

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT
CIVIL ACTION NO. 1977CV01593-C

**BOSTON CLEAR WATER COMPANY,
INC.,**

Plaintiff,

v.

**TOWN OF LYNNFIELD, THE TOWN
OF LYNNFIELD CONSERVATION
COMMISSION and its Members, Paul
Martindale, Donald Gentile, Melanie
Lovell, Angelo Salamone, Janice Solomon,
Bill Thompson and Kirk Mansfield,
Defendants.**

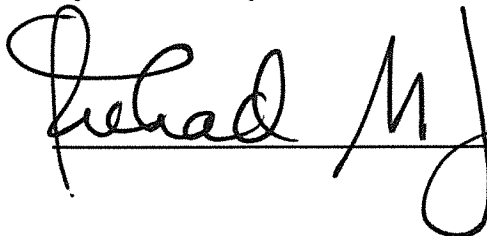
**PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Boston Clear Water Company, Inc. (hereinafter "Plaintiff") pursuant to the provisions of Massachusetts Rules of Civil Procedure 12 (c) and Standing Order 1-96 hereby moves that the Court enter Judgment on the Pleadings in favor of Plaintiff as filed herein. Plaintiff seeks to overturn the improper Final Decision issued by the Defendant Lynnfield Conservation Commission ("Lynnfield" or "Defendant") for Defendant's failure to act.

A Memorandum supporting the Motion is attached hold a public hearing on Plaintiff's Notice of Intent within the statutorily prescribed twenty-one (21) days for filings under the Wetlands Bylaw.

Respectfully Submitted,

**Boston Clear Water Company, Inc.
By Its Attorney,**

A handwritten signature in black ink, appearing to read "Richard M. J.", is written over a horizontal line.

Richard A. Nylan, Jr., Esq.
BBO# 375280
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(617) 348-4500

Date: August 4, 2020

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**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

Plaintiff Boston Clear Water Company, Inc. (hereinafter "Plaintiff" or "BCW") pursuant to the provisions of Massachusetts Rules of Civil Procedure 12 (c) and Standing Order 1-96 hereby moves that the Court enter Judgment on the Pleadings in favor of Plaintiff as filed herein. Plaintiff seeks to overturn the improper denial of an Order of Conditions (the "Order") issued by Defendant Lynnfield Conservation Commission ("Lynnfield" or "Defendant") under the Lynnfield non-zoning Wetlands Bylaw (the "Bylaw") denying Plaintiff's project. (AR 34)¹ Plaintiff seeks to perform improvements to a structurally deteriorated spring house that contains and protects a MassDEP licensed public water supply.

¹ References are to the Administrative Record ("AR") of proceedings filed by the Town as required by the Standing Order. Unfortunately, Defendant's AR has no page numbers. Instead, pages are separated by headings in Roman numerals. References in this Memorandum are to the Roman numerals in the Record.

Plaintiff states that the material evidence is uncontroverted and agreed to by the parties that Defendant Commission did not hold a public hearing within the prescribed twenty-one (21) days under the statute and Bylaw and there was no waiver of same. Therefore, the Commission has forfeited its jurisdiction to regulate this Project under the Bylaw to the Massachusetts Department of Environmental Protection (“MassDEP”).

II. ISSUE BEFORE THE COURT

Whether Defendant Lynnfield Conservation Commission has Jurisdiction to Deny the Project When it Failed to Hold a Public Hearing within Twenty-One (21) Days Following the Submission of the Notice of Intent by Plaintiff.

III. THE PROPERTY AND THE PROJECT

The Property is on one (1) acre in Lynnfield, Massachusetts and serves as the location of the MassDEP-approved Boston Clear Water public water supply. The subject Property consists of two (2) lots containing a spring house, a driveway and a distribution building. The public water supply is licensed by MassDEP; DEP PWS 3164005. The spring which feeds the public water supply is protected in an enclosed stone structure known as the spring house. The water lines convey the spring water to the building for distribution to the public. (AR; Exhibit “I”; Notice of Intent)

The Property has been a public water supply for more than 100 years. The spring house is an old stone structure which is in a deteriorated condition. (AR; Exhibit “I”; Structural Engineer’s Report) BCW observed cracks and bulging in the stone foundation walls of the spring house in 2019 and retained a structural engineer to inspect the spring house structure and the surrounding area. As noted below, (Section V of this Memorandum) Plaintiff proposed structural repairs and to reinforce the stone structure in a Notice of Intent filed with Defendant Commission. Since the work will take place within the buffer zone to wetlands and in wetlands,

approval is required under the Wetlands Protection Act and under the Lynnfield Wetlands Bylaw. (AR; Exhibit “XI.A”)

IV. JURISDICTION OF THE LYNNFIELD CONSERVATION COMMISSION UNDER THE WETLANDS PROTECTION ACT AND THE BYLAW

A. General

The Property contains buffer zone and bordering vegetated wetlands (BVW) under the jurisdiction of the Wetlands Protection Act (the “Wetlands Act”) and the Bylaw. (AR; Exhibit “I”; Site Plan)

Conservation Commissions were a legislative creation in the early 1970’s to regulate activities proposed under the Wetlands Act; M.G.L. c.131, §40 at the municipal level. Under the Wetlands Act, the Lynnfield Conservation Commission has the authority to review and condition proposed work in or near inland wetlands to ensure that the proposed activity will protect the statutory interests of storm damage prevention, flood control, protection of private and public water supplies, fisheries, shellfish, protection of groundwater, prevention of pollution and the protection of wildlife habitat in the wetlands. (M.G.L. c.131, §40) In this case, the Defendant Commission’s authority would have extended to reviewing and regulating the potential impacts of Plaintiff’s proposed improvements to the spring house activities within the BVW and within the one-hundred-foot buffer zone of the adjacent BVW. The Conservation Commission does not regulate uses on the Property, rather it regulates the impact of activities upon wetland resource areas. (AR; Exhibit “XI.A”)

Massachusetts General Laws (“M.G.L.”) Chapter 131, Section 40 states:

“The conservation commission, selectmen or mayor receiving notice under this section shall hold a public hearing on the proposed activity within twenty-one days of the receipt of said notice.” (*emphasis supplied*)

M.G.L. c.131, §40, ¶17; (Exhibit 1)

The Department's regulations at 310 CMR 10.05(5) state that the public hearing must be held within 21 days of receipt of the NOI as follows:

“(a) A public hearing shall be held by the conservation commission with 21 days of receipt of the minimum submittal requirements set forth in the general instructions for completing Notice of Intent (Form 3), Abbreviated Notice of Intent (Form 4), and Abbreviated Notice of Resource Area Delineation and shall be advertised in accordance with M.G.L. c.131, §40 and the requirements of the Open Meeting Law, M.G.L. c.39, §23B”.

(310 CMR 10.05(5); Exhibit 2)

B. The Bylaw

In addition to its authority under the Wetlands Act, the Commission separately regulates projects under its Wetland Bylaw. The Bylaw was adopted by the Town in 2005 (AR; Exhibit “XI.A”) and was followed by the adoption of regulations. (AR; Exhibit “XI.B”) The Bylaw adopts the procedural requirements of the Wetlands Act for the holding of public hearings within twenty-one (21) days of receiving the NOI application and the issuance of Orders of Conditions within twenty-one (21) days of closing the public hearing. The Bylaw includes certain regulations of activities different than the review under the Wetlands Act. For instance, the Bylaw regulations include a 25-foot No-Disturb Zone and a 50-foot No-Building Zone. (AR; Exhibit “XI.B”)

Defendant Commission regulates activities within the buffer zone and inland wetlands through the issuance of two (2) Orders of Conditions with a finding that the Project either conforms or does not conform to the performance standards established by MassDEP regulations at 310 CMR 10.00 et seq. (the “MassDEP Wetland Regulations”) and the performance standards of the Bylaw and its regulations. (AR; Exhibits “XI.A” and “XI.B”)

The Bylaw follows the Wetlands Act statute and the MassDEP regulations and states at Section 240-5(C):

“The Commission shall commence the public hearing/meeting within 21 days from receipt of a completed permit application [NOI], an ORAD or RFD unless an extension is authorized in writing by the applicant.” (*emphasis added*) (AR; Exhibit “XI.A”; Exhibit 3)

The Wetlands Act, MassDEP wetland regulations and the attached Bylaw regulations establish a process whereby an Applicant (Plaintiff) files a Notice of Intent (“NOI”) with the Lynnfield Conservation Commission on a form prescribed by MassDEP for both the Bylaw and the Wetlands Act. Plaintiff’s NOI identifies the wetland resource areas on the Property, the work proposed, and a description of how the wetlands will be protected by the proposed work and meets the MassDEP performance standards and the standards of the Bylaw. (AR; Exhibit “XI.A, B”)

Under the statutory and Bylaw process, Defendant is required to hold a public hearing within twenty-one (21) days of receipt of the NOI under the Wetlands Act and under the Bylaw. After the review is complete, it closes the public hearing and then issues an Order of Conditions approving or denying the Project under the Wetlands Act and an Order of Conditions affirming or denying the Project under the Bylaw. (AR; Exhibit “XI.A”)

V. NOTICE OF INTENT FILING AND PUBLIC HEARING NOT HELD WITHIN TWENTY-ONE (21) DAYS

A. Notice of Intent

On August 30, 2019, Plaintiff hand delivered the NOI to the Defendant Lynnfield Conservation Commission under the Wetlands Act and under the Bylaw to perform the improvements to the spring house, including stabilizing the foundation, reinforcing the walls, and terracing the hillside to regulate stormwater (collectively, the “Improvements”). It is critical

for the foundation to be secure and the spring house not be open to surface contamination. (AR; Exhibit “I”)

The NOI, found at Exhibit “I” of the Record, submitted to the Defendant Commission, included:

1. A description of the structural and physical work necessary to stabilize the spring house, that portion of the Property subject to Lynnfield Conservation Commission jurisdiction under the Wetlands Act under the Bylaw. (AR; Exhibit “I-1”)
2. A description of the construction standards and work to be performed. (AR; Exhibit “I-2”)
3. Erosion Controls proposed to mitigate impacts to the downgradient wetlands. (AR; Exhibit “I-2”)
4. The NOI procedural form identifying the potential impacts to wetland resource areas with the foundation work, listing the plans attached and identifying how the wetlands would be protected.
5. Replication of wetlands proposed (250 square feet) to compensate for the BVW altered due to the reinforcement of the walls.
6. Request for Variance under the Bylaw for work within the 25-foot No-Disturb Zone and 50-foot No-Build Zone.
7. Abutters List and filing fee.
8. Site Plans.
9. Opinion from the structural engineer regarding the physical condition of the spring house.
10. Detail sheets for work performed. (AR; Exhibit “I”)

The NOI explained that the site activities are necessary to bring the Property into compliance with DEP recommended grade and slope for the improvements.² Finally, the NOI included the erosion control and sediment collection measures and the operation and maintenance of the hay bales, silt fences and stormwater discharge areas to improve water quality.

B. Commission's Failure to Act and Hold a Hearing within Twenty-One (21) Days.

The Bylaw follows the Wetlands Act and requires that the public hearing be held within twenty-one (21) days of the receipt of the NOI. (AR; Exhibit "XI.A")³ Following the submission of the NOI, both parties agree that the Commission did not hold a public hearing within the prescribed twenty-one (21) days. (AR; Exhibit "V")

Upon receipt of the hand delivered NOI, the Commission published its first notice of a hearing to be held by the Commission on September 17, 2019, within the prescribed twenty-one (21) days. However, following publication of notice (AR; Exhibit "II.A") and prior to the public hearing on September 17, 2019, the Commission cancelled the public hearing and changed the first public hearing to September 24, 2019 without an extension from the Plaintiff/Applicant. The Record includes an email from the Commission staff to the Plaintiff's engineer on September 23, 2019 asking if a waiver of the 21-day public hearing requirements will be granted (25 days after the NOI was filed) and to Plaintiff's counsel. (AR; Exhibit "V")

These emails (1) acknowledge that the Commission did not hold a public hearing on September 17 within twenty-one (21) days of the filing of the NOI; and (2) no waivers or

² The NOI points out that the slope must be modified to prevent surface water directed to the spring house. This will include terracing the slope. (AR; Exhibit "I", p.2)

³ A copy is attached as an exhibit to this Memorandum. (Exhibit 3)

extensions of the (21) day period by Plaintiff or withdrawal of the NOI took place under the Bylaw. (AR; Exhibit “V”)

The Plaintiff informed Defendant Commission that it had appealed the Commission’s failure to act within the statutory and regulatory time period under the Wetlands Act and that it was not withdrawing the NOI under the Bylaw. (AR; Exhibit “IV”; emails) The minutes of the September 24, 2019 hearing of the Commission confirmed that the Defendant Commission did not hold the public hearing within twenty-one (21) days due to the lack of a quorum and the Commission discussed the Plaintiff’s NOI and continued the hearing. (AR; Exhibit “VI.A”; Transcript p.85)⁴

Defendant Commission opened the hearing on the Plaintiff’s NOI on October 15 and continued the hearing until November 2019. (AR; Exhibit “VI.B”) Defendant Commission opened the hearing on Plaintiff’s NOI on November 19 and continued the hearing to December 2019. (AR; Exhibit “VI.C”; Minutes, p.3)

Defendant Commission convened a public hearing on December 17, 2019 on the NOI. Plaintiff’s counsel appeared as a courtesy and informed Defendant that Defendant had no jurisdiction over the NOI and that Plaintiff was not withdrawing the NOI. The Commission continued the hearing until January, 2020. (AR; Exhibit “VI.D”)

Plaintiff filed a Complaint on January 16, 2020 alleging Defendant’s failure to act for not holding a public hearing. Defendant Commission convened a public hearing on January 21, 2020 on the NOI. The Commission went into Executive Session and continued the hearing until

⁴ The Chairman suggested, on September 24, 2019, that the Commission would take no action on the NOI until all other matters were resolved by BCW (AR; Exhibit “VI.A”; Transcript p.92), contrary to Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 565, 571 (1996). “Prior violations or prospective violations of a town by-law are not a legally tenable ground for denial of a submission that on its face complies with applicable law.” Fafard at 571; citing Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148, 157 (1977).

February 18, 2020. (AR; Exhibit “VI.E”; Minutes, p. 5) Defendant Commission convened a public hearing on February 18, 2020 and voted to deny the Project under the Bylaw. (AR; Exhibit “VI.F”)

On or about February 21, 2020, the MassDEP issued a Superseding Order of Conditions approving the improvements under the Wetlands Act as proposed in the NOI and acknowledging the Defendant’s failure to hold the public hearing within twenty-one (21) days of filing of the NOI by Plaintiff. Under the Superseding Order of Conditions, the spring house improvements can go forward as conditioned by MassDEP. (AR; Exhibit “VIII”)

On or about February 18, 2020, the Defendant issued an Order of Conditions under the Bylaw denying the improvements to the spring house. (AR; Exhibit “IX”; the “Denial”) On or about March 3, 2020, Plaintiff amended its Complaint to reflect the Defendant’s error of law issuing the Denial.

VI. THE ORDER OF CONDITIONS DENIAL

The Order of Conditions’ denial by Defendant Commission conceded the failure to hold the hearing within 21 days of receipt of the NOI and that the Commission continued the hearing in September, October, November and December 2019 and in January 2020. The Denial stated that the Commission was “unable to determine if all of the proposed modifications of resource area and buffer zone are necessary to achieve the intent of the Project.” (AR; Exhibit “IX”)

VII. STANDARD OF REVIEW

The review of the failure of a Commission to meet its statutory or regulatory requirements under the Wetland Bylaw by the Court is not novel. It is well settled that actions and inactions under local Wetland Bylaws are subject to judicial review under certiorari pursuant to M.G.L. c.249, §4. The Plaintiff is asking the Court to overturn the Commission’s Denial and

declare it had no jurisdiction because of its failure to hold a public hearing in accordance with the law and its Denial constituted an error of law.

It is axiomatic that an agency's actions must be in accordance with the applicable regulatory scheme. A decision is arbitrary and capricious where (a) the Commission "has acted for reasons that are extraneous to the prescriptions of the regulatory scheme," Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 565, 568 (1996); or (b) when the Commission applies criteria "devised for the occasion, rather than of uniform applicability," *id.*, at 572; or (c) it "has arbitrarily singled out an individual for unequal and perhaps invidious treatment." Yerardi's Moody St. Restaurant and Lounge v. Board of Selectmen of Randolph, 19 Mass. App. Ct. 296, 301 (1985). As further stated in Fafard, a decision is arbitrary and capricious where there is no "rational relation between [the agency's] decision and the purpose of the regulations it is charged with enforcing." Fafard, 41 Mass. App. Ct. at 572. The Courts have addressed the jurisdictional requirement that the review process under the Bylaw must follow the statutory timelines or the Order is null and the Commission forfeits its jurisdiction to the Department. Oyster Creek Preservation, Inc. v. Harwich Conservation Commission, 449 Mass. 859 (2008).

VIII. ARGUMENT

A. Defendant Does Not Have Jurisdiction as It Failed to Hold a Public Hearing Within Twenty-One (21) Days.

Under the Wetlands Act and the Bylaw, the parties agree that a Notice of Intent is required to seek permission to conduct activities within jurisdiction under the Act and the Bylaw. Garrity v. Conservation Commission of Hingham, 562 Mass. 779, 783 (2012).

There are clear requirements within the Wetlands Act and the Bylaw for the opening of a public hearing by the Defendant Commission within twenty-one 21 days of receiving the NOI.

The conduct of the public hearing and the issuance of an Order of Conditions within twenty-one (21) days of the close of the public hearing are obligatory. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859 (2007). (“Oyster Creek”)

Most notably, the Commission’s failure to hold a hearing within twenty-one (21) days is fatal to its jurisdiction and renders the Denial null and void. The NOI was filed on August 30, 2019 and the Defendant Commission admits that it did not hold a hearing within twenty-one (21) days as required by M.G.L. c.131, §40 and the Bylaw. (AR; Exhibit “XI.A, B”) Rather, the Commission’s hearing was held on September 24, 2019; twenty-six (26) days after the NOI submission by Plaintiff.

B. Case Law Finds No Jurisdiction of the Commission if it Misses the Statutory Deadline.⁵

The Court’s reported and unreported decisions removing jurisdiction from local commissions under their wetland bylaws for failing to meet statutory prescribed time periods began in 2007 with Oyster Creek at 859, 863.

In Oyster Creek, the Harwich Conservation Commission failed to issue an Order of Conditions within the statutory prescribed twenty-one days from the date the public hearing was closed. This statutory requirement is the second bookend for local commissions who must commence the public hearing process within 21 days of receiving the Notice of Intent and then issue a decision within 21 days of the close of the public hearing.

⁵ There is a suggestion by Huie v. Conservation Commission of Scituate, 79 Mass. App. Ct. 1127 (2011) that the failure to issue the decision within twenty-one (21) days renders the Order a nullity as a matter of law and that no appeal of the Bylaw decision is required. However, Huie is an unpublished Rule 1:28 decision and Oyster Creek’s holding that the Bylaw decision is not of any effect did not address that question. Plaintiff has not waived that argument that no appeal is required as that conclusion may be the next step in voiding commission jurisdiction as a matter of law when statutory timelines are violated.

The Massachusetts Supreme Judicial Court (“SJC”) spent time discussing the statutory scheme of the Wetlands Act. (Oyster Creek at 862-863) The SJC held that the Act mandates that the Commission must hold a public hearing on the proposed project within twenty-one (21) days after receiving the Notice of Intent and shall issue a written Order approving or denying the Project within 21 days. Oyster Creek pointed out, similar to this case, that the twenty-one-day limits were also include in the Harwich Bylaw. (Oyster Creek at 863)

The Court found that the Commission’s action was not “timely” and then discussed the remedy. The Oyster Creek Court found that:

“The timing provisions in the Act are obligatory and a local community is not free to expand or ignore them. . . and it is appropriate that it should lose the right to insist on the provisions of the local bylaw, and that any Superseding Order issued by the DEP should apply in its stead.”⁶

The Court concluded its findings by stating that the Superseding Order of Conditions issued by the DEP governs the proposed work and that Oyster Creek should proceed in accordance with the terms of that Order.

Oyster Creek’s findings that hold the local commissions to statutory time periods have continued. Case law is clear as to the consequences when the Commission does not meet the statutory and regulatory time frame imposed by the Bylaw. If the public hearing is not held within twenty-one (21) days of the NOI receipt, it is not timely. In Cave Corporation v. Conservation Commission of Attleboro, 91 Mass. App. Ct. 767, 770 (2017) (“Cave”) the Commission’s failure to hold a hearing on Notices of Intent for four house lots within 21 days of

⁶ The Court distinguished the requirements of the local commissions to adhere to the obligatory time standards from their ability to draft a bylaw that imposes more stringent performance standards than the State’s Wetlands Act. (Oyster Creek at 866)

receipt of the NOIs resulted in a loss of jurisdiction over those proposed activities.⁷ Finally, in Nelson v. Conservation Commission of Wayland, 97 Mass. App. Ct. 1108, in a Rule 1:28 finding, the Court held that:

“it is well settled that when a local conservation commission fails to act on an application filed under G.L.C.131, §40, in a timely manner, a subsequent Superseding Order of Condition from the Department of Environmental Protection (DEP) governs, and any late-issued decision of the Commission is without effect.”

The twenty-one (21) day requirements for the hearing in the Bylaw is similar to the twenty-one (21) day requirements in the Wetlands Act and it confers a right to a prompt hearing from a conservation commission within a defined time frame. The twenty-one (21) day deadline reflects the legislative purpose of ensuring that applications for Orders of Conditions are considered and ruled upon expeditiously. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859 at 865 (2008); Zizza v. Falmouth Conservation Commission, 35 Mass. L. Reporter 532 (2019) (“Zizza”).

The further consequence is that when a conservation commission misses its deadline, any Superseding Order issued by MassDEP shall apply to the project. Regan v. Conservation Commission of Falmouth, 77 Mass. App. Ct. 485, 488, 489 (2010).

Generally, the local commission has the final say with regard to Notices of Intent under a local wetland bylaw, and generally the more stringent requirements of the local wetland bylaw are not preempted by a Final Order of Conditions issued by MassDEP. Dubuque v. Conservation Commission of Barnstable, 58 Mass. App. Ct. 824, 826 (2003); Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1929). However, it is well established that the Defendant

⁷ Footnote 8 of the Cave decision confirms the finding as “Before the Superior Court and in this [Appeals Court] appeal, the Commission concedes that its denial of approval of the Notice of Intent for Lot 7 was a nullity because the DEP subsequently issued a Superseding Order of Conditions. Cave at 770.

Lynnfield Conservation Commission loses its right to regulate the project under the Bylaw if it fails to comply with the time provisions of the Wetlands Act and the local Bylaw. The late hearing held by Defendant is fatal to its jurisdiction. Oyster Creek at 866; Garrity at 790, 791; (the late issued decision is without effect).

C. The Commission's Offer to Hold a Public Hearing Soon After the Twenty-One (21) Days Had Expired Does Not Cure the Jurisdictional Defect.

At the time the Commission determined that it would not have a quorum on day 19 of the 21-day time period to hold a public hearing, it alleges that its' agent reached out to the Applicant's engineer to seek a waiver of the statutory and regulatory time period to hold a hearing. Plaintiff refers to this as an allegation because there is no written request or confirmation of a request prior to the 21st day in the Administrative Record. Rather, the Record includes an email from the Commission agent on day 23, after the 21-day hearing was already missed. (AR; Exhibit "V") It is black letter law that to be valid, a waiver of a right must be voluntary, as well as intentional. Garrity at 788, citing Roseman v. Day, 345 Mass. 93, 99 (1962).

The Courts have considered and rejected a similar argument when Orders of Conditions were issued even one day late on the 22nd day. In Oyster Creek, the Court discussed the "mandate" to adhere to statutory and regulatory obligation, Oyster Creek at 866, even though the Order was issued on the 22nd day. Similarly, in Zizza, the mailed envelope showed a Pitney-Bowes machine stamp on September 6, 2018 to evidence that the envelope containing the Final Order of Conditions was weighed and prepared for mailing on the 21st day. However, the mailing required a postmark per the MassDEP regulations at 310 CMR 10.04 and the postmark on the envelope was September 7, 2018; showing evidence of issuing the Order (mailing) on day 22, one day late. Zizza at 864-865.

The question before the Court does not extend to why the Commission was unable to hold the hearing within 21 days of receiving the Notice of Intent, or whether its rescheduled hearing on day 26 was a good faith attempt to hold a hearing. Oyster Creek, Zizza, Regan and Cave have all answered that question. The Commission loses its jurisdiction.

IX. CONCLUSION

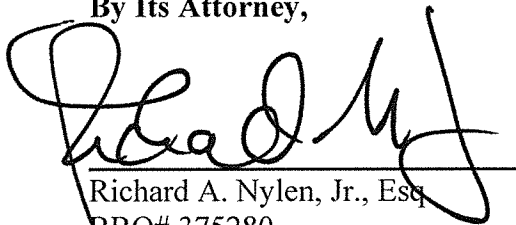
In this case, the hearing by Defendant Commission on Plaintiff's NOI was untimely and is null and void. The Commission lost its authority to regulate the Project when it failed to meet the twenty-one (21) days to conduct the public hearing. The Order of Conditions must be vacated. Oyster Creek, Zizza, Regan and Garrity.

Plaintiff seeks a decision in certiorari overturning the Denial and a declaration that the Order of Conditions issued by Defendant Commission is void; and find pursuant to M.G.L. c.231A that Defendant's failure to hold a public hearing within 21 days on the NOI, filed by hand by the Plaintiff, harmed the Plaintiff and that the Defendant Commission has no authority or jurisdiction under the Bylaw to regulate Plaintiff's activities proposed in the Notice of Intent.

Respectfully Submitted,

BOSTON CLEAR WATER COMPANY, INC.

By Its Attorney,



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Date: August 4, 2020

EXHIBIT 1

Part I ADMINISTRATION OF THE GOVERNMENT

Title XIX AGRICULTURE AND CONSERVATION

Chapter 131 INLAND FISHERIES AND GAME AND OTHER NATURAL RESOURCES

Section 40 REMOVAL, FILL, DREDGING OR ALTERING OF LAND BORDERING WATERS

Section 40. No person shall remove, fill, dredge or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, sewer, water, telephone, telegraph and other telecommunication services, without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of conditions and provided all appeal periods have elapsed. Said notice shall be filed by delivery in hand to the conservation commission or its authorized representative or by certified mail, return receipt requested, to said commission, or, if none, to the

board of selectmen in a town or the mayor of a city in which the proposed activity is to be located. Upon such filing, the receipt of such notice shall be acknowledged in writing on the face thereof and shall include the time and date so received. A person delivering said notice by hand shall be given a receipt in writing acknowledging the time and date of such filing. Copies of such notice shall be sent at the same time by certified mail to the department of environmental protection. To defray state and local administrative costs each person filing such a notice shall pay a filing fee, determined on a sliding scale basis by the commissioner of administration after consultation with the secretary of environmental affairs. Fifty percent of any filing fee in excess of twenty-five dollars shall be made payable to the department of environmental protection, in a manner to be determined by the commissioner of environmental protection, at the same time as the copies of the notice are sent to the department of environmental protection. The remainder of said fee shall be made payable to the city or town; provided, that said remainder shall be expended solely by the local conservation commission for the performance of its duties under this chapter and shall accompany the copy of the notice sent to the city or town. No such notice shall be sent before all permits, variances, and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that such notice may be sent, at the option of the applicant, after the filing of an application or applications for said permits, variances, and approvals; provided, that such notice shall include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment. Upon receipt of any notice hereunder the department of environmental protection, hereinafter called

the department, shall designate a file number for such notice and shall send a notification of such number to the person giving notice to the conservation commission, selectmen or mayor to whom the notice was given. Said notification shall state the name of the owner of the land upon which the proposed work is to be done and the location of said land.

Any person filing a notice of intention with a conservation commission shall at the same time give written notification thereof, by delivery in hand or certified mail, return receipt requested, to all abutters within one-hundred feet of the property line of the land where the activity is proposed, at the mailing addresses shown on the most recent applicable tax list of the assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private street or way, and in another municipality or across a body of water. When a notice of intent proposes activities on land under water bodies and waterways or on a tract of land greater than 50 acres, written notification shall be given to all abutters within 100 feet of the proposed project site. For the purposes of this section, "project site" shall mean lands where the following activities are proposed to take place: dredging, excavating, filling, grading, the erection, reconstruction or expansion of a building or structure, the driving of pilings, the construction or improvement of roads or other ways and the installation of drainage, sewerage and water systems, and "land under water bodies and waterways" shall mean the bottom of, or land under, the surface of the ocean or an estuary, creek, river stream, pond or lake. When a notice of intent proposes activity on a linear shaped project site longer than 1,000 feet in length, notification shall be given to all abutters within 1,000 feet of the proposed project site. If the linear project site takes place wholly within an easement through another person's land, notice shall also be given to the

landowner. Said notification shall be at the applicant's expense, and shall state where copies of the notice of intention may be examined and obtained and where information regarding the date, time and place of the public hearing may be obtained. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the conservation commission.

Within twenty-one days of the receipt by a conservation commission of a written request made by any person and sent by certified mail, said commission shall make a written determination as to whether this section is applicable to any land or work thereon. When such person is other than the owner, notice of any such determination shall also be sent to the owner.

The term "applicant" as used in this section shall mean the person giving notice of intention to remove, fill, dredge or alter.

The term "person" as used in this section shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, administrative agency, public or quasipublic corporation or body, or any other legal entity or its legal representative, agents or assigns.

The term "bogs" as used in this section shall mean areas where standing or slowly running water is near or at the surface during a normal growing season and where a vegetational community has a significant portion of the ground or water surface covered with sphagnum moss (*Sphagnum*) and where the vegetational community is made up of a significant portion of one or more of, but not limited to nor necessarily including all, of the following plants or groups of plants: aster (*Aster nemoralis*), azaleas

(*Rhododendron canadense* and *R. viscosum*), black spruce (*Picea mariana*), bog cotton (*Eriophorum*), cranberry (*Vaccinium macrocarpon*), high-bush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), laurels (*Kalmia angustifolia* and *K. polifolia*), leatherleaf (*Chamaedaphne calyculata*), orchids (*Arethusa*, *Calopogon*, *Pogonia*), pitcher plants (*Sarracenia purpurea*), sedges (*Cyperaceae*), sundews (*Droseraccae*), sweet gale (*Myrica gale*), white cedar (*Chamaecyparis thyoides*).

The term "coastal wetlands", as used in this section, shall mean any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action or coastal storm flowage.

The term "freshwater wetlands", as used in this section, shall mean wet meadows, marshes, swamps, bogs, areas where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.

The term "swamps", as used in this section, shall mean areas where ground water is at or near the surface of the ground for a significant part of the growing season or where runoff water from surface drainage frequently collects above the soil surface, and where a significant part of the vegetational community is made up of, but not limited to nor necessarily include all of the following plants or groups of plants: alders (*Alnus*), ashes (*Fraxinus*), azaleas (*Rhododendron canadense* and *R. viscosum*), black alder (*Ilex verticillata*), black spruce (*Picea mariana*), button bush (*Cephalanthus occidentalis*), American or white elm (*Ulmus americana*), white Hellebore (*Veratrum viride*), hemlock (*Tsuga*

canadensis), highbush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), cowslip (*Caltha palustris*), poison sumac (*Toxicodendron vernix*), red maple (*Acer rubrum*), skunk cabbage (*Symplocarpus foetidus*), sphagnum mosses (*Sphagnum*), spicebush (*Lindera benzoin*), black gum tupelo (*Nyssa sylvatica*), sweet pepper bush (*Clethra alnifolia*), white cedar (*Chamaecyparis thyoides*), willow (*Salicaceae*).

The term "wet meadows", as used in this section where ground water is at the surface for a significant part of the growing season and near the surface throughout the year and where a significant part of the vegetational community is composed of various grasses, sedges and rushes; made up of, but not limited to nor necessarily including all, of the following plants or groups of plants: blue flag (*Iris*), vervain (*Verbena*), thoroughwort (*Eupatorium*), dock (*Rumex*), false loosestrife (*Ludwigia*), hydrophilic grasses (*Gramincae*), loosestrife (*Lythrum*), marsh fern (*Dryopteris thelypteris*), rushes (*Juncaceae*), sedges (*Cyperaceae*), sensitive fern (*Onoclea sensibilis*), smartweed (*Polygonum*).

The term "marshes", as used in this section, shall mean areas where a vegetational community exists in standing or running water during the growing season and where a significant part of the vegetational community is composed of, but not limited to nor necessarily including all, of the following plants or groups of plants: arums (*Araceae*), bladder worts (*Utricularia*), bur reeds (*Sparganiaceae*), button bush (*Cephalanthus occidentalis*), cattails (*Typha*), duck weeds (*Lemnaceae*), eelgrass (*Vallisneria*), frog bits (*Hydrocharitaceae*), horsetails (*Equisetaceae*), hydrophilic grasses (*Gramineae*), leatherleaf (*Chamaedaphne calyculata*), pickerel weeds (*Pontederiaceae*), pipeworts (*Eriocaulon*), pond weeds (*Potamogeton*), rushes (*Juncaceae*), sedges

(*Cyperaceae*), smartweeds (*Polygonum*), sweet gale (*Myrica gale*) water milfoil (*Halcragaceae*), water lilies (*Nymphaeaceae*), water starworts (*Callitrichaceae*), water willow (*Decodon verticillatus*).

The term "Densely developed areas", as used in this section shall mean, any area of ten acres or more that is being utilized, or includes existing vacant structures or vacant lots formerly utilized as of January first, nineteen hundred and forty-four or sooner for, intensive industrial, commercial, institutional, or residential activities or combinations of such activities, including, but not limited to the following: manufacturing, fabricating, wholesaling, warehousing, or other commercial or industrial activities; retail trade and service activities; medical and educational institutions; residential dwelling structures at a density of three or more per two acres; and mixed or combined patterns of the above. Designation of a densely developed area is subject to the secretary of the executive office of environmental affair's approval of a city or town's request for such designation. Land which is zoned for intensive use but is not being utilized for such use as of January first, nineteen hundred and ninety-seven or which has been subdivided no later than May first, nineteen hundred and ninety-six shall not be considered a densely developed area for the purposes of this chapter.

The term "Mean annual high-water line", as used in this section, shall mean with respect to a river, the line that is apparent from visible markings or changes in the character of soils or vegetation due to the prolonged presence of water and which distinguishes between predominantly aquatic and predominantly terrestrial land. The mean high tide line shall serve as the mean annual high water line for tidal rivers.

The term "River", as used in this section, shall mean a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year.

The term "Riverfront area", as used in this section, shall mean 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. This definition shall not create a buffer zone, so-called, beyond such riverfront area. Riverfront areas within municipalities with (i) a population of ninety thousand or more persons or (ii) a population density greater than nine thousand persons per square mile, as determined by the nineteen hundred and ninety federal census; (iii) that are within densely developed areas as defined herein; (iv) land in Waltham between the Charles river on the north, and the Crescent street and Pine street on the south, and the intersection of the Charles river and a line extended from the center line of Walnut street on the west, and the railroad right-of-way now or formerly of the Boston and Maine Railroad on the east; or (v) property located in the town of Milton shown on Milton assessors Map G, Block 56, Lot 13, located on 2 Granite Avenue shall be defined as that area of land situated between a river's mean annual high-water line and a parallel line located twenty-five feet away, measured outward horizontally, from the river's mean annual high-water line. The riverfront area shall not include land now or formerly associated with historic mill complexes including, but not limited to, the mill complexes in the Cities of Holyoke, Taunton, Fitchburg, Haverhill, Methuen and Medford in existence prior to nineteen hundred and forty-six and situated landward of the waterside facade of a retaining wall, building, sluiceway, or other structure existing on the effective date of this act. The riverfront area shall not apply to any

mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or of any special act or to forest harvesting conducted in accordance with a cutting plan approved by the department of environmental management, under the provisions of sections forty to forty-six, inclusive, of chapter one hundred and thirty-two; and shall not include any area beyond one hundred feet of river's mean annual high water mark: in which maintenance of drainage and flooding systems of cranberry bogs occurs; in which agricultural land use or aquacultural use occur; to construction, expansion, repair, maintenance or other work on piers, docks, wharves, boat houses, coastal engineering structures, landings, and all other structures and activities subject to licensing or permitting under chapter ninety-one and its regulations; provided that such structures and activities shall remain subject to statutory and regulatory requirements under chapter ninety-one and section forty of chapter one hundred and thirty-one or is the site of any project authorized by special act prior to January first, nineteen hundred and seventy-three.

The term "Riverfront area boundary line", as used in this section, shall mean the line located at the outside edge of the riverfront area.

The conservation commission, selectmen or mayor receiving notice under this section shall hold a public hearing on the proposed activity within twenty-one days of the receipt of said notice. Notice of the time and place of said hearing shall be given by the hearing authority at the expense of the applicant, not less than five days prior to such hearing, by publication in a newspaper of general circulation in the city or town where the activity is proposed and by mailing a notice to the applicant and to the board of health and the planning board of said city or town. The conservation commission and its agents, officers and employees and the

commissioner of environmental protection and his agents and employees, may enter upon privately owned land for the purpose of performing their duties under this section. No conditions shall be imposed, nor shall any determination be rendered by a conservation commission, in reference to this section, unless the conservation commission meets with a quorum present.

If after said hearing the conservation commission, selectmen or mayor, as the case may be, determine that the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries or to the protection of the riverfront area consistent with the following purposes: to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries, such conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such hearing impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith. If the conservation commission, selectmen or mayor, as the case may be, make a determination that the proposed activity does not require the imposition of such conditions, the applicant shall be notified of such determination within twenty-one days after said hearing. Such order or notification shall be signed by the mayor or a majority of the conservation commission or board of selectmen, as the case may be, and a copy thereof shall be sent forthwith to the applicant and to the department.

If a conservation commission has failed to hold a hearing within the twenty-one day period as required, or if a commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order, or if a commission, upon a written request by any person to determine whether this section is applicable to any work, fails within twenty-one days to make said determination, or where an order does issue from said commission, the applicant, any person aggrieved by said commission's order or failure to act, or any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town in which said land is located, may, by certified mail and within ten days from said commission's order or failure to act, request the department of environmental protection to determine whether the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries or to the protection of the riverfront area consistent with the following purposes: to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries. The commissioner of environmental protection or his designee also may request such a determination within said ten days. The party making any such request shall at the same time send a copy thereof by certified mail to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. If such party is other than the applicant, a copy of such request shall also be sent at the same time by certified mail to the applicant. Upon receipt of such request the department shall make the

determination requested and shall by written order issued within seventy days of receipt of such request and signed by the commissioner or his designee, impose such conditions as will contribute to the protection of the interests described herein; provided, however, that said department shall notify the applicant within thirty days of the receipt of such request if his application or request is not in proper form or is lacking information or documentation necessary to make the determination. Such order shall supersede the prior order of the conservation commission, board of selectmen or mayor, and all work shall be done in accordance therewith, but in no event shall any work commence until ten days have elapsed following the issuance of said order. In the case of riverfront areas, no order issued by a conservation commission, board of selectmen, mayor, or the department shall permit any work unless the applicant, in addition to meeting the otherwise applicable requirements of this section, has proved by a preponderance of the evidence that (1) such work, including proposed mitigation measures, will have no significant adverse impact on the riverfront area for the following purposes: to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries, and (2) there is no practicable and substantially equivalent economic alternative to the proposed project with less adverse effects on such purposes. An alternative is practicable and substantially economically equivalent if it is available and capable of being done after taking into consideration: costs, and whether such costs are reasonable or prohibitive to the owner; existing technology; the proposed use; and logistics in light of overall project purposes. For activities associated with access for one dwelling unit, the area under consideration for practicable

alternatives will be limited to the lot; provided, that said lot shall be on file with the registry of deeds as of the August first, nineteen hundred and ninety-six. For other activities including, but not limited to, the creation of a real estate subdivision, the area under consideration shall be the subdivided lots, any parcel out of which the lots were created, and any other parcels that are adjacent to such parcel or adjacent through other parcels formerly or presently owned by the same owner at any time on or after August first, nineteen hundred and ninety-six or any land which can reasonably be obtained; provided, that an ownership interest can reasonably be obtained after taking into consideration: cost, and whether such cost is reasonable or prohibitive to the owner; existing technology; the proposed use; and logistics in light of overall project purposes. At any time prior to a final order of determination by the department, any party requesting a determination may in writing withdraw the request, and such withdrawal shall be effective upon receipt by the department.

Notwithstanding the withdrawal, the commissioner or his designee may continue the determination if he notifies all parties within ten days of receipt of the withdrawal. A copy of such order shall be sent to the applicant, to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. As used in this section the words "wildlife habitat" shall mean those areas subject to this section which, due to their plant community composition and structure, hydrologic regime or other characteristics, provide important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.

No work proposed in any notice of intention shall be undertaken until the final order, determination or notification with respect to such work has been recorded in the registry of deeds, or if the land affected thereby be registered land, in the registry section of the land court for the district

wherein the land lies. If the final order, determination or notification requires the recording of a plan which (1) shows the location of the work, (2) is prepared by a registered professional engineer or land surveyor and (3) is in recordable form, no work proposed in the notice of intention shall be undertaken until such plan has been recorded in the registry of deeds or, if the land affected thereby is registered land, in the registry section of the land court for the district wherein such land lies.

Within twenty-one days of the receipt of a written request, by the applicant or the owner of the property, for a certificate of compliance, the issuer of the final order shall grant such request if the activity, or portions thereof, complies with such final order. The certificate of compliance shall state that the activity, or portions thereof, has been completed in accordance with such order.

Any site where work is being done which is subject to this section shall display a sign of not less than two square feet or more than three square feet bearing the words, "Massachusetts Department of Environmental Protection File Number..." and the sign shall display the file number assigned to the project.

If the department of environmental protection finds that any proposed work would violate the provisions of chapter ninety-one, it shall proceed immediately to enforce the provisions of said chapter.

The provisions of this section shall not apply to any mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or of any special act; to maintenance of drainage and flooding systems of cranberry bogs, to work

performed for normal maintenance or improvement of land in agricultural use or in aquacultural use; or to any project authorized by special act prior to January first, nineteen hundred and seventy-three.

Within one hundred and twenty days of the effective date of this act, the department, upon the advice and consent of the Commissioner of the Department of Food and Agriculture, shall promulgate rules and regulations pursuant to this section which shall establish definitions for the term "normal maintenance or improvement of land in agricultural, or in aquacultural use", for each agricultural commodity, or where appropriate because of similarities in cultural practices, groups or commodities in the Commonwealth. The department shall create a farmland advisory board to be appointed by the commissioner consisting of five persons one a member of the cooperative extension service, one a member of the USDA soil conservation service, one a member of a municipal conservation commission who has demonstrated expertise in agricultural issues, and two commercial farmers with expertise in different agricultural commodities to assist the department in the drafting of rules and regulations pursuant to this paragraph.

The notice of intention required in the first paragraph of this section shall not apply to emergency projects necessary for the protection of the health or safety of the commonwealth which are to be performed or which are ordered to be performed by an agency of the commonwealth or a political subdivision thereof. An emergency project shall mean any project certified to be an emergency by the conservation commission of the city or town in which the project would be undertaken, or if none, by the mayor of said city or the selectmen of said town. If the conservation commission, mayor, or selectmen, as the case may be, fail to act favorably within twenty-four hours of receipt of a request for certification

of an emergency project, said project may be so certified by the commissioner or his designee. In no case shall any removal, filling, dredging, or alteration authorized by such certification extend beyond the time necessary to abate the emergency. The permitting and emergency provisions in this paragraph shall not apply to severe weather emergencies as declared by the commissioner of environmental protection following a destructive weather event requiring widespread recovery efforts, debris cleanup or roadway or utility repair. A severe weather emergency declaration shall allow for emergency related work to occur as necessary for the protection of the health or safety of the residents of the commonwealth. A severe weather emergency declaration by the commissioner shall describe the types of work allowed without filing a notice of intent, any general mitigating measures to condition the work that may be required in performing such work, any notification or reporting requirements, the geographic area of the declaration's effect and the period of time the declaration shall be in effect which, in no event, shall be longer than 3 months unless extended by the commissioner. A severe weather emergency declared by the commissioner shall be sent electronically to all conservation commissions in the geographic area of the severe weather emergency and shall be made widely available to the general public through appropriate channels for emergency communications. A declaration of a severe weather emergency by the commissioner shall not impact the department's ability to enforce any general or special law or rule or regulation that is not altered by the commissioner's declaration.

Notwithstanding the provisions of section fourteen of chapter twenty-one A or any other provision of law to the contrary, the notice of intention required in the first paragraph of this section shall not apply to a

maintenance dredging project for which a license has been previously issued within ten years by the division of waterways of the department of environmental protection. A person intending to fill or dredge under such previously issued license shall file a written notice by certified mail to the conservation commission or if none, to the board of selectmen in a town or mayor of a city in which the land upon which such dredging project is located. Such notice shall contain the name and address of the applicant. If the conservation commission, the board of selectmen or mayor fails to notify the applicant at the applicant's address within twenty days of the receipt of such notice of the specific objections to the commencement of such dredging fill or maintenance dredging contemplated under said license, the applicant may commence such work without any further notice to other agencies of the commonwealth. Notwithstanding failure to notify an applicant, as hereinbefore provided, the conservation commission, the board of selectmen or mayor may at any time designate an area at which spoilage from the dredging may be placed and may require the relocation of shellfish before such maintenance dredging takes place.

If the conservation commission, the board of selectmen or mayor cites specific objections to the notice of intention, such conservation commission, board of selectmen or mayor may order a hearing as provided in this section and all other pertinent provisions of this section shall apply.

Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its

condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person. Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of the attorney general, the commissioner, a city or town, an owner or occupant of property which may be affected by said removal, filling, dredging or altering, or ten residents of the commonwealth under the provisions of section seven A of chapter two hundred and fourteen.

Rules and regulations shall be promulgated by the commissioner to effectuate the purposes of this section. However, failure by the commissioner to promulgate rules and regulations shall not act to suspend or invalidate the effect of this section. In addition to the other duties provided for in this section, a conservation commission and its agents, officers, and employees; the commissioner, his agents and employees; environmental officers, and any officer with police powers may issue enforcement orders directing compliance with this section and may undertake any other enforcement action authorized by law. Any person who violates the provisions of this section may be ordered to restore property to its original condition and take other actions deemed necessary to remedy such violations.

No person shall remove, fill, dredge or alter any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with an enforcement order issued pursuant to this section. Each day such

violation continues shall constitute a separate offense except that any person who fails to remove unauthorized fill or otherwise fails to restore illegally altered land to its original condition after giving written notification of said violation to the conservation commission and the department shall not be subject to additional penalties unless said person thereafter fails to comply with an enforcement order or order of conditions.

Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b), shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation.

EXHIBIT 2

10.05: continued

(h) The issuing authority may require that supporting plans and calculations be prepared and stamped by a registered professional engineer (PE) when, in its judgment, the complexity of the proposed work warrants this professional certification. The issuing authority may also require the preparation of supporting materials by other professionals including, but not limited to, registered landscape architect, registered land surveyor, environmental scientist, geologist or hydrologist when in its judgment the complexity of the proposed work warrants the relevant specialized expertise. The issuing authority may require a delineation in an Abbreviated Notice of Resource Area Delineation to be performed by a professional with relevant specialized expertise. If the Notice of Intent is a Combined Application, the supporting plans and calculations shall also conform to the requirements of 310 CMR 9.11(3)(b) and 314 CMR 9.05(1): *Application Requirements* to the extent they are applicable.

(5) Public Hearings by Conservation Commissions.

(a) A public hearing shall be held by the conservation commission within 21 days of receipt of the minimum submittal requirements set forth in the *General Instructions for Completing Notice of Intent (Form 3)*, *Abbreviated Notice of Intent (Form 4)* and Abbreviated Notice of Resource Area Delineation, and shall be advertised in accordance with M.G.L. c. 131, § 40 and the requirements of the open meeting law, M.G.L. c. 39, § 23B.

(b) Public hearings may be continued as follows:

1. without the consent of the applicant to a date, announced at the hearing, within 21 days, of receipt of the Notice of Intent;
2. with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
3. with the consent of the applicant for a period not to exceed 21 days after the submission of a specified piece of information or the occurrence of a specified action. The date, time and place of said continued hearing shall be publicized in accordance with M.G.L. c. 131, § 40, and notice shall be sent to any person at the hearing who so requests in writing.

(6) Orders of Conditions Regulating Work and Orders of Resource Area Delineation.

(a) Within 21 days of the close of the public hearing, the conservation commission shall either:

1. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is not significant to any of the interests identified in M.G.L. c. 131, § 40, and shall so notify the applicant and the Department on Form 6;
2. make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge or alter, is significant to one or more of the interests identified in M.G.L. c. 131, § 40, and shall issue an Order of Conditions for the protection of said interest(s), on Form 5. If the issuing authority also determines that the project meets the eligibility criteria for issuance of a Restoration Order of Conditions set forth in the applicable provisions of 310 CMR 10.00, the Order of Conditions for the project shall be a Restoration Order of Conditions; or
3. make a determination that bordering vegetated wetland and other resource areas subject to jurisdiction have been identified and delineated according to the definitions in 310 CMR 10.00 and shall issue an Order of Resource Area Delineation to confirm or modify the delineations submitted. The Order of Resource Area Delineation shall be effective for three years.

The standards and presumptions to be used by the issuing authority in determining whether an area is significant to the interests identified in M.G.L. c. 131, § 40, are found in 310 CMR 10.21 through 10.37 (for coastal wetlands) and 10.51 through 10.60 (for inland wetlands).

(b) The Order of Conditions shall impose such conditions as are necessary to meet the performance standards set forth in 310 CMR 10.21 through 10.60 for the protection of those areas found to be significant to one or more of the interests identified in M.G.L. c. 131, § 40 and the Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q). The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet said standards.

EXHIBIT 3

- I. The Commission shall return any unused portion of the consultant fee to the applicant unless the Commission decides at a public meeting that other action is necessary.
- J. The maximum consultant fee charged to reimburse the Commission for reasonable costs and expenses shall be according to the following schedule:

Project Cost	Maximum Fee
\$0 to \$500,000	\$2,500
\$500,001 to \$1,000,000	\$5,000
\$1,000,001 to \$1,500,000	\$7,500
\$1,500,001 to \$2,000,000	\$10,000

Each additional \$500,000 project cost increment (over \$2,000,000) may be charged not more than an additional \$2,500 maximum fee per increment.

- K. The "project cost" means the estimated entire cost of the project, including but not limited to resource area delineation, building design and construction, site preparation, landscaping and all site improvements. The consultant fee shall be paid pro rata for that portion of the project cost applicable to those activities within resource areas protected by this bylaw. The project shall not be segmented to avoid the consultant fee. The applicant shall submit estimated project costs at the Commission's request, but the lack of such estimated project costs shall not affect payment of the consultant fee.

§ 240-5. Notice and hearings.

- A. Any person filing a permit or other application, but not an RFD, with the Conservation Commission shall also provide notification to the owners of any property within 100 feet of the property line of the land where the activity is proposed, including any in another municipality or across a public or private street or a body of water, such persons being referred to herein as "abutters." The applicant shall provide notification at the mailing addresses shown on the most recent applicable tax list from the Assessors' office. Notification shall be at the applicant's expense. The notification shall state where copies of the application or request, with plans, may be examined and copied and where information on the date, time and location of the public hearing may be obtained. The applicant shall notify abutters by certified mail, return receipt requested, or by certificates of mailing. Mailing at least seven days prior to the public hearing shall constitute timely notice. The applicant shall present either the certified mail receipts or certificate of mailing receipts for all abutters at the beginning of the public hearing. The presentation of the receipts for all abutters identified on the tax list shall constitute compliance with abutter notification requirements. When a person requesting a determination is other than the owner, the request, the notice of hearing and the determination itself shall be sent by the Commission to the owner as well as to the person making the request.

[Amended 10-18-2010 STM by Art. 6]

- B. The Commission shall conduct a public hearing on any permit application or abbreviated notice of resource area delineation ("ANORAD") with written notice given at the expense of the applicant, at least five business days prior to the hearing, in a newspaper of general circulation in the municipality. The Commission shall conduct a public meeting on a RFD application with written notice given at the expense of the applicant in a newspaper of general circulation in the municipality.

- C. [The Commission shall commence the public hearing/meeting within 21 days from receipt of a completed permit application, ANORAD or RFD unless an extension is authorized in writing by the applicant. The Commission shall have authority to continue the hearing/meeting to a specific date announced at the hearing/meeting, for reasons stated at the hearing/meeting, which may include

the need for additional information from the applicant or others deemed necessary by the Commission in its discretion.

- D. The Commission shall issue its permit, other order or determination in writing within 21 days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant.
- E. The Commission, in an appropriate case, may combine its hearing under this bylaw with the hearing conducted under the Wetlands Protection Act (MGL c. 131, § 40) and regulations (310 CMR 10.00).

§ 240-6. Permits and conditions.

- A. If the Conservation Commission, after a public hearing, determines that the activities which are subject to the permit application or the land and water uses which will result therefrom are likely to have a significant effect, individually or cumulatively, upon the resource area values protected by this bylaw, the Commission, within 21 days of the close of the hearing, shall issue or deny a permit for the activities requested. If it issues a permit, the Commission shall impose conditions which the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions. The Commission shall take into account the cumulative adverse effects of loss, degradation, isolation and replication of protected resource areas throughout the community and the watershed resulting from past activities, permitted and exempt.
- B. Where no conditions are adequate to protect those resource area values, the Commission is empowered to deny a permit for failure to meet the requirements of this bylaw. It may also deny a permit: for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards and other requirements in regulations of the Commission; or for failure to avoid or prevent unacceptable significant or cumulative effects upon the resource area values protected by this bylaw. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.
- C. Lands within 200 feet of rivers, and lands within 100 feet of ponds, lakes, vernal pools (whether certified or uncertified), isolated wetlands, and other resource areas, are presumed important to the protection of these resource areas because activities undertaken in close proximity have a high likelihood of adverse impact upon these areas, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. These adverse impacts from construction and use can include erosion, siltation, loss of groundwater recharge, poor water quality and loss of wildlife habitat. The Commission may therefore establish performance standards for protection of such lands, including strips of continuous, undisturbed vegetative cover within the two-hundred-foot or one-hundred-foot area, or other form of work limit or setback to buildings, roads, landscaping and other features, unless the applicant convinces the Commission that the area or part of it may be disturbed without harm to the values protected by the bylaw. The specific size of each type of protected area may be established by regulations of the Commission.
- D. In the review of areas within 200 feet of rivers, no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this bylaw, has proved by a preponderance of the evidence that (1) there is no practicable alternative to the proposed project with less adverse effects, and that (2) such activities, including proposed mitigation measures, will have no significant adverse impact on the areas or values protected by this bylaw. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g., residential, institutional, commercial or industrial purpose), logistics, existing technology, costs of the alternatives and overall project costs.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT
CIVIL ACTION NO. 1977CV01593

**BOSTON CLEAR WATER COMPANY,
INC.,**

Plaintiff,

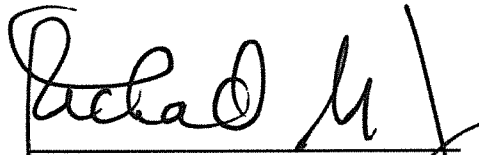
v.

**TOWN OF LYNNFIELD, THE TOWN
OF LYNNFIELD CONSERVATION
COMMISSION and its Members, Paul
Martindale, Donald Gentile, Melanie
Lovell, Angelo Salamone, Janice Solomon,
Bill Thompson and Kirk Mansfield,
Defendants.**

CERTIFICATE OF SERVICE

I, Richard A. Nylan, Jr., Attorney for the Plaintiffs in the above matter, hereby certify that I have served a copy of the foregoing Motion for Summary Judgment and Memorandum in Support thereof, upon the Defendants' Attorney, by electronic mail and by mailing a copy of same via first class mail, postage prepaid to: Thomas A. Mullen, Thomas A. Mullen, P.C., 40 Salem Street, Building 2, Suite 12, Lynnfield, MA 01940.

Signed under the penalties of perjury this 4th day of August, 2020.


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Date: August 4, 2020