DEPARTMENT OF ENVIRONMENTAL PROTECTION
James E. Fox

Docket No.: **80-2**
File No.: **19-118**
Case Name: **James E. Fox**
Date: **March 30, 1984**
Municipality: **Eastham**

Hearing Officer: **Anthony D. Cortese, Sc.D.**
Commissioner
Title: **FINAL DECISION: PHASE II**

I. SCOPE OF THE DECISION

On January 28, 1982, the Department issued a decision after an adjudicatory hearing in the above-captioned matter. The January 28, 1982 decision, to be referred to below as the "Phase I Decision," concerned a proposal by James E. Fox and Ruth Anne Fox (the Applicants) to construct a single family house and a subsurface sewage disposal system, or septic system. The house and septic system were to be located on the coastal dune portion of the Sunken Meadow barrier beach in Eastham. The proposed work would be subject to the Wetlands Protection Act, G. L. c.131, s.40 (the Act) and the Department's Coastal Wetlands Regulations, 310 CMR 10.21 through 10.36.

The Phase I Decision denied the Applicants' proposal because installation of a septic system on a retreating coastal dune would adversely affect the Act's interests of storm damage prevention, flood control, protection of marine fisheries, protection of land containing shellfish and prevention of pollution. The Phase I Decision also concluded that construction of a house with a solid foundation would increase the potential for storm or flood damage. No finding was made concerning the effect of construction of a house on pilings (an alternative which was acceptable to the Applicants), because the evidence on this alternative was not sufficiently developed at the hearing.

By agreement of the three parties, the Applicants, the Eastham Conservation Commission, and the Department Staff, a second phase of the hearing was convened to determine whether the Phase I decision amounted to an unconstitutional taking without compensation. To this end, each of the parties presented evidence concerning the value of the subject property with and without the Phase I Decision. Although the Phase I Decision did not expressly prohibit the construction of a single family house on the site, the response of the Department Staff and the Conservation Commission to the Applicants' interrogatories concerning permissible uses made it clear that the septic system prohibition in the Phase I Decision, considered together with other state and local regulations, had the practical effect of prohibiting any residential use of the site.

This is because any permanent residential construction would require a septic system, and a self-contained habitation such as a trailer or camper would be prohibited by local zoning. Therefore, unless specifically indicated otherwise, this decision will treat the prohibition against construction of a septic system as if it were also a prohibition against the use of this property for a single family residence.

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In addition to offering opinions on the value of the subject property in the two alternative conditions that a single family house was to be permitted or prohibited, the appraiser testifying on behalf of the Department Staff also estimated the property value in the circumstance that a prospective buyer knew of the

applicability of the Wetlands Protection Act but had not yet received the Phase I decision. Not suprisingly, the property value in that case was lower than under the alternative permitting a single family house, since the value reflected uncertainty about the uses which would eventually be permitted. My decision will not involve a consideration of this intermediate value, since I do not find that it establishes a fair point of comparison with the value after the Phase I Decision. This treatment is consistent with that held to be proper in eminent domain valuations, e.g., Lipinski v. Lynn Redevelopment Authority, 355 Mass. 550, 246 NE 2d 429 (1969).

The decision which follows will first summarize the evidence presented in this phase of the proceeding,[*] will then determine the value of the subject property in the event that a single family house and septic system would or would not be permitted under the Wetlands Protection Act and Coastal Wetlands Regulations, and will finally consider whether the Phase I Decision constitutes the equivalent of an unconstitutional taking of property without compensation.

II. SUMMARY OF THE EVIDENCE

Testimony by professional appraisers was offered on behalf of the Applicants and the Department Staff. Both Marcel Rene Poyant, testifying

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[*] The evidence presented in Phase I continues to be a part of the record for this decision.

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for the Applicants, and.Eric T. Reenstierna, testifying for the Department Staff, are well qualified by virtue of their training and experience to judge the value of the subject site. Both Poyant and Reenstierna employed customary appraisal methodology relying on comparable sales. Although the comparable properties used by the two appraisers were different for the most part, the estimates of value were similar, so long as the same assumptions prevailed. The determination of value which follows will give the greatest weight to the testimony of Poyant and Reenstierna and, except where

otherwise indicated, will be consistent with the similar judgments of both appraisers.

The Conservation Commission offered a determination of value by Wallace Ruckert of the Town Board of Assessors, who was of the opinion that the property had the same value whether or not construction of a house and septic system would be permitted under the Wetlands Protection Act. His reason for this conclusion was that the site was not a marketable building lot because of its physical features: shifting sand, erosion, flooding, access (especially during floods), a soil of sand over peat, and questionable potable water.

Other Conservation Commission testimony was offered by Henry Lind, Town Natural Resource Officer, who discussed his measurements showing continuing erosion in the area of the subject site Lind also testified as to his observations of storm damage in the Harmes Way area, including the impossibility of normal vehicular access during storms. Dr. Joseph F. Moran, a biologist, offered testimony concerning the danger of a septic system failure and the possibility of salt contamination of drinking water.

Jeffrey R. Benoit, a coastal geologist who has initially evaluated this site as a Department employee, testified for the Department Staff

concerning the hazardous conditions existing on barrier beaches during storms, and the changes in policy which have taken place in recognition of these hazards.

III. VALUE OF PROPERTY IF WETLANDS PROTECTION ACT PERMITS CONSTRUCTION OF SINGLE FAMILY HOUSE AND SEPTIC SYSTEM

In valuing the subject lot on the assumption that the Wetlands Protection Act would permit construction of a single family dwelling and septic system, both Poyant and Reenstierna used a number of "comparables," that is, similar undeveloped lots whose sale prices were known and which were presumed suitable for single family home construction. The sale prices of the comparables were then adjusted for factors such as lot size and location, which would make the comparable properties more or less attractive than the subject lot. Utilizing similar methodologies, Poyant concluded that the value of the property if a dwelling could be constructed was $62,000, while Reenstierna's estimate of value in that circumstance was $65,000. Reenstierna, however, valued the property at considerably less than the $65,000 figure, because he did not include in that estimate two other factors affecting value: (1) the need for a supply of potable water and (2) the requirement that a permit for the septic system be obtained from the Eastham Board of Health.

In addition, both Poyant and Reenstierna valued the property

as if it were nearly an acre in size (41,818 square feet), based on the 1957 Land Court plan of record. However, as indicated in Phase I of the proceeding, a subsequent survey undertaken by the Applicants established a land area of six-tenths of an acre or 26,136 square feet. The latter figure has been accepted by the Town of Eastham for assessment purposes and is found to be the correct area of the lot.

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Since both Poyant and Reenstierna appraised the subject lot as if it were 41,818 square feet rather than 26,136 square feet in area,[*] it is necessary to adjust any findings based on their

appraisals to reflect the correct smaller lot size. Although no evidence was presented which directly deals with the value of the subject lot based on its correct area, it is possible to establish the appropriate adjustments from the comparable sales data presented by Poyant and Reenstierna.

Many of the comparable sales of building lots relied on by Poyant and Reenstierna were of properties having land areas close to the 26,136 square feet of the subject lot. Because Poyant and Reenstierna had assumed that the subject Lot was larger than those particular comparables, the values of the comparables had been adjusted to equalize their values with the subject lot. If one now reverses the process and examines the data on comparable sales apart from the adjustment for lot size, one can establish from the evidence the value of the subject lot with an area of 26,136 square feet. It is necessary to employ this indirect method to establish the "buildable" property value because the testimony of both Poyant and Reenstierna (including the methods they employed in their appraisal report for equalizing different lot sizes) indicates that a strictly proportional reduction,or a calculation based solely on value per square foot,would not accurately reflect market value.[**]

Two of the comparable sales utilized by Poyant, and five of those cited by Reenstierna (one sale having been used by both appraisers) involved lots

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[*] Ruckert's testimony did, however, value the size on the basis of the correct smaller lot size.

[**] The same process will not be followed in adjusting for the smaller lot size when I determine the property value if a house cannot be built, since the testimony and underlying data presented by both appraisers suggests that "unbuildable" lots of less than an acre can best be valued on a square foot basis.

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which ranged in size from approximately one-half to three-quarters of an acre. Since the subject lot has now been determined to be

six-tenths of an acre, these particular sales are most useful for ascertaining the market value of smaller lots. Taking into consideration the special characteristics of each of the comparable lots as noted in the appraisal reports, I conclude that the value of the subject lot would be $59,000 before any further adjustments for site-specific conditions discussed below. Since I am in agreement with Poyant's judgment that an additional five percent reduction in value is appropriate to take account of the greater lack of privacy and likelihood of noise in this location adjoining a town beach and parking lot, I establish the property value at $56,000 before considering what further reductions may be warranted with regard to the availability of drinking water, the probability

of obtaining a septic system permit, and the susceptibility of the site to erosion and flood damage.

Drinking Water Supply

Both Poyant and Reenstierna considered the possibility of salt water contamination of drinking water as a factor which would influence property value. Thus, Poyant made a downward adjustment of $1,500 in his valuation to account for the additional cost of installing what he described as a salt-water-proof well. Benoit testified, however, and I find, that such a well would only prevent overflow of salt water into the well as a result of surface flooding; there is no well which can produce fresh water if the well is drawing from an area affected by salt water intrusion.

Reenstierna noted that the usual practice on Cape Cod would be to determine the availability of fresh well water before agreeing on a sale price. Assuming that could not be done, Reenstierna considered the possibility of salt water contamination as an uncertainty reducing the price a buyer would offer for the subject lot. Reenstierna did not, however, assign a specific dollar amount to this reduction in value, having grouped it together with the reduction in value attributed to uncertainty about septic system approval. On cross-examination, he said that the reduction in value attributable solely to the uncertainty about water supply would be $5,000 or slightly more.

Moran, a biologist, testified that he engaged in a research project funded by the college where he teaches, testing the sodium content of existing wells in Eastham. One of the wells Moran tested was on the Westlake property which directly abuts the subject lot. The sodium content in that location was 30 milligrams/liter. Other data reviewed by Moran indicated considerably higher sodium levels in other locations on the barrier beach further removed from the subject property.

Benoit testified that on barrier beaches there will be some fresh water available from which a well can draw, but that potential problems of salt water intrusion exist because the fresh water supply exists only as a lens or layer of fresh water resting above salt water. Whether salt water will intrude in a particular

case will depend on the depth of the fresh water lens, whether the well is properly located within the fresh water lens and whether
pumping is within the limits of the available supply. Benoit indicated that although he had no information regarding subsurface conditions on this site, he was familiar with the adjacent Westlake property and had no reason to believe that conditions on the subject lot would differ with regard to salt content.

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Based on the Moran and Benoit testimony discussed above (which provided information not available to Poyant and Reenstierna when they prepared their appraisals), I conclude that a prospective buyer of the subject property would face some uncertainty if the availability of fresh water were not assured, but that this uncertainty would be greatly reduced by the available information concerning the sodium count of the Westlake well. While a sodium count of 30 milligrams/liter is in excess of the recommended state standard for public water supplies (which is 20 milligrams/liter), that standard does not measure potability, but rather establishes the level above which public water supply districts must disclose the sodium content so that individuals on restricted diets can account for their sodium consumption. I find no reason to conclude that the average homebuyer would find a sodium content of 30 milligrams/liter to be a sufficient detriment to cause a reduction in price, although I would impose a small reduction in value in order to account for the uncertainty that the actual sodium count might be higher. In view of the low risk of substantial salt water contamination, based on the data from the Westlake well, I conclude that a reduction in value of $500 would appropriately reflect the uncertainty. Based on the information provided by Poyant, a further reduction of $1500 is necessary to account for the added cost of installing a well resistant to salt contamination by surface flooding.

Septic system permit

A more difficult issue is presented by Reenstierna's adjustment in value to account for the possibility that a septic system permit would not be available from the local Board of Health. Unlike the uncertainty regarding sodium content, any uncertainty regarding septic system approval presents an "all or nothing" question: if the septic system does not meet local health requirements, a residence cannot be constructed and the property becomes "unbuildable" with or without the Phase I Decision.

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Poyant assumed in his appraisal that a septic system could be constructed and made no allowance for uncertainty in this regard. Reenstierna, on the other hand, made a preliminary investigation and concluded that a buyer would be taking a major gamble if a purchase and sale agreement were entered into before it was known whether the septic system would be approved. Reenstierna concluded

that the effect of this uncertainty would be to reduce the value of the lot by $30,000.

On cross-examination, Reenstierna stated that he knew of no particular principles of appraisal which provided guidance in dealing with the uncertainty of obtaining an approval which was essential to development for the intended use. Reenstierna also noted that adjusting the sale price to take account of the uncertainty of septic system approval is not customary; the buyer and seller would normally enter into a purchase and sale agreement

contingent on obtaining necessary permits. However, if a buyer and seller were required to establish a price given this level of uncertainty, it was Reenstierna's opinion that they would arrive at a $30,000 reduction in value.

Assuming the reasonableness of Reenstierna's $30,000 figure, I have concluded that a deduction to account for uncertainty on such a major issue as the permissibility of the septic system under local law effectively begs the question to be decided here. Rather than halving the value under the "buildable" alternative to account for uncertainties, an adjudication of value should attempt to establish the facts concerning necessary permits, or at least determine what conclusion should be drawn if such information is not forthcoming from the party with the burden to produce it. "Splitting the difference" to reflect a major uncertainty is appropriate, in my opinion, only where no other alternative is available.

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In addition, I am not convinced that Reenstierna was justified in finding the amount of uncertainty that he did, based on his investigation as reported at this hearing. Mr. Reenstierna said that he talked with the town building inspector, Mr. Alexander, who professed no knowledge as to whether a septic system could be located on the property. He also spoke to an individual whose name he did not know and whom he identified as "Mr. Lind's assistant" (Mr. Lind being Henry Lind, who testified in this hearing on other matters), who expressed the opinion that a septic system could not be placed on the lot. No other investigation was undertaken, and no contact was reported with any members of the local Board of Health which is the agency with jurisdiction over this permit.

Based on this evidence alone, I would conclude that Reenstierna's information that a septic system might not be approved was too vague to justify his $30,000 uncertainty factor. At a minimum, a preliminary investigation by a prospective buyer concerned about a septic system permit would have involved an inquiry to the Board of Health concerning the septic system plan already prepared for this lot.[*] Given Reenstierna's lack of contact with the appropriate decision-makers and the absence of any specific reason in Reenstierna's testimony why a septic system permit might be unobtainable for this site, I do not think that Reenstierna had sufficient reason to conclude that a valuation of the locus should take account of the possibility that a Board of

Health permit for the septic system might be unobtainable.

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[*] Reenstierna indicated that he knew of the septic system plan, but did not consider that it was his responsibility to discuss it with the Board of Health.

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Indeed, I would now find that there is no substantial question concerning availability of a septic system permit, were it not for certain other evidence presented during the hearing. Ruckert's pre-filed testimony, offered in his capacity as Town Assessor, contained the statment: "The Eastham Board of Health has a special local septage system regulation which prevents the placement of a septic system within 100 feet of a wetland, spring high water, which makes approval conjectural and speculative." Mr. Ruckert then attached a page containing the applicable local regulation, identified as Section IX.

Based on the sentence quoted, I was unable to ascertain from the written testimony precisely why Ruckert thought approval of the proposed plan would be "conjectural and speculative." Review of Section IX as appended to Mr. Ruckert's testimony provided little clarification. The regulation reads as follows:

> No cesspool, septic tank, privy or other means of sewage disposal shall hereafter be constructed or installed in this town within one hundred (100) feet in the case of a single or duplex dwelling, or commercial building, or a multiple dwelling, of the normal spring high water level of any great pond, pond, stream, brook, river surface, swamp or wetland, fresh or salt, or mean high water or tidal water except upon a variance by the Board of Health in the case of hardship.

In attempting to apply Section IX to the proposed septic system as shown on the Applicant's plan (Exhibit A2, submitted during Phase I of this proceeding), I note first that the relevant water bodies or wetlands whose distance from the septic system's leaching field might be at issue are Cape Cod Bay to the west and Sunken Meadow Marsh, a tidally influenced salt marsh, to the east If there is any issue concerning compliance with this regulation, it appears to concern only the distance between Sunken Meadow Marsh and the leaching field. On the Applicant's septic system plan, the distance between the edge

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of the marsh and the leaching field is shown as 125 feet, a distance which has not been disputed.

No pre-filed testimony was offered by the Conservation Commission or any other party concerning the meaning of Section IX. Benoit stated in oral testimony that he did not know the meaning of

the regulation although he was familiar with "spring high water level" (not "normal spring high water level" as used in the regulation) as a technical term.

However, the technical meaning of "spring high water level" as used by Benoit referred exclusively to tidal cycles, while Section IX deals with setbacks from both tidally and non-tidally influenced water bodies. There was no testimony about the meaning of "normal

spring high water level" as applied to water bodies which are not tidally influenced, but it would presumably refer to a condition occurring in the spring of the year. Since it seems most unlikely that the drafters of this regulation would have employed the single word "spring" to convey two totally different meanings, I would interpret the reference to "normal spring high water level" to apply only to non-tidally influenced water levels, with "mean high water" establishing the relevant elevation for both Cape Cod Bay and Sunken Meadow Marsh. While the septic system plan clearly shows compliance with Section IX given this interpretation, I have no way of knowing whether my interpretation would be consistent with the application of the regulation by the Eastham Board of Health

Thus, the uncertainty regarding septic system approval in this case arises because of a failure of clarity in the Board of Health regulation on its face, and the lack of evidence on how it has been applied. I must therefore consider whether any party to the proceeding had the burden of affirmatively showing that the plans were or were not in compliance with

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Board of Health requirements and, if any party had this burden, what conclusion can be drawn from the failure to present necessary information.

Although this hearing is not an eminent domain proceeding, the legal principles applicable to valuation of property taken under the eminent doamin power should appropriately be considered when evaluating the evidence introduced at this hearing.

While as a general matter the landowner in an eminent domain proceeding will have the burden of proving damages, Sexton v. Inhabitants of North Bridgewater, 116 Mass. 200 (1874), the few pertinent Massachusetts cases appear to assume the landowner's burden does not extend to showing affirmatively that all permits are obtainable which would be required to develop the property for the use which is being valued. While evidence on valuation of a use requiring a special permit under existing zoning will be admissible only upon a showing of reasonable probability that the permit would have been obtainable, Colonial Acres, Inc. v. Town of North Reading 3 Mass. App. 384, 331 NE 2d 549 (1975), Skyline Homes, Inc. v. Commonwealth, 362 Mass. 684, 290 NE 2d 160 (1972),there is no indication that the same reasoning is to be extended to more routine permits such as a building permit or septic system permit.

The few cases presenting this question have dealt with

challenges by the condemning authority regarding the suitability of the property for septic systems. For example,Ux v. Town of North Reading, 379 Mass. 914, 398 NE 2d 489 (1979), held that the trial court had erroneously excluded certain maps offered by the town to show that soil conditions would prevent sewage disposal by septic systems. In Carlson v. Town of Holden, 358 Mass 22, 260 NE 2d 666

(1970), the landowner presented only his own testimony that the property at issue was suitable for building lots, which

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the town then attempted to rebut by showing that portions of the site were unsuitable for septic systems. In each case, the finding for the town on admissibility of evidence appeared to assume that the question of suitability for septic systems was an appropriate issue for the town to raise in order to show the limitations of the property, but not necessarily a matter which the landowner had to address affirmatively in the first instance.

In addition, I believe that it would be unfair to fault the landowner in this case for failing to introduce evidence concerning septic system approval unless the owner had reason to know that this approval was an issue in the proceeding. As noted previously, none of the pre-filed testimony submitted by the Department Staff and the Conservation Commission articulated clearly what problem might exist under local health regulations concerning approval of a septic system, nor had this issue been raised at the Phase I hearing.

As for evidence on the Eastham Board of Health's interpretation of Section IX, such information could most readily have been provided by the Conservation Commission. However, since the Conservation Commission is neither the moving party nor the party whose actions are at issue in this proceeding, I do not see how the Conservation Commission's failure to produce this information could affect my findings.

One obvious method to resolve any uncertanity regarding septic system approval would be to have the Applicants formally submit their septic system plan to the Board of Health and await the Board's decision.[*] However, I will

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[*] It is not clear from the record whether such an application has already been made. The plan submitted at this hearing does indicate that tests required for a septic system were witnessed by a Board of Health representative in 1979; it is not known why no further action was taken.

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not be requiring such action at this time since it would be unnecessary in view of my later findings.

Instead, based on the inconclusive evidence which is now before me on the issue of septic system approval, I provisionally find that the site should be valued as if septic system approval were obtainable. However, if at any time this provisional valuation

may become the basis for a finding that the Department's Phase I Decision amounts to a taking without compensation, I reserve in this decision the right to require the Applicant to formally apply to the Eastham Board of Health for a septic system permit. If such application is denied (and the denial is upheld in whatever appeals may be taken), the site shall be determined to have no value as a building lot for residential construction. If such application is granted, or if the Board of Health fails to act within a reasonable time (or any time which may be established by law), the value of the site for construction of a single family house and septic system shall be as provisionally established in this decision.

Susceptibility of the site to flooding and erosion

As previously noted, Ruckert testified that the unstable nature of the Sunken Meadow barrier beach would render it unmarketable for residential construction. Ruckert therefore, placed a value of $6330 on the lot whether or not a residence was permitted. Benoit and Lind offered evidence that barrier beaches are hazardous locations in which to build; Lind also cited examples of erosion and property damage to specific sites on the Sunken Meadow barrier beach.

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The testimony of Benoit and Lind goes far in supporting the result of the Phase I Decision, and in establishing that expenditures to purchase land or to construct buildings on barrier beaches constitute a risky investment. However, this evidence does not in my opinion demonstrate that there is no longer a market for building lots on barrier beaches. Even if, as Ruckert stated, "...it is generally recognized on the Cape that local folks don't build their houses on the shifting sands of barrier beaches,"it appears that there continue to be willing buyers for such sites. I note, for example, a comparable sale cited by Reenstierna, involving a recent offer to purchase for residential use another lot on the Sunken Meadow barrier beach.

On the other hand, the risk factor cannot be ignored in a determination of value. Poyant referred in his appraisal report to an accepted definition of "market value":

> The most probable price in terms of money which property should bring in competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus.

One of the circumstances implicit in that definition, as cited by Poyant, is that "both parties are reasonably well informed or well advised, and each acting in what they consider their own best interest."

Thus, one must consider whether a market value derived from other sales of coastal properties accurately reflects what a well-advised and prudent buyer would be willing to pay for the subject site. While I do not believe the evidence supports a conclusion that the site is unmarketable as a building lot, it is reasonable to conclude that the more knowledgeable the buyer, the lower the price which would be offered for the property. Even assuming that a buyer would intend to maximize personal

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safety by occupying the dwelling only during the summer months and evacuating if a major storm is forecasted, investment in a building would be insecure because any structure would be susceptible to damage by storm action. In addition, it was established in Phase I of this hearing that the shoreline is moving landward on the Sunken Meadow barrier beach; the investment in the land itself will also be depleted over time.

I therefore conclude that if the Department were to permit construction of a house and septic system of minimum impact (which would not include construction of a revetment or other measures intended to block the natural movement of the barrier beach), a knowledgeable buyer would establish a sales price by calculating the probable number of years that the site would remain usable for residential purposes, or by establishing the statistical risk that it would become unusable within a given period of time.

Since it is clear that the risk exists, but no evidence was presented which would enable me to establish a specific dollar value to account for this factor, I will not include the risk element in my present calculation of value as a building lot, but rather will treat it as a qualitative factor to be accounted for in determining whether the effect of the Department's Phase I Decision is equivalent to a taking.

Summary of value of property with single-family house permitted

I therefore conclude that if construction of a single family house and septic system were permitted under the Wetlands Protection Act, the subject lot should be provisionally valued at $54,000, considering all factors except the prospective buyer's adjustment for probable effects of shoreline retreat and storm damage to structures. This figure was arrived at by establishing a value of $59,000 based on other sales, subtracting $3000 for the disadvantage of a location adjacent to a town beach and parking lot, and subtracting $2000

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for factors relating to drinking water: $1500 for a well with protection from flooding and $500 for uncertainty of water quality. The characterization of this valuation as "provisional" refers to my assumption that septic system approval would be obtainable, an

assumption which may require verification at a later date.

IV. VALUE OF PROPERTY IF SINGLE FAMILY HOUSE AND SEPTIC SYSTEM ARE NOT PERMITTED

For zoning purposes, the subject site is located in District B, which permits a number of non-residential uses. Those which are not limited to use by a resident occupant[*] and which appear not to require septic systems are enumerated below:[**]

- Refreshment booths or stores purveying food, non alcoholic beverages and beach supplies, upon issuance of a permit from Board of Selectmen and building permit from Building Inspector.

- Certain farming activities, if not injurious, noxious or offensive to the neighborhood.

- Docks, wharves, fish and shellfish business, party boat business, renting of row boats, motor boats, sail boats, and fishing gear, and sale of fish bait; boat storage, boat repairs, boat building, marine railway; activities reasonably necessary and related thereto.

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[*] Other uses available to a resident occupant include accessory buildings, certain activities incidental to a trade, sale of agricultural products, and storage of campers or trailers (with permit from Selectmen). These uses would presumably be available to an abutter acquiring the property, but not to any other buyer.

[**] The enumerated uses are summarized from the Eastham Zoning By-Laws, submitted as Exhibit F. to Poyant's testimony.

There is an additional permitted use for private clubs whose primary activity is not a business service. According to Reenstierna, the Town Building Inspector referred to this as a use which would require a septic system. In Benoit's listing of uses acceptable to the Department Staff, he included temporary and permanent beach cabanas. It is unclear whether this was intended to be an example of private club use, and if so, whether it would be permissible without a septic system. (Presumably, the sale of beach rights without structures would be a permitted use either under the private club provision or as an interest in property which is outside the scope of zoning.)

In valuing the site if a house and septic system were not permitted, Poyant considered the only other use to be as a beach for abutters or others living in the vicinity. He referred to four

comparable sales of properties whose "highest and best use" was

recreational, with sales prices ranging from $3100 to $9500. Poyant concluded that the subject property might be worth fifty cents per square foot if the demand were moderate, but that this value should be reduced to twelve cents per square foot because of minimal demand for "unbuildable" beachfront property in a town offering many public beaches. I am in agreement with Poyant's reasoning that estimates of value should be adjusted to take account of low demand, but I consider his adjustment too extreme because it gave no consideration to the adaptability of the site for certain other permitted uses, such as boat storage or rental, for which the public beach may not be available.

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Reenstierna cited two comparable sales of apparently "unbuildable" property, one a sale of twenty acres for $60,000 and the other a sale of 18,582 square feet for $2000. Both sales were to abutters. Reenstierna thought the subject lot would have a higher value (per acre or per square foot) than either of the comparables because of its superior location and topography and its potential for additional uses such as a refreshment stand or cabanas.

Ruckert also noted the possibility of using the site for recreational purposes and related uses such as boat rentals and the sale of refreshments and beach supplies. Ruckert did not refer to any comparable sales, but noted one recent Superior Court decision which valued a beachfront site at $5566 per acre for recreational purposes. As previously noted, Ruckert testified that the value of the property whether or not a residence was permitted is $6330, which is also the assessed value.

In referring to the possible use of the site for sale of refreshments and beach supplies, neither Reenstierna nor Ruckert provided any specific information about similar uses elsewhere. In addition, neither witness discussed the likelihood of obtaining a permit from the Board of Selectmen which would be required for such use. It is also unclear how such uses might be affected by a deed restriction referred to by Poyant (but not appended to his testimony) which requires buildings to have a minimum floor area of 600 square feet.

In establishing a value for the subject site if not available for residential purposes, I have treated the permissible uses under the zoning by-law as expanding the range of prospective buyers beyond that of the immediate abutter, although probably not increasing the value significantly above what an abutter would pay. Considering the estimates of value based on comparable sales cited by Poyant and Reenstierna, I conclude that the

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value of the subject lot for the uses discussed in this section is $6250. This determination was made after increasing Poyant's estimates (based on mid-1970's sales) to account for inflation, and reducing both the Poyant and Reenstierna estimates to account for

the smaller lot size of 26,136 square feet. Given these adjustments, the value I have found is consistent with the estimates of both appraisers, as well as the assessed value of $6330 cited by Ruckert.

V. DOES THE PHASE I DECISION CONSTITUTE THE EQUIVALENT OF A TAKING WITHOUT COMPENSATION?

It remains to be considered whether the Department's Phase I Decision so restricts the use of the subject property as to constitute a taking. Because the earlier portions of this decision have considered the market value of the property if it were available for residential construction, as compared to the property value if only certain uses specified in the town's zoning by-law were permitted, a comparison of these "before" and "after" values suggests a greater restriction on the property than is actually effected by the Phase I Decision. For example, the Department Staff has taken the position that it has no objection to seasonal habitation in a self-contained camper or trailer (Benoit response to interrogatories), but such a use would not be permissible under the zoning by-law. Given the fact that all witnesses in this proceeding treated the Phase I Decision as if it were an absolute prohibition against residential use of the property, it is not possible to assign a dollar value to the restrictions imposed solely by virtue of that decision, as distinguished from other restrictions imposed by local zoning. The remainder of this section will therefore examine the effect of the Department's Phase I Decision as if it had restricted property uses to those enumerated in Section IV above, while recognizing that the Department's decision was in actuality less restrictive.

Thus, the question now presented is whether an administrative decision affecting property with a maximum market value of $54,000 for residential use, reduced by

the risk factors which a knowledgeable buyer would take into account, may restrict the alteration of the property in order to protect specific public interests, if such restriction would reduce the market value to $6250.

In analyzing the Applicant's claim of a taking as applied to the facts in this case, it may first be noted that certain principles relating to "regulatory takings"[*] are well-established in the case law, while others must be inferred or derived from the particular facts of decided cases.

One of the most clearly established principles with regard to the taking issue is that certain governmental actions which amount

to an appropriation of private property for public use will not be permitted without compensation. Thus, in United States v. Causby,328 U.S. 256 (1954), the direct impact of low flying military aircraft on a farmer's use of his land was found to constitute a taking because the overflights were treated as

equivalent to a physical invasion of the land. A similar analysis was recently applied in Kaiser Aetna v. United States, 444 U.S. 164 (1979), which held that the Army Corps of Engineers could not compel a landowner to grant public access to a lagoon which was private property under state law, although the landowner had connected it to navigable waters. The court noted that a requirement of access would interfere with the landowner's "right to exclude," which the court characterized as such a fundamental element of property ownership that it could not be taken without compensation.

In both of these cases, the United States had sought to acquire for itself or its citizens certain rights which could best be characterized as easements for public benefit; the governmental actions were sufficiently similar to the exercise of the eminent domain power that they were deemed to constitute takings.

In addition to governmental actions which are treated as takings because

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[*] The term "regulatory taking" will be used to refer to any exercise of the police power which is claimed to constitute a taking of property, whether the remedy sought is compensation or invalidation of the regulatory action.

they are effectively appropriations for the public benefit, it is clear that restrictions on land use will not withstand constitutional challenge if they are outside the proper scope of the police power because they do not have "a substantial relation to the public health, safety, morals or general welfare." Nectow v. City of Cambridge 277 U.S. 183 (1928), distinguishing Euclid v. Ambler Realty Co. 272 U.S. 365 (1926).

But even where a valid public purpose is recognized, a regulation may be found to constitute a taking if it goes "too far," to use the frequently-cited phrase in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "[W]hile property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."

How far is too far remains a largely unanswered question, although both Massachusetts and Federal courts have articulated certain limiting principles. It has repeatedly been noted that a mere diminution in value is not sufficient to establish a taking; as stated in Goldblatt v. Hempstead, 369 U.S. 590,594 (1962):

> There is no set formula to determine where regulations ends and taking begins. Although a comparison of values before and after is relevant, ... it is by no means conclusive, see Hadacheck v. Sebastian [239 U.S. 394 (1915)] where diminution in value from $800,000 to $60,000 was upheld.

Similarly, the landmark zoning decision in Euclid v. Ambler Realty Co., supra, upheld a zoning ordinance which was claimed to reduce property values by seventy_five percent.

The continuing force of these decisions which have upheld regulations causing substantial diminution in value was recently affirmed in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), as well as in Lovequist v. Conservation Commission of Town of Dennis, 379 Mass. 7, 393 NE 2d 858 (1979). The Lovequist case further pointed out that a deprivation of even the most beneficial property use will not establish a

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taking, unless the governmental action reaches the point of depriving the property of "all practical value to [the owner] or to anyone acquiring it, leaving them only with the burden of paying taxes on it." 393 NE 2d at 866, quoting from MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 255 NE 2d 347,352 (1970). [MacGibbon II]

In Andrus v. Allard, 444 U.S. 51 (1979), a case involving diminution of value of personal rather than real property, the Supreme Court further addressed the circumstances in which a valid regulation might constitute a taking. Although the owners of certain bird artifacts were deprived of the right to sell their property, their remaining rights to possess, transport, devise or donate the artifacts were held to be a sufficient "bundle" of property rights that that the destruction of one "strand," the right to sell, did not constitute a taking. The court's analysis suggests that the focus should be placed not on the extent of restrictions placed on a property owner, but on the rights which the owner continues to possess.

The landmark case in the Commonwealth addressing claims of takings under environmental regulations is Turnpike Realty v. Town of Dedham, 362 Mass. 221, 284 NE 2d 891 (1972), cert. denied, 409 U.S. 1108 (1973). The decision concerned a zoning by-law establishing a Flood Plain District in which land use, except for pre-existing buildings, was limited as follows: "[N]o structure or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, agricultural, horticultural or recreational use of land or water not requiring filling. Buildings and sheds accessory to
any of the Flood Plain uses are permitted on approval of the Board of Appeals." 284 NE 2d at 894.

The court found the purposes of the by-law to be consistent with what it characterized as "three basic public policy objectives": the protection of individuals who might develop or occupy land in a flood plain, the protection of other landowners from damages resulting from flood plain development and the

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protection of the entire community from choices of land use which will require subsequent public expenditures for public works and disaster relief. 284 NE 2d at 896.

After noting the "unquestionable" necessity of flood plain zoning as a general matter, 284 NE 2d at 891, the court considered Turnpike Realty's claim that the by-law was unconstitutional as applied to its land. The court appeared to apply two related tests. First, it distinguished between the use of the police power and the power of eminent domain, citing Vartelas v. Water Resources Commission, 146 Conn. 640,654, 153 A 2d 822: "The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain, on the other hand, takes private property because it is useful to the public interest."

Since the court had already concluded that the purpose of the by-law was protection against harm, this citation would appear to suggest that no governmental action will be deemed to be a taking unless it falls within the definition of the eminent domain power. However, the court went on to consider the specific facts in Turnpike Realty's claim that it had been deprived of all beneficial use of its property. Noting that Turnpike Realty had claimed a diminution in value from $431,000 to $53,000, and that the trial judge had found "a substantial" but unspecified diminution in value, the court concluded that the decrease did not amount to an unconstitutional deprivation of property. A critical element of the court's analysis appears in the following statement: "Although it is clear that the petitioner is substantially restricted in its use of the land, such restrictions must be balanced against the potential harm to the community for overdevelopment of a flood plain area." 284 NE 2d at 900.

Thus,when the Turnpike Realty court cited Goldblatt v. Hempstead, supra, for the proposition that there is no "set formula" for establishing a taking,

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the additional factor which enabled the court to reach a conclusion was a balancing of the landowner's interests against those of the public, in light of the facts of the particular case.[*]

The principles cited in Turnpike Realty remain good law; the case continues to be cited favorably in the more recent Massachusetts decisions dealing with the taking issue, see, e.g. Lovequist v. Conservation Commission of Town of Dennis, supra;

Moskow v. Commissioner of Department of Environmental Management, 1981 Mass. Adv. Sh. 2134, 427 NE 2d 750; S. Kemble Fischer Realty Trust, 9 Mass. App. 477, 402 NE 2d 100 (1980), cert.denied,499 U.S. 1011.[**] Since both the interests protected and the residual use remaining to the landowner bear similarities to the facts of the present case, the conclusion that the regulation did not constitute a taking is particularly instructive for the purposes of this

decision.

Thus, in evaluating the Phase I decision to determine if it is equivalent to a taking, I will consider the following points:

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[*] See also Agins v. City of Tiburon, 447 U.S. 255, 261 (1980), which likewise characterized the taking question as one which "necessarily requires a weighing of public and private interests."

[**] The one other case which must be taken note of in this decision is MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 340 NE 2d 487 (1976) [MacGibbon II] in which the court found that limitation of use of a parcel of land to specified recreational and agricultural purposes was not sufficiently "practical" to avoid a taking. The MacGibbon decision is considered to be of limited value for the purposes of our review, particularly on account of the court's later statement, in connection with its denial of a motion for rehearing, 369 Mass. 523 344 NE 2d 185 (1976), that its decision had been expressly limited to the power of a Board of Appeals under a particular local zoning by-law. The court went on to say that its decision was not intended to apply to numerous other environmental statutes and programs, including the Wetlands Protection Act. We are aware of no subsequent reported cases which have relied upon the particular facts which were the basis of the decision in MacGibbon III, as contrasted with the general statements of law set forth in that decision.

- The public purpose to be accomplished and the relation of the Department's decision to that purpose;
- The diminution in value resulting from the Department's decision;
- The property rights remaining to the landowner; and
- Whether the restrictions on the landowner, if not so great as to prohibit all practical use, are within the limits of reasonable regulatory action when balanced against the potential harm in the absence of the restriction.

Public Purpose

The Department's Phase I Decision prohibited construction of a septic system on an eroding barrier beach and thus limited development of the property. As discussed in that decision, the prohibition was necessary because due to predicted shoreline retreat, the subsurface components of the septic system were likely to become exposed in the future when the shape of the land changed,

if the landowner was not permitted to interfere with the natural processes of dune migration. Exposure of the septic system would cause pollution and would be harmful to the fisheries values of the adjacent salt marsh. The alternative of allowing the landowner to interfere with natural dune processes would also be unacceptable because changing the shape of the dune would disturb the dune's sensitive natural equilibrium and interfere with the dune's function of protecting the land behind it from the full force of wave impacts.

The prohibition against construction of a septic system on this barrier beach site was supported by additional testimony of Benoit and Lind at the Phase II hearing. This testimony identified major hazards to life and property associated with development on barrier beaches. Like the by-law upheld in Turnpike Realty, the Department's restrictions in this case seek to assure the continued existence of this parcel of land in a form which will function to protect other land behind it. Over time, the Phase I Decision

will also contribute to avoiding additional public expenditure for disaster relief.

Thus, the public purpose of the Phase I Decision was the avoidance of certain specific harm which was likely to occur if the natural functioning of the dune system was altered; the decision was not a direct or indirect attempt to make available for public use the subject property or any interest in it. The particular restriction was rationally related to the Wetlands Protection Act's interests of storm damage prevention, flood control, prevention of pollution, protection of marine fisheries and protection of land containing shellfish, and limited the development of the property only to the extent necessary to protect these values.

The protection of wetlands values is unquestionably a proper purpose for which the police power may be exercised. See Turnpike Realty, supra, Lovequist, supra, Moskow, supra, Just v. Marinette County, 56 Wis. 2d 7, 201 NW 2d 761 (1972). While none of the cited decisions had occasion to deal with the unique values of coastal dunes in protecting other property from flooding and storm damage, the role of dunes on a barrier beach is in reality of even greater significance, with respect to development of a given land area,
than an inland flood plain. While the loss of inland flood storage will cause displacement of flooding onto other land to the extent

of the flood storage lost, the weakening of a dune system as a barrier will necessarily impact the functioning of an entire stretch of barrier beach as a buffer protecting the marsh behind it from the full force of wave action.[*]

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[*] See particularly Finding (9) in the Phase I Decision (pages 14-15) and the quotation from Benoit commencing at the final paragraph of page 8 of that decision Additional support for

Benoit's testimony is found in a report of the United States Secretary of the Interior entitled "Undeveloped Coastal Barriers: Report to Congress," which recounts examples of the devastating effects which have from interference with the natural movement of coastal barriers.

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Diminution of value

While an an analysis based strictly on the "comparable sales" identified by the appraisers testifying in this case would indicate that the Phase I decision had the effect of causing a decline in property value from $54,000 to $6250, the actual diminution in value will be a lesser amount. As discussed earlier, this is because the $54,000 figure fails to take into account the allowances which a knowledgeable buyer would make for the retreat of the shoreline and the uncertain fate of any investment which would be made to develop the property for residential use. Since even a diminution of value from $54,000 to $6250 (or approximately eighty-eight percent) would be within the scope of the land use regulations upheld in Turnpike Realty, supra, and Hadacheck v. Sebastian, supra, from a strictly monetary standpoint, the lesser decline in value which would occur under the facts of this case would not be precluded solely on the basis of the dollar loss.

Property rights remaining to the landowner

With the Department's Phase I Decision in effect, the Applicants or other purchasers could make use of the subject property for the various uses listed in Section IV of this decision as well as for personal recreational enjoyment. Reenstierna's appraisal took note of some of the possibilities for refreshment, bait, or boat rental facilities, or for cabanas, as contributing to the value of the property, while Poyant apparently considered only the possibility of beach use by an abutter or others living in the vicinity.

No evidence was offered to establish the marketability of the land for any particular use among those discussed in Section IV, and likewise no evidence to show lack of marketability for any non-residential use. The small number of comparable sales for non-residential purposes does suggest that such

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sales have been infrequent. However, that fact simply demonstrates that residential use is the "highest and best" use of this and similar properties, so that sales would rarely contemplate any other use.

The idea of using beachfront property for something other than residential use is sufficiently new that one cannot draw conclusions solely on the basis of the evidence of comparable sales or the lack of such evidence. Rather, I must apply my own judgment

as to what uses are practical in this setting. The marine-related uses such as boat storage or boat rental have an obvious practicality in this location and could be accomplished in a manner which would be acceptable to the Department. With regard to other possible uses, I am inclined to agree with Poyant that beach rights as such would generate minimal demand in this town of many public beaches. On the other hand, a physically private beach facility might well be a realistic venture.

With regard to permissable commercial uses such as refreshment stands and bait sales, there was no information from which I could judge how feasible these might be in terms of a return on investment in the property. Certainly if the present owner or a person acquiring the property for an estimated $6250 was interested in generating supplementary income, these commercial uses would be practical as an adjunct to primary beach or boating uses.

Of course, if an abutter were interested in acquiring the site, the permissible uses would be even broader, as indicated in the first footnote on page 19. An abutter could thus treat the acquisition as a simple extension of his or her property or could use the expanded acreage to make use of one of the additional permitted uses available to "residential occupants." The practicality of such uses would necessarily depend on the practical needs of the abutter.

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Conclusion

I have found that the Phase I Decision caused a substantial diminution in value but did not so restrict the property as to prevent all practical use. Because of the strong public interest which is served by regulations protecting the natural functioning of barrier beach systems, and the necessity of imposing the Phase I Decision to prevent construction which is incompatible with natural dune migration on this site, I am of the opinion that the Department's interference with the owner's property rights in this case is not so great as to constitute a taking. Accordingly, both the Phase I Decision and this decision are now issued as a Final Decision in this adjudicatory proceeding.

The parties to this proceeding are hereby notified of their right to file a motion for reconsideration of this decision, pursuant to 310 CMR 1.01(10)(p). Such motion must be filed within fourteen days of the postmark date of this decision and must include a statement of all matters alleged to have been erroneously decided and, if applicable, a statement as to any newly discovered matters or circumstances that have arisen to this decision. Any such motion shall be filed with the Hearing Officer and all parties.

The parties to this proceeding are hereby further notified of their right to appeal this decision to the Superior Court pursuant to the Massachusetts Administrative Procedure Act, G. L. c. 30A, s.14(1). The complaint must be filed in the Court within thirty

days of receipt of this decision.

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End Of Decision