SMOLAK & VAUGHAN LLP
ATTORNEYS AT LAW

Stephanie A. Kiefer, Esq.
T: 978-682-5221 | F: 978-327-5219
skiefer@smolakvaughan.com

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Via Certified Mail

Department of Environmental Protection
Division of Wetlands and Waterways
Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347

RECEIVED
JUL 13 2018
BY CONSERVATION

Re: Little Pond Village at Falmouth Heights
Worcester Court and Alma Road, Falmouth, MA
DEP File No. SE 25-4349
REQUEST FOR SUPERSEDING ORDER OF CONDITIONS

Dear Sir or Madam:

Pursuant to M.G.L. c.131, §40 (the "Act") and 310 CMR 10.05(7), Applicant Randal Lilly, Helmis Circle, LLC (the "Applicant") requests that the Department of Environmental Protection (the "Department") issue a Superseding Order of Conditions ("SOC") concerning Applicant's proposed project at the project site located at Worcester Court and extending from Alma Road in Falmouth, Massachusetts.

On June 27, 2018, the Falmouth Conservation Commission ("Commission") issued an Order of Conditions (the "Order") approving the proposed project. A copy of the Order is attached as Exhibit A. A copy of the plans, as approved through the Order, are attached as Exhibit B. Although the Applicant's Notice of Intent ("NOI") application was filed with the Commission solely under the Act, the Commission erroneously made findings and imposed conditions under the Falmouth Wetlands Protection Bylaw (the "Local Bylaw') and the Falmouth Wetland Regulations ("FWR"). A copy of the Applicant's NOI application is attached as Exhibit C. As more fully set forth herein, the Applicant requests the Department issue a SOC consistent with the scope of the Applicant's NOI application.

In accordance with 310 CMR 10.05(7), a Request for Department Action Transmittal Form and filing fee ($245.00) have been sent on this day to the Department's Lock Box. Copies of the form and filing fee payment are attached as Exhibit D. This Request for Department Action is timely made in accordance with 310 CMR 10.05(1).

BACKGROUND

The project site consists of 4.98+/- acre site composed of seven (7) land parcels (Assessor's Parcel ID 39 16 0001A 003-007 and 009-010) together with a private right of way and Helmis Circle (Lot 16). The project site is located within the northern portion of Falmouth Heights. The two westerly parcels front on Worcester Court (Parcel 09 and 10), whereas the remaining parcels are located off Helmis Circle (a paper street), extending northerly off Alma Road. Little Pond, a Salt Pond, abuts the project site to the east.

The eastern portion of the project site includes the following resource areas jurisdictional under the Act: Bank (to Little Pond, a Salt Pond), a narrow fringe of Bordering Vegetated Wetland ("BVW") from the shoreline of Little Pond[1], Land Subject to Coastal Storm Flowage ("LSCSF") and Coastal Bank. Additional Coastal Bank, LSCSF, BVW and Isolated Land Subject to Flooding ("ILSF," located within the BVW interior) exist off-site to the north. While the project site contains no certified or potential vernal pools, vernal pool habitat has been previously documented within the northerly, off-site BVW.[2]

The Applicant proposes to develop the project site as a 28-house lot subdivision pursuant to M.G.L. c.40B, §§20-23 (hereinafter, "Chapter 40B"), of which 25 percent of the houses will be sold to low or moderate income families in accordance with the Chapter 40B regulatory program. The Applicant has previously submitted its Comprehensive Permit Application to the Falmouth Zoning Board of Appeals, on or about October 5, 2017. As part of the Zoning Board's review of the Comprehensive Permit Application under Chapter 40B, the Zoning Board will address those aspects of the 40B project relevant to all local bylaws, including the Falmouth Wetlands Bylaw and the FWRs together with any requests for waivers submitted as part of the Comprehensive Permit application.

During the course of the public hearings conducted by the Commission on the NOI application, the Applicant's wetland consultants at LEC Environmental Consultants, Inc. ("LEC") submitted two separate letter reports and enclosures, dated March 12, 2018 and April 23, 2018 with respect to the project design, revisions thereto and protection of the interests under the Act. The Applicant's engineers at DiPrete Engineering further supplemented the original filing with additional information, project revisions and revised plans, as submitted to the Commission on March 30, 2018 and April 20, 2018[3].

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[1] The project site is also within 100 feet to another area of BVW directly to the north of the project site and dominated by Atlantic white cedar trees.

[2] The off-site ILSF supports vernal pool habitat based on the documented presence of spotted salamander egg masses and wood frog chorusing. The vernal pool limits are the same as the ILSF boundary, as was determined in a prior DEP File (#025-4243). The ISLF (vernal pool habitat) does not maintain a 100 foot buffer zone under the Act.

[3] Copies of the LEC and DiPrete Engineering supplemental filings can be provided to the Department upon request.

The proposed project work is limited to the 100 foot buffer of resource areas (buffer to on- and off-site Coastal Bank and to the northerly, off-site BVW. While the entire project consists of 28 proposed lots, it is only those lots along the northern property boundary (Lots 1-11) and eastern boundary (Lots 12-13) that involve work within the buffer zone. During the course of the public hearings before the Commission, the Applicant increased the Limit of Work setbacks and revised project details to provide greater protection of downgradient Resource Areas. Updated project plans for the Little Pond Village at Falmouth Heights, as approved by the Order, consist of a 13-sheet set prepared by the project engineer at DiPrete Engineering. See Exhibit B.

Consistent with the permitting scheme of Chapter 40B, local permitting is streamlined through the local Zoning Board, who incorporates all such approval under a single Comprehensive Permit. In light of the fact that the local permitting under the Falmouth Wetlands Bylaw and its FWR, as may be applicable, is vested in the Zoning Board, the Applicant's NOI application to the Commission was limited in scope to work subject to jurisdiction under the State Act.

On June 27, 2018, the Commission issued an Order approving the proposed project work. As more fully set out below, the Applicant objects to certain of the Findings and Conditions (and Special Conditions) which are beyond the jurisdiction of the Commission under the Act and/or do not protect the interests identified under the Act.

OBJECTIONS TO THE ORDERS OF CONDITION

WPA Form 5, Part B – The Commission failed to make Findings under Part B, Subpart 3 (Buffer Zone Impacts) as to the shortest distance between the limit of project disturbance and a wetland resource area.

WPA Form 5, Part D - The NOI was submitted to the Commission seeking an Order solely under the Act and its Regulations. The Commission erroneously states that a municipal wetlands bylaw is applicable. Further, Part D, Paragraph 2 provides that the Commission made a finding that additional conditions are necessary to comply with Falmouth Wetlands Bylaw, Section 10.00. As the NOI application was not filed under the local Bylaw, it is improper for the Commission to impose conditions to project interests protected under its Local Bylaw.

Finding 7 (page 1 of 8) – Finding 7 states that Resource Areas onsite or within 100 feet of the proposed project include LSCSF, Coastal Bank, Land Under Salt Pond, Land Under Ocean, BVW and Resource Area Buffer. No portion of the proposed project is located within 100 feet of "Land Under Salt Pond" or "Land Under Ocean" and "Resource Area Buffer" is not an Area Subject to Protection under the Act. As the NOI is filed only under the Act, locally-regulated areas are not relevant to the application filed with the Commission.

Standard Condition 2 (page 3 of 8) – Through this Condition, the Commission specifically reserved the right to impose "additional or other conditions" beyond those contained in the Order. The Act and its Regulations do not confer unbridled authority on the Commission to assert continued authority to impose additional conditions after issuance of an Order. Standard Condition 2 must be stricken.

Standard Condition 3 (page 3 of 8) – This condition states that the determinations made by the Commission are made not only under the Act, but also to determine issues arising under the local Bylaw. The NOI application submitted to the Commission applies only to work proposed relevant to the Act. Standard Condition 3 must be amended to clarify that it applies only to determination under the Act.

Standard Condition 3 (duplicate) (page 5 of 8) – duplicate Standard Condition 3 requires that the site be "cleaned daily to remove any loose debris and permitting cuttings offsite." The condition is overly broad as the requirement across the entire site to remove "loose debris" may be subject to abusive discretion, significantly when such cuttings or debris are well outside the buffer zones on the project site. The Commission may only impose conditions upon work or portions thereof within an Area Subject to Protection under the Act or a buffer thereto; as written Standard Condition 3 is in excess of permissive conditioning.

Standard Condition 6 (page 5 of 8) – this condition addresses a completely separate bylaw, the Falmouth Nitrogen Control Bylaw (Chapter 237 of the Code of Falmouth). Compliance with a local nitrogen control bylaw is not appropriately part of a condition approving the project work under the Act and its Regulations. Standard Condition 6 must be stricken.

Standard Condition 7 (page 5 of 8) – The Order issued by the Commission seeks to prohibit all application of nitrogen within 100 feet of "additional areas under Conservation Commission jurisdiction…" Such additional areas are not Resource Areas under the Act and therefore, as an Order may only impose conditions upon work or portions thereof within an Area Subject to Protection under the Act or a buffer thereto, Standard Condition 7 must be stricken.

Standard Condition 8 (page 5 of 8) – This condition requires drywells and roof gutters to contain all roof runoff, to which the Applicant does not object. Similarly, Applicant does not object to the requirement that the Certificate of Compliance include photographs of the installed drywells. The Applicant does, however, object to the overreaching penalty that could arise from an inadvertent incompleteness in documenting the drywell, i.e., that the Order requires the drywell to be excavated to prove compliance.

Standard Condition 10 (page 6 of 8) – Standard Condition 10 provides that "[a]ny change to the plan of record… no matter how minor in scope, including but not restricted

to, changes in the building footprint and appendages such as decks, addition and/or modification of accessor structures, changes in landscape features such as patios, retaining walls, plantings, removal of vegetation, the modification of finished grades, etc., require that the applicant obtain the permissions of the Conservation Commission *before* undertaking the modified work..." The condition is overreaching as written because it seeks to condition work well outside work within an Area Subject to Protection or buffer thereto and instead seeks to condition the entire affordable housing project such that the applicant would be required to obtain permission for any adjustments related to the affordable housing development. The condition is overreaching and must be stricken. As to changes affecting work within an Area Subject to Protection or buffer thereto, the Applicant is required to abide with the Act's Regulations and Wetlands Program Policy 85-4, as may be appropriate.

Standard Condition 11 (page 6 of 8) – Standard Condition 11 requires a bond sufficient to cover all outstanding work plus 25% in excess in the event an occupancy permit is sought prior to a Certificate of Compliance for the entire project. The bonding requirement does not protect an Area Subject to Protection under the Act and must be stricken.

Standard Condition 12 (page 6 of 8) – Standard Condition 12 seeks to impose a requirement that all structure and landscape features be depicted on as-built plans accompanying a request for Certificate of Compliance. The level of detail required, especially where much of the structures and associated features may be outside of jurisdictional areas, is over-inclusive and must be revised.

Special Condition 1 (page 6 of 8)- Special Condition 1 provides that during a preconstruction meeting, matters will be reviewed as to "if the LOW can be relocated landward in the proximity of Coastal bank #2 and #4, installation methods proposed for the LOW, and determine what trees, if any, along the LOW can be saved during construction." The Commission has already approved the plans, which show the location of the LOW. While the Applicant has agreed to attempt to work around trees as feasible, the Special Condition should clarify that possible adjustments to the LOW in proximity to Coastal Bank #2 and #4, if feasible, do not otherwise impact the development footprint/lot buildability. It is not appropriate to allow for *ad hoc* determinations to be made which would otherwise compromise the footprint as shown on the approved plans. .

Special Condition 3 (page 6 of 8)- The Construction and Sequencing Schedule, as referenced in the DiPrete Engineering response to the Commission was left fluid and noted to be subject to change. Special Condition 3 should reflect that the Construction and Sequencing Schedule be submitted once finalized and may be subject to change.

Special Condition 7 (page 7 of 8) – Special Condition 7 requires the structure on Lot 11 to be shifted (east and landward) "to create a greater distance between structure, LOW and coastal bank." Special Condition 7, however, provides no indication of what a

"greater distance" means. Further, the location of the structure on Lot 11 is approximately 22+/- feet away from Top of Coastal Bank and roughly 14 feet from the LOW. As documented in LEC's April 23, 2018 letter report, the Coastal Bank is well vegetated by a dense forested upland. The vegetated bank together with the Applicant's proposed erosion and sedimentation plan, SWPPP and post-construction wildlife-friendly split fence which prevents future encroachment toward the Coastal Bank areas adequately protect the resource area.

Special Condition 8 (page 7 of 8) – This condition requires that upon completion of the project, or portions thereof, the limit of work ("LOW") is to be removed and replaced with a staggered row of native plantings. The Applicant has agreed to a wildlife-friendly split fence along the former LOW at Lots 1-13. Applicant objects to Special Condition 8 as the proposed wildlife fence along the northern boundary adequately prevents future encroachment towards the downgradient resource areas. Otherwise, stormwater runoff associated with impervious surfaces is appropriately handled by the roadway drainage system and the subsurface infiltration systems located on each lot (away from the Coastal Bank). Within the small backyard areas (20+/- feet), shallow vegetated swales were designed to collect and infiltrate runoff. Sediment traps incorporated into the design function to prevent overland movement of surface water and sediment toward the Coastal Banks. As such, the designed drainage system and sediment traps protects the buffer, without the need for additional plantings along the northern and easterly property boundaries. Further, any plantings along the southern boundary (Lots 14-28) provide no protection of the off-site Coastal Bank as the LOW along the southerly boundary is well outside the 100 foot buffer and therefore not jurisdictional.

Special Condition 9 (page 7 of 8) – This condition requires that landward of the staggered row of vegetation along the LOW, the applicant install a single rail fence landward of the plantings along the northern property boundary. The fencing cannot be installed along the entire northern boundary lots together with native plantings. The combined effect of Special Conditions 8 and 9 will result in loss of an additional 3-4 feet of the backyards of these lots above and beyond what is already depicted on the plans. The imposed conditions of native plantings plus a single rail fence along the northern boundary LOW are not necessary to further protect the buffer to Coastal Bank. The Applicant maintains that a wildlife-friendly fence along the boundary of the northern lots is sufficient to prevent encroachment into the buffer. Together with the natural extent of vegetation along within the buffer and the subsurface infiltration system approved by the Order, the addition of staggered native plantings provides no protection to the resource areas associated with the buffer and should be stricken.

Special Condition 10 (page 7 of 8) – The Commission seeks to impose a requirement for an Environmental Monitor ("EM") to be onsite weekly (and immediately after significant rain events) and to submit weekly reports to the Commission. The requirement for a special "EM" and ongoing weekly reports to be submitted is beyond the stormwater management requirements for a Stormwater Pollution Prevention Plan

("SWPPP"). Under the Applicant's SWPPP, erosion control inspections will occur during the construction phase on a weekly basis and after rain events. Such reports are maintained on-site and may be made available upon request. Further, the SWPPP inspections are to be performed by a site contractor and do not require a separate "EM." While the Applicant will adhere to the SWPPP created for this project, Special Condition 10's requirements of submittal of weekly reports to the Commission by a designated "EM" exceeds the state SWPPP requirements for erosion control during the construction period.

Special Condition 11 (page 7 of 8) – Special Condition 11 is a ban against armoring of the coastal bank in the future. The NOI submitted to the Commission does not request approval to armor coastal bank and as such, there is no basis for the Commission to impose a condition relating to work that is not subject to the NOI.

Special Condition 13 (page 8 of 8) – This condition requires all plantings from 2-gallon or 3-gallon containers and spaced 3 feet on center. As stated within Applicant's objection to Special Condition 8, during the public hearings, the Applicant agreed to a split-rail fence along the northern boundary of Lots 1-13. Further, the 3-foot spacing requirement is unrealistic for the longevity and growth of the plantings. The plantings sought to be imposed under Special Condition 8 and the additional conditioning as contained in Special Condition 13 should be stricken.

Special Condition 14 (page 8 of 8) – Special Condition 14 prohibits the plantings addressed in Special Condition 13 to be "altered in any way," including pruning, without obtaining a permit from the Commission. Applicant repeats and reasserts its position as set forth with respect to Special Conditions 8 and 13 above. To the extent the Department finds native plantings appropriate in lieu of the split rail fence, Special Condition 14, as drafted, is overly restrictive and should be revised to state that such plantings cannot be removed without prior consultation with the Commission.

Special Condition 17 (page 8 of 8) – This condition is self-contradictory. The first sentence prohibits a Certificate of Compliance until the entire project is complete. The second sentence provides that a partial COC may be sought upon completion of a phase of the project. The condition should state that Applicant may seek a partial COC for completion of stages of the project but that a full COC be requested upon completion of all project work approved by the Order.

The Applicant reserves its ability to raise additional objections as the Department evaluates this SOC Request.

Relief Requested

For the reasons set forth above, the Applicant respectfully requests the Department issue a Superseding Order of Conditions which is based on the NOI application and, as such, limited to approval of the proposed buffer zone work under the Act and its Regulations.

Sincerely,

Stephanie A. Kiefer

Encl.
cc: Falmouth Conservation Commission (with encl.)
DEP Lock Box (with encl.)

EXHIBIT A