L. c. 30, §14(4) provides is the agency's obligation. Plaintiffs assented, and the Motion was allowed. (A. 69-71) On October 21, 2010, the DEP filed the Administrative Record which did not contain a transcript of the hearing. In addition to their being no requirement in the Rules that they submit a transcript of the hearing, Plaintiffs did not order a transcript because Ms. Roby made clear in her decision that she did not consider the live testimony, and therefore, evidence adduced at the hearing would be irrelevant to the agency decision. Moreover, it was doubtful that audio tapes of the entire hearing even existed as DEP officials had given Plaintiffs' counsel confusing and conflicting information as to the availability of the hearing tapes.[8] (Bracken Aff't., paras. 3-5, A. 1665-7) Such

[8] While counsel for the developer states that her client "generously" offered to pay one-half the cost of a transcript, Plaintiffs did not accept the offer because they did not want to spend their limited resources on

misinformation misled Plaintiffs to believe that there were no extant tapes of the entire hearing.

The judge said in her decision that the appealing party must demonstrate that its substantial rights have been prejudiced. (App. C, p. 4) The right to cross-examination is a substantial right, and Ms. Roby's denial of Plaintiffs' effective exercise of that right substantially prejudiced their right to challenge the DEP's SOC decision as set forth in paragraphs 25, 29, 34, 59-66 of their Complaint (A. 33-37; 46-48), in which they alleged the deficiencies in the developer's plans (See discussion infra at pp. 42-49.) The lower court erred in holding that Plaintiffs waived their claim that they were denied their per se due process right to conduct meaningful cross-examination because they did not submit a transcript of the hearing testimony that Ms. Roby ignored and was not required under Standing Order 1-96. Ms. Roby's due process violations which the Commissioner accepted and the lower court judge refused to remedy make a mockery of the DEP's adjudicatory hearing process.

In any event, this Court has held that the failure to submit a transcript of the hearing does not preclude appellants from pursuing claims of procedural irregularities other than a claim that the decision is

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producing a document that would have been expensive to prepare and only of academic value.

unsupported by substantial evidence. In Sturdy Memorial Foundation, Inc. v. Board of Assessors of North Attleborough, 60 Mass. App. Ct. 573, 577 (2004), this Court stated:

> "Because the Foundation did not request a transcript of the proceedings before the board, the Foundation is precluded from arguing that the board's findings are not warranted by the evidence. New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth, 368 Mass. 745, 749-751 (1975). However, it can argue that the board's general conclusion is inconsistent with or not supported by the board's subsidiary findings. The Children's Hospital Medical Center v. Board of Assessors of Boston, 353 Mass. 35, 39 (1967)."

See, also, Connolly v. Suffolk County Sheriff's Department, 62 Mass. App. Ct. 187 (2004). The SJC stated in Children's Hospital, supra at 39, that "in accordance with the standards set forth in the State Administrative Procedure Act...one aspect of review here is that a general finding stands if supported by subsidiary findings but is set aside if inconsistent with them." Ms. Roby's decision was made under unlawful procedures (1) by not adequately assessing the credibility of witnesses and (2) failing to provide subsidiary findings to support the ultimate findings and conclusions.

The lower court judge ignored Sturdy and Children's Hospital and, contrary to those decisions, ruled that the failure of Plaintiffs to submit a transcript precluded them from pursuing their other claims that the decision was based on unlawful

procedures. Specifically, after ruling that by not submitting a transcript Plaintiffs had waived their due process claim that Ms. Roby denied their right to conduct meaningful cross-examination, the judge went on to state that the Court's "review is limited to determining whether the DEP's decision is marred by legal errors or is otherwise arbitrary, capricious or an abuse of discretion." (Add. C, p. 6) The Court's review was not so limited – the DEP's decision also was "marred" by its failure to make subsidiary findings supporting the ultimate findings and to make a proper assessment of the credibility of the witnesses, claims which this Court held in Sturdy and Connolly, appellants may pursue in the absence of a transcript. Plaintiffs further claim that Ms. Roby's and the lower court's decisions are based on errors of law.

3. The Presiding Officer did not adequately assess the credibility of witnesses as she was required to do.

This Court and the SJC have made clear that the agency has the responsibility of assessing the credibility of witnesses, as the judge recognized in her decision. (App. C, pp. 5, 18) In Fisch v. Board of Registration of Med., 437 Mass. 128, 138 (2002), the Court said that "it is for the agency, not the courts to weigh the credibility of witnesses" and that "a reviewing court may vacate an agency's decision as unsupported by substantial evidence if the decision provides no means of analyzing the agency's assessment

of credibility." See also, City of Salem v. Board of Registration in Medicine, 437 Mass. 128, 138 (2002), where the SJC remanded the case to the agency for a new hearing when the credibility of witnesses could not be evaluated on the hearing record.

In the case at bar, Ms. Roby deprived the reviewing court of the benefit of a proper assessment of the credibility of witnesses by not considering their verbal cross-examination testimony and therefore presumably not considering their demeanor while they were testifying. As to the expert witnesses for the Plaintiffs and the BCC, the lawyers for the developer and the DEP made a strategic decision not to cross-examine them, thereby depriving Ms. Roby of even the opportunity to observe their demeanor in a face to face encounter.[9] By accepting the unchallenged pre-filed written testimony of the developer's witnesses and ignoring the testimony of those witnesses on cross-examination, Ms. Roby

[9] Ms. Roby allowed Plaintiffs to call their expert Charles Katuska as a rebuttal witness at the hearing to respond to issues raised by the developer's witnesses during the hearing regarding the photographs attached to Mr. Katuska's written rebuttal testimony. (A. 1307-1310) However, Ms. Roby would not allow any questions to be asked other than the ones she posed to Mr. Katuska to identify the wildlife habitat shown in the photographs. (A. 1307-1310) In response to Ms. Roby's questions as to whether wildlife living on the upper floodplain could find alternative habitat in the area, Mr. Katuska responded that it would be unlikely that they could because of the dense development of the area. Ms. Roby ignored this testimony, along with all the other live testimony.

presented the reviewing court with a lopsided picture of the evidence.

While turning a blind eye to the cross-examination testimony of the developer's witnesses, Ms. Roby nonetheless concluded:

> "I credit the testimony of Albrecht, Howard, and Vondrak on this issue, and the standard of review inclines me in that direction." (Add. D, p. 17)

By "crediting" the pre-filed testimony of the developer's three witnesses and not considering the cross-examination testimony which challenged their credibility, Ms. Roby not only denied Plaintiffs their due process right to conduct meaningful cross-examination, she applied an arbitrary standard of review that "inclined" her to credit the written testimony of the developer's witnesses while ignoring the cross-examination testimony that challenged the witnesses' credibility.

Further, neither Ms. Roby nor the judge provided any factual basis for crediting the unchallenged written testimony of the developer's witnesses. Ms. Roby stated that she based her finding of credibility on the "numerous reports" based on calculations the developer's witnesses cited in their written testimony, stating:

> "These witnesses for Cambridge Partners made a particularly striking impression [sic] the compilation of numerous reports based on calculations accepted as standard industry practice." (Add. D, p. 27)

However, Ms. Roby did not identify any of the reports or calculations which supported the developer's witnesses' opinions. Nor did the judge identify any reports that supported the witnesses' opinions and Ms. Roby's conclusion. Therefore, neither Ms. Roby nor the judge adequately assessed the credibility of the witnesses.

4. The Presiding Officer did not make adequate subsidiary findings to support her ultimate findings and conclusions, as required by law.

The Administrative Procedure Act, G.L. c. 30A, §11(8), provides:

> "Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision including determination of each issue of fact or law necessary to the decision…"

The SJC and this Court have explained in numerous cases what this section requires as summarized in 38 Massachusetts Practice Series, Administrative Law and Practice, §408 as follows:

> "The agency must do more than merely recite the evidence in the record or state ultimate facts. The agency must make subsidiary findings of fact to support any ultimate findings of fact it may make.[10]

[10] See, e.g. Town of Hingham v. Department of Telecommunications and Energy, 433 Mass. 198, 200 (2001); Glynn v. City of Gloucester, 9 Mass. App. Ct. 454, 457 (1980); Costello v. Department of Public Utilities, 391 Mass. 527, 533 (1984); Save the Bay, Inc. v. Department of Public Utilities 366 Mass. 687, 673-676 (1975); School Committee of Chicopee v. Massachusetts Commission Against Discrimination, 361 Mass. 352, 353-

Ms. Roby did not make adequate findings to support her conclusions. Indeed, her conclusions were often inconsistent with the facts as presented by the developer's witnesses. With respect to the protection of wildlife habitat, Ms. Roby identified as Issue No. 2, "Whether the project meets the requirements of 310 CMR 10.57(4)(a) including the requirements of 310 CMR 10.60(3)." (Add. D, p. 16) The facts found by Ms. Roby do not support her conclusions that the project meets these requirements.

310 CMR 10.57(4)(a) provides in pertinent part:

> "Work in those portions of bordering land subject to flooding found to be significant to the protection of wildlife habitat shall not impair its capacity to provide important wildlife habitat functions...[A] project or projects on a single lot, for which Notices(s) of Intent is filed on or after November 1, 1987, 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." (emphasis added) (Add. G, p. 11)

310 CMR 10.60(1)(a) defines "Adverse Effects on Wildlife Habitat" to mean (Add. G, pp. 13-14):

> "Adverse effects on wildlife habitat mean the alteration of any habitat characteristic listed in 310 CMR 10.60(2), insofar as such alteration

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355 (1972); and New York Central Railroad v. Department of Public Utilities 347 Mass. 586, 593 (1964).

> will, following two growing seasons of project completion and thereafter (or, if a project would eliminate trees, upon the maturity of replanted saplings) substantially reduce its capacity to provide the important wildlife habitat functions listed in 310 CMR 10.60(2).”

310 CMR 10.60(2)(d) specifies that the important habitat characteristics of the lower floodplain of BLSF are the provision of: “food, shelter, migratory and overwintering areas for wildlife.”

310 CMR 10.60(3) provides in part:

> “Alterations of wildlife habitat characteristics beyond permissible thresholds may be restored onsite or replicated offsite in accordance with the following general conditions... (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’); (b) the elevation of groundwater relative to the surface of the replacement area shall be approximately equal to that of 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...” (Add. G, p. 14)

The resource area involved on the Belmont project site is bordering land subject to flooding (BLSF). As previously explained, BLSF is divided into lower and upper floodplains. The regulations presume that the lower floodplain is significant to the protection of

wildlife habitat because the important characteristics of such habitats typically exist there. (Add. G, Preamble, 310 CMR 10.57(1)(a)3., pp. 8-9) (This is the area within 100 feet of the bank of a water body or within the 10-year flood frequency area, whichever is furthest from the water body.) The developer's witnesses recognized that the wildlife habitat on the lower floodplain that the project will alter is significant to the protection of wildlife habitat. (Add. D, p. 21)

Under the heading "Findings of Fact Regarding Issue No. 2," (protection of wildlife habitat) Ms. Roby set forth statements from the pre-filed testimony of the developer's witnesses, Julie Vondrak and Michael Howard. (Add. D, p. 21) Based on Ms. Vondrak's testimony, Ms. Roby stated:

> "Vondrak determined that impacts to wetland resource areas are limited to impacts to BLSF. Id. at para. 9. Approximately 8,390 of BLSF that was determined to be significant to wildlife habitat will be altered by the project. Id. This is in addition to 2,642 square feet that will be temporarily altered. Id. Vondrak's analysis led her to the conclusion that the alteration will not substantially reduce the capacity of the resource area to provide important wildlife habitat functions because the features are common on the site. Id. There is a total of approximately 11,032 square feet, that is, about 9 percent will be altered due to the work on the project. Id. at para. 10. The remaining 107,758 square feet or 91 percent of the lower floodplain will not be affected. Id." (Add. D, p. 21; Vondrak Pre-Filed Testimony, paras. 9-10, A. 1112-13) (emphasis added)

Ms. Roby then stated what Mr. Howard said in his pre-filed testimony as follows (Add. D, p. 23):

> "According to Howard, the wildlife habitat evaluation developed by Epsilon showed that the impact of the project is insignificant because it will not substantially reduce the capacity of the lower floodplain to provide important wildlife habitat functions. Id. at para. 14. He reached this conclusion because "the important features identified in the study area...are very common on the site, so that the amount of the habitat features lost is insignificant when compared to the amount that will remain in the approximately 91 percent of undisturbed lower floodplain on the site." (emphasis added)

Thus, developer's witnesses concluded that since the wildlife habitat altered by the project would be only about 9% (11,032 sf) of the total amount of similar wildlife habitat on the lower floodplain (118,790 sf), leaving 91% of the habitat "undisturbed," the impacts on wildlife habitat were "insignificant." (Add. D, p. 23) These witnesses made no reference to the 10% or 5,000 sf thresholds for application of the "no adverse effects" requirement in 310 CMR 10.57(4)(a). Ms. Roby accepted these witnesses opinions that the amount of habitat altered was an "insignificant" amount compared to the total similar wildlife habitat on the site. She did not focus on the thresholds for application of the "no adverse effects" requirement either. What the developer's experts and Ms. Roby overlooked was that the regulatory requirement is not based on the subjective opinions of the proponent's experts as to what amount of

lost habitat is "insignificant" but on an objective determination based on a two-pronged regulatory threshold that the alteration of more than (1) 10% of the wildlife habitat or (2) 5,000 sf of such habitat, whichever is the lesser, is sufficiently significant to trigger application of the "no adverse effects" requirement. As defined in 310 CMR 10.60(1), "no adverse effects" is measured by the ability of the habitat area to reestablish itself within two growing seasons and that saplings planted to replace the existing trees will reach maturity in the same period. The developer's witnesses did not present any facts demonstrating that the wildlife habitat altered by the project, including the Silver Maple Trees, a large portion of which will be cut down, would be reestablished in two years after project completion. Notwithstanding the facts, based on the faulty analysis by Ms. Vondrak and Mr. Howard of what the "no adverse effects" requirement means, Ms. Roby concluded:

> "When their [the developer's experts'] analysis is combined with the SOC's Special Conditions, the likelihood 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 some weight." (emphasis added) (App. C, p. 27-28)

Thus, Ms. Roby's ultimate finding that the project complies with the "no adverse effects" requirement of 310 CMR 10.57(4)(a), including 310 CMR 10.60(3), simply is not supported by any findings of fact. To the

contrary, the facts as stated by Ms. Vondrak and Mr. Howard and recited by Ms. Roby clearly show that the project exceeds the 5,000 sf threshold and therefore must comply with the "no adverse effects on wildlife habitat" requirement.[11] Neither the developer's witnesses, Ms. Roby, nor the judge found that the alteration of 11,032 sf of wildlife habitat would have no adverse effects, as defined in 310 CMR 10.60(1).

The judge, however, apparently was troubled by the witnesses analysis of this issue and Ms. Roby's conclusion, and accordingly, she attempted to show that the project's failure to comply with the "no adverse effects" requirement of 310 CMR 10.57(4)(a) would be effectively met by complying with the replication requirement in 310 CMR 10.60(3). However, the judge's analysis was faulty. 310 CMR 10.60(3) provides that the altered areas must be replaced by replication areas which meet four specific requirements, namely that they will be (a) at least as large as the altered areas, (b) the same distance above ground water as the altered areas, (c) the same distance from the water body as the altered areas and (d) contain similar habitat plantings as the altered areas. While Ms. Roby and the judge found that the replication areas would be a greater size than

[11] All expert witnesses agreed that 11,032 sf of significant wildlife habitat on the lower floodplain of BLSF will be altered by the project (8,390 sf permanently and 2,642 sf temporarily); (Add. D, p. 21)

the lost areas, they made no findings that the replication areas meet the requirements regarding distances from ground water and surface water bodies as required by 310 CMR 10.60(3)(b) and (c). Therefore, the judge failed to provide a meritorious rationale for avoiding compliance with 310 CMR 10.57(4)(a).

Not only was Ms. Roby's ultimate finding of compliance with 310 CMR 10.57(4)(a), including 310 CMR 10.60(3), unsupported by the facts and the plain language of the regulation, her qualification of the ultimate finding with the word "likelihood" falls far short of a definitive conclusion that the project complies with the regulatory requirements. Neither does Ms. Roby's assessment that the developer's witnesses' testimony merited "some weight" support her qualified conclusion.

The lower court judge attempted to correct Ms. Roby's qualified conclusion and insufficient findings of fact by (1) deleting the words "likelihood" and "some weight," (2) deleting any reference to the project's compliance with 310 CMR 10.57(4)(a) (the "no adverse effects" requirement), and (3) asserting that Ms. Roby properly credited the opinions of Vondrak and Howard because they were supported by "numerous reports based on calculations accepted as standard industry practice." (Add. C, p. 10) The judge wrote:

> "The Presiding Officer credited the testimony of Howard and Vondrak because of their numerous

> reports based on calculations accepted as standard industry practice. 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). (Add. C, p. 10)

However, Ms. Roby did not identify any facts in the "numerous reports" or "calculations" on which these witnesses said they relied in forming their opinions. Therefore, there was no support for the judge's conclusion that Ms. Roby made adequate findings to support her conclusion that the replication plan complies with 310 CMR 10.60(3). As discussed above at p. 37, Ms. Roby did not make any finding that the project complied with requirements (b) and (c) of 310 CMR 10.60(3) regarding distances from ground water and water bodies. Ms. Roby made only a general insufficient finding regarding the replication plan as follows:

> "Cambridge Partners' replication plan is powerful evidence of compliance with the applicable regulations." (Add. D, p. 19)

Reliance on the plan itself is not persuasive evidence. The developer's plan (A. 1443, Exh. 20) does not purport to provide any "evidence" of compliance with the applicable replication requirements. It simply indicates by cross-hatching and shading, without dimensions or distances, the location of areas where the developer claims it will replicate the lost wildlife habitat

areas, without providing information describing the size, location and characteristics of the replacement areas and distances from relevant features as required by 310 CMR 10.60(3). Although the judge stated that Ms. Roby's conclusions were based on adequate findings, the judge did not identify any findings Ms. Roby made to support her conclusions.

In rewording Ms. Roby's conclusion in an attempt to turn her qualified conclusion that it is "likely" the replication plan met the regulatory requirements into a positive conclusion attributing findings to Ms. Roby that she did not make, the judge ignored the decisions of this Court explaining that the proper role of the reviewing court is not to make findings that the agency itself has not made. See, Massachusetts Institute of Technology v. Department of Public Utilities, 425 Mass. 856, 871 (1997), in which the Court stated:

> "But we have insisted that the agency make subsidiary findings of fact on all issues relevant and material to the ultimate issue to be decided, and that it 'set forth the manner in which it reasoned from the subsidiary facts so found to the ultimate decision reached."

See also, Town of Bourne v. Austin, 19 Mass. App. Ct. 738, 742 (1985).

In order to conclude that the developer's replication plan satisfied the requirements of 310 CMR 10.60(3), the judge would have been required to make findings that Ms. Roby did not make presumably because

there were no facts in the record to support the necessary findings that the conditions of 310 CMR 10.60(3) had been met.

5. The Presiding Officer's and the judge's decisions contain material errors of law in applying the Wetlands Regulations.

In addition to basing her decision on improper procedures, Ms. Roby and the lower court made errors of law by misapplying the Wetlands Wildlife Habitat Regulations and Preface thereto.

a. Ms. Roby and the lower court judge misapplied the regulations applicable to the protection of wildlife habitat on the upper floodplain.

310 CMR 10.57(4)(a) provides for protection of important wildlife habitat located on Bordering Land Subject to Flooding (BLSF). The habitat on the lower floodplain is presumed to be important. Although the upper floodplain (the area upland of the lower floodplain within the statistical 100-year flood frequency area) is not "presumed" to be significant, the Preface to Wetlands Regulations Relative to Protection of Wildlife Habitat provide that the wildlife habitat on the upper floodplain also is subject to protection on a case-by-case basis when there is evidence, as there was here, that such habitat exists that is similar to the wildlife habitat on the lower floodplain. (Add. G, Preface, Part V, Section D, p. 24, first full para.) The Preface to the Regulations explains the regulations

as they apply to protection of wildlife habitat on the upper floodplain as follows:

> "Therefore, in the final regulations the Department determined that a presumption of significance for wildlife habitat was warranted only for the lower floodplain...The lower floodplain is defined as areas on the 10 year floodplain or within 100 feet of the bank or bordering vegetated wetland, whichever is further from the water body or waterway. 'Important' 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." (emphasis added) (Add. G, Part V, Sect. D, p. 24)

The developer's wildlife habitat experts agreed that the same wildlife habitat existed throughout the site, on both the lower and upper floodplain. (Add. D, pp. 21-23) Ms. Roby accepted their written testimony, stating that Ms. Vondrak's assessment showed that the "wildlife habitat...features are common on the site." (Add. D, p. 21) Plaintiffs' wildlife expert, Mr. Katuska, pointed out to Ms. Roby on the site visit evidence of wildlife habitat on the upper floodplain as shown in the photographs attached to his rebuttal testimony (A. 1306-1310; see also A. 294, 296)[12] The BCC had reason to

[12] Enlargements of these photographs were entered into evidence at the hearing in response to Ms. Roby's questioning of Mr. Katuska about the importance of wildlife habitat on the upper floodplain. In response to her question about whether these habitats could be replicated in the nearby area, Mr. Katuska replied that they could not be because of the dense development. Ms.

believe the upper floodplain was significant to wildlife habitat and made a written request to Vondrak to prepare an evaluation of that area. (A. 1738, para. 6) However, Ms. Vondrak failed to do so. (A. 1764, para. 6) Ms. Freed concluded that the project will alter 5,440 sf of wildlife habitat on the upper floodplain.[13]

Despite the agreement of all the wildlife habitat experts that the wildlife habitats on the upper floodplain of BLSF are similar to those on the lower floodplain, Ms. Roby incorrectly concluded that since there is no regulatory presumption of significance of wildlife habitat on the upper floodplain, such habitat was not subject to protection, notwithstanding the clear statement in the Preface to the Wildlife Habitat Regulations that when the evidence shows habitat on the upper floodplain that is similar to that on the lower floodplain, the habitats on both floodplains are subject to protection. The judge also misunderstood the DEP's explanation of the circumstances under which wildlife habitat on the upper floodplain is subject to protection, stating:

> "As there is no regulatory presumption for the protection of wildlife habitat interests in the

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Roby ignored this testimony in her decision, along with all the rest of the hearing testimony.

[13] Ms. Freed, the DEP's reviewing officer, stated in a letter to the developer that the project will alter 13,830 sf of wildlife habitat in BLSF, of which 8,390 sf are in the lower floodplain, leaving 5,440 in the upper floodplain. (A. 179)

> 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." (Add. C, p. 12)

Not only did the judge misunderstand that the Preface instructs that the regulations for protection of wildlife habitat apply under the conditions applicable here, she mischaracterized the Coalition's argument. The Coalition did not argue that the Presiding Officer should have considered Mr. Katuska's testimony over the developer's witnesses' testimony as the judge erroneously stated. The Coalition's argument was that based on the testimony of the developer's wildlife habitat experts, confirmed by the Coalition's expert Mr. Katuska, the wildlife habitat on the upper floodplain is important and subject to protection. Ms. Roby and the judge made an error of law in concluding that the wildlife habitat regulations do not apply to the alteration of 5,440 sf of wildlife habitat in the upper floodplain of the project site.

b. The Presiding Officer and the Judge made an error of law in failing to apply the "no adverse effects on wildlife habitat" requirement to the project's alteration of more than 5,000 sf of significant wildlife habitat in both the lower and upper floodplain.

As discussed above, Ms. Roby did not consider whether the project met the "no adverse effects"

requirement in reliance on the irrelevant opinions of the developer's experts that the amount of wildlife habitat the project would alter on the lower floodplain was "insignificant" in comparison with the total amount of similar wildlife habitat on the site, even though she found that the evidence showed the project would alter more than 5,000 sf of wildlife habitat, a threshold that triggered the application of the "no adverse effects" requirement. As a result, Ms. Roby did not make findings of fact to support her conclusion that the project complies with 310 CMR 10.57(4)(a). The result is that Ms. Roby made a plain error of law in concluding that the project "likely" complies with 310 CMR 10.57(4)(a) as it incorporates 310 CMR 10.60(3) since there were no findings to support this conclusion.

The lower court judge made the same error as Ms. Roby by focusing only on the "significance" of the habitat altered, and ignoring the 5,000 sf threshold for application of the "no adverse effects" requirement. (App. D, pp. 12-13) The judge's attempt to provide a rationale for not applying the "no adverse effects" requirement even though the project will alter more than 5,000 sf of wildlife habitat on the lower floodplain was not supported by adequate findings of fact. As discussed supra at 38-42, the judge's analysis failed because Ms. Roby did not make sufficient findings that the developer's replication plan for the altered wildlife

habitat on the lower floodplain satisfied all the requirements of 310 CMR 10.60(3). Nor did the judge herself point to any facts not found by Ms. Roby to support her conclusion. Thus, the requirement that the project have "no adverse effects" on wildlife habitat was applicable to the project. Accordingly, the judge as well as Ms. Roby made an error of law in concluding that the project meets the requirements of 310 CMR 10.57(4)(a), including 310 CMR 10.60(3), by basing their conclusion on the opinions of the developer's experts that the alteration of wildlife habitat would be "insignificant" in their opinion.

c. The Presiding Officer and the judge made an error of law in concluding that the project's replication plan need not comply with all the requirements of 310 CMR 10.60(3).

310 CMR 10.60(3) provides that:

> "Alterations of wildlife habitat characteristic beyond permissible thresholds may be restored onsite or replicated offsite in accordance with the following general conditions..."

The four general conditions are set forth in subparagraphs (a) thru (d) (Add. G, p. 14) (See discussion supra at 33-34)

Ms. Roby and the judge focused on the size of the replication areas in comparison with the size of the areas altered by the project. However, neither Ms. Roby nor the judge addressed requirements (b) and (c) as to location of the replication areas in relation to the

distance of the altered areas from ground water and the water bodies.

Although the regulation allows the replication areas to be onsite or offsite, it provides that wherever located, the replicated areas must meet the "general conditions" in (a) through (d). Therefore, the judge made an error of law in concluding that the project complies with 310 CMR 10.60(3) when Ms. Roby made no adequate findings that the requirements of conditions (b) and (c) were satisfied.

Ms. Roby's and the judge's refusal to recognize the Act's jurisdiction over wildlife habitats in the upper floodplain despite the evidence of the similarity of the wildlife habitat on both the lower and upper floodplains was an error of law that allowed the developer to provide less replication area than required when alteration of the wildlife habitat on the upper floodplain (5,440 sf) is added to the 11,032 sf of wildlife habitat that will be altered on the lower floodplain. The total wildlife habitat actually altered will be 16,472 sf, exceeding the size of the replication area of 15,896 sf by 576 sf. Thus, the project does not meet the size requirements of 310 CMR 10.60(3)(a) as well as the requirement of (b) and (c). (See discussion, supra at 35-39)[14] Accordingly, Ms. Roby and the judge

[14] Ms. Roby concluded that the replication area of 15,896 sf would exceed the size of the wildlife habitat on the lower floodplain altered by the project (11,032 sf).

made error of law in concluding that the developer's replication plan satisfied the requirements of 310 CMR 10.60(3).

CONCLUSION

Ms. Roby's misconduct of the hearing, including failing to consider the cross-examination testimony, to adequately assess the credibility of witnesses and to provide adequate subsidiary findings on which her ultimate findings were based, and the errors of law in her decision which the DEP Commissioner and the judge accepted, made a mockery of the whole hearing process in this case.

The Plaintiffs were prejudiced by Ms. Roby's unlawful procedures and errors of law and the judge's rulings upholding them, the result of which is a decision that adversely impacts on the substantial interests of the Plaintiffs and the public which the Wetlands Protection Act seeks to protect. An agency that violates the procedural requirements of G.L. c. 30A, §11(3), (4) and (8) and misapplies the applicable regulations, as Ms. Roby's decision does, compels the reviewing Court to set aside the decision under G.L. c. 30A, §14(7)(c) and (d).[15]

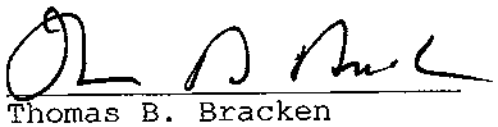
(Add. D, p. 21) However, Ms. Roby did not find that the project would meet the requirements of 10.60(3)(b) or (c).

[15] See Cobble v. Commissioner of Department of Social Services, 430 Mass. 385, 390 (1999).

RELIEF SOUGHT

For the foregoing reasons, Plaintiffs respectfully urge this Court to vacate the decision of the lower court and remand the case to the lower court with directions to remand the matter to the Commissioner of the Department of Environmental Protection for proceedings consistent with this decision and to provide such further relief as prayed for in their Complaint.

Respectfully submitted,
Plaintiffs-Appellants,
by their counsel

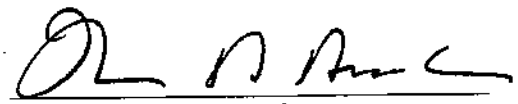


Dated: July 30, 2012 Thomas B. Bracken

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)."



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ADDENDUM