

STATE OF MAINE

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW COURT DOCKET NO. YOR-26-59

CURTIS SAND & GRAVEL LLC et al.

Plaintiff/Appellant

v.

TOWN OF NORTH BERWICK

Defendant/Appellee

**ON APPEAL FROM THE
YORK COUNTY SUPERIOR COURT**

BRIEF OF DEFENDANT/APPELLEE

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INTRODUCTION

Curtis Sand & Gravel (“Curtis”) applied to the Town of North Berwick (“Town”) Planning Board for a conditional use permit to operate a gravel pit. During the proceedings, the Planning Board received extensive evidence that the Blanding’s Turtle – an endangered species that spends most of its life in water – inhabits several wetlands on Curtis’s property. The Planning Board also received multiple pieces of correspondence from the Maine Department of Inland Fisheries and Wildlife (“MDIFW”), recommending that ground disturbance be limited as much as practicable within 250 feet of those wetlands in order to protect the Blanding’s Turtle and its habitat. In response to MDIFW’s recommendations, Curtis did not propose any alternative measures to protect the Blanding’s Turtle, nor did Curtis submit any expert evidence controverting the state agency’s opinions.

Based on the evidence before it, the Planning Board imposed a permitting condition prohibiting Curtis from extracting gravel within 250 feet of the wetlands (the “Environmental Protection Condition”), in order to ensure that Curtis’s operations would meet section 5.2.2.a of the Zoning Ordinance, which prohibits extraction and earth removal that will foreseeably impair water quality, fish, and/or aquatic life—such as the Blanding’s Turtle.

Curtis now asks the Court to overturn the Planning Board's reasonable, evidence-based 250-foot wetland buffer condition. In addition to the extraordinary argument that the Planning Board lacked the authority to impose a condition on a conditional use permit, Curtis challenges the Environmental Protection Condition on two grounds. First, Curtis contends that section 5.2.2.a does not protect the Blanding's Turtle. In making this contention, Curtis misconstrues both the Zoning Ordinance and the reasons for the Planning Board's imposition of the condition at issue, offering an unduly restrictive interpretation of section 5.2.2.a that would lead to absurd and illogical results. Second, Curtis assails the 250-foot buffer condition as an abuse of the Planning Board's discretion, claiming that the Board exceeded the bounds of the choices available to it by imposing a condition that (in Curtis's view) went further than MDIFW's recommendation. Although Curtis has framed its objection this way, it is really asking the Court to do something its past precedent has consistently rejected: reweigh the evidence that was before the Planning Board, including MDIFW's input (which Curtis never attempted to rebut as a factual matter), and reach a contrary decision.

The Planning Board's decision, including the imposition of the 250-foot buffer condition, must be affirmed.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

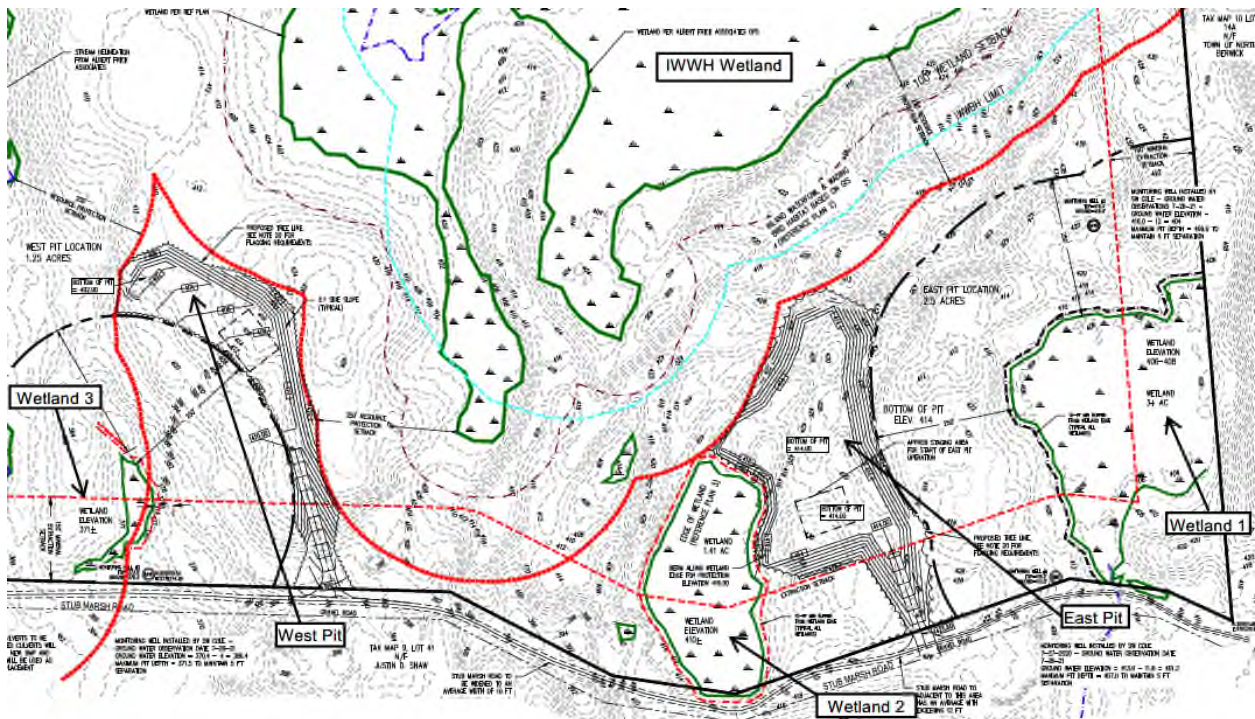
In 2021, Curtis filed an application with the Planning Board for conditional use approval to operate a “Gravel Pit” at property (Tax Map 9, Lots 39 and 51) (the “Property”) located on Stub Marsh Road in the Town. (Appendix (“App.”) 123-124; Administrative Record, filed June 24, 2025 (“R.”), 1-2.)¹ The Property is approximately 120 acres, and is located within the Town’s Farm & Forest District—where “Earth Removal” is permitted as a conditional use requiring a permit from the Town. (App. 103, 123-124.)

The Property hosts four separate wetlands. (App. 67, 135, 201-209.) The wetland located on the Property’s northerly boundary is identified by the State of Maine as a protected Inland Wading and Waterfowl Habitat (the “IWWH Wetland”) and is located within the Town’s Resource Protection Zone.² (App. 103, 127, 201; R. 563, 820.) Curtis sought approval from the Planning Board to extract materials from two areas on the Property, which Curtis’s plans refer to as the East and West Pits. (App. 135; R. 54, 264, 417, 563.) A roughly three-acre wetland, in the Property’s southeasterly corner, is located adjacent to the location of the East

¹ For reasons that are unclear to the Town, Curtis has redacted the “excerpted” materials that appear in the Appendix to exclude information that Curtis apparently deems impertinent to this appeal. For the Court’s benefit, the Town’s brief includes citations to the administrative record that was before the Superior Court, where unredacted versions of the materials within the record appear.

² The Town’s Zoning Ordinance does not permit “Earth Removal” within the Resource Protection District. (App. 103; R. 715.) Accordingly, Curtis’s extraction activities are set back 250 ft. from the IWWH Wetland. (R. at 5, 563.)

Pit (“Wetland 1”). (App. 135, 205-206; R. at 54, 264, 417, 563.) A 1.41-acre wetland, between the East and West Pits, is located to the west of Wetland 1, and is directly adjacent to the East Pit (“Wetland 2”). (App. 135, 207; R. at 54, 264, 417, 563.) A small wetland, near the Property’s southerly boundary, is located adjacent to the West Pit (“Wetland 3”). (App. 135, 208-209; R. at 54, 264, 417, 563.) A captioned excerpt of Curtis’s final plan is depicted below to orient the Court:



(R. at 563.) When Curtis initially filed its application, and up until the Planning Board formally voted to impose the Environmental Protection Condition, Curtis proposed to extract materials up to the edge of Wetlands 1 and 3. (App. 135; R. 54, 264, 276, 417.)

Curtis filed its application prior to obtaining MDEP approval for the project, and in advance of engaging MDIFW. (App. 129.) Shortly after the application was

filed, the Planning Board received substantial written public comment concerning the project’s prospective impacts on the endangered Blanding’s Turtle—which is widely known to inhabit the area of Town where the Property is located. (R. 60, 62, 78, 82, 84-91, 107-113); *see also* 12 M.R.S. § 12803(3)(J) (designating the Blanding’s Turtle as an endangered species). On October 14, 2021, at its first public hearing on the Application, the Planning Board heard several Town residents express concern regarding the project’s potential to harm the Blanding’s Turtle and its habitat on the Property. (R. 129-131.)

Over the course of its proceeding on Curtis’s conditional use application, the Planning Board received extensive evidence concerning the Blanding’s Turtle, its habitat, its seasonal movements, and the activities that threaten it—much of which was drawn from information published by MDIFW. (App. 195-196.) MDIFW’s published information on the Blanding’s Turtle provides that:

- The Blanding’s Turtle is “found most frequently in complexes of small, acidic wetlands and vernal pools” (like Wetlands 1 and 3) “located in large blocks (over 500 acres) of forested habitat.” (App. 195.)
- Blanding’s Turtles “spend[s] most of their time in the water,” but “readily travel overland from one wetland to another during the spring and summer.” (App. 195.) “Upland habitats are critical for nesting,

basking, estivating . . . and as travel corridors for migrating between isolated wetlands.” (App. 195.)

- “Habitat fragmentation and sprawl . . . threaten Blanding’s turtles. Fragmentation isolates populations and increases the risk of extinction.” (App. 196.) “Secondary effects of human development . . . pollution filling of small wetlands, and blocking upland travel corridors – also limits populations.” (App. 196.)
- MDIFW recommends “[a]void[ing] intensive development that concentrates human activity and road traffic within ¼ mile of turtle wetlands.” (App. 196.)

On January 7, 2022, MDEP approved Curtis’s Notice of Intent to Comply and issued a license to Curtis to conduct extraction operations at the Property, subject to the performance standards contained within 38 M.R.S. § 490-D.³ (App. 157-158.) Over a month later, on February 18, 2022, Scott Lindsay, a Regional Wildlife Biologist with MDIFW, provided MDEP and the Town with MDIFW’s initial review comments (the “MDIFW Initial Review Comment”), which provided that “the endangered Blanding Turtle are known to occur on site [the IWWH

³ MDEP maintains concurrent jurisdiction over gravel extraction operations. See 38 M.R.S. § 490-B. Notably, a municipality may enforce the provisions of MDEP’s standards for “borrow, topsoil, clay or silt excavations,” if approved by MDEP. 38 M.R.S. § 490-I. However, the statute enabling municipal enforcement of MDEP’s standards provides that it may not “be construed to limit a municipality’s authority under home rule to adopt ordinances regulating borrow, topsoil, clay or silt excavations.” 38 M.R.S. § 490-I. In other words, the Town was free to adopt restrictive standards—as it did—to protect the Blanding’s Turtle.

Wetland] and other wetlands in the area provide habitat for this rare turtle [t]hus the wetlands themselves and a 250 ft. upland buffer are critical for the species and proposed impact on this habitat requires MDIFW consultation.” (App. 193, 194.) The MDIFW Initial Review Comment confirmed what many members of the public had argued to the Board: the Blanding’s Turtle inhabits the Property. The MDIFW Initial Review Comment was provided to the Planning Board, and the Board was informed that the MDIFW planned to provide further “written comment” on the matter. (App. 162; R. 219, 231-232.)

On April 7, 2022, Curtis’s representatives met with MDIFW wildlife biologist Derek Yorks at the Property. (App. 175, 179.) Mr. Yorks visited the Property for the purpose of “examin[ing] potential turtle habitat firsthand and look[ing] at the proposed project layouts as it relates to these habitats.” (App. 179.) After Mr. York’s site visit, further proceedings on the Application stalled while the Town and Curtis awaited MDIFW’s guidance concerning the necessary measures to protect the Blanding’s Turtle and its habitat. (R. 298-311.)

Curtis filed an amendment to its Application on January 19, 2023. (App. 164-166.) On January 26, 2023, the Board considered the Application again. (App. 168-172; R. 268-269, 280-295.) Curtis’s amended Application represented that “mineral extraction will be accomplished in Phases the East pit area will be phase 1. The West Pit will not start excavation until East active pit area is

reclaimed. *Town regulations only allow 2- acres of open excavation before reclamation is to be started.*” (R. 272) (emphasis added). The CEO and Curtis’s representatives explained to the Planning Board that they had been waiting for MDIFW’s comments for nine months, and the CEO represented that MDIFW informed him those comments would issue shortly. (App. 169.) After considering this, the Board voted to approve the Application subject to a condition “that there is no adverse response received within 30 days from [MDIFW].” (App. 172.)

On February 10, 2023, which was within 30 days of the Planning Board’s oral vote to approve the Application, the Planning Board received an “adverse response” from MDIFW Regional Wildlife Biologist Scott Lindsay (the “First MDIFW Recommendation”). (App. 177-180.) In an email conveying the First MDIFW Recommendation, Mr. Lindsay explained “my recommendations are based upon the expertise of MDIFW herpetologist Derek Yorks and guidance from MDIFW staff.” (R. 322.) The First MDIFW Recommendation reads as follows:

This letter is in regards to the evaluation of wildlife habitat in the vicinity of a proposed gravel pit (NOITC # 2032700) adjacent to Stubb Marsh in North Berwick. There is a documented record of state endangered Blanding's turtle occurring in the Inland Wading Bird and Waterfowl Habitat (IWWH # 011050) within the property. It is my understanding that this wetland is buffered a distance of 250 ft. as measured outward from the wetland edge, per Natural Resource Protection Act (NRPA). This is acceptable. Based partly upon research that has been conducted in Maine, we know that this turtle does travel across uplands from its primary wetland to other nearby accessory wetlands. There are three other wetlands nearby which warranted a site visit to evaluate habitat suitability for Blanding's Turtle. Derek Yorks, MDIFW biologist with the Herptile and Invertebrate Group, conducted a site visit in April of 2022. His observations are detailed in his report, attached. We are recommending to town that the applicant limits disturbance around wetland # 1 and wetland # 3 (referenced in attached report) to a distance of 250 ft., as measured from the wetland edge. This will help maintain the habitat of these wetlands such that negative impact on a known population of endangered Blanding's turtles, will be minimized. The applicant would bear some responsibility under the Maine Endangered Species Act for any Blanding's turtle's which are killed during operation of the gravel pit if this recommendation to avoid take is not complied with.

Please follow up with me if I can provide further guidance on this.

(App. 177.) Appended to the First MDIFW Recommendation was a report prepared by Derek Yorks, which summarized the findings and conclusions he reached after the site visit to the Property. (App. 179.) Mr. York's report made the following findings: (1) "[a]ll wetlands at the project site are within published annual movement distances for Blanding's turtles meaning they are accessible to the turtles known to occupy the IWWH on the property," (2) Wetland 1 "offers excellent habitat for Blanding's turtles during the spring and early summer but is likely not sufficiently deep for overwintering," (3) Wetland 3 "[a]ppears to be a vernal pool and based on the observed egg masses would likely provide good foraging habitat for Blanding's turtles," and (4) "[W]etlands 1 and 3 are suitable habitat for Blanding's turtles and *are in my professional opinion* likely to be utilized by the population that has been documented in the IWWH and another wetland north of the site." (App. 179.) (emphasis added).

In sum, Mr. Yorks concluded that the Blanding's Turtle travels overland, across the land areas where Curtis proposed to extract gravel, to Wetlands 1 and 3 from the IWWH Wetland. (App. 179, 202.)

The Town's Attorney subsequently advised the Planning Board that its condition of approval had not been met, its oral vote to approve the Application subject to this condition did not become final, and the Application was thus still pending before the Board. (App. 181-183.) On February 23, 2023, the Planning Board tabled the application and voted to reopen the record to allow Curtis additional time to revise its proposal. (App. 198-200.)

On April 13, 2023, Scott Lindsay provided "updated wildlife comments" after consulting with Curtis's representatives (the "Second MDIFW Recommendation"). (App. 201-210.) Mr. Lindsay's Second MDIFW Recommendation stated:

It is my recommendation, though not a requirement, that ground disturbance be limited as much as practicable, within 250 ft. of wetland #1 and #3 (referenced in attached report.) This will help maintain the habitat of these wetlands such that negative impact on a known population of endangered Blanding's turtles, will be minimized. During some follow up discussion with the applicant's consultant, revisions have been made to the plan addressing these concerns. As indicated in the plan's Mineral Extraction Note 22, the work will be phased with the east pit worked and restored before work commences on the west pit. This will minimize the extent of ground disturbance at any one time. Also, any observed evidence of potential turtle nesting will be marked and flagged and MDIFW staff will be notified. This will limit potential disturbance of a turtle nest, though species of turtle will be difficult to determine. In addition, I have learned that the permissible open pit area, per town standards, is limited to 2 acres, which is less than the DEP standard. The applicant would still bear some responsibility under the Maine Endangered Species Act for any Blanding's or Spotted Turtle's which are killed during operation of the gravel pit if this recommendation to avoid take is not complied with.

(App. 201.)

After considering MDIFW's guidance for six months, Curtis submitted a "new" plan for its project that was nearly identical to the plan it had submitted

shortly before the First MDIFW Recommendation issued. (App. 211-219; R. 416-438.) Curtis’s purportedly revised plan did not meaningfully address MDIFW’s recommendations. For instance, Extraction Note # 22 on Curtis’s January 19, 2023 plans read as follows: “The Excavation will be phased. The East Pit location will be phase 1. The West Pit (Phase 2) will not be started until the East Active Pit Area is reclaimed.” (App. 166.) Extraction Note 22, on Curtis’s “revised” plan, is identical.⁴ (App. 212.) As Curtis noted prior to the issuance of MDIFW’s guidance, section 5.2.2.d.18, which mandates that “[r]eclamation shall occur . . . with the expansion of the extraction pit i.e as the third acre of unreclaimed land is opened for extraction, reclamation shall begin on the first two acres,” required Curtis to phase its proposal all along. (App. 108.)

Notably, in the half-year period between the issuance of the First MDIFW Recommendation and Curtis’s submission of a purportedly revised plan, Curtis did not retain a professional or expert to offer alternative recommendations to protect the Blanding’s Turtle, nor did Curtis endeavor to refute Mr. Yorks’ finding that the Blanding’s Turtle inhabits Wetlands 1 and 3.

On October 26, 2023, the Planning Board held a second public hearing on the Curtis’s conditional use application. (App. 233-239.) At that meeting, the Town

⁴ The only material difference between the two plans is a note that reads” “If potential turtle nesting site if found. Place flagging and grade stakes around area and contact Maine Inland Fisheries and Wildlife for direction. Turtle nesting occurs from May through September.” (App. 212.)

Attorney advised the Planning Board that Curtis must comply with section 5.2.2.a – which provides that “[f]illing, grading, lagooning, dredging, excavation, processing and storage of soil, earth, loam, sand, gravel, rock, peat or any other mineral or organic deposits, which would result in erosion, sedimentation, or impairment of water quality or fish and aquatic life, is prohibited.” (App. 237.)⁵ The Town Attorney further counseled that the Planning Board possessed the authority to impose conditions of approval necessary to meet this standard, and advised the Board that it must (1) consider whether there is evidence that Curtis has not met this standard, and (2) determine whether restrictions on Curtis’s operations are necessary to ensure the project complies with section 5.2.2.a. (App. 237.)⁶ The Planning Board did not reach a decision that night; rather, it tabled the Application and requested that the Applicant present plans depicting a 250 ft. buffer around Wetlands 1 and 3. (App. 239.)

The Planning Board next considered the Application at its December 14, 2023 meeting. (App. 241-243.) Notably, Curtis again presented no evidence at this meeting to support alternative recommendations for limiting ground disturbance

⁵ Article 5 of the Zoning Ordinance, which contains section 5.2.2.a, applies to “all new . . . uses of land.” (App. 104.)

⁶ Curtis erroneously claims that the Town’s attorney previously offered conflicting guidance to the Planning Board. Blue Brief at 18 n. 7. Counsel for Lincoln and Kathryn Harrison submitted a letter to the Planning Board requesting that it conduct a biological and environmental survey of the Property, citing several state and federal statutes in support of the request. (App. 147-148.) In response, the Town attorney opined that the Planning Board was not legally obligated to require Curtis to conduct such a survey. (App. 153.) The Town attorney’s prior opinion had nothing to do with the issue discussed by the Board at its October 26, 2023 meeting.

within 250 feet of Wetlands 1 and 3, other than the phasing originally proposed (and required by the Zoning Ordinance) and flagging of turtle nest sites. After discussing MDIFW’s guidance, the Planning Board voted to adopt MDIFW’s recommendation and impose the Environmental Protection Condition. (App. 242.)⁷ At the end of the meeting, the Board voted to close the public record, except to accept final plans depicting the imposition of the 250 ft. no-disturbance buffer around Wetlands 1 and 3. (App. 253-254, 258.)

On April 12, 2024, the Planning Board voted to approve the Application, subject to the imposition of the Environmental Protection Condition, and adopted written findings of fact and conclusions of law (the “Decision”). (App. 67-82; R. 526-547.) Prior to the Board’s adoption of the Decision, Curtis filed written legal argument contesting the Planning Board’s imposition of the Environmental Protection Condition on several grounds. (App. 264-273.) Among other things, Curtis objected to the Planning Board’s interpretation of the Second MDIFW Recommendation as an evidentiary dispute—*i.e.*, Curtis disagreed with *how* the

⁷ Curtis claims that one or more Planning Board members were “confused” by Curtis’s phasing proposal and suggests that comments made by the Board members during its deliberations evidence the Board’s misapprehension of MDIFW’s recommendations and section 5.2.2.a of the Zoning Ordinance. Aside from the fact that Curtis mischaracterizes the Board’s discussion and deliberations, the Planning Board’s decision “should be reviewed based upon what it accomplishe[d] and the [Board's] stated justifications,’ not a review of the [Board's] deliberations.” *Mick Land Development, Inc. v. Town of South Berwick*, 2026 ME 53, ¶ 25 n. 6, --- A.3d --- (quoting *Narowetz v. Board of Dental Practice*, 2021 ME 46, ¶ 20 n.8, 259 A.3d 771).

Board interpreted the evidence before it—rather than an abuse of the Board’s discretion. (App. 267-271.)

The Decision concluded that section 5.2.2.a of the Zoning Ordinance prohibits extraction that impairs the Blanding’s Turtle—a species that spends most of its “time in the water.” (App. 76.) The Board observed that Derek Yorks’ site report summary served as the only evidence in the record concerning the Blanding’s Turtle’s presence in Wetlands 1 and 3, and Mr. Yorks had concluded—in his professional opinion—that both Wetlands are likely Blanding’s Turtle habitats. (App. 76.) The Planning Board then explained:

Although the Second MDIFW Letter notes that the Applicant’s phasing proposal addresses MDIFW’s general concerns, the Board does not see how anything less than prohibiting excavation activities within 250 ft. of Wetlands 1 and 3 will be sufficient to limit ground disturbance within these areas. The Board also finds that prohibiting extraction operations within 250 ft. of Wetlands 1 and 3 will ensure that the Applicant’s operations will not impair Blanding’s Turtles travelling between the IWWH Wetland and Wetlands 1 and 3. Although phasing excavation within 250 ft. of Wetlands 1 and 3 will result in only a portion of the area within 250 ft. of the Wetlands being disturbed at any given time, the ground disturbance within the area that is excavated will not be limited in any real sense. In other words, the Applicant’s Project will result in maximum ground disturbance within 250 ft. of Wetlands 1 and 3, but only in a limited area at any given time.

In order to ensure that the Applicant’s Project does not impair the endangered Blanding’s Turtle species that is known to inhabit the IWWH Wetland, and likely travels between that Wetland overland to Wetlands 1 and 3, the Board finds that it is necessary to impose a condition requiring a 250 ft. buffer around Wetlands 1 and 3 in which no extraction activities, or hauling of materials, may occur. The Board concludes that this condition is reasonable and necessary to ensure that section 5.2.2(a)’s mandates are met by the Project. The Applicant has submitted a revised site plan, labeled L1-R, implementing the required 250 ft. no disturbance buffer here imposed by the Board.

(App. 77.)

Curtis appealed the Decision to the Town’s Zoning Board of Appeals (“ZBA”), and concurrently, to the Superior Court. (App. 57-65, 282-284.) Again,

Curtis framed its challenge to the Planning Board’s interpretation of MDIFW’s input as an evidentiary matter, rather than an abuse of the Planning Board’s discretion. (App. 283.)

The Zoning Ordinance directed the ZBA to conduct an appellate review of the Decision. (R. 801-802.). The ZBA denied Curtis’s administrative appeal, and Curtis then filed an appeal from the ZBA’s decision to the York County Superior Court. (App. 47-56, 66.) On January 12, 2026, the Superior Court denied Curtis’s appeal, and affirmed the Planning Board’s decision.⁸ (App. 16-46.) This appeal followed.

SUMMARY OF THE ARGUMENT

The Planning Board possessed the authority to impose the Environmental Protection Condition. The Zoning Ordinance is replete with broad and permissive language authorizing the Planning Board to attach conditions to a conditional use permit to ensure that the Zoning Ordinance’s approval standards are met.

The Planning Board did not err in interpreting Section 5.2.2.a. Section 5.2.2.a prohibits extractive activities that impair water quality, fish and/or aquatic life—like the Blanding’s Turtle—collectively and individually. Section 5.2.2.a applies to aquatic life irrespective of where the impairment of that aquatic life

⁸ Lincoln and Kathryn Harrison also appealed the ZBA’s decision affirming the Planning Board’s conclusion that Curtis’s proposed crushing and importation of materials at the project site are permitted accessory uses. (R. 618, 652.) The Superior Court affirmed the Planning Board’s conclusion, and the Harrisons did not appeal that decision. (App. 35-46.)

occurs, and any contrary conclusion would allow an anomalous result where the Zoning Ordinance would permit Curtis to take the endangered Blanding's Turtle when it is on land, but not when it is in the water. The evidence in the record also supports the Planning Board's conclusion that the Blanding's Turtle constitutes "aquatic life," as that term is used by section 5.2.2.a, that is entitled to the Zoning Ordinance's protections.

The Planning Board did not abuse its discretion by imposing the Environmental Protection Condition because the Condition was a reasonable choice that did not exceed the bounds of the options available to the Board. Curtis's dissatisfaction with the Planning Board's interpretation of MDIFW's recommendations (which, again, Curtis did not attempt to rebut) and the other evidence in the record is a factual matter, not a legal one. The Planning Board's interpretation of the evidence is entitled to deference, and must be affirmed on appeal.

ARGUMENT

I. Standard of Review

The Town concurs with Curtis's recitation of the standard of review that applies to this case, but notes Curtis neglects to identify several critical legal principles that govern the Law Court's review of Curtis's appeal.

“When the BOA conducts an appellate review,” as it did in this case, “the decision of the Planning Board, or other previous tribunal, is operative.” *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, ¶ 11, 234 A.3d 214.

Curtis “bears the burden of persuasion on appeal as the party seeking to vacate the Board's decision.” *Mick*, 2026 ME 53, ¶ 16, ___ A.3d ___. The Court “reviews a municipal board's factual findings to determine if they are supported by substantial evidence in the record.” *Id.* ¶ 23; *see also Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 27, 974 A.2d 903. “Substantial evidence exists if there is any competent evidence in the record to support a decision.” *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶ 10, 153 A.3d 113 (quotation marks omitted). “A demonstration that no competent evidence supports the local board's findings is required in order to vacate the board's decision.” *Mick*, 2026 ME 53, ¶ 23, ___ A.3d ___.

II. The Planning Board Possessed the Authority to Impose the Environmental Protection Condition.

Unsurprisingly, the Zoning Ordinance is chock-full of provisions that authorize the Planning Board to attach conditions to a conditional use permit to ensure that performance standards are met. The Planning Board concluded that the Environmental Protection Condition “is . . . necessary to ensure that section 5.2.2(a)’s mandates are met by the Project.” (App. 77.) Nevertheless, Curtis contends that because the Board did not identify the source of its authority to

attach conditions to a conditional use permit in its written findings, the Decision must fail.⁹ Blue Brief at 28, 29 n. 13. This sophistic argument conflates the Planning Board’s *authority* to impose conditions of approval (which appears clearly on the face of the ordinance) with the Planning Board’s *conclusion* that the Environmental Protection Condition was necessary to ensure Curtis’s project met section 5.2.2.a’s strictures. Blue Brief at 28-30.

A. The Zoning Ordinance Authorized the Board to Impose the Environmental Protection Condition.

The Town agrees with Curtis that “[a] municipal planning board has no inherent authority and may only exercise such authority as the municipality has conferred upon it by ordinance.” *Mick*, 2026 ME 53, ¶ 18, ___ A.3d ___.; *Newfield Sand v. Town of Newfield*, 2025 ME 45, ¶ 11, 335 A.3d 626. The Town also agrees that a “Board is not limited to express grants of authority, but also has all powers granted ‘by necessary inference as an incidence essential to the full exercise of powers specifically granted.’” *Id.* However, Curtis misapplies those principles to the text of the Zoning Ordinance, and the substance of the Decision.

The Zoning Ordinance is replete with broad and permissive language demonstrating that the Planning Board possesses substantial authority to attach

⁹ Curtis’s M.R. Civ. P. 80B complaint asserted that the Planning Board’s procedures deprived Curtis of due process. (App. 54, 64.) Curtis has not developed this argument in its brief to this Court, *see generally* Blue Brief, therefore it has been waived. *See Thurston v. Galvin*, 2014 ME 76, ¶ 5 n. 1, 94 A.3d 16; *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290.

conditions to conditional use permits. (App. 95, 106-107, 116, 121.) The Zoning Ordinance defines a “Conditional Use,” in part, as “a use that would not be appropriate without restriction but which, if controlled under the provisions of this Ordinance, would promote the purposes of this Ordinance.” (App. 95.) By their very nature, conditional uses are only appropriate with sufficient restrictions in place to control them. (App. 95.) Section 6.9.2 of the Zoning Ordinance defines the Planning Board’s conditional use review authority, providing, in part, that the “Planning Board shall hear and approve, *approve with modifications or conditions*, or disapprove all applications which require Planning Board review.” (App. 116.) (emphasis added). Section 6.9.7 of the Zoning Ordinance generally provides the Planning Board with the authority to impose two types of conditions to conditional use permits: (1) conditions “that would mitigate any adverse effects on adjoining or neighboring properties, which might otherwise result from the proposed use,” and (2) conditions that are “required elsewhere in this Ordinance.” (App. 121.) The Zoning Ordinance then provides that these two classes of “conditions may include, but are not limited to . . . *increased setbacks* and yards . . . operational controls . . . restrictive covenants . . . or any other conditions, restriction, or safeguard that would uphold the spirit and intent of this Ordinance.” (App. 121.)

The Zoning Ordinance also provides more specific authority for the Planning Board to impose conditions on the operations of extractive earth removal

uses, like Curtis’s project. (App. 106-107.) For instance, and in addition to the Planning Board’s general conditional use authority, section 5.2.2 of the Zoning Ordinance, which contains the standards specific to “Earth Material Removal,” specifies that “[t]he Planning Board shall render a written decision specifying whether, *and under what conditions*, the proposed operation would be permitted.” (App. 106.) (emphasis added). This section further vests the Planning Board with the authority to “specify such requirements in any conditional Use Permit issued for earth material removal as it deems necessary or desirable to assure compliance with” 18 enumerated standards. (App. 107.)

When read together, as they must be, these many provisions expressly authorize the Planning Board to impose conditions to ensure earth removal uses will meet section 5.2.2.a’s standards. *Wolfram v. Town of N. Haven*, 2017 ME 114, ¶ 9, 163 A.3d 835 (“[i]n construing the language of an ordinance, the ordinance is to be considered as a whole”); *Dickau v. Vermont Mutual Insurance Co.*, 2014 ME 158, ¶ 22, 107 A.3d 621 (evaluating “the entirety of the statute, ‘giving due weight to design, structure, and purpose as well as to aggregate language’”). The Planning Board’s authority to review and approve conditional use applications is accompanied by an express grant of authority to attach conditions like the Environmental Protection Condition.¹⁰ (App. 116, 121). Section 6.9.2 permits the

¹⁰ In any event, even if the Zoning Ordinance did not directly authorize the Planning Board to impose the Environmental Protection Condition, this Court has repeatedly acknowledged that “Board is not limited to

Planning Board to approve conditional use applications with “modifications or conditions,” and this Court recently concluded that similar language authorized a Planning Board to impose conditions necessary “to ensure compliance with the review criteria.” *Mick*, 2026 ME 53, ¶ 19, ___A.3d___(concluding that the Planning Board’s authority to “‘modify and approve’ final subdivision plans” coupled with the ordinance’s subdivision review criteria, when “read together . . . authorize the Board to impose conditions on final subdivision plans to ensure compliance with the review criteria”); *Total Quality, Inc. v. Scarborough*, 588 A.2d 283, 285 (Me. 1991) (upholding conditions that were “[a] reasonable means of achieving the goals stated in the Ordinance”). Likewise, the Planning Board concluded here that the Environmental Protection Condition was *required* in order for Curtis to meet Section 5.2.2.a, one of the review criteria that applied to the project.¹¹ (App. 121.)

express grants of authority, but also has all powers granted ‘by necessary inference as an incidence essential to the full exercise of powers specifically granted.’” *Mick*, 2026 ME 53, ¶ 18, ___ A.3d ___. It must be necessarily inferred, from the express authority provided to it by the Zoning Ordinance, that the Planning Board possesses the authority to ensure section 5.2.2.a’s standards are met. *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, ¶ 28, 868 A.2d 210, 219, *aff’d on other grounds sub nom. S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 126 S. Ct. 1843 (2006) (concluding that the BEP possessed the authority “to include ‘reopeners’” that would allow it to reopen previous approvals because such authority “is ‘essential to the full exercise of powers specifically granted’ to the BEP”).

¹¹ Section 6.9.7.a’s allowance of conditions “required elsewhere in this Ordinance” is properly construed to authorize the Planning Board to impose conditions that are “required” in order for an applicant to meet standards that appear “elsewhere” in the Zoning Ordinance. (App. 121.)

Curtis’s narrow construction of the Planning Board’s authority to condition permits would hamstring the Board’s ability to approve permits, requiring the denial of a permit where a condition to ensure compliance with a particular standard would have resulted in an approval. Curtis argues that the Zoning Ordinance only allows the Board to impose conditions to protect neighboring properties, or those that the Zoning Ordinance expressly requires it to impose. The Zoning Ordinance does not *require* the Planning Board to impose operational controls on most uses, but leaves the Board the discretion to impose, for instance, “such requirements as it deems necessary or desirable to assure compliance.” (App. 107.) Curtis fails to see the absurdity of its position. If the Zoning Ordinance does not permit the Planning Board to impose conditions necessary to meet approval standards, then the Planning Board is for all intents and purposes powerless to enforce section 5.2.2.a through any means other than denying a permit.

B. The Planning Board Did Not Rely on Section 5.2.2.a as the Source of Its Authority to Impose the Condition.

Curtis erroneously contends that the Planning Board relied on section 5.2.2.a as the source of its authority to impose the Environmental Protection Condition. Blue Brief at 29. Nowhere in its Decision did the Planning Board find that section 5.2.2.a—which is a substantive standard that Curtis must meet in order to obtain a permit—gave it the authority to impose the Environmental Protection Condition. (App. 75-76.) Instead, the Planning Board found that the Environmental Protection

Condition was a necessary restriction to ensure that Curtis’s project would meet this substantive approval standard. (App. 76.) The source of the Planning Board’s authority to impose the Environmental Protection Condition is entirely distinct from section 5.2.2.a. Indeed, the very fact that the Planning Board imposed the Environmental Protection Condition evinces the Board’s understanding that the Zoning Ordinance gave it the authority to do so. In light of the numerous foregoing provisions of the Zoning Ordinance bestowing such authority, that understanding was correct.

The Court should reject Curtis’s challenge to the Planning Board’s authority to impose the Environmental Protection Condition.

III. The Planning Board’s Interpretation of Section 5.2.2.a of the Zoning Ordinance Did Not Result in an Error of Law.

Curtis concocts three fantastical, and increasingly contrived, readings of section 5.2.2.a to support its claim that section 5.2.2.a is inapplicable to Curtis’s project. Blue Brief at 30-35. To summarize, Curtis contends: (1) that section 5.2.2.a is inapplicable to the land-based movements of the Blanding’s Turtle, (2) section 5.2.2.a only applies when both “fish” *and* “aquatic life” are impaired, and (3) the Blanding’s Turtle does not constitute “aquatic life.” Blue Brief at 30-35. Aside from the patently absurd and illogical result that would flow from Curtis’s proffered interpretations, the plain language and intent of section 5.2.2.a do not support Curtis’s restrictive readings.

A. Section 5.2.2.a Protects Aquatic Life Irrespective of Where it is When Impairment Occurs.

Curtis asks the Court to read restrictions into section 5.2.2.a that do not exist, unduly narrowing the protections it extends to “aquatic life.” Section 5.2.2.a prohibits excavation activities that impair habitats (*i.e.*, water quality) and/or species (*i.e.*, fish and aquatic life). (App. 106.) Section 5.2.2.a doesn’t explicitly, or implicitly, withhold its protections based on the habitat an aquatic species inhabits when impairment occurs. *Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 21, 17 A.3d 667 (“[b]ecause the Legislature did not require use exclusively outside of Maine in the exemption [statute] we construe today, we do not read in that additional language”); *Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, ¶ 9, 765 A.2d 566 (refusing “to add language to [statute] that was not there”). Indeed, nothing in the plain language of section 5.2.2.a states, or even suggests, that its protection of aquatic species is qualified, and limited to the activities of an aquatic species when it is inhabiting a water body.

Any other construction would lead to anomalous results the Court’s canons of statutory interpretation require it to avoid. *Desfosses v. City of Saco*, 2015 ME 151, ¶ 16, 128 A.3d 648 (“we must interpret [the ordinance] to avoid ‘absurd, illogical, unreasonable, inconsistent, or anomalous results if an alternative interpretation avoids such results’”). For instance, if section 5.2.2.a’s protections do not apply to an aquatic turtle species when it is on land, then Curtis may not

impair or kill an aquatic (and endangered) turtle species when it is in the water, but is free to do so when that same aquatic turtle species is on land only a foot removed from the upland edge of a water body. *Cf. Desfosses*, 2015 ME 151, ¶ 16, 128 A.3d 648 (“[t]o interpret [the ordinance] to provide *the applicant* a right of appeal . . . but to provide no such appeal to a *nonapplicant* . . . would be to condone precisely the type of absurd result we are charged with avoiding”). Curtis’s interpretation creates a patently illogical result, which the Court must avoid, where section 5.2.2.a protections only apply based on the environment—broadly, water or land—that an aquatic species is located in when impairment occurs.

Moreover, Curtis’s legal interpretation rests on the fictitious premise that the Environmental Protection Condition was not intended to protect the water quality of the wetlands the Blanding’s Turtle inhabits. Blue Brief at 31. The First and Second MDIFW Recommendations both provided that MDIFW’s recommendations were intended to “help maintain *the habitat of these wetlands* such that negative impact on a known population of endangered Blanding’s turtle, will be minimized.” (App. 177, 201) (emphasis added). In its Decision, the Board concluded that it “[d]id not see how anything less than prohibiting excavation activities within 250 ft. of Wetlands 1 and 3 will be sufficient to limit ground disturbance within these areas,” and then went on to note that “[t]he Board *also*

finds that prohibiting extraction operations within 250 ft. of Wetlands 1 and 3 will ensure that [Curtis’s] operations will not impair Blanding’s Turtles travelling between the IWWH Wetland and Wetlands 1 and 3.” (App. 77) (emphasis added). The Planning Board’s Decision reveals that the Environmental Protection Condition served two purposes—to protect the Blanding’s Turtle’s upland travel corridor, *as well as the water quality of the wetlands* the Turtle inhabits. (App. 77.) Impairment of Wetlands 1 and 3’s water quality would in turn result in impairment of the Blanding’s Turtle, and the Environmental Protection Condition implemented MDIFW’s recommendation to protect not only the Turtle, but also its wetland habitat.

B. Section 5.2.2.a’s Protections are Triggered When Either “Fish” or “Aquatic Life” is Impaired.

Curtis misconstrues section 5.2.2.a’s coordinating conjunctions to create a set of species that must both be impaired, namely “fish” and “aquatic life,” before section 5.2.2.a’s protections are triggered. On its face, section 5.2.2.a imposes a prohibition against certain activities that impair a list of identified habitats and species. (App. 106.) It does not, as Curtis contends, establish a list of natural resources that must be impaired in order for extraction activities to be prohibited. *Pulsifer v. United States*, 601 U.S. 124, 137 (2024) (interpreting a federal statute’s prefatory phrase ““offenses against the United States” to apply to three enumerated

criminal offenses individually, rather than crimes that manage to satisfy the three enumerated criminal offenses following the statute’s prefatory language).

In the broader context of section 5.2.2.a, the coordinating conjunction “and” between the terms “fish” and “aquatic life” serves to extend section 5.2.2.a’s protections to both “fish” and “aquatic life,” not to require that both things are impaired in order to invoke the provision’s prohibitions. (App. 106.) Section 5.2.2.a establishes environmental protections, and the dependent clause “which would result in . . . impairment of water quality or fish and aquatic life” establishes the things this provision’s protections apply to. Once again, any other construction would invite illogical results where extraction activities that harm fish, but not aquatic life, and vice-versa, would escape section 5.2.2.a’s regulation. *Desfosses*, 2015 ME 151, ¶ 16, 128 A.3d 648. Such a result would contravene section 5.2.2.a’s plain language and intent underlying its protections.

C. The Blanding’s Turtle Is “Aquatic Life.”

Finally, Curtis deploys its most implausible construction of section 5.2.2.a, claiming that the Blanding’s Turtle does not qualify as “aquatic life,” as that term is used by section 5.2.2.a, because when read next to the terms “water quality” and “fish,” the term “aquatic life” must be interpreted to mean “fish-like” species. Blue Brief at 32-33.

Curtis seems to acknowledge that whether the Blanding’s Turtle qualifies as an “aquatic species” is a mixed question of law and fact. *Stiff v. Town of Belgrade*, 2024 ME 68, ¶ 13, 322 A.3d 1167 (holding that the “characterization of structures in applications for conditional use permits is a mixed question of law and fact”); *Jordan v. City of Ellsworth*, 2003 ME 82, ¶¶ 8-9, 828 A.2d 768. When the Planning Board’s determination as to whether something meets an undefined term in an ordinance is greatly informed by the facts within the record, as it was here, the Court must “afford a board's ultimate characterization ‘substantial deference.’” *Tominsky v. Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142 (also noting that the Court’s “standard of review for municipal adjudicative decisions is to give great deference to a board's findings of fact, i.e., to sustain the findings unless the evidence compels a contrary conclusion”).

The record evidence before the Planning Board demonstrated that the Blanding’s Turtle is “found most frequently in complexes of small, acidic wetlands and vernal pools,” and “spend[s] most of [its] time in the water.” (App. 195.) MDIFW’s published guidance refers to the Blanding’s Turtle as a “secretive denizen”—or inhabitant—“of southern Maine vernal pools and pocket swamps.” (App. 195.) The mere fact that the Blanding’s Turtle seasonally travels amongst wetlands is insufficient to disqualify it from section 5.2.2.a’s protections when the

wetlands the Turtle travels to are its primary habitat.¹² With this evidence before it, it is difficult to conceive how the Board could reach a contrary conclusion—namely, that the Blandings Turtle does not constitute “aquatic life.” Nevertheless, it was up to the Board to resolve that question as a matter of fact. *Jones v. Town of Warren*, 1997 ME 200, ¶ 3, 704 A.2d 1210 (“[t]hat the evidence supports two inconsistent conclusions does not prevent an administrative agency's finding from being supported by substantial evidence”); *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 903 (Me. 1993) (“[t]he fact that two inconsistent conclusions can be drawn from the evidence does not mean that a board's finding is unsupported by substantial evidence”).

Like the implausible readings of section 5.2.2.a before it, Curtis’s claim that “aquatic life” must interpreted to mean only “fish-like” species stretches the bounds of any rational reading of section 5.2.2.a. For instance, many aquatic

¹² To the extent the term “aquatic life” is susceptible to more than one interpretation, the Town’s Comprehensive Plan, which establishes the policy directives enshrined in the Zoning Ordinance, sheds light on the Town’s conservation policies. See *Wawenock, LLC v. Department of Transportation*, 2018 ME 83, ¶ 7, 187 A.3d 609 (“[i]f the language is ambiguous, we will “consider the statute's meaning in light of its legislative history and other indicia of legislative intent”); *Nestle Waters N. Am., Inc. v. Town of Fryeburg*, 2009 ME 30, ¶ 24, 967 A.2d 702 (“[a] comprehensive plan . . . dictates how the town effectuates its land use planning obligations. The ordinance is the translation of the comprehensive plan's goals into measurable requirements”). For instance, one of the Comprehensive Plan’s goals is to “conserve and protect significant natural resources, including unfragmented forested blocks, habitat for endangered and threatened wildlife species, rivers, streams, coastal waters, wetlands, aquifers, and scenic areas.” Pltf in AP-24-28 Kethryn & Lincoln Harrison Brief in Support of 80B Brief with Exhibit 1 filed 6/24/2025 (Exhibit 1 is a copy of the Town’s Comprehensive Plan). The Comprehensive Plan policies to fulfill this goal include: “[e]nhanc[ing] the town’s programs for protecting sensitive, natural resources through *regulatory* and non-regulatory mechanisms.” *Id.* (emphasis added). At a minimum, the stated goals of the Comprehensive Plan should inform the legislative intent underpinning section 5.2.2.a’s prohibitions, which are, on their face, intended to protect natural resources from extractive activities.

species, like frogs and salamanders, which live and lay their eggs in water, are not “fish-like,” under Curtis’s restrictive interpretation. Moreover, aquatic vegetation, which is entirely reliant on the water in which it grows, is not “fish-like.” Curtis’s narrow reading of the term “aquatic life” would virtually read the protections it affords to “aquatic life” other than fish out of the Zoning Ordinance, a result which this Court cannot countenance.¹³

IV. The Planning Board’s Imposition of the Environmental Protection Condition Did Not Constitute an Abuse of Discretion.

Curtis recasts its dispute with the Planning Board’s interpretation of MDIFW’s guidance as a legal, rather than factual, issue. Blue Brief at 35-40. However, Curtis framed its objection to the Planning Board’s imposition of the Environmental Protection Condition, before first the Board and then the ZBA, as a misinterpretation of the evidence in the record, not an abuse of the Board’s discretion. (App. 269-271, 282-284.) Curtis cannot switch horses mid-race, or shop for standards of review it (mistakenly) believes are more favorable to its case. The core of Curtis’s appeal from the Decision is its disagreement with the Planning Board’s interpretation of the evidence that was before it, and Curtis cannot avoid, through a clever sleight of hand, the deference that is due to the Planning Board’s interpretation of MDIFW’s recommendations. (App. 269-271, 282-284.) In any

¹³ Curtis’s hyperbolic claim that the logical result of the Planning Board’s conclusion that the Blanding’s Turtle qualifies as “aquatic life” would mean that a moose or bear could qualify for section 5.2.2.a’s protections is itself illogical and beyond reason.

event, the Planning Board’s imposition of the Environmental Protection Condition did not constitute an abuse of discretion, because the Condition is a reasonable means of effectuating section 5.2.2.a’s mandates, and is founded upon the guidance received by a State agency.

A. The Planning Board’s Interpretation of the Second MDIFW Recommendation is Supported By Substantial Evidence.

The Court must treat Curtis’s objection to the Environmental Protection Condition the same way Curtis did in the proceedings below—as a question of whether there is substantial evidence to support the Planning Board’s interpretation of the MDIFW Second Recommendation. (App. 269-271, 283.) Curtis challenged the Planning Board’s imposition of the Environmental Protection Condition before the ZBA on the grounds that the Planning Board “misinterpret[ed] and misapply[ied] recommendations made by [MDIFW].” (App. 283.) Therein lies the substance of Curtis’s objection to the Decision. Curtis relies on its characterization of the facts in the record to support its contention that the Planning Board abused its discretion. Blue Brief at 37. That is telling, because Curtis is, in essence, asking the Court to reweigh the evidence that was before the Planning Board, and reach a different conclusion. *Mick*, 2026 ME 53, ¶ 26, ___A.3d___ (rejecting appellant’s argument that imposition of approval conditions was arbitrary and capricious because “they are ultimately requests that we weigh the evidence differently, which is not our role”). This Court has routinely refused to do that. *Id.*; *see also*

Friends of Lamoine, 2020 ME 70, ¶ 21, 234 A.3d 214 (“Regarding the Planning Board’s ability to determine credibility and to weigh evidence, we will not substitute our judgment for that of the Planning Board.”); *Ouellette v. Saco River Corridor Comm’n*, 2022 ME 42, ¶ 20, 278 A.3d 1183 (“[t]he substantial-evidence standard of review ‘does not involve any weighing of the merits of evidence’”).

When its position is distilled to its essence, Curtis is really contending that there is only *one* way to interpret the Second MDIFW Recommendation. On its face, however, the Second MDIFW Recommendation is not susceptible to only one interpretation. *Jones*, 1997 ME 200, ¶ 3, 704 A.2d 1210. The Second MDIFW Recommendation did not retract MDIFW’s guidance to implement measures to protect the Blanding’s Turtle, and the wetlands it inhabits. (App. 201.) Both the First and Second MDIFW Recommendations counseled that Curtis should limit ground disturbance within 250 ft. of Wetlands 1 and 3, with the only qualification (if it can be called that) to that guidance in the Second MDIFW Recommendation being that disturbance “be limited as much as practicable.” (App. 177, 201.) The fact that MDIFW issued a second letter that contained a substantively similar recommendation, with an insubstantial qualification to the recommendation offered in the First MDIFW Recommendation, indicates that MDIFW was still recommending something to Curtis and the Planning Board. (App. 177, 201.) Consequently, it was not unreasonable for the Planning Board to interpret the

Second MDIFW Recommendation to extend continuing guidance to the Planning Board.

Curtis suggests that the Second MDIFW Recommendation accepted Curtis's phasing proposal as the only control necessary to address all of the agency's concerns regarding take of the Blanding's Turtle. Blue Brief at 16. The Second MDIFW Recommendation is not, in fact, that unequivocal. (App. 201.) Rather, MDIFW noted that "revisions have been made to the plan *addressing* these concerns," which was a reference to Curtis's existing phasing proposal, but it did not state that phasing addressed its concerns entirely. (App. 201.)

Regardless, the Planning Board, not MDIFW, was the permitting authority, and Curtis bore the burden of demonstrating that its operations could meet section 5.2.2.a's requirements. As the record reveals, Curtis didn't even try to propose operational limits that would have protected the Blanding's Turtle, nor did it attempt to present any alternatives to MDIFW's recommendation. The Zoning Ordinance required Curtis to phase its extraction all along, and the plans it presented before and after the issuance of the First and Second MDIFW Recommendations were substantively identical (App. 108, compare App. 166 with 212; R. 272.) Curtis had nearly a year to present alternative environmental protection measures to the Planning Board, or to attempt to rebut MDIFW's expert analysis and opinions, yet it chose not to do so.

Consequently, the only evidence before the Planning Board demonstrated that Curtis’s project would foreseeably impair the Blanding’s Turtle, by impacting the wetlands it inhabits and the upland corridor it travels, unless appropriate controls were implemented to protect this endangered species. Confronted with this evidence of prospective impairment, the Planning Board can’t be faulted for implementing guidance from a State agency charged with protecting endangered species and interpreting that guidance the way the Board did. *Tominsky*, 2023 ME 30, ¶ 22, 294 A.3d 142 (noting that the Court’s “standard of review for municipal adjudicative decisions is to give great deference to a board’s findings of fact”).

B. The Imposition of the Environmental Protection Condition was not an abuse of the Planning Board’s Discretion.

Even if the abuse of discretion standard was implicated by Curtis’s appeal, the Environmental Protection Condition was a reasonable means of effectuating section 5.2.2.a’s prohibitions and the Zoning Ordinance’s objectives. *Forest Ecology Network v. Land Use Regulation Comm’n*, 2012 ME 36, ¶ 28, 39 A.3d 74 (“[a]n abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law”). MDIFW presented the only recommended regulatory mechanism to prevent impairment of the Blanding’s Turtle, namely limiting “ground disturbance . . . as much as practicable” within 250 ft. of Wetlands 1 and 3. (App. 201.) The Planning

Board, quite reasonably, concluded that “[a]lthough phasing . . . will result in only a portion of the area within 250 ft. of the Wetlands being disturbed at any given time, the ground disturbance within the area that is excavated will not be limited in any real sense.” (App. 77); *see Id.* ¶ 28 (“[i]f the agency's decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision”). While Curtis may disagree with the extent of the Planning Board’s restriction, an abuse of discretion does not result when the Planning Board could have made choices more acceptable to Curtis but declined to do so. *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567 (“[i]t is not sufficient to demonstrate that, on the facts of the case, the decisionmaker could have made choices more acceptable to the appellant or even to a reviewing court”).

The evidence within the record—including the uncontroverted evidence that the Property includes wetland habitats of the Blanding’s Turtle and that the species needs some protection against gravel extraction disturbances—left the Planning Board with limited choices to effectuate the objectives established by section 5.2.2.a. Indeed, the Planning Board had essentially three options: (1) do nothing (which was in essence what the Curtis asked the Planning Board to do), (2) implement MDIFW’s guidance, or (3) deny Curtis’s application. The Second MDIFW Recommendation did not explain what measures or controls could be

implemented to minimize ground disturbance, it merely acknowledged that phasing does limit the open pit area at any one time. (App. 201.) Nonetheless, a recommendation to limit ground disturbance in a particular land area as much as is practicable, in the context of a *gravel extraction use*, could reasonably be construed to entail prohibiting extraction altogether. *Jones*, 1997 ME 200, ¶ 3, 704 A.2d 1210; *Gorham*, 625 A.2d at 903. Ground disturbance is an immutable characteristic of a gravel extraction business, and whether extractive activities are phased or not, the effects of extraction are cumulative, permanently altering the topography of the land from which materials are removed.

Moreover, the choices available to the Planning Board were constrained by section 5.2.2.a's strict standards. (App. 106.) Section 5.2.2.a does not allow some modicum of impairment of water quality, fish, or aquatic life; it categorically prohibits impairment. (App. 106.) More pointedly, Curtis's operations did not pose a threat to just any species; they posed a threat to an *endangered* species. 12 M.R.S. § 12803(3)(J); 12 M.R.S. § 12808 (imposing criminal penalties for the take of endangered species). Once the Planning Board received record evidence demonstrating that Curtis's use would foreseeably impair the Blanding's Turtle, it was obligated to either impose a condition necessary to prevent such impairment or

issue a denial.¹⁴ While phasing within 250 ft. of Wetlands 1 and 3 would limit the extent of ground disturbance at any given time, Curtis fails to acknowledge that, over time, its proposed extraction operations would cumulatively disturb *all* of the land within 250 ft. of these wetlands. Consequently, it is not difficult to see why the Planning Board concluded phasing Curtis's extraction operations would be insufficient to satisfy section 5.2.2.a's strict mandate by continuing to threaten the Blanding's Turtle.

The essential thrust of Curtis's position is that the Planning Board abused its discretion by imposing a condition that went *further* than MDIFW's recommendation. The most glaring hole in Curtis's logic is that MDIFW is not bound by section 5.2.2.a, but the Planning Board is. MDIFW's recommendation was not crafted to ensure compliance with section 5.2.2.a (even Curtis does not contend that it was). Rather, MDIFW offered guidance based on controls the agency has found sufficient to protect the Blanding's Turtle and its habitats.

Grant's Farm Assocs., Inc. v. Kittery, 554 A.2d 799, 803 (Me. 1989)

("Environmental damage is easy to do and difficult to undo. It is therefore often the case that an applicant going through a multistage review process must simultaneously persuade different agencies that the same or similar standards are

¹⁴ It is worth noting that denying Curtis a permit was one choice that was available to the Planning Board. Rather than prohibit Curtis's operations altogether, the Planning Board chose instead to impose a condition that would still allow Curtis to extract some amount of materials from the Property.

met”). If the Planning Board can be said to have gone beyond MDIFW’s recommendation, it is because section 5.2.2.a required it. MDIFW was not the permitting authority, the Planning Board was, and MDIFW is not bound by section 5.2.2.a’s standard, but the Planning Board is.

Ultimately, the Planning Board chose to impose a condition that was reasonably tailored, in light of the evidence before it, to ensure compliance with section 5.2.2.a. That choice did not exceed the bounds of the options that were available to the Planning Board, particularly when Curtis failed to present any countervailing evidence or any alternative options to the Board. Even if Curtis has shown that the Planning Board could have made a different choice, which it hasn’t, that isn’t enough to overturn the Planning Board’s imposition of the Environmental Protection Condition. *Sager*, 2004 ME 40, ¶ 11, 845 A.2d 567.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Court affirm the Decision of the Superior Court, and in turn, the Planning Board.



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