

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

91-J-933

ALFRED NELSON, EVELYN NELSON,
LEWIS HICKS, III & BERNICE HICKS

vs.

COMMONWEALTH OF MASSACHUSETTS
and the
TOWN OF CHATHAM.

MEMORANDUM & ORDER

Although not immune to review, the regulations of administrative agencies and the decisions of those agencies applying their regulations, carry great weight. In this case the Department of Environmental Protection has developed regulations concerning coastal dunes. They are based on assumptions founded in hydrodynamics and geology. The Superior Court judge who refused to enjoin application of the regulations and, in consequence, refused to authorize the building of stone revetments by the petitioners, correctly prognosticated slim chance of success on the merits.

The adverse consequences to the petitioners, that the sea may wash their houses away, are sufficiently grave, that I invited the government to furnish me with material touching on what harm might accrue to the general public interest should a sea wall be erected and left in place pending adjudication of the merits. That is, might steps be taken so that adjudication of the

merits does not become academic?

I have been furnished with affidavits from government engineers which say that the construction of revetments by the Nelsons and the Hicks would tend to erode the beaches on either end of those revetments. I read the government affidavits as predicting that protection of the Nelson and Hicks properties will simply place at risk other properties. Natural dune movement, the government affidavits say, is the best hope for coastal preservation. Indeed, the government affidavits say, the revetments are not even likely to save the Nelson and Hicks houses. Of course, the petitioners do not agree with this scientific view and put forward scientific opinions of their own. In this situation of conflict, and taking into account the considerable unlikelihood that the plaintiffs would be able to establish that the underlying regulation is unlawful, let alone unconstitutional, I think the Superior Court judge correctly declined to make an order which would permit the petitioners to construct seawalls to protect their oceanfront houses. On the question of whether injunctive relief ought to be granted, government steps to protect the general public interest receive deference. See Commonwealth v. Mass CRINC, 392 Mass. 79, 88-89 (1984).

I deny the petition for relief under G. L. c. 231, § 118, first par.

I add as a postscript that the interests of the

plaintiffs in this action may be better served by reaching a commonly acceptable solution (the government, for example, has recommended dune nourishment), rather than engaging in protracted combat with local and State authorities.

By the Court (Kass, J.),

Ashley Shearn
Assistant Clerk

Entered: January 17, 1992.