STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:	**Docket No.: 21-003354**
Petition of James Nairne	**Agency No.: HP2-5594-19JDH**
	Part: 303, Wetlands Protection
	Agency: Department of Environment, Great Lakes, and Energy
	Case Type: Water Resources Division

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Issued and entered
this 17th day of June 2022
by Daniel L. Pulter
Administrative Law Judge

FINAL DECISION AND ORDER

This contested case involves an Application for a permit filed by the Petitioner, James Nairne, under Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.30301, *et seq*. The Application was denied by the Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE) by a letter dated December 30, 2020. That agency action was challenged by Mr. Nairne, who filed a Petition for Contested Case Hearing on February 12, 2021.

JURISDICTION

Part 303 grants the right to a contested case hearing to a person "aggrieved by any action … of the department…." MCL 324.30319(2). Mr. Nairne claimed he was aggrieved by the denial of his Application on December 30, 2020. Consistent with § 30319(2), a contested case hearing was conducted on August 18-19, 2021. The hearing was conducted under the applicable provisions of the Administrative Procedures Act (APA), 1969 PA 306, as amended. MCL 24.201, *et seq*. Due to COVID-19 and pursuant to Administrative Hearing Standard No. 2021-1, the hearing was conducted via videoconference on the Microsoft Teams platform. The record was closed at the conclusion of the

hearing. Closing briefs and response briefs were filed in accordance with the agreed schedule of the parties. [1]

PROPERTY RIGHTS PRESERVATION ACT

Pursuant to the Property Rights Preservation Act, 1996 PA 101, MCL 24.421, *et seq*., the undersigned, in formulating this Final Decision and Order (FDO), reviewed the Takings Assessment Guidelines and considered the issue of whether this governmental action equates to a constitutional taking of property. Const 1963, art 10 § 2.

PARTIES

Mr. Nairne was represented by Joseph E. Quandt of the firm Kuhn Rogers, PLC. Mr. Nairne testified on his own behalf (2 Tr 279-357), and offered the testimony of Tom Alflen, an expert in Leelanau County and Northport area real estate (1 Tr 237-270); and Christopher P. Grobbel, Ph.D., an expert in wetland science and wetland regulation (2 Tr 363-451). Through these witnesses, Mr. Nairne entered Exhibits P-1 through P-12, P-17, and P-19 through P-30. [2]

The WRD, which administers Part 303, was represented by Charles A. Cavanagh, [3] Assistant Attorney General, and offered the testimony of Robyn Schmidt, the WRD employee who reviewed and processed the Application (1 Tr 17-163); Keyto Gyekis, a WRD employee with expertise in wetland identification, and wetland science and ecology (1 Tr 166-202); and Chad Fizzell, a WRD employee with expertise in geographic information systems, aerial photograph interpretation, and aerial wetland mapping (1 Tr 203-234). Through these witnesses, the WRD entered Exhibit R-1, R-3 through R-6, R-9, R-10, R-12, R-13, R-16 through R-25, and R-29 through R-38.

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[1] During the course of the administrative hearing, the Tribunal discovered a potential conflict of interest that could constitute a potential ground for disqualification of the undersigned. See R 792.10106(2) - (5). After advising the parties of the potential conflict, the parties elected to waive the potential conflict and to proceed with the contested case. See 2 Tr 358-361.

[2] The Exhibits in this contested case have been submitted electronically in portable document format (PDF). All references to exhibit page numbers are to the PDF page number of the electronic Exhibit, not the page number at the bottom of the exhibit.

[3] By a document filed on April 26, 2022, entitled Substitution of Counsel, Assistant Attorney General Elizabeth Morrisseau entered her appearance as counsel for the WRD in place of Charles Cavanagh.

STIPULATIONS ON THE RECORD

By a filing dated August 6, 2021, the parties stipulated that:

1. The Applicant is a lawful applicant.

2. The Application was administratively complete.

3. The activity requested by the Applicant is for the construction of a single-family home and attendant features.

4. The activity requested in the Application is a regulated activity under MCL 324.30304(a) and (b).

5. The activity requested in the Application will not affect more than two acres of wetland.

6. The activity requested in the Application is not covered by a general permit.

7. The activity requested in the Application is to deposit or permit the placing of fill material in a wetland and/or dredge, remove or permit removal of soil or minerals from a wetland.

8. The activity requested in the Application is otherwise lawful.

9. The activity requested in the Application is not primarily dependent upon being located in a wetland.

10. The Applicant purchased the subject parcel (Tax ID. No. 008-106-001-00) in January 2020.

11. The Applicant owns the parcels (Tax ID No. 008-106-001-10, Tax ID No. 008-106-001-11, and Tax ID No. 008-106-001-13) south of the subject parcel.

12. The parcel (Tax ID No. 008-106-001-13) directly south of the subject parcel was created by a prior owner through a property split recorded on October 30, 2012.

13. Green Bridge Holdings, Inc. owns parcels (Tax ID No. 008-105-011-00, Tax ID No. 008-105-011-01, Tax ID No. 008-105-018-01, Tax ID No. 008-105-018-02, Tax ID No. 008-105-018-03, and Tax ID No. 008-105-018-04) to the east of the subject parcel.

Stipulations by the parties are evidence and are binding on the parties. MCL 24.278. Since these stipulations are factual, I adopt them as Findings of Fact.

FINDINGS OF FACT

The Application was originally filed by Mr. Nairne on August 20, 2020. Exhibit P-2. An Amended Application was filed on October 5, 2020. Exhibit R-3. The Application was deemed administratively complete by the WRD. Stipulation 2, *supra*. The Public Notice for the project was issued on October 23, 2020. Exhibit R-9. Ms. Schmidt conducted a site inspection on December 9, 2020. 1 Tr 34. The WRD sent Mr. Nairne a letter dated December 30, 2020, denying the Application. Exhibit R-12.

The project contemplated in the Application is to construct a single-family home and attendant features. Exhibit R-3 at p 7; Stipulation 3, *supra*. A wetland delineation for the project site was performed by Dr. Grobbel. Exhibit R-4. The project site consists of two parcels of land – the first (Parcel A) is a 12.46-acre parcel on the east of Onominese Trail, and the second (Parcel B) is a 0.49-acre trapezoidal parcel on the west of Onominese Trail on the shore of Lake Michigan. Exhibit P-6; Exhibit P-7. Parcel B has 160.47 feet of shoreline along Lake Michigan. Exhibit P-7. The only buildable uplands located on these two parcels is at the southwest corner of Parcel A east of Onominese Trail. [4] Exhibit P-6.

The Application proposed to construct a residence on Parcel B, which was delineated as a wetland parcel. 1 Tr 29-30. The project plans called for the construction of a 40-foot x 80-foot residence, with a four-foot apron, along with a driveway that would extend to Onominese Trail, and a septic system which included a pump chamber that would be dredged, placed, and backfilled. Exhibit R-3; 1 Tr 32. The septic line would extend to a drain field proposed to be placed on the uplands of Parcel A. *Id*; Exhibit R-5. The Application contemplated wetland impacts of .16 acres for the project. 1 Tr 32; Stipulation 5, *supra*.

In order to better understand the parcels involved in this contested case, the survey from Exhibit P-19 will be included on the following page of this FDO. Parcel A, which contains uplands upon which Mr. Nairne proposed to install a septic drain field, is clearly identified on the survey. Parcel B is the trapezoidal parcel to the west of Parcel A and is the proposed location of the residence. The property upon which Mr. Nairne's current residence is located is to the south of Parcel B, which has a small square indicating a cabin. Finally, to the east of the parcel containing Mr. Nairne's current residence is the "Solar Panel Property" [5] identified as Parcel D on Exhibit P-19. Mr. Nairne is the owner, individually, of the lands identified on Exhibit P-19.

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[4] Parcel B is considered almost entirely wetland property, but it has a narrow strip of "drained uplands" located "along the ridge when it drops off the bank to go down to Lake Michigan…." 1 Tr 40.

[5] The "Solar Panel Property" is further described in the feasible and prudent alternatives section of this FDO.

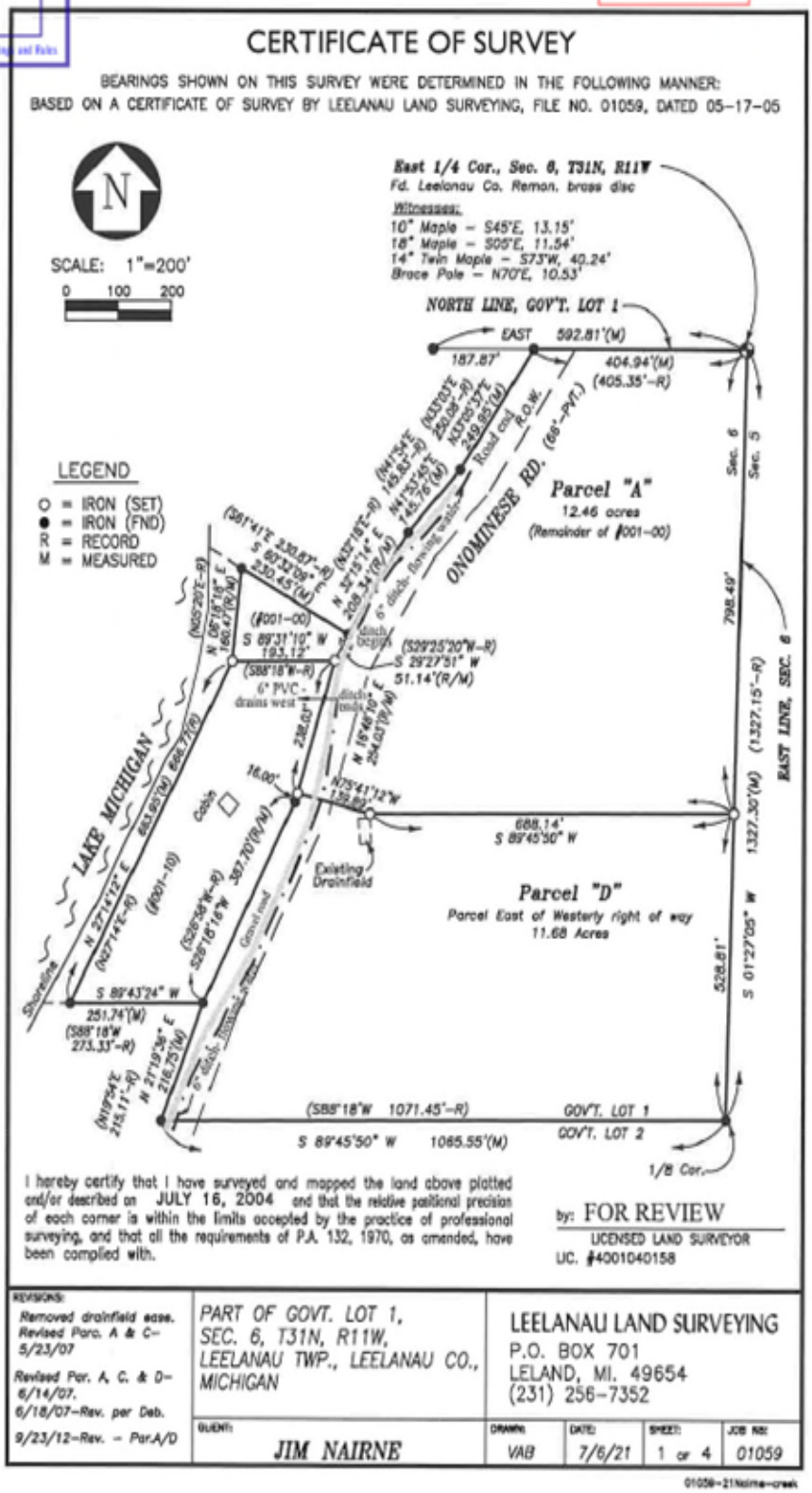
PETITIONER EXHIBIT
P-19
Michigan Office of Administrative Hearings and Rules

ADMITTED

Exhibit P-19

CERTIFICATE OF SURVEY

BEARINGS SHOWN ON THIS SURVEY WERE DETERMINED IN THE FOLLOWING MANNER:
BASED ON A CERTIFICATE OF SURVEY BY LEELANAU LAND SURVEYING, FILE NO. 01059, DATED 05-17-05



I hereby certify that I have surveyed and mapped the land above platted and/or described on JULY 16, 2004 and that the relative positional precision of each corner is within the limits accepted by the practice of professional surveying, and that all the requirements of P.A. 132, 1970, as amended, have been complied with.

by: FOR REVIEW
LICENSED LAND SURVEYOR
LIC. #4001040158

REVISIONS:					
Removed drainfield ease. Revised Parc. A & C- 5/23/07 Revised Par. A, C. & D- 6/14/07. 6/18/07-Rev. per Deb. 9/23/12-Rev. - Par.A/D	PART OF GOVT. LOT 1, SEC. 6, T31N, R11W, LEELANAU TWP., LEELANAU CO., MICHIGAN	LEELANAU LAND SURVEYING P.O. BOX 701 LELAND, MI. 49654 (231) 256-7352			
	CLIENT: JIM NAIRNE	DRAWN: VAB	DATE: 7/6/21	SHEET: 1 of 4	JOB NO: 01059

01059-21\Nairne-creek

PART 303, WETLANDS PROTECTION

I. Jurisdiction

Part 303 is implicated if a jurisdictional activity occurs in the proposed project. MCL 324.30304. The jurisdictional activities identified in Part 303 are (a) placing fill material in a wetland; (b) dredging or removing soil from a wetland; (c) constructing or operating a use in a wetland; and (d) draining surface water from a wetland. *Id*. In this case, the Application contemplates dredging soil from a wetland and placing fill in a wetland, impacting .16 acres of wetland. Exhibit R-3 at pp 8-11; Stipulation 7, *supra*. The parties stipulated that the activity requested in the Application is a regulated activity under MCL 324.30304(a) and (b). Stipulation 4, *supra*. Therefore, I find, as a Matter of Fact, that the proposed project implicates activities covered by Part 303 which require a permit from the WRD. MCL 324.30304 (a) & (b).

II. Section 30311(1)

The first inquiry in determining what project, if any, can be permitted are the following requirements in § 30311(1):

> A permit for an activity listed in section 30304 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.

MCL 324.30311(1). Hence, under § 30311(1) analysis, there are three requirements necessary for approval of the permit: (a) "the issuance of a permit is in the public interest"; (b) "the permit is necessary to realize the benefits derived from the activity"; and (c) "the activity is otherwise lawful." MCL 324.30311(1). The first requirement necessitates a finding that "the issuance of a permit is in the public interest…." MCL 324.30311(1). Because the general criteria for determining whether the proposed activity is in the public interest are contained in § 30311(2), this requirement will be addressed *infra*.

The second requirement compels a finding that "the permit is necessary to realize the benefits derived from the activity…." MCL 324.30311(1). In this case, the proposed project is the construction of a 40-foot x 80-foot residence, with a four-foot apron, along with a septic system and a driveway that would extend to Onominese Trail. 1 Tr 32. The record indicates that the proposed residence is to be located entirely within regulated wetlands, causing impacts of .16 acres for the project. 1 Tr 32; Stipulation 5, *supra*. Given the fact that the residence cannot be constructed at the proposed location without a permit, I find, as a Matter of Fact, that a permit is necessary to realize the benefits derived from the activity.

The third requirement necessitates a finding that "the activity is otherwise lawful." MCL 324.30311(1). This standard asks whether the proposed activity is, assuming all requisite approval is obtained, lawful. The parties have stipulated that this is a lawful activity under Michigan law. Stipulation 8, *supra*. Therefore, I find, as a Matter of Fact, that the proposed activity is otherwise lawful.

III. Section 30311(2)

Determining whether the proposed activity is in the public interest requires a balancing of the benefit against the foreseeable detriments, keeping in mind the national and state concern with protecting wetlands from impairment. MCL 324.30311(2). Section 30311(2) sets forth nine general criteria, each of which go to the benefit/detriment balancing test that must be considered. The following is a recitation of the evidence submitted as it applies to each statutory criterion of the balancing test:

A. The relative extent of the public and private need for the proposed activity.

The first criterion seeks a determination of both the public and private need for the proposed activity. With respect to public need, Ms. Schmidt testified that "there is always a public interest in having that economic construction project … so there are people who've been hired to do that." 1 Tr 48. Hence, Ms. Schmidt's testimony recognizes that there are public benefits from construction projects, such as the construction of a private residence. Based on such testimony, I find, as a Matter of Fact, that there is a public need for the project.

With respect to private need, Mr. Nairne currently owns a residence on property immediately south of Parcel B. Exhibit P-27; Exhibit R-38 (identified as Parcel No. 008-106-002-00); Stipulation 11, *supra*. Mr. Nairne intends to utilize the proposed activity for building a "family home that I can bring my children and grandchildren and guests to and be within a couple of hundred feet of our house … to expand our family compound." 2 Tr 291. While he intends to eventually expand his current residence to provide for a live-in caregiver, Mr. Nairne conceded that the proposed project was to provide "room for our guests to stay there instead of in our house." [6] 2 Tr 291. 2 Tr 291, 283. Therefore, I find, as a Matter of Fact, that there is a private need for the proposed activity

[6] Surprisingly, on cross-examination, Mr. Nairne admitted that, because he lives in a home on property to the south of Parcel B, he does not have a private need for the project. 2 Tr 319. However, the Tribunal reasonably infers that Mr. Nairne has a private need for the project or else he would not have filed an Application and a contested case supporting such application. *Zytkewick v Ford Motor Co*, 340 Mich 309, 318; 65 NW2d 813 (1954) (evidence includes reasonable inferences that can be drawn from the facts).

B. The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

This criterion seeks a review of the availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity. This criterion is to be distinguished from the requirement to review feasible and prudent alternatives set forth in MCL 324.30311(4). This criterion instead focuses on alternative locations and methods. The Court of Appeals has defined a "feasible" alternative as one that is "capable of being put into effect or accomplished…." *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 466; 554 NW2d 328 (1996). On the other hand, a "prudent" alternative is one that is "exercising sound judgment." *Id*. The facts in this case have raised several issues which merit discussion. Each of these issues will be separately discussed *infra*.

1. The Project Purpose

In evaluating feasible and prudent alternatives, the project purpose is relevant. In this case, the WRD contends that Mr. Nairne has narrowly defined the project purpose. The WRD points to Rule 2a of the Administrative Rules, which provides, in part, as follows:

> A permit applicant shall completely define the purpose for which the permit is sought, including all associated activities. An applicant shall not so narrowly define the purpose as to limit a complete analysis of whether an activity is primarily dependent upon being located in the wetland and of feasible and prudent alternatives. The department shall independently evaluate and determine if the project purpose has been appropriately and adequately defined by the applicant, and shall process the application based on that determination.

Mich Admin Code, R 281.922a(4). To help clarify this Rule, WRD Policy and Procedure No. WRD-003 provides, in part, as follows:

> It is understandable that a proposed project may have been designed to take advantage of the features of a given site, such as its proximity to a waterfront, or provision of a particular scenic view. However, from the perspective of Part 303 and the Wetland Rules, these features may not be necessary to meet the basic project purpose, whether that is to provide housing, or to develop a commercial venture. Alternative sites that do not include such secondary features could thus be feasible and prudent alternatives.

Exhibit R-37 at p 3. A review of the facts in this case may help in the application of these principles.

Initially, it should be noted that the project purpose stated in the Application is for "[p]rivate residential development for full-time occupancy." Exhibit R-3 at p 7. Indeed, the parties stipulated that "[t]he activity requested by the Applicant is for the construction of a single-family home and attendant features." Stipulation 3, *supra*. In fact, Dr. Grobbel, who prepared the Application, explained that the project purpose "was for a family use home." 2 Tr 380. The Application, therefore, does not stress that the residential development must occur on a lakefront. However, during the course of the contested case, Mr. Nairne's project purpose evolved. Specifically, he testified that he desired "[t]o build a waterfront family home…." 2 Tr 291. This goal was reiterated in his Closing Brief. Nairne Closing Brief at p 11. Indeed, when Mr. Nairne's real estate agent supplied an exhibit listing comparable properties to Parcel B, all of such properties were Lake Michigan waterfront properties. Exhibit P-21. Hence, for feasible and prudent alternatives analysis, Mr. Nairne has attempted to narrow his project purpose from building a residential development to constructing a waterfront home.

As noted in Rule 2a, Part 303 expressly prohibits an applicant from narrowly defining a project thereby limiting a complete analysis of feasible and prudent alternatives. R 281.922a(4). In fact, the Rule provides that "[a]n alternative may be considered feasible and prudent even if it does not accommodate components of a proposed activity that are incidental to or severable from the basic purpose of the proposed activity." R 281.922a(10).

Finally, in his Briefs, Mr. Nairne relies upon the holding of *Petition of Thomas Anderson*, 1994 WL 551231 (Mich.Dept.Nat.Res.). He argues that this case stands for the proposition that the project purpose as defined by the Petitioner ultimately controls the scope of the feasible and prudent alternative analysis. Nairne Closing Brief at p 11. In its Response Brief, the WRD notes that this argument is refuted by the language of Rule 2a, which requires the agency to "independently evaluate and determine if the project purpose has been appropriately and adequately defined by the applicant…." R 281.922a(4). The WRD also correctly notes that, unlike the instant case, the facts in *Anderson* indicate that there were no available lots within a reasonable distance of the applicant's existing home to accomplish his desired purpose. In *Anderson*, the Tribunal noted:

> There was some inspection on the ground to verify the lands were vacant. There was no survey of the availability of the lots nor were prices evaluated. It was a study limited to determining if there are other, non-wetland, vacant lots that might meet the applicant's objectives.

1994 WL 551231, at *4. Hence, in *Anderson*, there was a question of whether the lots could be purchased, if at all, and at what price. In this case, both Mr. Nairne and his

solely owned corporation, Green Bridge Holdings, Inc. (Green Bridge), own numerous lands within the vicinity of the proposed project. See Stipulations 11 and 13, *supra*; Exhibit R-38. Because alternative lands are already available to Mr. Nairne, the *Anderson* decision is simply inapposite in the instant case.

Based on the evidence in the record, I conclude, as a Matter of Law, that for feasible and prudent alternatives analysis Mr. Nairne has attempted to narrow his project purpose to development along the waterfront of Lake Michigan. Therefore, in determining whether a feasible and prudent alternative exists in this case, this Tribunal will treat the project purpose as the construction of a single-family home.

2. The Burden of Production

In his Closing Brief, Mr. Nairne argues that the WRD has an obligation to demonstrate that feasible and prudent alternatives could "actually be accomplished…." Nairne Closing Brief at p 18. In his Response Brief, Mr. Nairne also alleges that "it was expected that prior to the issuance of a denial letter, EGLE would have communicated with Mr. Nairne if in fact it was believed that feasible and prudent alternatives existed to this proposed project particularly in regard to onsite alternatives." Nairne Response Brief at p 11. By such arguments, it appears that Mr. Nairne is attempting to require the agency to fulfill an evidentiary burden prior to alleging that feasible and prudent alternatives exist. Therefore, it is necessary to review the requirements of the statute in determining the obligation to come forward with evidence regarding feasible and prudent alternatives.

Part 303 requires an applicant for a permit to file an "application." MCL 324.30306. Under Part 13, the applicant must produce sufficient information to the agency for it to determine whether the application is administratively complete. MCL 324.1305(1). If the application is not administratively complete, the agency may specify to the applicant "the information necessary to make the application administratively complete…." *Id*. In fact, once an application is considered administratively complete, "the department may request the applicant to clarify, amplify, or correct the information required for the application." MCL 324.1305(4). In fact, the Administrative Rules expressly state that "[a] permit applicant shall provide adequate information, including documentation as required by the department, to support the demonstration required by section 30311 of the act." R 281.922a(3). Indeed, Rule 2a further states that "[t]he department shall independently evaluate the information provided by the applicant to determine if the applicant has made the required demonstration." Hence, the burden of production is upon the applicant to prove that there are no feasible or prudent alternatives to the activity requested in the application.

The WRD's Response Brief highlights two additional provisions of Part 303 and Rule 2a that squarely places the burden of production on the applicant. Specifically:

> Section 30311(4) provides that "[a] permit shall not be issued unless the applicant also shows … [a] feasible and prudent alternative does not exist." MCL 324.30311(4)(b).
>
> Rule 2a provides that "[t]he applicant shall demonstrate that, given all pertinent information, there are no feasible and prudent alternatives that have less impact on aquatic resources." R 281.922a(6).

These provisions also make it clear that the burden of production is on the applicant, not the agency. For all of these reasons, it is clear that it is the applicant's obligation to come forward with evidence regarding feasible and prudent alternatives. The agency's obligation is merely to evaluate the evidence supplied by the applicant. R 281.922a(3).

Finally, by the arguments in his Briefs, Mr. Nairne implies that he was somehow prejudiced because the WRD did not communicate the feasible and prudent alternatives to him prior to his receipt of the denial letter. However, the contested case hearing is "an extension of the initial application process for the purpose of arriving at a single final agency decision on the application…." *National Wildlife Fed'n v Department of Envtl Quality*, 306 Mich App 369, 379; 856 NW2d 394 (2014). As such, an applicant is not limited to the evidence supplied with his Application but can present new evidence in order to demonstrate that the alternatives alleged by the agency in its denial letter are not feasible or prudent. In his Response Brief, Mr. Nairne suggests that he "was never given the opportunity to provide information on a small home footprint or if pilings could be used for the project." Nairne Response Brief at p 9. However, Mr. Nairne could have presented this evidence during the contested case hearing but elected not to do so. For these reasons, Mr. Nairne was not prejudiced by merely receiving the WRD's assertions of feasible and prudent alternatives for the first time in the denial letter. Therefore, Mr. Nairne's assertions regarding burden of production are without merit.

3. Alternative Locations

As noted *supra*, this criterion seeks an analysis of feasible and prudent alternative locations. The Administrative Rules explain that feasible and prudent alternatives include "[u]se of a location other than the proposed location." R 281.922a(6)(b)(i). Alternative locations include locations elsewhere on the proposed project lands, or on other lands owned by the applicant. In fact, the Administrative Rules acknowledge that a feasible and prudent alternative location may include "[a]n area not presently owned by the permit applicant that could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity….." R 281.922a(9). However, to be feasible and prudent, the alternative location must cause less wetland impacts than proposed in the project. R 281.922a(6) ("An alternative is feasible and prudent if … [t]he

alternative would have less adverse impact on aquatic resources"). Based on these principles, the Tribunal will review the feasible and prudent alternative locations suggested by the WRD.

a. Market Value

Before addressing alternative locations, this Tribunal will address an issue related to market value of the alternative parcels. As noted *supra*, Mr. Nairne's real estate agent supplied an exhibit listing comparable properties to Parcel B. Exhibit P-21. The first comparable property referenced in such exhibit is a tract with 180 feet of lakefront real estate on the bay side of Leelanau County. Exhibit P-21 at p 1; 1 Tr 245-246. This tract sold for $475,000. *Id*. The second comparable property is a tract with 150 feet of lakefront real estate along Lake Michigan. Exhibit P-21 at p 2; 1 Tr 246-247. This tract sold for $487,500. *Id*. The third comparable property is a tract with 100 feet of lakefront real estate along Lake Michigan. Exhibit P-21 at p 3. This tract sold for $765,000. 1 Tr 247. The fourth comparable property is a tract with 200 feet of waterfront along Lake Michigan. Exhibit P-21 at p 4. This tract sold for $965,000. 1 Tr 248. In fact, the waterfront property on Lake Michigan on which Mr. Nairne currently resides was purchased for $864,000. [7] 2 Tr 328. That parcel has 663.95 feet of lakefront. Exhibit P-7. These properties are to be compared to Parcel B, which has 160.47 feet of shoreline along Lake Michigan. Exhibit P-7. Mr. Nairne acquired Parcels A and B consisting of a total of 12.95 acres for $77,377. Exhibit P-19; 2 Tr 328.

Mr. Nairne's real estate agent testified that wetland parcels such as Parcel B, that are 100 percent wetland property, have a lower market value. 1 Tr 269-270. The reason that such properties have lower market value is that it is uncertain whether wetland parcels can be developed. 1 Tr 270. Mr. Nairne purchased Parcel B in 2020. 2 Tr 353. He testified that he understood that it was a wetland parcel at the time he purchased the property. *Id*. He also testified that, since he currently owns a home on property to the south of Parcel B, the home he intends to build upon Parcel B will be a second home. *Id*. Finally, he acknowledged that he is currently able to utilize the beach on Parcel B – even without a home on the parcel. *Id*. These facts will be considered when reviewing the evidence of alternative locations, discussed *infra*.

[7] This purchase price was for a total of 14.88 acres, including the waterfront acreage. 2 Tr 328.

b. The Rebuttable Presumption

Before addressing alternative locations, one final issue needs to be addressed. During the course of the contested case, Mr. Nairne alleged that he was entitled to rely on the rebuttable presumption contained in § 30311(5). MCL 324.30311(5). That section provides:

> If it is otherwise a feasible and prudent alternative, a property not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered. If all of the following requirements are met, there is a rebuttable presumption that alternatives located on property not presently owned by the applicant are not feasible and prudent:
>
> (a) The activity is described in section 30304(a) or (b).
>
> (b) The activity will affect not more than 2 acres of wetland.
>
> (c) The activity is undertaken for the construction or expansion of a single-family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a small business facility.
>
> (d) The activity is not covered by a general permit.

MCL 324.30311(5). The language of the second sentence is somewhat ambiguous, because it uses a double negative. That sentence essentially means that there is a rebuttable presumption that property owned by an individual other than the applicant is not a feasible and prudent alternative when certain requirements expressed in paragraphs (a) through (d) are met.

Initially, it should be noted that the rebuttable presumption does not apply with respect to property currently owned by Mr. Nairne. According to the stipulations of the parties, Mr. Nairne currently owns Parcel No. 008-106-001-10, Parcel No. 008-106-001-11, and Parcel No. 008-106-001-13 (which is the Solar Panel Property). Stipulation 11, *supra*. However, the issue for this contested case is whether property owned by Green Bridge constitutes "property not presently owned by the applicant." MCL 324.30311(5).

Specifically, the WRD submitted evidence in this case regarding property owned in Leelanau County by Green Bridge. See Stipulation 13, *supra*. Green Bridge is a Wyoming corporation that Mr. Nairne incorporated in 2010. 2 Tr 281. Mr. Nairne testified that the purpose of Green Bridge was "for holding investments, liability protection with regards to real estate holdings, tax planning, et cetera." *Id*. Mr. Nairne is the sole shareholder of Green Bridge. 2 Tr 333. He is also the President, Treasurer, and Secre-

tary of Green Bridge. 2 Tr 333-334. He testified that he uses Green Bridge assets as collateral to finance other business projects. 2 Tr 314.

In his Closing Brief, Mr. Nairne argues that a corporation is its own "person" under Michigan law, an entity distinct and separate from its owners, even when a single shareholder holds ownership of the entire corporation. Citing *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 222; 880 NW2d 793 (2015). As a result, Mr. Nairne contends that "EGLE cannot argue that properties that belong to a distinct legal entity – Green Bridge Holdings, are potential offsite alternatives in an attempt to overcome the rebuttable presumption afforded Petitioner under Section 30311(5)." Nairne Closing Brief at p 10.

However, the Michigan Court of Appeals has held:

> A corporation—or other artificial entity—is a legal fiction…. "[A]bsent some abuse of corporate form," courts honor this fiction by indulging a presumption—often referred to as the corporate veil—that the entity is separate and distinct from its owner or owners. Courts will honor this presumption even when a single individual owns and operates the entity. "However, the fiction of a distinct corporate entity separate from the stockholders is a convenience introduced in the law to subserve the ends of justice. When this fiction is invoked to subvert justice, it is ignored by the courts."

Green v Ziegelman, 310 Mich App 436, 450-451; 873 NW2d 794 (2015) (citations omitted). In his Closing Brief, Mr. Nairne asked "if EGLE is correct in its analysis that a company owned by a Petitioner is legally indistinguishable from the Petitioner, how much of that company must be owned by the Petitioner to trigger that assumption? 25%? 50%?" Nairne Closing Brief at p 9. However, in this case, Mr. Nairne owns 100% of Green Bridge. [8] It makes no sense to allow Mr. Nairne to shield from feasible and prudent alternative analysis all lands he owns by this corporation. Such an interpretation invites improper attempts by individuals to assign lands to a corporation in order to avoid the strictures of Part 303. Therefore, when an applicant owns 100% of a corporation that owns real estate in Michigan, the legal fiction should be ignored for purposes of determining whether feasible and prudent alternative locations exist. Therefore, I conclude, as a Matter of Law, that, under such circumstances, the 100% shareholder shall be treated as the owner of the property for purposes of feasible and prudent alternatives analysis. Hence, the rebuttable presumption set forth in § 30311(5) is not available for lands owned by Green Bridge.

[8] This Tribunal will leave for another day the question of whether it is appropriate to utilize lands owned by a corporation when the applicant owns less than 100% of the shares of the corporation.

During the contested case, Mr. Nairne argued that using Green Bridge's property as an alternative would eliminate his ability to use that property for collateral and could have adverse tax consequences for Green Bridge. 2 Tr 314. However, the analysis under §30311(2)(b) is just that – an analysis. The analysis determines whether a feasible and prudent alternative location exists that has less wetland effects upon which the project could occur. The analysis does not require the applicant to construct his project on the alternative location and does not require the corporation to sell the alternative location. Rather, § 30311(2)(b) merely requires the applicant to identify all feasible and prudent alternative locations. Therefore, for purposes of analysis under § 30311(2)(b), Green Bridge's use of its property for collateralization and for tax purposes is unaffected. [9]

One final issue related to the rebuttable presumption should be addressed. In its Briefs, the WRD argued that, with respect to property owned by Green Bridge, the presumption has been rebutted by evidence showing that a feasible and prudent alternative does, in fact, exist. It argued that, if the WRD "presents credible evidence to refute the presumption that a feasible and prudent alternative does not exist, the rebuttable presumption disappears." WRD's Response Brief at p 8. It indicated that the presumption may be rebutted by evidence that an alternative (with lesser wetland impacts) is available and capable of being done after taking into consideration cost, existing technology, and logistics. WRD's Closing Brief at p 19, citing R 281.922a(6). I agree. Hence, the Tribunal agrees with the WRD's assertion that the rebuttable presumption under § 30311(5) cannot serve to prohibit this Tribunal's consideration of any feasible and prudent alternative located on property owned by Green Bridge. See WRD's Response Brief at p 8.

c. Alternative Locations

During the contested case, the WRD suggested that there were feasible and prudent alternative locations for the proposed project. Specifically, the WRD suggested that there were alternative locations on (i) the subject property; (ii) other property owned by Mr. Nairne; and (iii) property owned by Green Bridge. Each of these alternative locations will be addressed *infra*.

(i) The Subject Property

The only buildable uplands on the subject property is located at the southwest corner of Parcel A. See Exhibit P-6. There is no question that the location of the proposed residence on these uplands is feasible, *i.e.*, "capable of being put into effect or accomplished…." *Friends of Crystal River v Kuras Properties*, 218 Mich App at 466. Rather,

[9] It must also be remembered that the balancing test of § 30311(2) is used to determine whether the proposed activity is in the public interest. Feasible and prudent alternative locations and methods is merely one of the criteria involved in that balancing test. MCL 324.30311(2). However, each of the nine criteria of this balancing test have equal weight.

Mr. Nairne has alleged three reasons why it would not be prudent, *i.e.*, not "exercising sound judgment," to locate the residence on these uplands. *Id*. Each of these three reasons will be addressed.

First, Mr. Nairne alleged that the project purpose is to have a lakefront residence, and that the uplands are not located on the lakefront. As noted *supra*, this objection to the placement of the residence on the uplands is without merit, because Rule 2a provides that "[a]n applicant shall not so narrowly define the purpose as to limit a complete analysis … of feasible and prudent alternatives." R 281.922a(4).

Second, Mr. Nairne objected to the construction of the residence on the uplands of Parcel A, because he will have nowhere to place his septic drain field. See, e.g., Exhibit P-6 for the proposed location of the residence and septic drain field. The WRD presented evidence regarding three alternative locations for Mr. Nairne's septic drain field.

A. The WRD suggested that both the residence and the septic drain field could be reconfigured and located on the uplands of Parcel A. Specifically, Ms. Schmidt testified that Mr. Nairne "could fit the septic and the house on that property if they chose a different size and configuration for both activities." 1 Tr 112. Mr. Nairne did not present any evidence as to the feasibility or the prudence of locating both the residence and the drain field on the uplands of Parcel A. The Administrative Rules provide that, "[i]f an activity is not primarily dependent upon being located in the wetland, it is presumed that a feasible and prudent alternative exists unless an applicant clearly demonstrates that a feasible and prudent alternative does not exist." R 281.922a(7). Because Mr. Nairne did not present evidence that this alternative was not feasible or prudent, the Tribunal will presume that it is.

B. The WRD suggested that the septic drain field could be located on the Solar Panel Property. See, e.g., 1 Tr 69. However, Mr. Nairne testified that there are currently eight septic fields (and reserve fields) on the Solar Panel Property, and that there is no room for more. 2 Tr 308; 2 Tr 309. In its Closing Brief, the WRD argues that Mr. Nairne's testimony is incorrect. Specifically, Exhibit R-19 indicates the location or contemplated location for six drain fields on the Solar Panel Property. The location of the seventh drain field, which is on the northern border of the Solar Panel Property, is illustrated on Exhibit P-1 at p 33 and Exhibit P-17 at p 4. The location of the eighth drain field is not clarified on any of the Exhibits in the record. In its Closing Brief, the WRD stated that "property records show that existing unoccupied drain field areas exist on the [Solar Panel P]roperty." WRD's Closing Brief at p 17. In support of this statement, the WRD noted that Exhibit R-19 "shows that easement rights exist on the [Solar Panel Property] for drain fields for two properties directly south of Mr. Nairne's current home." Closing Brief at p 17 n 2. EGLE stated that "[i]t is undisputed that Mr. Nairne owns one of these parcels and that the parcel is currently

unoccupied." *Id*. A review of the evidence in support of these assertions is warranted.

One of the parcels owned by Mr. Nairne is known as "Parcel K," which is immediately south of the lands upon which Mr. Nairne's residence was built.[10] 2 Tr 441-442; Exhibit R-3 at p 33. Parcel K is identified as Parcel No. 008-106-001-11, to which the parties stipulated was owned by Mr. Nairne. Stipulation 11, *supra*; Exhibit R-38. According to Exhibit R-19, there is a drain field easement affiliated with Parcel K. See Exhibit R-19 at p 4. Such drain field is one of the six drain fields identified on Exhibit R-19. Mr. Nairne described Parcel K as consisting of mostly wetlands. 2 Tr 442. As a result, Parcel K would have a lower market value, because it is uncertain whether the parcel can be developed. 1 Tr 269-270. Since Mr. Nairne owns Parcel K, along with its attendant drain field, he cannot contend that he does not have a feasible and prudent location for a drain field available for a residence built on the uplands of Parcel A. The fact that he arbitrarily affiliated the drain field with Parcel K for a future potential sale of the tract is irrelevant.

C. The WRD suggested that the septic for the residence could utilize an alternative treatment system, such as holding tanks. 1 Tr 66. Mr. Nairne implied that such an alternative was not prudent, because "[t]here are people on our road and others in the area that have holding tanks and it significantly diminishes the value of their property." 2 Tr 325. It should be noted that Mr. Nairne was not offered as an expert in real estate values in Leelanau County. Rather, Mr. Alflen was certified as an expert in Leelanau County and Northport area real estate. 1 Tr 239, 241. However, Mr. Alflen did not opine as to diminishment in real estate values caused by holding tanks. [11] In fact, Mr. Nairne did not provide any evidence in support of his testimony. Therefore, such testimony will receive no weight. Mr. Nairne also testified that "it's an ongoing expense every month for the rest of your life to take this stuff and haul it off. So a holding tank on a high end type of development is a poor solution." 2 Tr 325. When the WRD asked Mr. Nairne whether a holding tank was a feasible alternative, his counsel objected, stating that "the witness has already testified that he has no knowledge of whether or not that's a feasible alternative." 2 Tr 325. Because Mr. Nairne provided no evidence of whether the alternative is feasible or prudent, the Tribunal will presume that it is. R 281.922a(7) ("If an activity is not primarily dependent upon being located in the wetland, it is presumed

[10] Parcel K is identified as Parcel 2 on Exhibit R-19.

[11] Curiously, Mr. Nairne testified that this subject "could have been testified to by Mr. Alflen." 2 Tr 325. However, Mr. Nairne did not recall Mr. Alflen to testify as to this subject.

that a feasible and prudent alternative exists unless an applicant clearly demonstrates that a feasible and prudent alternative does not exist").

Third, Mr. Nairne argued that there is no vehicular access to the uplands of Parcel A, and that the construction of an access road will cause more wetland impacts than the proposed project. [12] During her testimony, Ms. Schmidt suggested that access to the uplands could be obtained via two routes. First, access to the Solar Panel Property could be obtained by the road on the south of the property. See 1 Tr 60; Exhibit R-18 at pp 1-2. Then, access to the uplands could be obtained by the road going north to the barn on the Solar Panel Property. 1 Tr 60; Exhibit R-18 at pp 3-5.

Mr. Nairne argued that the road on the south border to his property was unavailable for access to the uplands of Parcel A, because it is located on property owned by the Jones Trust. 1 Tr 310. He stated that "[t]he road was originally constructed to service an access septic field for two of our neighbors." *Id*. He testified that he purchased an easement on such road, which was "reserved for the properties that we bought initially, originally 14.8 acres…." 2 Tr 311. He alleged that the easement [13] does not "provide any benefit to expand and include the subject property…." *Id*. As a result, he testified that he would have to install a new road. *Id*. As to the northerly road, he stated that "three's no room for a road to go through there" because "[y]ou can't drive over septic fields." 2 Tr 309.

On cross-examination, Mr. Nairne testified that he did not pay for the easement, but instead agreed to improve and maintain the road. 2 Tr 344. When asked if he explored whether he could obtain an easement from the Jones Trust for access to the uplands on Parcel A, he stated that he "[n]ever even thought about it." 2 Tr 344. However, when he was asked how he intended to access the drain field that was proposed to be placed on Parcel A, Mr. Nairne stated that he will use the Jones Trust access road, "skirt the [drain] fields, … [and] wind along a trail that's been cut through there with an ATV…." 2 Tr 344-345.

Mr. Nairne's testimony regarding his lack of vehicular access to the uplands of Parcel A is not persuasive. Initially, his easement to use the road on the Jones Trust property was for maintenance and improvement. To the extent that additional use of the road for access to Parcel A causes additional wear and tear on the road, it would merely require more maintenance by Mr. Nairne. Moreover, Mr. Nairne never attempted to modify the easement with the Jones Trust in order to allow access to Parcel A. Before an applicant can credibly posit that an alternative is not feasible, the applicant must at least attempt to obtain the needed permissions. Not only did Mr. Nairne fail to ask if an easement was available, he "[n]ever even thought about it." Finally, and most importantly, Mr. Nairne intended to use the exact same access route as suggested by Ms. Schmidt in order to

[12] Dr. Grobbel testified that a new access road cut to the uplands on Parcel A would cause impacts to almost 3,000 square feet of wetlands. 2 Tr 412.

[13] If this easement is in writing, it was not offered as an exhibit into evidence. Hence, there was no evidence offered to support Mr. Nairne's testimony regarding the terms of the easement.

service his proposed drain field on Parcel A. The Tribunal reasonably infers that a third-party service company will be required to service the septic drain field. *Zytkewick v Ford Motor Co*, 340 Mich 309, 318; 65 NW2d 813 (1954). Hence, it is likely that the service road will need to be installed and delineated for such service companies. Therefore, Mr. Nairne's assertion that he could not reach a residence upon Parcel A is not credible. For these reasons, Mr. Nairne's objections to the location of the residence on Parcel A are without merit.

Therefore, I find, as a Matter of Fact, that the placement of the residence on the uplands to Parcel A – along with either a reconfigured house and drain field on Parcel A, or a drain field on the Solar Panel Property, or the use of holding tanks – constitutes a feasible and prudent alternative to the project contained in the Application.

(ii) Other Property Owned by the Applicant

The parties stipulated that Mr. Nairne, individually, owns the following lands near the proposed project: Tax ID No. 008-106-001-10; Tax ID No. 008-106-001-11, and Tax ID No. 008-106-001-13 (known as the Solar Panel Parcel). Stipulation 11, *supra*. During her testimony, Ms. Schmidt stated that it was feasible to construct a single-family house on the uplands of the Solar Panel Property. [14] 1 Tr 71-72. In response, Mr. Nairne testified that it would not be prudent to construct a house on such property beside the chicken house, the barn, and the solar panels. 2 Tr 311. In addition to the seven septic drain fields (and reserve fields), Mr. Nairne also described the existence of a chicken house and raised garden beds on this property. 2 Tr 308; Exhibit R-19. Finally, Mr. Nairne described the Solar Panel Property as a "utility parcel" which also contains geothermal lines running into the groundwater for heat and air conditioning. 2 Tr 308. The photographs of the uplands of the Solar Panel Property corroborates Mr. Nairne's testimony. See Exhibit R-18 at pp 3-5. While it would be feasible to construct a residence on this parcel, the Tribunal agrees that it would not be prudent to place a residence in the middle of such utilities. Therefore, I find, as a Matter of Fact, that the Solar Panel Parcel is not a feasible and prudent alternative location to the project contained in the Application.

(iii) Lands Owned by Green Bridge

The parties stipulated that Green Bridge owns the following tracts of land in the vicinity of Parcel B: Parcel Nos. 008-105-011-00, 008-105-011-01, 008-105-018-01, 008-105-018-02, 008-105-018-03, and 008-105-018-04. Stipulation 13, *supra*. While the WRD examined Mr. Nairne with respect to all Green Bridge's real estate holdings in the project

[14] The uplands located on the Solar Panel Property are in the center of the parcel, running somewhat north and south. See Exhibit R-19 at p 2 and Exhibit R-3 at p 33. These maps indicate that there is an additional "finger" of upland in the southwest corner of the Solar Panel Property. Dr. Grobbel testified that this "finger" of uplands was too small for a residence. 2 Tr 448. His testimony was not rebutted in the record by the WRD.

area, its Closing Brief focuses on the Finger Farm. Therefore, for purposes of alternatives analysis, this Tribunal will limit its analysis to such land.

In 2019, Green Bridge purchased 47.7 acres of land directly east of the Solar Panel Property, known as the Finger Farm. Exhibit P-22. Mr. Nairne identified the Finger Farm as being comprised of Parcel No. 008-105-011-00 and Parcel No. 008-105-011-01. 2 Tr 329-330. There is a three- or four-bedroom residence on the northerly parcel of the Finger Farm, being Parcel No. 008-105-011-00. 2 Tr 330; Exhibit R-38. This residence is currently leased. 2 Tr 330. However, no residence has been built on the southerly parcel of the Finger Farm. 2 Tr 330-331. While the Finger Farm is subject to a Conservation Easement, it allows for the construction of one additional residence upon the property. Exhibit P-23 at p 3; 2 Tr 331. While the Finger Farm is not located on the waterfront, Mr. Nairne admitted that it has a view of Lake Michigan. 2 Tr 285. See also Exhibit R-21. [15]

Mr. Nairne contends that the Finger Farm does not meet his project purpose, because it is not waterfront property. However, this objection is without merit, because Rule 2a provides that "[a]n applicant shall not so narrowly define the purpose as to limit a complete analysis … of feasible and prudent alternatives." R 281.922a(4). Mr. Nairne also contends that the Finger Farm is not feasible, because he intends to plant a cherry orchard on the parcel. The mere fact that Mr. Nairne has "other plans" for the property does not render a development on such lands unfeasible. Indeed, the definition of "feasible" is "capable of being put into effect or accomplished…." *Friends of Crystal River, supra*. These lands are capable of being developed for a residence, instead of a cherry orchard. This objection is similarly without merit. Finally, Mr. Nairne objected because these lands "would require driving from those parcels to reach the lake shore…." Nairne Response Brief at p 14. Such an objection in no way renders a potential residence on the Finger Farms either unfeasible or imprudent. Therefore, I find, as a Matter of Fact, that development on Parcel No. 008-105-011-00 is a feasible and prudent alternative location to the proposed project.

4. Alternative Methods

This criterion also seeks evidence regarding feasible and prudent alternative methods to accomplish the activity proposed in the application. In other words, this criterion seeks a determination if there are other methods which would cause less wetland impacts than the method proposed in the project. R 281.922a(6) ("An alternative is feasible and prudent if … [t]he alternative would have less adverse impact on aquatic resources"). The WRD indicated two alternative methods that could be employed by Mr. Nairne in order to reduce wetland impacts: using pilings or constructing a two-story residence.

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[15] Exhibit R-21 is a survey of two parcels immediately east of the Finger Farm recently sold by Green Bridge (Identified as Parcel Nos. 008-105-018-02 and 008-105-018-03 on Exhibit R-38). According to the survey, the lands to the immediate west of those parcels are "no build" lands in order to preserve a view of Lake Michigan. Exhibit R-21; 1 Tr 267.

The project plans in this case called for a 40-foot x 80-foot single-story residence on a slab. Exhibit R-3 at pp 16-17; Tr 32. On cross-examination, Dr. Grobbel admitted that he never provided the agency with any information, schematics or details about the project footprint using pilings instead of wetland fill. 2 Tr 431. Dr. Grobbel similarly testified that he never provided the agency with alternative plans for a two-story residence with a smaller footprint instead of a one-story residence. 2 Tr 432. This Tribunal reasonably infers that both alternative methods would have resulted in less wetland impacts than the proposed project. *Zytkewick v Ford Motor Co*, *supra.* While Mr. Nairne complains that the agency did not discuss such alternatives with him prior to issuing the denial letter, he never explained why he failed to present such alternatives at the contested case hearing. From the evidence in this case, I find, as a Matter of Fact, that the use of pilings or a two-story residence are feasible and prudent alternative methods to the proposed project.

C. The extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

This criterion seeks a determination of the extent and permanence of both the beneficial and detrimental effects of the project. The Application proposed to construct a 40-foot x 80-foot residence, with a four-foot apron, along with a driveway that would extend to Onominese Trail, and a septic system which included a pump chamber that would be dredged, placed, and backfilled. Exhibit R-3; 1 Tr 32. There is no question from the record that the .16 acres of wetland impacts would be permanent. In fact, the evidence is clear that such impacts are likely to further affect the functional value of these wetlands by edge disturbance effects and by fragmentation. 1 Tr 185. In fact, edge effects grow over time. 1 Tr 186. Hence, I find, as a Matter of Fact, that the detrimental effects of the wetland impacts are permanent and are expected to grow over time.

With respect to the public use to which the area is suited, Mr. Gyekis testified that Parcel B is a white cedar coastal forested wetland. See generally 1 Tr 177-182. This type of wetland is rare and is classified as vulnerable throughout the state of Michigan. Over half of the coastal wetlands in Michigan have been lost since the dawn of the industrial revolution. This wetland type has been in place for thousands of years and has extremely high functional value. The ancient root systems of these wetlands have evolved over thousands of years and provide protection to the shoreline of Lake Michigan, particularly during high-water years. As a result, there is “virtually no significant erosion” along the shoreline of Parcel B, even under current high-water conditions in Lake Michigan. That Parcel currently possesses 35 plant species with no invasive species, which is notable. “[T]ypically there are rare and imperiled animal species associated with northern white cedar wetland systems.” 1 Tr 180. In light of this testimony, I find, as a Matter of Fact,

that the proposed activity will have detrimental effects on the public uses to which the area is suited, including the benefits the wetland provides.

D. The probable effects of each proposal in relation to the cumulative effects created by other existing and anticipated activities in the watershed.

This criterion seeks the probable effects of the proposed project in relation to cumulative effects by other existing or anticipated projects within the watershed. Ms. Schmidt testified that the cumulative effects from this project are significant given the fact that only 7% of Leelanau County is wetland. 1 Tr 49; 1 Tr 218 (Testimony of Chad Fizzell). Despite high real estate values – Mr. Alflen testified that property in Leelanau County sold for almost $1 Million (1 Tr 248) – there is a demand for real estate in Leelanau County. 1 Tr 258. In fact, after Mr. Nairne applied for a permit in this case, Green Bridge sold two parcels of real estate in the project area. 1 Tr 257, 262. Based on such high real estate activity in Leelanau County, and based upon the small amount of wetlands located in the county, I find, as a Matter of Fact, the proposed project's cumulative effects are significant due to the anticipated activities in the watershed.

E. The probable effects on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.

This criterion seeks a determination of the probable effects of the project on recognized values in the area, such as historic, cultural, scenic, ecological, and recreational values, as well as its effects on public health or fish or wildlife. There was no evidence in the record regarding effects upon historic, cultural, scenic, or recreational values, or its effect on fish or public health. Therefore, I find, as a Matter of Fact, that the proposed project will not affect recognized historic, cultural, scenic, or recreational values, or fish or public health.

Evidence with respect to ecological values was discussed *supra*. As a result of such evidence, I find, as a Matter of Fact, that the proposed project will have adverse effects on ecological values.

With respect to wildlife, Ms. Schmidt testified that the proposed project would have an adverse effect on white tailed deer and deer hunting. 1 Tr 45-46. However, I agree with the testimony of Dr. Grobbel and find, as a Matter of Fact, that the proposed project will not have an adverse effect on white tailed deer habitat or deer hunting. See 2 Tr 391-392, 424.

With respect to other wildlife, Ms. Schmidt testified that she observed wildlife utilizing the project area. 1 Tr 44. She noted that the project area is the type of wetland that would provide habitat for amphibians and reptiles. 1 Tr 44-45. She stated that migratory birds will use forested wetland types, such as the project area, for resting and feeding as they move along the Great Lakes. 1 Tr 50. Ms. Schmidt noted that wildlife habitat becomes eliminated as a secondary wetland effect due to a larger footprint from manmade developments over time. 1 Tr 52. Based on this testimony, I find, as a Matter of Fact, that the proposed project will have an adverse effect on wildlife.

F. The size of the wetland being considered.

According to Ms. Schmidt, the size of the wetland complex of which the project area is a part is more than five acres. 1 Tr 43. As noted *supra*, the proposed project contemplates wetland impacts of .16 acres. 1 Tr 32; Stipulation 5, *supra*.

G. The amount of remaining wetland in the general area.

As noted *supra*, the proposed project contemplates wetland impacts of .16 acres from a wetland complex in excess of five acres. 1 Tr 32, 43; Stipulation 5, *supra*. Both Ms. Schmidt and Mr. Fizzell testified that only 7% of Leelanau County is wetland. 1 Tr 49; 1 Tr 218. However, over five acres of wetlands will be remaining in the general area. Nevertheless, Parcel B is a white cedar coastal forested wetland, which is rare and classified as vulnerable throughout the state of Michigan. 1 Tr 177, 179. Dr. Grobbel explained that the balance of the wetlands located on Parcel A are forested wetlands. 2 Tr 377. While the wetlands on Parcel B are part of a larger wetland complex, the impacts are being limited to this rare wetland type. According to the record, these wetlands are 0.49-acres in size. Exhibit P-6; Exhibit P-7. It is unclear from the record whether there are any other white cedar coastal forested wetlands in the general area. Therefore, I find, as a Matter of Fact, that the .16 acres of wetland impact in the project are not significant considering the amount of wetlands remaining in the general area, but it is significant considering that the 0.49 acres Parcel B are the only white cedar coastal forested wetlands identified in the area.

H. Proximity to any waterway.

This criterion seeks a determination of whether the proposed wetland impacts are proximately located near any waterway. This determination is relevant because wetlands associated with waterbodies generally have greater functional value. The wetland impacts in this case are located adjacent to Lake Michigan. Therefore, I find, as a Matter of Fact, that the proposed wetland impacts are in proximity with Lake Michigan.

I. Economic value, both public and private, of the proposed land change to the general area.

This criterion seeks a determination of the economic value, both public and private, of the proposed land change to the general area. Ms. Schmidt stated that "there's always a public interest in having that economic construction project … so there are people who've been hired to do that. However, I do weight those against the public values that the wetland provides." 1 Tr 48. With respect to the private economic value which the proposed land change would provide, Mr. Nairne testified that "property has historically gone for about $3,000 per front foot on Lake Michigan" and that the private value of this parcel should be $480,000, plus $100,000 to $200,000 of construction costs for the residence. 2 Tr 348. Considering he purchased Parcels A and B for $77,377, the private economic value of the land change could be over $600,000. Therefore, I find, as a Matter of Fact, that there is both a public and private economic value of the proposed land change to the general area.

Weighing § 30311(2) Criteria

Part 303's "public interest" test requires a balancing of the proposed activity's benefits against its detriments. MCL 324.30311(2). Along with consideration of the general criteria addressed above, § 30311(2) mandates that "[t]he decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction." Factors weighing in favor of public interest include: (a) there is a public and private need for the proposed activity; (b) the proposed project will not affect recognized historic, cultural, scenic, or recreational values, or fish or public health; (c) the local wetland complex is over five acres, of which .16 acres are contemplated to be impacted by this project; and (d) the proposed project will provide an economic value, both public and private, to the general area. Factors weighing against public interest include: (i) there are both feasible and prudent alternative locations and methods to accomplish the project proposed in the Application; (ii) the detrimental effects of the project are permanent; (iii) the proposed project's cumulative effects are significant due to the anticipated activities in the watershed; (iv) the proposed project will affect ecological and wildlife values; (v) the .16 acres of wetland impact are significant considering that the 0.49 acres Parcel B are the only white cedar coastal forested wetlands identified in the record; and (vi) the proposed wetland impacts are in proximity to Lake Michigan. Providing equal weight to each of these factors, the evidence appears balanced in favor of a finding of no public interest. Therefore, I find, as a Matter of Fact, that the proposed project is not in the public interest. Because the proposed project is not in the public interest, I conclude, as a Matter of Law, that it is not permittable. MCL 324.30311(1).

IV. Section 30311(3)

Section 30311(3) requires that, "[i]n considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies." MCL 324.30311(3). There have been no such findings for the proposed activity.

V. Section 30311(4)

Section 30311(4) contains the final criteria, as follows:

> A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether the disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:
>
> (a) The proposed activity is primarily dependent upon being located in the wetland.
>
> (b) A feasible and prudent alternative does not exist.

MCL 324.30311(4). Hence, the three main factors for analysis under this statutory provision include a determination of whether (a) there is an unacceptable disruption to aquatic resources; (b) the proposed activity is wetland dependent; and (c) a feasible and prudent alternative does not exist.

A. Disruption to Aquatic Resources

Section 30311(4) first focuses on the disruption to aquatic resources caused by the proposed activity. To determine if the disruption is unacceptable, the provision requires a consideration of the Legislative findings set forth in §30302, which provides that "[a] loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland: … (ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or engendered wildlife species." MCL 324.30302(1)(b)(ii).

The proposed project contemplates .16 acres of impact. To reiterate the evidence as to aquatic resources in the record, Mr. Gyekis testified that Parcel B is a white cedar coastal forested wetland. See generally 1 Tr 177-188. This type of wetland is rare and is classified as vulnerable throughout the state of Michigan. Over half of the coastal wetlands in Michigan have been lost since the dawn of the industrial revolution. This

wetland type has been in place for thousands of years and has extremely high functional value. The ancient root systems of these wetlands have evolved over thousands of years and provide protection to the shoreline of Lake Michigan, particularly during high-water years. As a result, there is "virtually no significant erosion" along the shoreline of Parcel B, even under current high-water conditions in Lake Michigan. That Parcel currently possesses 35 plant species with no invasive species, which is notable. "[T]ypically there are rare and imperiled animal species associated with northern white cedar wetland systems." 1 Tr 180. The Application contemplates wetland impacts of .16 acres for the project. 1 Tr 32; Stipulation 5, *supra*. Mr. Gyekis explained that the proposed project would affect the functional value of these wetlands by edge disturbance effects and by fragmentation. In fact, edge effects grow over time. Because white cedar wetlands are slow growing and cannot be successfully recreated elsewhere, when "they're gone, they're gone." 1 Tr 187-188.

Moreover, Ms. Schmidt testified that she observed wildlife utilizing the project area. 1 Tr 44. She noted that the project area is the type of wetland that would provide habitat for amphibians and reptiles. 1 Tr 44-45. She stated that migratory birds will use forested wetland types, such as the project area, for resting and feeding as they move along the Great Lakes. 1 Tr 50. Ms. Schmidt noted that wildlife habitat becomes eliminated as a secondary wetland effect due to a larger footprint from manmade developments over time. 1 Tr 52.

Based upon all of this evidence in the record, I find, as a Matter of Fact, that the proposed project will cause an unacceptable disruption to aquatic resources.

B. Wetland Dependent

Second, § 30311(4) prohibits the issuance of a permit unless the applicant shows the proposed activity is either wetland dependent or a feasible and prudent alternative does not exist. MCL 324.30311(4). With respect to the determination of whether the proposed activity is wetland dependent, the parties have stipulated that the activity requested in the Application is not primarily dependent upon being located in a wetland. Stipulation 9, *supra*. Based on this stipulation, I find, as a Matter of Fact, that the proposed activity is not wetland dependent.

C. Feasible and Prudent Alternatives

Feasible and prudent alternative locations and methods were found to exist, *supra*. However, for a project to be permittable under § 30311(4), no feasible and prudent alternatives may exist. Because there are feasible and prudent alternatives, I conclude, as a Matter of Law, that the proposed project is not permittable. MCL 324.30311(4).

IV. Summary

To summarize the findings under Part 303, the Applicant is a lawful applicant. The Application was administratively complete. The activity requested by the Applicant is for the construction of a single-family home and attendant features. The activity requested in the Application is a regulated activity under MCL 324.30304(a) and (b). The activity requested in the Application will not affect more than two acres of wetland. The activity requested in the Application is not covered by a general permit. The activity requested in the Application is to deposit or permit the placing of fill material in a wetland and/or dredge, remove or permit removal of soil or minerals from a wetland. The activity requested in the Application is otherwise lawful. The activity requested in the Application is not primarily dependent upon being located in a wetland. The Applicant purchased the subject parcel (Tax ID. No. 008-106-001-00) in January 2020. The Applicant owns the parcels (Tax ID No. 008-106-001-10, Tax ID No. 008-106-001-11, and Tax ID No. 008-106-001-13) south of the subject parcel. The parcel (Tax ID No. 008-106-001-13) directly south of the subject parcel was created by a prior owner through a property split recorded on October 30, 2012. Green Bridge Holdings, Inc. owns parcels (Tax ID No. 008-105-011-00, Tax ID No. 008-105-011-01, Tax ID No. 008-105-018-01, Tax ID No. 008-105-018-02, Tax ID No. 008-105-018-03, and Tax ID No. 008-105-018-04) to the east of the subject parcel.

The proposed project implicates activities covered by Part 303 which require a permit from the WRD. A permit is necessary to realize the benefits derived from the activity. The proposed activity is otherwise lawful. There is a public and private need for the proposed activity. The placement of the residence on the uplands to Parcel A – along with either a reconfigured house and drain field on Parcel A, or a drain field on the Solar Panel Property, or the use of holding tanks – constitutes a feasible and prudent alternative to the project contained in the Application. The Solar Panel Parcel is not a feasible and prudent alternative location to the project contained in the Application. Development on Parcel No. 008-105-011-00 is a feasible and prudent alternative location to the proposed project. The use of pilings or a two-story residence are feasible and prudent alternative methods to the proposed project.

The detrimental effects of the wetland impacts are permanent and are expected to grow over time. The proposed activity will have detrimental effects on the public uses to which the area is suited, including the benefits the wetland provides. The proposed project's cumulative effects are significant due to the anticipated activities in the watershed. The proposed project will not affect recognized historic, cultural, scenic, or recreational values, or fish or public health. The proposed project will have adverse effects on ecological values. The proposed project will not have an adverse effect on white tailed deer habitat or deer hunting. The proposed project will have an adverse effect on wildlife. The .16 acres of wetland impact in the project are not significant considering the amount of wetlands remaining in the general area, but it is significant considering that the 0.49 acres Parcel B are the only white cedar coastal forested wetlands identified in the area. The proposed wetland impacts are in proximity with Lake Michigan. There is both a public

and private economic value of the proposed land change to the general area. The proposed project is not in the public interest. The proposed project will cause an unacceptable disruption to aquatic resources. The proposed activity is not wetland dependent.

CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude, as a Matter of Law:

1. For feasible and prudent alternatives analysis, Mr. Nairne has attempted to narrow his project purpose to development along the waterfront of Lake Michigan. R 281.922a(4).

2. The applicant has the burden of production to demonstrate that a feasible and prudent alternative does not exist. MCL 324.30311(4)(b); MCL 324.30306; MCL 324.1305(1); MCL 324.1305(4); R 281.922a(3); R 281.922a(6).

3. Because a contested case hearing is "an extension of the initial application process for the purpose of arriving at a single final agency decision on the application…," *National Wildlife Fed'n v Department of Envtl Quality*, 306 Mich App 369, 379; 856 NW2d 394 (2014), Mr. Nairne was not prejudiced by merely receiving the WRD's assertions of feasible and prudent alternatives for the first time in the denial letter.

4. The applicant, who is the 100% shareholder of a corporation that owns real estate in the vicinity of the proposed project, shall be treated as the owner of the property for purposes of feasible and prudent alternatives analysis. *Green v Ziegelman*, 310 Mich App 436, 450-451; 873 NW2d 794 (2015).

5. Because the proposed project is not in the public interest, it is not permittable. MCL 324.30311(1).

6. Because there are feasible and prudent alternatives, the proposed project is not permittable. MCL 324.30311(4).

FINAL DECISION AND ORDER

The Application for a permit under Part 303 (as contained in Exhibit R-3) is **DENIED**.

Daniel L. Pulter
Administrative Law Judge

REVIEW OF THIS DECISION

In light of the 2018 amendments to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1301, *et seq.*, the right to seek review of this decision may vary based on the particular Part of the NREPA under which this contested case was brought. To ascertain the correct manner to seek review of this decision, and the correct time frame for review, the parties and/or their legal counsel should examine the applicable statutes and administrative rules. See Section 1317 of the NREPA, being MCL 324.1317; Sections 301-306 of the APA, being MCL 24.301-306; and the Department of EGLE website information regarding petitions for review at: www.michigan.gov/egle.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, by electronic delivery, unless indicated otherwise, this 17th day of June 2022.

R. Tidwell

R. Tidwell
Michigan Office of Administrative Hearings and Rules

Via Electronic Delivery

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