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DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 5, 2020

In the Matter of
Ronen Drory, The Titanium Group, LLC

OADR Docket No. WET-2019-002
Boston, MA

RECOMMENDED FINAL DECISION

A residents group (“Petitioners”) filed this appeal concerning the real property at 1625 VFW Parkway, Boston, Massachusetts (“the Property”).¹ The Petitioners challenge the Superseding Order of Conditions (“SOC”) that the Massachusetts Department of Environmental Protection’s Northeast Regional Office (“MassDEP”) issued to the Applicant, Ronen Drory, The Titanium Group, LLC (“Titanium”). The SOC was issued pursuant to the Wetlands Regulations, 310 CMR 10.00, and the Wetlands Protection Act, G.L. c. 131 § 40, and it approved Titanium’s project to construct a car wash facility (“Project”).

The Property contains approximately 2.65 acres of land. It is the former location of a McDonald’s restaurant which was destroyed in a fire in 2013, and it has been vacant since then. The VFW Parkway runs along the eastern property line and the Charles River borders on the western property line. Existing businesses lie to the south. The Property contains the following

¹ It is undisputed that the residents group was generally organized by Adam Korngold, the manager of VFW Parkway Car Wash, LLC d/b/a Waves Car Wash, which operates across the street from the Property, where Titanium intends to build a competing car wash. Waves Car Wash and Korngold have funded this litigation. In addition, some members of the group also have either a direct or indirect relationship to Waves Car Wash, such as employment, with the company. See Titanium’s Pre-Hearing Conference Statement. Despite Titanium’s objections, neither of these factors preclude the Petitioners from bringing the appeal because there is a valid legal claim based on the Wetlands Regulations and Wetlands Act.

wetlands resource areas: Bordering Land Subject to Flooding (“BLSF”), Bordering Vegetated Wetlands (“BVW”), and Riverfront Area associated with the Charles River and an unnamed perennial stream that emerges from an underground chamber beneath VFW Parkway on the north side of the Property. Gordon PFT², pp. 5-6; 310 CMR 10.02 (jurisdiction), 10.55 (BVW), 10.57 (BLSF), 10.58 (Riverfront Area).

The sole issue for resolution in this decision is whether the BVW boundary that was approved as part of the SOC is accurate. After holding an adjudicatory hearing and reviewing the administrative record, I recommend that MassDEP’s Commissioner issue a Final Decision affirming the SOC. A preponderance of the evidence supports the BVW delineation approved in the SOC, which was based upon a prior delineation by the Massachusetts Water Resources Authority (“MWRA”). In fact, that evidence shows the BVW boundary in the SOC is conservative, i.e. it is more upland and more protective of the BVW than may be required under the Wetlands Regulations.

REGULATORY FRAMEWORK

SOC Appeal Process. This decision arises in an adjudicatory proceeding for a Wetlands permit appeal, filed under the Wetlands Protection Act and the Wetlands Regulations. The Applicant filed a Notice of Intent to initiate the wetlands review process with the City of Boston Conservation Commission (“BCC”) because certain of the proposed work involved work in Wetlands Resource Areas or their Buffer Zone. 310 CMR 10.02. A Notice of Intent must show that the proposed work in the Resource Areas complied with, or could be conditioned to comply with, the performance standards for those areas. 310 CMR 10.02 (discussing jurisdiction over Resource Areas and need to file Notice of Intent). The Wetlands Resource Areas at issue here are BVW, BLSF, and Riverfront Area. See 310 CMR 10.02 (jurisdiction), 10.55 (BVW), 10.57

² “PFT” is the acronym for “pre-filed testimony.”

(BLSF), 10.58 (Riverfront Area). More specifically, the Petitioners contend that BVW delineation that was approved as part of the SOC is inaccurate, and an accurate delineation would show that work would be occurring in BVW in noncompliance with the Wetlands Regulations.

BVW. The Inland Wetlands Regulations group together the types of freshwater wetlands as "Bordering Vegetated Wetlands," or BVW, as follows: "Bordering vegetated wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering vegetated wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetative community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40." 310 CMR 10.55(2)(a).

"Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat." 310 CMR 10.55(1). "The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters." *Id.* "Prevention of Pollution means the prevention or reduction of contamination of surface or ground water." 310 CMR 10.04 ("Prevention of Pollution").

"Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. . . ." 310 CMR 10.04 ("Significant").

River and Riverfront Area. Under the Wetlands Act and the Regulations, a river is defined as a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year. G.L. c. 131 § 40. 310 CMR 10.58(2)(a)1. Rivers include perennial streams because surface water flows within them throughout the year. Id.; 310 CMR 10.04 (definition of stream).

All perennial streams, or rivers, have a regulated Riverfront Area. Riverfront Areas generally receive special protection under the Act and the Regulations because of the environmental benefits they provide, including: protection of the water supply (including groundwater), flood control, storm damage prevention, protection of wildlife habitat (including fisheries and habitat within the Riverfront Area), and maintenance of water temperatures. They are critical to preventing water pollution by filtering contaminants before they reach the River and groundwater. See generally 310 CMR 10.58(1) (discussing in detail environmental benefits of the Riverfront Area). The Act defines the Riverfront Area as: "that area of land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line." G.L. c. 131 § 40.

BLSF. BLSF is "an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies. . . ." 310 CMR 10.57(2)(a)1. BLSF "provides a temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basin of a pond or lake. During periods of peak run-off, flood waters are both retained (i.e., slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by Bordering Land Subject to Flooding. Over time, incremental filling of these areas causes increases in the extent and level of flooding by eliminating flood

storage volume or by restricting flows, thereby causing increases in damage to public and private properties." 310 CMR 10.57(1)(a). The BLSF boundary is established according to 310 CMR 10.57(2)(a)3.a, b, and c.

EVIDENCE

Prior to the adjudicatory hearing, the parties filed written testimony from their witnesses. At the hearing, the parties had an opportunity to cross examine the opposing witnesses. The following witness testified for Titanium:

1. David Gordon. Gordon is the manager of Thunderchase Environmental, LLC, an environmental consulting firm. He has 26 years of consulting experience as an environmental scientist. Gordon holds a BS degree in resource development and an MS degree in plant and soil science.

The following witness testified for MassDEP:

1. Heidi Davis. Davis has been employed with MassDEP in its Division of Wetlands and Waterways Program since 1989. She has substantial experience in wetlands permitting and enforcement matters. From March 2013 until June 2014 she served as Acting Section Chief for the Wetlands and Waterways program in MassDEP's Northeast Regional Office. She is a certified wetlands scientist and has a BA in environmental science.

The following witnesses testified for the Petitioners:

1. Russell E. Waldron. Waldron is an environmental consultant and wetland ecologist with Applied Ecological Sciences, an environmental consulting firm. He has over 23 years of wetlands experience. He has a BS degree in environmental management

with core study concentrations in wetland ecology and soil science and an AAS degree in forest management.

2. Paul J. McManus. McManus is president of EcoTec Inc., an environmental consulting firm. He has over 30 years of experience as a full-time environmental consultant. He is also a professional wetland scientist certified by the Society of Wetland Scientists Professional Certification Program. He holds a BA degree in biology and an MS degree in ecology.

BACKGROUND

There is a long history of approved fill on the Property throughout the 1900s and into the 2000s, arising out of the development of the McDonald's restaurant and the use of the Property for sewer and other utility lines by various governmental entities, including the MWRA. Gordon PFT, pp. 5-8. Approximately four sewer easements and an associated access road run across the Property. A sewage pump station is located in the northwesterly corner of the Property. Gordon PFT, pp. 5-8; Davis PFT, p. 7. The MWRA access easement, now a gravel road, extends west of the paved area towards the 20-inch wide MWRA sewer easement, which extends north-south and to the east of the Charles River. Davis PFT, p. 5. BVW is located in the rear, western part of the site. Id.

In about 1977 and 1982, an earlier Superseding Order of Conditions authorized over 32,000 cubic yards of fill on the Property and construction of the McDonald's restaurant. The MWRA work in the early 2000s was authorized by an Order of Conditions issued by the BCC that permitted extensive work in wetlands areas on the Property, including work proximate to the unnamed stream and 12 feet below ground in the open space behind and west of the McDonald's parking lot, near the disputed BVW boundary. Davis PFT, p. 7; Gordon PFT, p. 5-8. As

recently as 2016, the MWRA performed excavation work associated with the access easement. Davis PFT, pp. 5-6.

In 2013, a fire damaged the McDonald's building on the Property, leaving it unusable. Gordon PFT, p. 8. In 2014, Mazzal Holding Corp. ("Mazzal"), the Property owner at the time, filed a Notice of Intent for a project on the Property. Gordon PFT, p. 8. Mazzal's associated project plans used a May 1, 2013, wetlands delineation performed by Russell Waldron, an environmental consultant and a witness for the Petitioners in this appeal. The Petitioners refer to the alleged 2013 BVW boundary to the west of the parking lot on those plans as the "Waldron line"; they believe the Waldron line is the correct BVW delineation. Those 2013 plans were not stamped by a professional engineer, and the Notice of Intent lacked stormwater forms and calculations. Mazzal withdrew the Notice of Intent on October 28, 2015. Gordon PFT, p. 8.

On November 18, 2015, Titanium purchased the Property. Gordon PFT, p. 8. In 2016, when an ancillary shed was removed from the Property approximately 750 square feet of buffer zone to BVW was disturbed. Davis PFT, p. 8. As a consequence, from February 2016 through January 2017 the Property was the subject of an enforcement action by the BCC. Gordon PFT, pp. 10-11. During that proceeding, Titanium agreed to plant native vegetation in the disturbed area and in another 750 square foot area contiguous to the wetlands disturbance, as part of the Enhancement Plan. Gordon PFT, p. 11. The proposed vegetative mitigation measures were approved by the BCC to be incorporated in a future Notice of Intent for Titanium's Project. Gordon PFT, p. 11; Davis PFT, p. 8. The BCC provided Titanium with a plan from the MWRA 2001 Order of Conditions, and instructed Titanium to use the MWRA's May 23, 2000, wetlands delineation that was approved in that Order of Conditions ("MWRA BVW line"). Gordon PFT, p. 11; Davis PFT, p. 8. In the enforcement action the BCC determined that the MWRA BVW

line was reasonable and conservative, especially because it originated *before* the allegations of wetlands alteration in 2016. Gordon PFT, ¶¶ 51-52.

In February 2017, Titanium filed its Notice of Intent for the car wash Project with the BCC using the MWRA BVW line, as required by the BCC. Gordon PFT, p. 12. The area of the proposed Project is almost entirely paved, including the slab foundations of the former McDonald's restaurant, a shed, and parking lot and driveways. Davis PFT, p. 4. The project includes demolition of some existing structures and infrastructure and development of a parking lot, driveways, a car wash building, drainage improvements, vegetative improvements, and a small convenience store. Titanium also submitted to the BCC an "Enhancement Plan." Gordon PFT, p. 11. In particular, the Notice of Intent proposed drainage improvements; 1,500 square feet of vegetative enhancements within BLSF and BVW Buffer Zone (Enhancement Area A); general planting in the flood zone; and 2,400 square feet of improvements in the Riverfront Area (Enhancement Area B). The Enhancement Area A was intended to serve as the restoration work that the BCC approved at its January 4, 2017, hearing in the enforcement proceeding. Gordon PFT, pp. 12-13. The design was modified at the BCC's request to reduce impervious surface and increase flood storage capacity. The BCC issued the Order of Conditions approving the Project on September 21, 2017, which included Enhancement Areas A and B.

A residents group appealed that Order of Conditions to MassDEP's Northeast Regional Office, requesting an SOC rejecting the Project. During the SOC appeal process Titanium increased the area of plantings coverage to approximately 1,956 square feet. Gordon PFT, p. 13. That occurred after Davis observed that Enhancement Area A was massed together in an area close to the MWRA easement. Davis PFT, p. 6. Davis requested that this area be expanded in order to provide more of a buffer between the developed and undisturbed portions of the site.

Davis PFT, p. 6. Enhancement Area A is located to the west of the parking lot and includes 1,500 square feet of native plantings. Enhancement Area B is located along the southern bank of the unnamed perennial stream and includes 2,400 square feet of native plantings. Davis PFT, p. 6.

On December 21, 2018, MassDEP issued the SOC approving the Project, including the MWRA BVW line. The new approved plans in the SOC changed the name from Enhancement Area A to “Protective Vegetative Area – Located West of Former McDonalds Site.” Gordon PFT, p. 14. The SOC allows fill of 1,188 cubic feet of BLSF with compensatory flood storage of 2,295 cubic feet pursuant to 310 CMR 10.57(4)(a).

The Petitioners appealed the SOC here, to the Office of Appeals and Dispute Resolution (“OADR”).

BURDEN OF PROOF

As the party challenging the MassDEP’s issuance of the SOC in this de novo appeal, the Petitioners had the burden of going forward by producing credible evidence from a competent source in support of its positions. 310 CMR 10.03(2); see Matter of Town of Freetown, Docket No. 91-103, Recommended Final Decision (February 14, 2001), adopted by Final Decision (February 26, 2001) (“the Department has consistently placed the burden of going forward in permit appeals on the parties opposing the Department’s position.”). Specifically, the Petitioners were required to present “credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c. So long as the initial burden of production or going forward is met, the ultimate resolution of factual disputes depends on where the preponderance of the evidence lies. Matter

of Town of Hamilton, DEP Docket Nos. 2003-065 and 068, Recommended Final Decision (January 19, 2006), adopted by Final Decision (March 27, 2006).

“A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability.”

Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the Hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .”

DISCUSSION

The sole issue for resolution in this decision is whether the BVW delineation in the SOC, which adopted the MWRA BVW line, is accurate.

The Property’s substantial history of fill and alteration over many years led Davis to employ an array of methods and tools to analyze the Property’s wetlands. Using multiple sources over a long period of time enabled Davis to more accurately assess the credibility of the Petitioners’ claim that recent fill was covering up soil and vegetative indicators of BVW. From

her analysis Davis determined that the MWRA BVW line is accurate and that there is no BVW to the west of the McDonald's parking lot in the area alleged by Petitioners.

First, Davis relied upon her personal observations at the site as the foundation of her analysis. Davis PFT ¶¶ 17, 19-21, 26-28, 30, 52-58. During a site inspection on November 28, 2017, she observed a slope vegetated primarily by herbaceous growth immediately west of the paved area; the 2000 MWRA Delineation wetland flags WA-13 and WA-14 were previously located on this slope. Davis PFT ¶ 21. Ms. Davis did not note any wetland vegetation on the slope or at the toe of slope. Davis PFT ¶¶ 4, 21, 27.

During a later site inspection with the Army Corps of Engineers on May 25, 2018, Ms. Davis again observed “very few wetland species down gradient of the flagged wetland line,” and that “conditions appeared wetter ... approximately 95 feet west of the paved area.” Davis PFT ¶¶ 27-28. She did not observe any cut stumps, recent clearing, or evidence of recent wetland filling. Davis PFT ¶¶ 30-31 and Ex. B (Army Corps Memorandum closing the investigation of unauthorized activity “[b]ased on the lack of clear evidence of wetland fill by the current landowner”).

Davis also relied upon numerous other pieces of evidence to analyze the MWRA BVW line and gain an historical perspective to better understand the Property's status before allegations of filling in 2016. Those include: (1) the Massachusetts Geographic Information System (“MassGIS”) aerial photo taken April 23, 2018, with a wetland overlay which shows the presence of wetlands on average to be approximately 200 feet west of the existing toe of slope; (2) thousands of aerial images of the Property using wetlands photointerpretation; (3) many oblique and aerial MassGIS images from 1990 to 2017; (4) oblique aerial photographs published

by the Massachusetts Department of Transportation (“MassDOT”) from 2014-17; and (5) Google Earth oblique aerial images from June 2010 to June 2019.

From all the above evidence, Davis concluded that the MWRA BVW wetlands line is farther upland than the actual wetlands on the Property, and thus is more protective of the wetlands than required by the Wetlands Regulations. In particular, Davis concluded that the actual wetlands line is further west and closer to the Charles River by as much as 95 feet from the MWRA BVW line. Davis PFT, p. 10; Davis PFT, p. 8. This is also consistent with Davis’ observations in the field. Id. For these reasons, she has concluded that the Project would not alter BVW and the MWRA line is accurate, in fact it is more protective of wetlands than necessary under the Wetlands Regulations and the Wetlands Act. HT #3 at 32:18-33:13.

Gordon, Titanium’s wetlands expert, corroborated Davis’ testimony. Gordon based his testimony on: (1) over two dozen visits to the site; (2) review of MassDEP 2005 wetlands mapping data layer, MassGIS Data: MADEP Wetlands (2005 and 2007 and 2019 updates); (3) observations on April 5, 2019; and (4) review of the primary wetlands delineation materials used by Petitioners’ expert Waldron in 2013 and 2019. In sum, Gordon concluded that the vegetation, soils, and hydrology of the area to the west of the former McDonald’s parking lot do not support the Petitioners’ BVW delineation allegations. Id.; Gordon PFT, p. 15. The wetlands on the site are consistent with the above mapping tools that Gordon relied upon, which do not include the extent of wetlands portrayed by the Petitioners. Gordon PFT, p. 16, 49-52.³

Gordon also pointed out that the MWRA BVW line would create an estimated 1,956 square feet of protective vegetated area to the west of the former McDonald’s site, including new

³ I have allowed the Petitioners’ Motion to Include Drory ID Ex.-1 into the administrative record, but for impeachment purposes only. Regardless, I attach little weight to it for impeachment purposes; Gordon has consistently stated that he did not perform a wetlands delineation for the site; instead he delineated an area of disturbance which was presented to and accepted by the BCC.

plantings of wetlands vegetation. That far exceeds the 1:1 BVW replacement required by the Wetlands Regulations by 186 square feet. Gordon PFT, ¶¶ 120-124; 310 CMR 10.55(4)(b).

In addition to the evidence above from Davis and Gordon, they both also persuasively undermined the weight of the Petitioners' expert testimony from Waldron and McManus. Davis and Gordon persuasively testified that Waldron's and McManus' testimony, particularly their soil and vegetative analyses, are inaccurate and unsupported by the administrative record for several reasons. Davis PFT, pp. 10-11; Gordon PFT, pp. 17-38. In particular, Waldron failed to: (1) follow MassDEP data gathering protocols and analysis with respect to vegetation, soils, and hydrology; (2) show that wetland indicator plants are predominant; (3) show saturated or inundated conditions exist; (4) properly space analytical plots, and instead placed vegetation observation plots that were too small, too close together, and sometimes overlapping, leading to an inappropriately small area of study that is not accurately representative of the entire area; (5) analyze all five of the vegetative layers; (6) rely upon current soil charts, and instead used outdated soil charts, leading to inaccurately characterized soils; and (7) accurately characterize hydrology at the site. Gordon PFT, pp. 17-38; ¶¶ 58-59, 60-68, 70-81, 82-103, 112-119.

Gordon also credibly undermined the Petitioners' purported evidence of recent alterations that allegedly obscured the wetlands. At the April 5, 2019 Site visit, Gordon did not observe McManus or Waldron unearth any straw wattle from a test pit, which the Petitioners claim is recent evidence of the presence of BVW and subsequent alteration. Gordon PFT ¶¶ 114; HT #2 at 59:41-59:55; HT #3 at 25:13-26:03. Instead, Gordon observed an erosion control blanket that Titanium installed in March 2016 per the BCC's instruction, which was still covering the surface of the ground, beneath vegetation. Gordon PFT ¶ 114, Ex. FF. Gordon also disagreed with Waldron's April 5, 2019 observations regarding the presence of goldenrod, and in fact observed

nine more species that Waldron missed. Gorden PFT ¶¶ 99-100 and Ex. CC (showing no goldenrod yellow flowers where the alleged goldenrod would be, in August 2019) and Ex. DD (showing conditions on the slope immediately to the west of the parking lot, with green erosion control blanket, in April 2019).

McManus' testimony is also of little assistance to the Petitioners. He took pictures of the site on two days in February 2016 from another property; reviewed Waldron's data years after it was collected; attended a site walk but did not access the Site on November 28, 2017; and he attended one Site visit in April 2019 to dig two soil pits. Because his observations were from an abutting property, based upon Waldron's 2013 wetlands analysis, or recorded on site with Waldron, his testimony suffers from the same problems as Waldron's testimony and a lack of direct, personal familiarity with the Property.

CONCLUSION

For all the above reasons, I recommend that MassDEP's Commissioner issue a Final Decision affirming the SOC. A preponderance of the evidence supports the BVW delineation approved in the SOC, which was based upon a prior delineation conducted by the MWRA before the alleged site alterations occurred in 2016. In fact, that evidence shows the BVW boundary in the SOC is conservative, i.e. it is more upland and more protective of the BVW than may be required under the Wetlands Regulations.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is

subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: November 5, 2020



Timothy M. Jones
Presiding Officer

SERVICE LIST

In The Matter Of:

Ronen Drory, The Titanium Group, LLC

Docket No. WET-2019-002

File No. 006-1500

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