COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 12, 2011

In the Matter of Stephen D. Peabody, Trustee
Peabody Family Trust

OADR Docket No. WET-2008-063
DEP File No. NE 050-0562
Newbury, MA

FINAL DECISION

INTRODUCTION

In this appeal, Stephen D. Peabody, Trustee of Peabody Family Trust ("Mr. Peabody"), challenges the September 2, 2008 decision of Laurie Burt, the then Commissioner of the Massachusetts Department of Environmental Protection ("the Department" or "MassDEP") denying his request for a Variance from the requirements of the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 ("MWPA"), and the Wetlands Regulations, 310 CMR 10.00 et seq. (the "Wetlands Regulations"), in connection with his proposed development of a portion of oceanfront real property at 16 51st Street, Plum Island, Newbury, Massachusetts (the "Site"). The Site was part of an original parcel of real property at 14 51st Street on Plum Island (the "Land") that Mr. Peabody purchased in August 1997.

Mr. Peabody proposes to construct a single family home on wood pilings at the Site. In March 2002, the Department's Northeast Regional Office ("NERO Office") denied approval of

the proposed Project under the MWPA and the Wetlands Regulations because it failed to meet the regulatory performance standards for work in a coastal dune under the Wetlands Regulations at 310 CMR 10.28(3)(b). In response to Mr. Peabody's administrative appeal challenging the denial, the Department's former Commissioner Robert W. Golledge ("former Commissioner Golledge") in January 2006 issued a Final Decision affirming the denial ("the January 2006 Final Decision"). The January 2006 Final Decision was affirmed by the Superior Court in June 2007, and Mr. Peabody's appeal from that judgment is pending in the Appeals Court. The proceedings in the Appeals Court are currently stayed pending the outcome of this administrative appeal of former Commissioner Burt's denial of Mr. Peabody's Variance Request.

In the Superior Court, Mr. Peabody contended that the January 2006 Final Decision constituted a taking of his real property in violation of the Fourteenth Amendment to the U.S. Constitution ("Fourteenth Amendment"). The Department moved to dismiss the claim because Mr. Peabody had failed to apply for a Variance from the MWPA and the Wetlands Regulations in accordance with 310 CMR 10.05(10). In response, Mr. Peabody agreed to voluntarily dismiss his taking claim without prejudice so that he could apply for a variance in accordance with 310 CMR 10.05(10).

On January 28, 2008, Mr. Peabody filed his Variance Request with the Department pursuant to 310 CMR 10.05(10). Five days earlier, on January 23, 2008, Mr. Peabody filed a federal civil rights suit in the U.S. District Court of Massachusetts against the Department and former Commissioners Golledge and Burt contending that the January 2006 Final Decision violated Mr. Peabody's substantive due process and equal protection rights under the Fourteenth

Amendment. Mr. Peabody's federal civil rights suit is stayed pending the outcome of this administrative appeal of former Commissioner Burt's denial of Mr. Peabody's Variance Request.

With respect to his Variance Request, Mr. Peabody contended that he was entitled to the Variance because, in his view, the January 2006 Final Decision is so restrictive that it constitutes an unconstitutional taking of his property without compensation, and has made his property worthless after once being valued at approximately $1.6 million. He also contended that he was entitled to a Variance because he had purportedly made significant revisions to the proposed Project to reduce disturbance to the primary coastal dune and barrier beach at the Site.[1] After a careful review of the record before her, former Commissioner Burt disagreed with Mr. Peabody's claims in her September 2008 decision denying his Variance Request because he failed to submit sufficient evidence in support of his claims. Mr. Peabody has appealed that denial in this action.

The Issues for Resolution in this appeal are twofold:

(1) Whether former Commissioner Burt erred in finding that the mitigating measures proposed by Mr. Peabody do not allow the proposed Project to be conditioned so as to contribute to the protection of the interests identified in the MWPA? See 310 CMR 10.05(10)(a)(2).

(2) Whether former Commissioner Burt erred in finding that the Variance is not necessary to avoid an Order of the Department that so restricts the use of Mr. Peabody's real property that it constitutes an unconstitutional taking without compensation? See 310 CMR 10.05(10)(a)(3).

On January 13, 2009 and March 19, 2009, a Presiding Officer of the Office of Appeals and Dispute Resolution ("OADR") conducted an Adjudicatory Hearing ("Hearing") to resolve these two issues. Prior to the Hearing, Mr. Peabody and the Department filed sworn Pre-filed

[1] As discussed below, at pp. 6-10 coastal dunes and barrier beaches are wetlands subject to protection under the MWPA and the Wetlands Regulations.

Testimony ("PFT") of several witnesses in support of their respective positions in this appeal. Mr. Peabody's witnesses were:

(1) Mr. Peabody;

(2) Mitchell Silverstein ("Mr. Silverstein"), Mr. Peabody's real estate advisor; and

(3) Stephen Ingemi, Jr. ("Mr. Ingemi"), Mr. Peabody's real estate appraiser.[2]

The Department's witnesses were two Wetlands specialists in the Department: (1) Lisa Rhodes ("Ms. Rhodes"); and (2) Michael Stroman ("Mr. Stroman"). At the Hearing, all witnesses were cross-examined under oath on their PFT by the parties' respective legal counsel.

In September 2009, the parties filed post Hearing briefs and proposed Findings of Fact and Conclusions of Law. In March 2010, the Presiding Officer who conducted the Hearing commenced her duties as a Deputy General Counsel in the Department's Office of General Counsel ("OGC"). As of the date of her transfer to OGC, the Presiding Officer had not issued a Recommended Final Decision in this appeal. To ensure the separate and different functions of the OGC and OADR, resolution of this appeal was assigned to the Chief Presiding Officer in accordance with 310 CMR 1.01(14)(c). This adjudicatory rule of procedure provides in relevant

[2] Mr. Peabody also filed the PFT of real estate broker Jeanne McHugh ("Ms. McHugh"). Ms. McHugh's PFT was subsequently stricken from the record because she did not appear for cross-examination at the Hearing. See Post-Hearing Order on Motions to Strike, July 27, 2009, at p. 13, n. 3; 310 CMR 1.01(12)(f) (". . . All witnesses whose testimony is prefiled shall appear at the hearing and be available for cross-examination. If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise); 310 CMR 1.01(13)(h)3 (". . . If a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise"). As a result, portions of Mr. Peabody's PFT that relied on statements that Ms. McHugh purportedly made to him regarding the real estate market on Plum Island were not considered in resolution of this administrative appeal. See [Pre-filed] Testimony of Stephen D. Peabody, December 5, 2008 ("Mr. Peabody's PFT"), ¶¶ E1-E6.

part that "[w]hen a Presiding Officer becomes . . . unavailable to make a decision, a tentative decision shall be made by a substitute Presiding Officer upon the record."[3]

In accordance with 310 CMR 1.01(14)(c), the Chief Presiding Officer conducted a review of the record, including the testimonial and documentary evidence from the parties' respective witnesses at the Hearing. Based upon his review of the record and the applicable law, he issued a Tentative Decision on October 1, 2010, concluding that former Commissioner Burt had properly denied Mr. Peabody's Variance Request, and recommending that she issue a Final Decision affirming her denial of Mr. Peabody's Variance request.[4]

After considering the record, including the Chief Presiding Officer's Tentative Decision and the parties' respective legal memoranda in support of or in opposition to the Tentative Decision, I affirm former Commissioner Burt's September 2008 decision denying Mr. Peabody's

[3] Tentative decisions are governed by 310 CMR 1.01(14)(a). The regulation provides that "[t]entative decisions shall not be issued as a matter of routine, but shall be issued only [certain circumstances, including] . . . the hearing was conducted by a Presiding Officer other than the one who will write the recommended decision and the recommended decision will be adverse to a party other than the Department; or if the Commissioner, Presiding Officer or other designee of the Commissioner determines that a tentative decision should be issued in the interest of justice." The rule also provides that "[e]very tentative decision shall be in writing and shall contain a statement of the reasons, including a determination of every issue of fact or law necessary to the decision." Under the rule "[t]he parties shall have seven [business] days from the receipt of the tentative decision to file objections to the decision and supporting arguments with the Department['s] [Office of Appeals and Dispute Resolution]. . . ." Following receipt of the parties' responses to the tentative decision, the Presiding Officer may issue a Recommended Final Decision ("RFD") for the Commissioner's review, or the Commissioner may issue a Final Decision. 310 CMR 1.01(14)(a), (14)(b).

[4] The Chief Presiding Officer had hoped to issue a Tentative Decision well before October 1, 2010, but, unfortunately, he was unable to do so because he was on medical leave during various periods between March 30 and August 23, 2010 as a result of a serious medical condition. On July 2, 2010, the Chief Presiding Officer forwarded an e-mail message to the parties making them aware of his medical condition and apologizing for the delay in the issuance of a decision in this matter. Ideally, this administrative appeal should have been resolved within the six month time frame for resolution of Wetlands Permit Appeals under 310 CMR 10.05(7)(j) or shortly thereafter. A review of the docket in the case, however, reveals that Mr. Peabody acquiesced or contributed to the delay in the appeal's resolution. Accordingly, I find unpersuasive his recent contention that he should prevail in the appeal because resolution of the appeal did not occur sooner. See Petitioner's Objections to the Tentative Decision (October 22, 2010), at pp. 1-4; Belhumeur v. Labor Relations Commission, 432 Mass. 458, 463-64 (2000) (plaintiff's contention that agency's resolution of claim after eight years of the proceeding's filing was unduly delayed rejected because delay was caused in part by parties' actions) .

Variance Request. Accordingly, I issue this Final Decision affirming former Commissioner Burt's denial of Mr. Peabody's Variance request.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PURPOSE OF THE MWPA AND THE WETLANDS REGULATIONS

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2). As discussed below, coastal dunes, barrier beaches, and Land Subject to Coastal Storm Flowage are wetlands resource areas protected by the MWPA and the Wetlands Regulations. 310 CMR 10.02; 310 CMR 10.04; 310 CMR 10.28; 310 CMR 10.29; 310 CMR 10.57.

A. Coastal Dunes

The Wetlands Regulations at 310 CMR 10.28(2) define a coastal dune as:

> any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

Under the Wetlands Regulations:

> All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach in any area are per se significant to storm damage prevention and flood control. Coastal dunes are also often significant to the protection of wildlife habitat.

310 CMR 10.28(1).

"Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches." Id. "Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns." Id.

"Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition. On retreating shorelines, the ability of the coastal dunes bordering the coastal beach to move landward at the rate of shoreline retreat allows these dunes to maintain their form and volume, which in turn promotes their function of protecting against storm damage or flooding." Id.

"When a proposed project involves the dredging, filling, removal or alteration of a coastal dune,[5] the issuing authority[6] shall presume that the area is significant to the interests of

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[5] The Wetlands Regulations define "alter" as a "change [to] the condition" of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. 310 CMR 10.04.

> Examples of alterations include, but are not limited to, the following:
> (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
> (b) the lowering of the water level or water table;
> (c) the destruction of vegetation;

storm damage prevention, flood control and the protection of wildlife habitat." Id. "This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the issuing authority makes a written determination to that effect." Id.

B. Barrier Beaches

The Wetlands Regulations at 310 CMR 10.29(2) define a barrier beach as:

> a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast. It is separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh

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> (d) the changing of water temperature, biochemical oxygen demand ("BOD"), and other physical, biological or chemical characteristics of the receiving water."

Id. "Dredge" is defined as "deepen[ing], widen[ing] or excavat[ing], either temporarily or permanently" a protected wetlands area, and "[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently." Id.

[6] The "issuing authority" is the local Conservation Commission when initially reviewing the applicant's proposed work in a wetlands resource area subject to protection under the MWPA and the Wetlands Regulations, or the Department if it assumes primary review of the proposed work or on appeal from a local Conservation Commission decision. See Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, "[l]ocal [Conservation Commissions] are allowed to 'impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]'" and to require that 'all work shall be done in accordance' with the conditions they might impose. . . ." Id.

> The [MWPA] "establishes minimum Statewide standards leaving local communities free to adopt more stringent controls. . . This delegation of limited but autonomous power to the local authorities d[oes] not, however, divest the Commonwealth of its right to the final say on project applications decided on the basis of those interests recited [in the MWPA and the Wetlands Regulations]. To the contrary, . . . [the MWPA] as expressly reserve[s] this right to the Commonwealth, acting through [MassDEP]". . . The [MWPA] is clear that "[an] applicant, any person aggrieved by [a conservation commission's] order . . . , or any ten residents of the city or town in which said land is located, may . . . request the [Department]" to redetermine the application of the [MWPA] to the subject property[,] [and] . . . [the Department], upon making the requested redetermination, may "impose such conditions as will contribute to the protection of the interests described in [the MWPA.]" . . . [A]ny "[s]uch order [by the Department] shall supersede the prior order of the conservation commission . . . and all work shall be done in accordance" with the [Department's] order.

Id.

system. A barrier beach may be joined to the mainland at one or both ends.

Under the Wetlands Regulations:

> [b]arrier beaches are significant to storm damage prevention and flood control and . . . protect landward areas because they provide a buffer to storm waves and to sea levels elevated by storms. Barrier beaches protect from wave action such highly productive wetlands as salt marshes, estuaries, lagoons, salt ponds and fresh water marshes and ponds, which are in turn important to marine fisheries and protection of wildlife habitat. Barrier beaches and the dunes thereon are also important to the protection of wildlife habitat in the ways described in 310 CMR 10.27(1) (coastal beaches) and 10.28(1) (coastal dunes).

310 CMR 10.29(1).

"Barrier beaches are maintained by the alongshore movement of beach sediment caused by wave action." Id. "The coastal dunes and tidal flats on a barrier beach consist of sediment supplied by wind action, storm wave overwash and tidal inlet deposition. Barrier beaches in Massachusetts undergo a landward migration caused by the landward movement of sediment by wind, storm wave overwash and tidal current processes. The continuation of these processes maintains the volume of the landform which is necessary to carry out the storm and flood buffer function." Id.

"When a proposed project involves removal, filling, dredging or altering of a barrier beach, the issuing authority shall presume that the barrier beach, including all of its coastal dunes, is significant to the interest(s) specified above." Id. "This presumption may be overcome only upon a clear showing that a barrier beach, including all of its coastal dunes, does not play a role in storm damage prevention, flood control, or the protection of marine fisheries, wildlife habitat, or land containing shellfish, and if the issuing authority makes a written determination to such effect." Id.

Plum Island, the locus of Mr. Peabody's proposed Project, is a barrier beach protected by

the MWPA and the Wetlands Regulations. In the Matter of Carol Henderson, Docket No. 2009-059, Recommended Final Decision (April 12, 2010), 2010 MA ENV LEXIS 14, at 12 ("the entirety of Plum Island is a barrier beach"), adopted by Final Decision (April 27, 2010), 2010 MA ENV LEXIS 116. During the past decade, Plum Island has suffered significant beach erosion prompting Newbury Town Government to declare a local state of emergency and undertake restoration efforts. See Plum Island Erosion Information, http://www.townofnewbury.org/Pages/plum_island_erosion. Restoration efforts have included a beach replenishment project with the assistance of the U.S. Army Corps of Engineers and a Dune Stabilization Project. Id.

C. Land Subject To Coastal Storm Flowage

The Wetlands Regulations at 310 CMR 10.04 define Land Subject to Coastal Storm Flowage ("LSCSF") as:

> land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.

Under Wetlands Regulations, LSCSF is "likely to be significant to flood control and storm damage prevention." In the Matter of Edward Longo, Docket No. 91-001, Decision on Motion for Reconsideration, 1996 MA ENV LEXIS 6, at 4 n.2, citing, 310 CMR 10.57(1)(a). This wetlands resource area, "by its very nature, serves to dissipate the force of coastal storms, [and thus,] serves the [MWPA] interests of flood control and storm damage prevention . . . ." Longo, 1996 MA ENV LEXIS 6, at 6-7. The Department may only authorize activities in land subject to coastal storm flowage if the Department determines that the proposed activities will not

interfere with the MWPA interests of flood control and storm damage prevention. Longo, 1996 MA ENV LEXIS 6, at 5-7.

II. VARIANCE CRITERIA AND PROCEDURE UNDER 310 CMR 10.05(10)

The Wetlands Regulations at 310 CMR 10.05(10) authorize the Department's Commissioner to grant variances waiving the requirements of the Wetlands Regulations under certain conditions. Specifically, 310 CMR 10.05(10)(a) provides that the Commissioner **"**may waive the application of any [Wetlands] regulation(s) in 310 CMR 10.21 through 10.60" if he or she determines:

> (1) that there are no reasonable conditions or alternatives that would allow the proposed project to proceed in compliance with 310 CMR 10.21 through 10.60;
>
> (2) that mitigating measures are proposed that will allow the proposed project to be conditioned so as to contribute to the protection of the interests of MWPA; and
>
> (3) that the variance is necessary to accommodate an overriding community, regional, state or national public interest; or that it is necessary to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation.

By its terms, "[t]he allowance of a variance . . . is a matter of discretion [by the Department's Commissioner] rather than right[,] [and] . . . the exception rather than the rule." In the Matter of Giles H. Dunn and Gail W. Dunn, Docket No. 89-072R, Final Decision, 4 DEPR 219, 222, 1997 MA ENV LEXIS 5, at 18 (December 17, 1997) (variance request denied due to proponents' failure to demonstrate (1) that proposed construction of residential dwelling on pilings and associated work on beachfront property could be conditioned to further the MWPA regulatory interests of storm damage prevention and flood control and (2) that denial of variance would result in property taking).

Under 310 CMR 10.05(10)(b), all variance requests to the Commissioner must be in writing and include the following minimum information:

> (1) a description of alternatives explored that would allow the proposed project to proceed in compliance with 310 CMR 10.21 through 10.60 and an explanation of why each is unreasonable;
>
> (2) a description of the mitigating measures to be used to contribute to the protection of the interests identified in the MWPA;[7] and
>
> (3) evidence that an overriding public interest is associated with the project which justifies waiver of 310 CMR 10.21 through 10.60, or evidence that the [Department's] Superseding Order so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

Dunn, supra, 4 DEPR at 222, 1997 MA ENV LEXIS 5, at 18-20.

The provisions of 310 CMR 10.05(10)(b) also require the Department to give public notice of any variance request so that members of the public may offer comments on any variance request. Following the public notice, the Department is to conduct a public hearing on the variance request. 310 CMR 10.05(10)(b). "After reviewing the information submitted with the [variance] request . . . and any other information submitted by any party within the public comment period, the Commissioner [is to] issue a decision . . . grant[ing] [or denying] the variance." Id.

The Commissioner's decision on a variance request may be appealed to OADR within ten days of the Commissioner's issuance of the decision. Id.; Dunn, supra, 4 DEPR at 223, 1997 MA ENV LEXIS 5, at 22-23. In appeals contending that a variance is necessary "to avoid restrictions that would constitute an unconstitutional taking, the Commissioner [or his or her designee] shall hold an adjudicatory hearing" in the appeal. Id. The applicant for the variance

[7] The Wetlands Regulations at 310 CMR 10.04 define "mitigation" as measures "rectifying an adverse impact [of a proposed project] by repairing, rehabilitating or restoring the affected [wetlands] resource area or compensating for an adverse impact by enhancing or providing replacement resource areas."

"has the burden of demonstrating that the [proposed] project meets the criteria necessary for a variance" as required by 310 CMR 10.05(10)(a) and 310 CMR 10.05(10)(b). Id. "Other parties . . . may introduce evidence [at the adjudicatory hearing] either in favor of or opposing the variance request . . . ." Id.

FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

The evidence introduced at the Hearing in this appeal documented the following:

On August 11, 1997, Mr. Peabody, individually, purchased oceanfront real property located at 14 51st Street on Plum Island in Newbury, Massachusetts (the Land) from Susan Vozzella for $285,000.00. Quitclaim Deed, August 11, 1997, Recorded in Book 14261, Page 232 in the Southern Essex District Registry of Deeds ("August 1997 Quitclaim Deed");[8] Commissioner's Variance Decision, at 1; See Peabody v. Department of Environmental Protection, ESCV2006-00299, at 1-2 (Mass. Super Ct. Sept. 21, 2007) (unpublished) ("Superior Court Decision"), at 2.[9] The Land consisted of two parcels of real property: Parcel One and Parcel Two. Id.

Parcel One, a landward real property, contained a single family three-bedroom home. Id.; [Pre-filed] Testimony of Stephen D. Peabody, December 5, 2008 ("Mr. Peabody's PFT"), ¶¶ C1-C3, at p. 3; ¶ C9, at p. 4. Parcel Two, a seaward real property, was undeveloped. Id. The

[8] A copy of the August 1997 Quitclaim Deed is contained in Document No. 15 of the Department's Basic Documents, filed November 4, 2008 ("Department's Basic Documents").

[9] A copy of the Superior Court Decision is contained in Exhibit No. 9 of the Department's Basic Documents. The Superior Court Decision is "the law of the case" unless it is vacated by the Appeals Court. See Field v. Mans, 157 F.3d 35, 40 (1st Cir. 1998), quoting, Cohen v. Brown University, 101 F.3d 155, 167 (1st Cir. 1996) ("the doctrine of 'law of the case' is a prudential principle that 'precludes re-litigation of the legal issues presented in successive stages of a single case once those issues have been decided.' . . . The law of the case doctrine prohibits a litigant from resurrecting an issue decided by the trial court that either has not been challenged on appeal or has been decided on appeal").

deed conveying the Land to Mr. Peabody described Parcel One and Parcel Two as follows:

> Parcel One: The land in Newbury, . . . being Lot 207 in Block D as shown on a Plan entitled, "Plan of Section One and Two of Lands of Plum Island Beach Company," . . . dated May, 1920, and recorded with [the] Essex South District Registry of Deeds . . .;
>
> Parcel Two: The land in Newbury, . . . as shown as Lots 208, 209, and 210, in Block D as shown on a on a Plan entitled, "Plan of Section One and Two of Lands of Plum Island Beach Company," . . . dated May, 1920, [and] recorded with [the Essex South District Registry of] Deeds.

August 1997 Quitclaim Deed. The Site is Lot 208 in Parcel Two. Id.

On April 6, 2000, Mr. Peabody transferred Parcel Two to the Peabody Family Trust (the "Trust") for nominal consideration. Quitclaim Deed, April 6, 2000, Recorded in Book 16279, Page 528 in the Southern Essex District Registry of Deeds ("April 2000 Quitclaim Deed");[10] Commissioner's Variance Decision, at p. 1; Superior Court Decision, at 2; Mr. Peabody's PFT, ¶ C17, at p. 5. Mr. Peabody is the Trust's Trustee, and controls the Trust's assets. Id. The deed conveying Parcel Two to the Trust described Parcel Two as follows:

> the land in Newbury, . . .being Lots 208, 209, and 210, in Block D as shown on a on a Plan entitled, "Plan of Section One and Two of Lands of Plum Island Beach Company," . . . dated May, 1920, [and] . . . filed with the Essex South District Registry of Deeds. . . .

August 1997 Quitclaim Deed.

Since 2003, the Town of Newbury Assessor's Office has issued separate real estate tax bills for Parcel One and Parcel Two. Mr. Peabody's PFT, ¶ C17, at p. 5. The Assessor's Office has separate addresses for Parcel One and Parcel Two; Parcel One's address is listed as 14 51st Street and Parcel Two's address is listed as 16 51st Street. Id.

In August 2000, Mr. Peabody filed a Notice of Intent ("NOI") with the Town of

[10] A copy of the April 2000 Quitclaim Deed is contained in Exhibit No. 14 of the Department's Basic Documents.

Newbury Conservation Commission ("NCC") seeking authorization under the MWPA and the Wetlands Regulations for approval of his proposed Project at the Site (Lot 208 of Parcel Two). Superior Court Decision, at 2; Mr. Peabody's PFT, ¶ C12, at p. 4; ¶ C16, at p. 5.[11] His proposed Project called for construction of a 1,080 square foot three bedroom single family home on at the Site along with a 900 square foot cantilevered deck on an open pile foundation, a 300 square foot gravel driveway, and parking area. Id. Mr. Peabody also sought authorization from the Town of Newbury Board of Health and the Department to construct a septic system for the proposed home on the Property. Id., ¶ C14, at p. 5.

Standing alone, the Site did not have sufficient land area for the construction of a septic system meeting the requirements of Title 5 of the Department's septic system regulations. See Letter of Mr. Peabody's attorney, Michael A. Leon, December 11, 2002 ("December 2002 Letter"). [12] As a result, in or about December 2002, Mr. Peabody requested that the Department authorize construction of the septic system by allowing him to combine the Site's land area with that of Parcel One's. Id. According to Mr. Peabody, the total land area comprising Parcel One and the Site was "41,360 square feet, which under the Title 5 regulations, [was] in excess of one acre." Id., at p. 2.[13]

On March 29, 2001, the NCC issued an Order of Conditions ("OOC") under the MWPA

[11] Authorization for the proposed Project was required under the MWPA and the Wetlands Regulations because the proposed Project would impact four wetland resource areas: (1) a coastal dune; (2) a coastal beach; (3) land subject to coastal storm flowage; and (4) a barrier beach (Plum Island is a barrier beach). Commissioner's Variance Decision, at p. 1; Superior Court Decision, at 2. The provisions of Wetlands Regulations that govern these four wetland resource areas are discussed above, at pp. 6-11.

[12] A copy of the December 2002 Letter is contained in Exhibit No. 13 of the Department's Basic Documents.

[13] The Trust represented to the Department that Parcel One contained 4,900 square feet of land area and Lot 208 of Parcel Two contained 36,460 square feet of land area. See December 2002 Letter, at p. 2.

and the Wetlands Regulations approving Mr. Peabody's proposed Project at the Site. Commissioner's Variance Decision, at p. 2; Superior Court Decision, at 2. Abutters to the Site challenged the OOC by requesting the Department issue a Superseding Order of Conditions ("SOC") rejecting the proposed Project. Id. The abutters contended that the proposed Project would adversely affect the already unstable coastline in the area. Superior Court Decision, at 2.

On March 12, 2002, the Department's NERO Office issued an SOC denying the proposed Project because it failed to meet regulatory performance standards for work in a coastal dune under 310 CMR 10.28(3)(b). Commissioner's Variance Decision, at p. 2; Superior Court Decision, at 2-3. Specifically, Mr. Peabody failed to demonstrate how the proposed Project would not impair the ability of the coastal dune to serve the MWPA statutory interests of flood control and storm damage prevention. Id. The proposed Project also called for the removal of existing vegetation without adequate replacement. Id. Mr. Peabody then filed an administrative appeal of the SOC. Id.

During the pendency of his administrative appeal of the SOC, Mr. Peabody's proposed Project underwent required environmental review by the then Massachusetts Executive Office of Environmental Affairs, now Energy and Environmental Affairs ("EEA") pursuant to the Massachusetts Environmental Policy Act, G.L. c. 30, § 61 ("MEPA"). Superior Court Decision, at 3. "As part of the MEPA process, Mr. Peabody filed a Draft Environmental Impact Report ("DEIR"), in which he acknowledged:

> that the [proposed] project could affect the ability of waves to remove sand from the dune, disturb vegetative cover so as to destabilize the dune, cause a [change] of the dune form that would increase the potential for storm or flood damage, and interfere with the landward or lateral movement of the dune.

Id.

"With respect to his proposed mitigation measures in the DEIR, [Mr. Peabody] asserted that [his] revegatation plan involving the planting and transplanting of 8,650 square feet of dune vegetation (by transplanting some dune grass to other locations, planting dune grass in sparsely vegetated and bare areas, and planting more robust dune species) would compensate for the disturbance of the site and insure the stability of the 'frontal dune.'" Id., at 3-4.

Mr. Peabody's DEIR included a site plan for the area in question that noted the following:

> (1) erosion in the area of 28 feet between 1928 and 1953;
>
> (2) accretion in the area of 90 feet between 1953 and 1978;
>
> (3) erosion in the area of 55 feet between 1978 and 1994; and
>
> (4) accretion in the area of 105 feet between 1994 and 2000.

Id., at 7.

Mr. Peabody's DEIR also included copies of correspondence from abutters opposed to the proposed Project because in their view the proposed Project would adversely affect the already unstable coastline in the area. Id., at 4. In support of their position, the abutters pointed out the following:

> (1) in 1967, severe erosion caused the owners of several homes in the area, including the home owned by Mr. Peabody on Parcel One, to move their homes landward;
>
> (2) in 1978, several homes, including the home on Parcel One were surrounded by water; and
>
> (3) in 1991, water surged down the right of way in the area.

Id.[14]

[14] EEA subsequently approved Mr. Peabody's Environmental Impact Report, but the approval did not constitute a formal adjudicative decision approving or disapproving his proposed Project. 310 CMR 11.01(1)(b). Moreover,

In July and September 2004, an Administrative Magistrate of the Commonwealth's Division of Administrative Appeals (the "DALA Magistrate") conducted an adjudicatory hearing on Mr. Peabody's administrative appeal of the SOC. Superior Court Decision, at 5. On September 1, 2005, the DALA Magistrate issued a Recommended Final Decision ("RFD") recommending that the Department's Commissioner issue a Final Order of Conditions ("FOC") approving the proposed Project because in the DALA Magistrate's view, the proposed Project could be conditioned to meet regulatory performance standards for work on a coastal dune as set forth in the Wetlands Regulations. Commissioner's Variance Decision, at p. 2; Superior Court Decision, at 5.

In issuing her RFD, the DALA Magistrate improperly ignored the adjudicatory hearing testimony of the Department's two main witnesses (wetlands experts) regarding coastline instability in the area of the proposed Project. Superior Court Decision, at 5-6. The DALA Magistrate also improperly ignored the evidence submitted by the abutters described above that the proposed Project would adversely affect the already unstable coastline in the area**.** Id., at 11-12.

On November 1, 2005, former Commissioner Golledge issued a Tentative Decision adopting in part and rejecting in part the DALA Magistrate's RFD. See In the Matter of Stephen D. Peabody, Docket No. 2002-053, Tentative Decision, 12 DEPR 191 (November 1, 2005); Commissioner's Variance Decision, at p. 2; Superior Court Decision, at 6-8. In his Tentative Decision, former Commissioner Golledge rejected the proposed Project for failure to meet

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MEPA review by EEA neither alters the Department's review or permitting authority under the MWPA and the Wetlands Regulations nor alters the applicability of the MWPA and the Wetlands Regulations to the proposed Project. Id.

performance standards for work on a primary coastal dune on a barrier beach, which as discussed previously above at pp. 6-10, is a highly protected resource area due to its contribution to the MWPA interests of flood control and storm damage prevention. Id. Former Commissioner Golledge concluded that the proposed Project would adversely affect the primary coastal dune's ability to change form and move laterally in response to wind and wave action. Id.

In accordance with 310 CMR 1.01(14)(a),[15] former Commissioner Golledge invited the parties to file objections to or supporting arguments in favor of his Tentative Decision, and scheduled oral argument. Id. After consideration of the parties' written and oral arguments, former Commissioner Golledge issued the January 2006 Final Decision adopting his Tentative Decision with minor modifications. See In the Matter of Stephen D. Peabody, Docket No. 2002-053, Final Decision, 13 DEPR 37 (January 25, 2006); Commissioner's Variance Decision, at p. 2; Superior Court Decision, at 6-8.

The January 2006 Final Decision denied the proposed Project because, based on evidence of recent shoreline change at the site, disturbance of vegetative cover, and interference with the movement of the dune, the proposed Project would adversely affect the capacity of the dune to serve the MWPA interests of storm damage prevention and flood control. January 2006 Final Decision, at 39; Commissioner's Variance Decision, at p. 2; Superior Court Decision, at 6-8. Former Commissioner Golledge reasoned that:

> Coastal dunes and barrier beaches differ from all other resource areas in that they are inherently dynamic and almost certain to change, even over relatively short periods of time. [footnote deleted]. The [Wetlands] regulations are designed to prohibit alterations which would interfere with these natural processes; with some flexibility in the context of existing residential structures. The regulations are stringent, appropriately reflecting the policy determination that siting new

[15] See note 3, at p. 5 above regarding the provisions of 310 CMR 1.01(14)(a) concerning Tentative Decisions.

> structures, including pile-supported structures for residential use, will likely interfere with the natural functioning of the dune absent some demonstration that the dune functions atypically due to site considerations. While the impacts of a single pile-supported house seem dwarfed by the impacts of a major coastal storm, the integrity of the primary dune under and around structures may be compromised, diminishing the ability of the dune to serve as the first line of defense against storm damage. By placing limitations on new development, particularly on oceanfront lots with primary dunes, the regulations adopted in 1978 reflect a considered public policy of providing a high level of protection to dunes to preserve their natural functions for the public interests they serve. By restraining overall development along the coast and minimizing associated cumulative adverse effects, the coastal dune regulations avoid increased demands for public services to hazard-prone areas and promote public safety for both coastal and more inland property.

Commissioner's Variance Decision, at pp. 2-3.

During oral argument on the Tentative Decision issued by former Commissioner Golledge, Mr. Peabody claimed that the proposed Project's adverse impacts would be reduced to nine pilings due to the elimination of the proposed septic system and well installation for the Site as a result of the Town of Newbury's installation of water and sewer service to Parcels One and Two. Commissioner's Variance Decision, at p. 6. The January 2006 Final Decision found that, although disturbance of vegetation during construction and the potential for erosion from waves would be reduced, the revised project would still "adversely affect the capacity of the dune to serve the interests of storm damage prevention and flood control." Id. Therefore, despite a reduction in proposed disturbances to the primary coastal dune, the January 2006 Final Decision suggested that there are no reasonable conditions or alternatives that will allow the proposed Project to proceed in compliance with 310 CMR 10.21 through 10.60. Id.

As noted previously, the January 2006 Final Decision was affirmed by the Superior Court in June 2007, and Mr. Peabody's appeal from that judgment is pending in the Appeals Court.

His federal civil rights litigation and Variance Request pursuant to 310 CMR 10.05(10) then followed in January 2008. See above at pp. 2-3.[16]

Mr. Peabody contended in his Variance Request that the January 2006 Final Decision is so restrictive that it constitutes an unconstitutional taking of his property without compensation**,** and has made his property worthless after once being valued at approximately $1.6 million. Mr. Peabody's Variance Request, at p. 1; Commissioner's Variance Decision, at p. 3. He also contended that he was entitled to a Variance because he had purportedly made significant revisions to the proposed Project to reduce disturbance to the primary coastal dune and barrier beach, and that such purported mitigation measures contribute to the protection of wetlands resources in accordance with the MWPA and the Wetlands Regulations. Id. As discussed below, at pp. 25-53, former Commissioner Burt correctly rejected Mr. Peabody's claims in denying his Variance Request.

DISCUSSION

I. MR. PEABODY'S BURDEN OF PROOF IN THE APPEAL

The Wetlands Permit Appeal Regulations at 310 CMR 10.05(7)(j), as well as the requirements of the MWPA and the Wetlands Regulations govern resolution of Mr. Peabody's appeal of former Commissioner Burt's denial of his Variance Request. Under 310 CMR 10.05(7)(j), Mr. Peabody had the burden of proving in the Hearing that former Commissioner Burt improperly denied his Variance Request under the MWPA and the Wetlands Regulations, and the legal principles governing property takings. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b; 310 CMR 10.05(10)(a); 310 CMR 10.05(10)(b). Specifically, Mr. Peabody was required to

[16] A copy of Mr. Peabody's Variance Request is contained in Exhibit No. 8 of the Department's Basic Documents.

"produce [at the Hearing] at least some credible evidence from a competent source in support of [his] position" that former Commissioner Burt improperly denied his Variance Request. 310 CMR 10.03(2); 310 CMR 10.05(7)(j)3.b; 310 CMR 10.05(10)(a).

In challenging former Commissioner Burt's factual determinations in denying his Variance Request, Mr. Peabody was required to present "credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c; 310 CMR 10.05(10)(a). "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted by Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends "[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Commonweatlh v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted by Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected),

adopted by Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted by Final Decision (May 9, 2003); Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 36-39 (petitioner's failure to submit expert testimony in appeal challenging Department's Commissioner's issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner's claims in appeal because Variance was "detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance," including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design").

Another ground rule for the Hearing was that Mr. Peabody's failure to present credible evidence from a competent source in support of his claims would constitute a waiver of his claims. 310 CMR 10.05(7)(j)3.c. Whether he presented credible evidence from a competent source in support of his claims is a question of law regardless of any evidence submitted by the Department in opposition to the claims. See 310 CMR 1.01(11)(e) ("[u]pon the petitioner's submission of prefiled testimony, . . . any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case; or the Presiding Officer may, on the Presiding Officer's own initiative, order the petitioner to show cause why such a dismissal of claims should not issue. . . ."); Compare

Mass. R. Civ. P. 41(b)(2) ("[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . ."). Indeed, "[d]ismissal [of an administrative appeal] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case -- generally, the testimony and exhibits comprising its prefiled direct testimony -- presents no evidence from a credible source in support of its position on the identified issues, and thus fails to sustain its burden of going forward." See In Matter of Farber, OADR Docket No. 2001-106, Recommended Final Decision (May 31, 2002), 9 DEPR 149, 151, 2002 MA ENV LEXIS 32 adopted by Final Decision (August 23, 2002), 2002 MA ENV LEXIS 147; In the Matter of Town of Southbridge Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision (September 18, 2009), 16 DEPR 299, 302 n.7, adopted by Final Decision (October 14, 2009), 16 DEPR 299; Compare Mass. R. Civ. P. 41(b)(2), supra.

Lastly, the relevancy, admissibility, and weight of evidence that the parties sought to introduce in the Hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record . . . rest[ed] within the sound discretion of the Presiding Officer. . . ." A substitute hearing officer in

an administrative appeal may make findings of fact without hearing and observing the witnesses when such findings are based upon undisputed evidence that does not turn on the credibility of witnesses, SEIU v. Labor Relations Commission, 410 Mass. 141, 146 (1991), or where the petitioner has failed to meet its burden of proof as a matter of law. See 310 CMR 10.05(7)(j)3.c; 310 CMR 1.01(11)(e); Farber, supra; Town of Southbridge Public Works, supra; Carulli, supra; Indian Summer Trust, supra; Robert Siegrist, supra; Pittsfield Airport Commission, supra; Compare Mass. R. Civ. P. 41(b)(2), supra.

II. RESOLUTION OF ISSUE NO. 1

> **Issue No. 1:** Whether former Commissioner Burt erred in finding that the mitigating measures proposed by Mr. Peabody do not allow the proposed Project to be conditioned so as to contribute to the protection of the interests identified in the MWPA? See 310 CMR 10.05(10)(a)(2).

As discussed above, the Variance provisions of 310 CMR 10.05(10) authorize the Department's Commissioner to **"**waive the application of any [Wetlands] regulation(s) in 310 CMR 10.21 through 10.60" if he or she determines, among other things, "that mitigating measures are proposed that will allow the proposed project to be conditioned so as to contribute to the protection of the interests of MWPA." 310 CMR 10.05(10)(a), 10(b); Dunn, supra, 4 DEPR at 223, 1997 MA ENV LEXIS 5, at 22-23. Thus, it was Mr. Peabody's burden in this appeal to prove by way of credible evidence from a competent source that his proposed mitigation measures will allow his proposed Project to be conditioned to contribute to the protection of the interests of MWPA. 310 CMR 10.03(2); 310 CMR 10.05(7)(j)3.b; 310 CMR 10.05(10)(a); Dunn, supra, 4 DEPR at 223, 1997 MA ENV LEXIS 5, at 22-23. As discussed below, Mr. Peabody failed to meet his burden of proof on this issue. See 310 CMR 10.05(7)(j)3.c; 310 CMR 10.05(10)(a); 310 CMR 10.05(10)(b); 310 CMR 1.01(11)(e); Farber,

supra; Town of Southbridge Public Works, supra; Carulli, supra; Indian Summer Trust, supra; Robert Siegrist, supra; Pittsfield Airport Commission, supra; Compare Mass. R. Civ. P. 41(b)(2), supra. Accordingly, I affirm former Commissioner Burt's September 2008 finding that the mitigating measures proposed by Mr. Peabody do not allow his proposed Project to be conditioned so as to contribute to the protection of the interests identified in the MWPA.

A. Mr. Peabody's PFT on the Mitigation Issue

As previously noted, storm damage prevention and flood control are interests that MWPA and the Wetlands Regulations are intended to advance. G.L. c. 131, § 40; 310 CMR 10.01(2). The Wetlands resource at issue in this appeal: coastal dune, "aid[s] in storm damage prevention and flood control by supplying sand to coastal beaches," and "protect[s] inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because [they] are higher than the coastal beaches which they border." 310 CMR 10.28(1). "In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape to conform to natural wind and water flow patterns." Id. Moreover, "[w]hen a proposed project involves the dredging, filling, removal or alteration of a coastal dune, the issuing authority shall presume that the area is significant to the interests of storm damage prevention, flood control and the protection of wildlife habitat." Id. "This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of wildlife habitat, and if the issuing authority makes a written determination to that effect." Id.

Here, Mr. Peabody, who is not a wetlands expert, was his only witness on the mitigation issue at the Hearing. See Mr. Peabody's PFT, ¶¶ B.1-B.8. His PFT on the issue in essence only

described what he considered to be mitigating measures to meet the regulatory performance standards for work in a coastal dune under the Wetlands Regulations at 310 CMR 10.28(3)(b). Id. For instance, originally, Mr. Peabody's proposed Project called for altering 5,140 square feet of coastal dune on a barrier beach. Commissioner's Variance Decision, at p. 3. His Variance Request contended that the Town of Newbury's extension of sewer and water lines to the Land decreased dune and barrier beach alterations from 5,140 to 1,600 square feet. Id.[17]

In support of his Variance Request, Mr. Peabody also proposed a further reduction in the amount of dune vegetation plantings from 8,650 to 1,894 square feet as mitigation for temporary and permanent dune vegetation disturbances resulting from project construction. Commissioner's Variance Decision, at p. 6. The reduction reflected reduced disturbance due to elimination of a septic system and well installation. Id. Mr. Peabody also reduced the amount of plantings to address a concern raised in the January 2006 Final Decision that proposing to increase vegetation on the dune beyond what would naturally occur in order to add protection to the newly developed property could potentially starve down drift locations of sediment. Id.

All of Mr. Peabody's proposed mitigation measures, however, do not demonstrate that they will allow his proposed Project to be conditioned so as to contribute to the protection of the relevant MWPA interests of storm damage and flood control. Compare, Dunn, supra, 4 DEPR at 223-24, 1997 MA ENV LEXIS 5, at 26-29 (variance request "lack[ed] evidence of 'mitigating measures . . . that [would] allow the [proposed residential construction on pilings and associated work on beachfront property] to be conditioned so as to contribute to the protection of relevant

[17] See June 2, 2008 correspondence from Stephen D. Peabody, Trustee, to Michael Stroman, MassDEP Wetland Program Chief (Exhibit 5 of Mr. Peabody's Hearing Exhibits; Document No. 4 of Department's Basic Documents). Mr. Peabody's January 28, 2008 Variance Request previously represented on page 2 that dune alterations had been reduced by 50% to 2,520 square feet. See Exhibit 1 of Mr. Peabody's Hearing Exhibits; Document No. 8 of Department's Basic Documents.

wetlands interests' [of storm damage prevention and flood control]"). At best, his proposed mitigation measures evidence a reduction of damage to the coastal dune by the proposed Project rather than its enhancement. Id. The same holds true for the December 15, 2007 letter purportedly written by wetlands expert William Decie ("Mr. Decie") that Mr. Peabody submitted at the Hearing.

Mr. Decie's letter merely recites Mr. Peabody's proposed mitigation measures and does not assert that those measures will allow Mr. Peabody's proposed Project to be conditioned to protect MWPA interests, including the relevant interests of storm damage and flood control. The letter also has other evidentiary limitations in that it does not constitute pre-filed testimony because the letter is not a sworn statement of Mr. Decie and he was not present for cross-examination at the Hearing. See 310 CMR 1.01(13)(h)3 ('[a]ll testimony [in an adjudicatory hearing] shall be given under oath or affirmation[,] [and] [w]itnesses shall be available for cross-examination [at the hearing and if not present at the hearing for cross-examination their] written testimony . . . shall be excluded from the record unless the parties agree otherwise"). See also note 2, at p. 4 above.[18]

In summary, to obtain a variance under 310 CMR 10.05(10), which is granted only in rare circumstances, the project proponent must do more than merely reduce the project's harm to

[18] The information contained in Exhibit 7 of Mr. Peabody's Hearing exhibits purportedly listing properties on Plum Island "similarly situated" as his property, also does not prove that his proposed mitigation measures will allow his proposed Project to further wetlands interests because the information consists of his summary of files he purportedly reviewed at the Town of Newbury and the Department. The best evidence of that purported information are the documents that Mr. Peabody purportedly reviewed, but nevertheless, he failed to introduce true copies of those documents at the Hearing. See Commonwealth v. Ocasio, 434 Mass. 1, 6 (2001) ("[t]he best evidence rule provides that, where the contents of a documents are to be proved, the party must either produce the original or show a sufficient excuse for its nonproduction"). Moreover, Mr. Peabody, the party with the burden of proof, has failed to provide a sufficient excuse for failing to produce true copies of the documents that he purportedly reviewed. Id.

the relevant wetlands interests; he or she "[must propose] mitigating measures . . . that will allow the project to be conditioned so as to contribute to protection of the [relevant wetlands] interests identified in [MWPA]." Dunn, supra, 4 DEPR at 222, 1997 MA ENV LEXIS 5, at 18-19. "[This requirement is] mandatory . . . [and cannot] . . . be waived, and no variance can be issued unless [this requirement is met]." Id. Here, as discussed above, Mr. Peabody has not made that showing. Simply stated, he has not persuaded me that his proposed Project will not "destabilize coastal dune, promote its erosion, impede its natural movement and migration, and undermine the dune's storm damage prevention and flood control functions." Dunn, supra, 4 DEPR at 224, 1997 MA ENV LEXIS 5, at 26-27. In contrast, the Department's witnesses and wetlands experts, Ms. Rhodes and Mr. Stroman, both submitted probative and substantial evidence through their pre-filed testimony demonstrating that Mr. Peabody's proposed mitigation measures will not allow his proposed Project to be conditioned so as to contribute to the protection of the relevant MWPA interests of storm damage and flood control.

B. Ms. Rhodes' PFT and Mr. Stroman's PFT

1. Ms. Rhodes' PFT

As her PFT notes, Ms. Rhodes has more than 25 years of professional experience in the wetlands area. See Ms. Rhodes' PFT, ¶¶ 1-8. She holds a Bachelor of Science degree in Natural Resources from the University of Rhode Island (1982), has successfully completed graduate courses in Surface Water Hydrogeology, Groundwater Hydrogeology, and Geochemistry of Groundwater at Boston University (1989-90), and has obtained training from a National Highway Institute Environmental Training Center Program (1990). Id., ¶ 8.

Prior to joining the Department in September 2000 as an Environmental Analyst in the

agency's Wetlands Program, Ms. Rhodes worked as the Conservation Administrator for the Town of Weymouth (1985 to 1986); as an Environmental Planner/Wetlands Scientist at the transportation consulting firm Howard, Needles, Tammen, and Bergendoff (1986 to 1989); and as a staff member of the Massachusetts Highway Department ("MassHighway") (1989 to 2000). Id., ¶¶ 1-8.

Ms. Rhodes' last position at MassHighway was Supervisor of the agency's Environmental Compliance Section. Id., ¶ 4. At MassHighway, Ms. Rhodes was responsible for project management of large MassHighway projects involving the development of MEPA and National Environmental Policy Act ("NEPA") environmental documentation. Id. She was also responsible for the environmental permitting of hundreds of MassHighway projects, including many requiring a wetlands variance from the Department. Id., ¶ 5.

At the Department, her duties as an Environmental Analyst in the agency's Wetlands Program include administering and enforcing the MWPA and the Wetlands Regulations. Id., ¶ 2. Her duties include the review of wetlands variance applications and the preparation of wetlands variance decisions. Id. She testified that from 2000 to 2008, she had direct involvement in the preparation of 21 wetlands variance decisions, 14 of which she served as the Department's primary contact and project manager. Id., ¶ 3.

With respect to Mr. Peabody's mitigation claim, Ms. Rhodes testified that the MWPA "coastal dune regulations afford a high level of protection to dunes to preserve their natural functions for the public interests they serve: Flood Control and Storm Damage Prevention." Ms. Rhodes' PFT, ¶ 34. She testified that "[p]reservation of natural dune formations promotes public safety for both coastal and more inland properties," and that "[d]une

preservation helps avoid increased demands for public services and inevitable requests, and expenditure, of public funds to protect private property loss in the dynamic and hazard-prone coastal shore zone." Id.

Ms. Rhodes also testified that the mitigating measures that Mr. Peabody proposed in his Variance Request will not allow his proposed Project to be conditioned to contribute to the protection of these wetlands interests. Id. Specifically, Ms. Rhodes testified that:

> [Mr. Peabody's proposed] [m]itigation for this project includes planting 1,894 s.f. of dune vegetation to stabilize the dune to replace 1,600 s.f. of dune disturbance that [Mr. Peabody][alleges would result from the project. . . . "Unlike the [Wetlands] regulations for bordering vegetated wetlands which explicitly allow the replacement of inland vegetated wetlands to compensate for altered areas, 310 CMR 10.55(4)(b), the regulations governing work on coastal dunes do not establish or even suggest a standard based on replication of vegetation to compensate for adverse impacts from a project." . . .
>
> [P]lanting additional vegetation to promote dune growth in some areas cannot substitute for the loss of dune stability resulting from the project. A Superseding Order of Conditions denying construction of a single family house on the same reach of primary dune in Plum Island ([See] Exhibit B [to Ms. Rhodes' PFT]) states on page three that "activities and construction on primary dunes or dunes on barrier beaches are most likely to adversely [a]ffect the shape and volume of the dune, either through removal of vegetation or other direct modification or by interfering over time with the natural sediment transport process."
>
> Therefore, dune planting mitigation will not be sufficient to protect the storm damage prevention and flood control interests served by the coastal dune because the construction of structures, even those that are pile-supported can adversely affect the form and function of the dune through the effects of the structure itself and of daily use following construction.

Ms. Rhodes' PFT, ¶¶ 28-32.

2. Mr. Stroman's PFT

Mr. Stroman, the Chief of the Department's Wetlands Program, corroborated Ms.

Rhodes' testimony regarding the inadequacy of Mr. Peabody's proposed mitigation measures. As Mr. Stroman's PFT notes, he has more than 20 years of professional experience in the wetlands area as a Department staff member. See Mr. Stroman's PFT, ¶¶ 1-4; Exhibit 1 to Mr. Stroman's PFT. He holds a Bachelor of Science degree in Zoology from University of Massachusetts (1978), a Masters of Science degree in Botany from the University of Massachusetts (1983), and a Juris Doctor degree from the New England School of Law (1988). He has been a member of the Massachusetts bar since 1988, and has co-authored and published a paper in the wetlands area involving barrier beach and coastal dune. See Exhibit 1, page 2 attached to Mr. Stroman's PFT.

At the Department, Mr. Stroman's duties in the agency's Wetlands Program include administering and enforcing the MWPA and the Wetlands Regulations. Mr. Stroman's PFT, ¶ 2. His duties include the review of wetlands variance applications and the preparation of wetlands variance decisions. Id. He testified that from 1990 to 2001, he had direct involvement in over 30 wetlands variance decisions, and that from 2001 to 2009, he supervised the issuance of 21 wetlands variance decisions. Id., ¶ 3.

With respect to Mr. Peabody's mitigation claim, Mr. Stroman testified that the dune planting proposed by Mr. Peabody as mitigating measures for the proposed Project will not allow it to be conditioned so as to contribute to the protection of wetlands interests, specifically, coastal dune. Mr. Stroman's PFT, ¶ 18. He also testified that "neither the installation of live water and sewer service from the Town of Newbury nor the proposed project re-design to eliminate the septic system or modify the driveway and deck constitute mitigation under the wetland regulations." Mr. Stroman's PFT, ¶ 12. He testified that

"[w]hile such alternatives may reduce project impacts, the removal of the septic system from the [proposed] project does not serve to rectify the adverse impact that will result from the proposed project." Id. He testified that "[t]he removal of the septic system from the project plan does not serve to repair, rehabilitate, or restore the coastal dune vegetation impacts that will result from construction of the proposed single family home." Id. He testified that "[a]lthough [Mr. Peabody] proposes to, and alleges to have already provided dune replanting that comports to the Department's guidance for dune stabilization, on balance, [his proposed] project as a whole will result in long-term dune destabilization." Mr. Stroman's PFT, ¶ 13. He testified that "[a]t present, the primary frontal dune is substantially vegetated but for the existing footpath and some previously disturbed areas." Id.; See also Mr. Stroman's PFT, ¶¶ 9, 16, and 17.

Mr. Stroman also testified that "[c]ontrary to [Mr. Peabody's] claim that [his] proposed project and 'similarly situated' projects on Plum Island have not destabilized the dunes, dune destabilization from such projects is commonplace on Plum Island." Mr. Stroman's PFT, ¶ 16. He testified that "[d]une destabilization and erosion is apparent in a number of areas along the Plum Island shore." Id. An aerial photograph of the area attached to his PFT as Exhibit 2 supports his testimony. He testified that "[d]une destabilization is evident from the uncontrolled beach access from homes and roads in the form of footpaths cut through the coastal dune fields." Mr. Stroman's PFT, ¶ 16. The aerial photograph (Exhibit 2 to Mr. Stroman's PFT) notes that dune destabilization is particularly apparent where the footpaths reach the coastal beach. Id. Mr. Stroman testified that "[f]oot traffic fans out over the dune face and down to the beach and has resulted in

notable dune de-vegetation." Id. He testified that "[t]his de-vegetation occurs at the coastal beach and coastal dune interface, that portion of the primary dune most vulnerable to the erosive forces of routine wave action and coastal storm surges." Id.

Mr. Stroman also testified that "[the] points of destabilized dunes create weak points in the primary coastal dune resulting in vulnerable areas in the barrier beach system more likely to be breached during coastal storms." Mr. Stroman's PFT, ¶ 17. He testified that "[t]he frequency and location of such breaches, or 'overwash,' while a natural and commonplace element of barrier beach ecology, are accelerated in areas where dunes are destabilized." Id. He testified that "[o]verwash breaches serve as the primary means by which barrier beaches naturally migrate landward in response rising sea levels and oceanic storm waves," and that "[s]uch breaches also serve to establish new inlets in barrier beach systems and represent a natural occurrence as part of the dynamic nature of barrier beach ecology." Id. He testified that "[a] notable example of an impending overwash event is underway at Plum Island Center, south of [Mr. Peabody's property], but part of the same barrier beach and coastal primary dune complex." Id. Mr. Stroman's testimony is supported by a map attached as Exhibit 3 to his PFT. Id. This map demonstrates "the relationship between the subject parcel and the location of the severe coastal erosion underway in the central developed portion of Plum Island." Id.

In sum, I find that Mr. Peabody's evidence on Issue No. 1 is far outweighed by the persuasive testimony of Ms. Rhodes and Mr. Stroman.

III. RESOLUTION OF ISSUE NO. 2

Issue No. 2: Whether former Commissioner Burt erred in finding that the Variance is not necessary to avoid an Order of the Department that so restricts the use

of Mr. Peabody's real property that it constitutes an unconstitutional taking without compensation? See 310 CMR 10.05(10)(a)(3).

Mr. Peabody presented three witnesses at the Hearing on his taking claim: (1) himself; (2) his real estate advisor, Mr. Silverstein; and (3) his real estate appraiser, Mr. Ingemi. The Department did not present any witnesses on the taking claim.

The Department's lack of witnesses on the taking claim does not mean that Mr. Peabody automatically prevails on that claim. He had the burden of proof on all issues, and, thus, the question for me as the Final Decision-Maker in this appeal is whether Mr. Peabody proved his taking claim. 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b; 310 CMR 10.05(10)(a); 310 CMR 10.05(10)(b); Dunn, supra, 4 DEPR at 224, 1997 MA ENV LEXIS 5, at 29-30 (regulatory taking claim rejected because there was "no evidence in the record that the wetlands permit denial ha[d] interfered with [project proponent's] reasonable investment-backed expectations"); See also Farber, supra; Town of Southbridge Public Works, supra; Carulli, supra; Indian Summer Trust, supra; Robert Siegrist, supra; Pittsfield Airport Commission, supra; Compare Mass. R. Civ. P. 41(b)(2), supra. As explained below, Mr. Peabody failed to meet his burden of proof on his taking claim.

The total gist of Mr. Peabody's testimony and that of Mr. Silverstein and Mr. Ingemi is (1) that Mr. Peabody purchased the Land in August 1997 intending to develop the vacant Parcel Two of the Land, including the Site on Parcel Two, and (2) that the Department's disapproval of his proposed Project at the Site has significantly diminished the value of his real property and constitutes a regulatory taking. However, a review of the testimony and the legal principles governing private property takings by the government lead to a different conclusion: that Mr.

Peabody's taking claim fails, and, thus, former Commissioner Burt properly rejected the claim in denying his Variance Request in September 2008.

A. Applicable Law Governing Resolution of Issue No. 2

1. Legal Principles Governing Regulatory Takings

"A regulatory taking, a concept adopted by the United States Supreme Court for the first time in 1922, arises not from the acquisition of an interest in property by the government, but rather from a regulation enacted under the State's police power that severely limits the property's use." Blair v. Department of Conservation and Recreation, 457 Mass. 634, 641 (2010), citing, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). It is well settled that "[a] State's police power extends to the regulation of land use for the public health, safety, or welfare." Blair, 457 Mass. at 641 n.10.

"While most [governmental] restrictions on the use of private property do not constitute a taking, when a regulation substantially restricts the owner's use of the property, so that the regulation 'goes too far,' it may be deemed a regulatory taking of that property for a public use." Blair, 457 Mass. at 641. "Whether a regulation 'goes too far' is determined ordinarily by a three-prong test" that considers the following:

(1) the economic impact of the regulation on the claimant;

(2) the extent to which the regulation has interfered with distinct investment-backed expectations; and

(3) the character of the governmental action.

Blair, 457 Mass. at 641, citing, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124-125 (1978); Leonard v. Brimfield, 423 Mass. 152, 154, cert. denied, 519 U.S. 1028

(1996), quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986); Lopes v. Peabody, 417 Mass. 299, 304 (1994).

"In limited circumstances, a regulatory taking may be deemed a 'categorical taking': a taking that "arises where a regulation is such that the owner retains no viable economic use of the property." Blair, 457 Mass. at 641, citing, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-1016 (1992); Lopes, supra, at 304 n.9. "If a regulation is determined not to impose a 'categorical taking,' then the three-prong [test] [described above] is applied to determine whether the regulation nonetheless 'goes too far.'" Blair, 457 Mass. at 641-42, citing, Lake Tahoe, supra, at 320-327; Leonard v. Brimfield, supra, at 154.

"To determine whether a regulatory taking has occurred, it is first necessary to decide the 'relevant parcel' to which the regulation is applicable." Blair, 457 Mass. at 642, citing, Giovanella v. Conservation Commission of Ashland, 447 Mass. 720, 726- 731 (2006). "[T]he 'relevant parcel' has consistently been held to be the 'parcel as a whole,' and whether a regulatory taking has occurred has been determined by considering the effect of a regulation as applied to an entire parcel." Blair, 457 Mass. at 642, citing, Lake Tahoe, supra, at 327. "Treatment of the impact of a regulation on a portion of a parcel as a taking has been squarely rejected." Blair, 457 Mass. at 642, citing, Penn Central, supra, at 130-131; Moskow v. Commissioner of Environmental Management, 384 Mass. 530, 533 & n.3 (1981).

Moreover, all contiguous real property held by an applicant at the time of the alleged taking is presumed to be one parcel or unit of real property because "[c]ommon sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property." Giovanella, 447 Mass. at 729. However, this is a rebuttable presumption that may be overcome

with relevant, competent evidence, including evidence of "whether the property is divided by a road, . . . whether property was acquired at the same time, . . . whether the purchase and financing of parcels were linked, . . . the timing of development, . . . whether the land is put to the same use or different uses, . . . whether the owner intended to or actually did use the property as one economic unit, . . . and the treatment of the property under State law . . . ." Giovanella, 447 Mass. at 728-29.

While "[t]reatment of the property under State or local law is a relevant factor, [it is of] limited weight." Giovanella, 447 Mass. at 730. "[The courts'] reliance on contiguous property minimizes the significance of lot lines in defining the boundaries of the denominator." Id. "Separate addresses or tax treatment as separate lots similarly carries little weight. Treatment under State law may play a larger role in cases of 'conceptual severance,' where individual uses of land are identified and protected under State law, and an owner attempts to recover compensation for the loss of the use based on that protection.'" Id.

B. Findings of Fact and Rulings of Law On Issue No. 2

Based on the pre-filed testimony of his witnesses and the legal principles discussed above governing private property takings by the government, Mr. Peabody did not prove his taking claim against the Department.

1. Former Commissioner Burt Properly Examined Parcels One and Two As One Unit of Real Property.

As discussed previously, when Mr. Peabody purchased the Land in August 1997, the Land consisted of two adjacent parcels of real property: Parcel One and Parcel Two. Undisputedly, Parcel One was a landward real property containing a single family three-bedroom home, and Parcel Two was an undeveloped seaward real property. Hence, Mr. Peabody has an

economically viable use of Parcel One given its single family home, and he can only prevail on a categorical taking claim if he can show that Parcel Two should be treated separately from Parcel One. He cannot make such a showing for the following reasons.

First, the pre-filed testimony of Mr. Peabody's witnesses failed to rebut the legal presumption that the contiguous Parcels One and Two of the Land are one unit of real property. See GiovaneIla, supra; Blair, supra. As previously noted above, Mr. Peabody purchased the contiguous Parcels One and Two at the same time (August 1997) by one quitclaim deed for a lump sum of $285,000.00. Mr. Peabody also financed his purchase of the Land by obtaining a $190,000.00 mortgage from Patriot Funding, LP of Framingham, Massachusetts ("Patriot"). Mortgage, August 11, 1997, Recorded in Book 14261, Pages 233-39 in the Southern Essex District Registry of Deeds ("August 1997 Mortgage").[19] Six months later in March 1998, Mr. Peabody filed a Declaration of Homestead declaring a homestead in the Land comprising both Parcels One and Two and representing that he owned and occupied the Land as his principal residence. Declaration of Homestead, March 27, 1998, Recorded in Book 14687, Page 70 in the Southern Essex District Registry of Deeds ("March 1998 Declaration of Homestead").[20]

There is also undisputable evidence indicating that Mr. Peabody has treated Parcels One and Two as one unit of real property. As previously noted above, in December 2002, Mr. Peabody argued to the Department that the land area comprising Parcel One and the Site on Parcel Two should be combined to calculate the total acreage available to meet the nitrogen loading requirements of Title 5 relative to the proposed septic system installation on Site. Mr.

[19] A copy of the August 1997 Mortgage is contained in Document No. 15 of the Department's Basic Documents.

[20] A copy of the March 1998 Declaration of Homestead is contained in Document No. 15 of the Department's Basic Documents.

Peabody's expert witness in the DALA proceeding challenging the Department's SOC also used the total land area from both Parcels One and the Site in Parcel Two to argue that Mr. Peabody was entitled to a Title 5 septic system permit. Commissioner's Variance Decision, at p. 8.

It is also important to note that when Mr. Peabody purchased the Land in August 1997, the septic system serving the house located on Parcel One was located on the Site in Parcel Two and currently remains in that location. Commissioner's Variance Decision, at p. 8. In sum, in evaluating Mr. Peabody's Variance Request, former Commissioner Burt properly examined Parcels One and Two as one unit of real property to determine whether the Department's denial of Mr. Peabody's proposed Project amounted to a taking without compensation. Id. Because there is a single family home within this property, there is an economically viable use and no categorical taking.[21]

2. Mr. Peabody's Taking Claim Fails the Three Prong Test.

As previously discussed, in the absence of a categorical taking, courts conduct a three prong factual inquiry to determine (1) the economic impact of the regulation on the claimant; (2) the claimant's reasonable, investment backed expectation; and (3) the character of the government action. See Blair, supra. Here, Mr. Peabody failed to establish that consideration of these factors indicates that denial of his proposal to develop the Site in Parcel Two with a single-family home amounts to a taking of the property.

a. Mr. Peabody Failed to Prove the First Prong of the Three Prong Test.

On the first prong of the test that considers the economic impact of the government

[21] Mr. Peabody's categorical taking claim also fails as a matter of law because, as discussed below, at pp. 44-45, he has not explored alternative uses of the property at issue that make the property more than economically viable.

regulation at issue on the claimant, this test "consider[s] the value of th[e] [claimant's] property 'before and after the alleged taking.'" Blair, 457 Mass. at 645, citing, Giovanella, supra, at 725. The courts have established that the economic impact must be severe before a taking has occurred. E.g., Blair, supra; Gove, supra; FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone, 41 Mass. App. Ct. 681, 693-94 (1996). A diminution in property value alone is usually not enough to amount to a taking. Penn Cent., 438 U.S. at 13133. Thus, an applicant may not simply claim that the value of a parcel of real property is substantially diminished solely because he or she is denied the most profitable use of the property. Id. These legal principles are illustrated by the Massachusetts appellate court rulings in Blair, supra; FIC Homes, supra; and Gove, supra.

Blair involved the Massachusetts Department of Conservation and Recreation's ("DCR") enforcement of the Massachusetts Watershed Management Act, G. L. c. 92A1/2, §§ 1-20, a statute "designed to protect certain water systems that are critical to the public water supply." Blair, 457 Mass. at 635. The plaintiffs in Blair "owned lakefront property located within a 200-foot buffer zone created by the [statute] for land abutting particular sources of drinking water. Pursuant to G. L. c. 92A1/2, § 5, alterations within that buffer zone are prohibited unless a variance is issued [by DCR]. The plaintiffs' single-family home is located on the property. To increase the size of their lawn and double the extent of their existing sandy beach, the plaintiffs sought a variance [from DCR] to remove trees from a forested area of their property." Id. Specifically, the plaintiffs sought a variance to install a beach and lawn on 10,000 to 14,000 square feet of the 125,017 square foot parcel. Blair, 457 Mass. at 645, n. 14.

"[DCR] denied the [plaintiffs'] variance [request] on the ground that the proposed

alterations would be harmful to the water supply; [DCR] determined that the trees in their natural state would better protect water quality than would a lawn and beach." Blair, 457 Mass. at 635. The plaintiffs challenged the DCR's denial of the variance by claiming that the denial constituted a regulatory taking of a portion of their property. Id. The SJC rejected the claim.

The SJC ruled that although DCR's "denial of the variance [at issue] . . . impose[d] a permanent ban on any type of building or landscaping on approximately eight to eleven per cent of the plaintiffs' property," the plaintiffs' regulatory taking claim nevertheless failed because, among other things, the plaintiffs "continue[d] to derive significant economic benefit from their property as a whole." Blair, 457 Mass. at 645. According to the Court, the plaintiffs' "property is zoned for single-family residential use; [they] constructed a single-family house, a three-car detached garage, and a driveway on the locus; [and] they retain[ed] also the use of the pre-existing small sandy beach and dock." Id. The Court ruled that the "eight to eleven per cent reduction in the amount of land that the plaintiffs [could] use [as a result of DCR's variance denial] [might] result in a diminution in value of their property, but it [did] not interfere with the plaintiffs' use of the land to the extent that would represent a taking." Id. In rendering its judgment, the SJC cited its previous ruling in Moskow, supra, that "a wetlands regulation prohibiting building on fifty-five per cent of a plaintiff's land, where that portion of the land retained no economically viable use but the plaintiff could build a single-family house on the remaining portion, did not constitute a taking." Id.

FIC Homes involved a local conservation commission's denial of the plaintiff's proposed construction of a house and driveway on a lot that bordered on and included a vegetative wetland. 41 Mass. App. Ct. at 682. The conservation commission denied approval because the

proposed construction would have violated a local wetlands by-law prohibition against building within 100 feet of a wetland, and would have, in the commission's view, an adverse impact on wetlands interests protected by the by-law, including ground water supply, storm damage prevention, prevention of pollution, and protection of wildlife habitat. Id., at 682. The plaintiff challenged the conservation commission's decision in court on various grounds including that the decision constituted a regulatory taking. Id. The Massachusetts Appeals Court rejected the plaintiff's claims. Id.

The Court ruled that the economic impact of the local wetlands by-law was not overly severe because the lot at issue could still be used for woodland, wetland and recreation purposes, or as additional acreage for neighbors. Id., at 689. The lack of severity was also evidenced by the following facts:

The lot at issue was part of a 38 lot subdivision that the plaintiff had purchased for $389,474.00. Id. At the time of the purchase, the plaintiff knew that three lots in subdivision were unbuildable. Id. According to the plaintiff's real estate appraiser, the value of the lot at issue in the litigation was worth $31,800.00 if buildable, and $1,200.00 if not buildable. Id. This represented a loss in value of $30,600.00 for the lot in dispute. Id. "There was further evidence that the thirty-four buildable lots in the parcel had sold (with houses on them) for an average of $115,000.00 each. The plaintiff's gross proceeds from the sale of the thirty-four buildable lots on the parcel were, therefore, roughly $3,910,000.00. There was no evidence at trial as to the plaintiff's costs for constructing homes on the lots, nor was there evidence indicating the plaintiff's net profit from sale of the thirty-four buildable lots." Id. According to the Appeals Court "it [was] surely . . . reasonable to conclude that, with gross sales of close to $4 million, a

loss of roughly $31,000.00 [did] not represent a 100 percent loss of economic value." Id.

Gove involved the Chatham Zoning Board's denial of a building permit to construct a three bedroom home on an undeveloped parcel of land located within a 100-year coastal floodplain and "coastal conservancy district" in Chatham where construction of new residences was prohibited. 444 Mass. at 755. The plaintiff challenged the Board's decision in court on the ground that the decision constituted a regulatory taking. Id. The SJC rejected the plaintiff's claim. Id.

The SJC ruled that limiting the plaintiff's use of the land for fishing, agriculture, boat launches, and a public beach were reasonable uses as compared to the alternative proposal to construct a house in the 100-year coastal floodplain. 444 Mass. at 762-765. The Court also ruled that the plaintiff had "failed to prove that the challenged regulation left her property 'economically idle'" and left her with just a "token interest" in the property. 444 Mass. at 763. Although the plaintiff's real estate appraiser witness testified that the value of the lot at issue was $346,000.00 "as buildable for a three bedroom dwelling," and $23,000.00 as "unbuildable," the Court ruled that the lower valuation "[was] more than a 'token interest' in the property" because "[it] did not take into account uses allowed in the conservancy district, either as of right or by special permit, which . . . could make the property 'an income producing proposition.'" 444 Mass. at. 763, 764 n.16. Those potential income producing uses included using the property as a marina or boat storage facility as a neighboring property or for stabling horses. Id.

In Mr. Peabody's case, even though the construction of a single-family home at Site in Parcel Two might be the most valuable use of his seaward parcel, Mr. Peabody has nevertheless failed to demonstrate that the value of his real property is so diminished as to be of no value to or

of no profitable use by him, a neighbor, or another interested party. See Gove, supra; Daddario v. Cape Cod Commission, 425 Mass. 411 (1997) (denial of permit authorizing construction of sand and gravel extraction facility on plaintiff's property not a taking because viable alternative uses existed for property). Indeed, he has not explored alternative uses of the property, which is part of the mandatory criteria for obtaining a variance from the Wetlands Regulations.[22] Undisputedly, Mr. Peabody could potentially sell the property to abutters interested in preserving its value as open space, keep it for recreational purposes, or to preserve the highly valued oceanfront location of his single family home situated on Parcel One directly behind Parcel Two. Without exploring these alternative uses of the property, Mr. Peabody cannot pass the first prong of the three prong regulatory taking test.

Moreover, in previous cases, courts have required a decrease in property value exceeding ninety percent before they would consider whether a taking occurred. See. e.g. Appolo Fuels. Inc. v. U.S., 381 F.3d 1338, 1348, (3d. Cir. 2005); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178 (Fed. Cir.); Giovanella, supra. Assuming the most conservative assessment values, the economic impact of the wetlands regulations on Mr. Peabody falls well short of this figure. The evidence introduced at the Hearing established that Parcels One and Two were

[22] In support of his Variance Request, Mr. Peabody provided Department staff with additional information on March 20, 2008, including the Alternative Analysis that he had submitted as part of the MEPA Environmental impact Report and revised to reflect the removal of the septic system and well from Mr. Peabody's proposed Project. Commissioner's Variance Decision, at p. 4; Exhibit 3 of Mr. Peabody's Hearing Exhibits; Document No. 6 of Department's Basic Documents. Mr. Peabody's Alternative Analysis represented that a full alternative analysis for a single family dwelling consisted of a no build alternative (no impact), a larger dwelling located further seaward alternative (adverse impact), and the preferred alternative (no adverse impact). Id. Mr. Peabody reasoned that because the proposed Project site was taxed as a single-family residential lot the no build alternative was not economically possible based on the annual tax burden and the premium he purportedly paid for the land. Id. Mr. Peabody stated that his reason for rejecting the alternative of selling the property to an abutter was that the abutters effectively have use and enjoyment of the land by default, and that human nature dictates "why buy it when we can enjoy it for nothing?" Id, Mr. Peabody did not present any information to indicate that he actually explored the option of selling his land with his abutters. Id.

assessed by the Town of Newbury for a total of $1,255,200.00 in January 2006 when the January 2006 Final Decision was issued denying Mr. Peabody's proposed Project. Commissioner's Variance Decision, at p. 10.[23] Parcel One was assessed at $712,400.00 and Parcel Two was assessed at $542,800.00. Id. Assuming for argument's sake that Parcel Two was rendered valueless by the January 2006 Final Decision denying his proposed Project, Mr. Peabody was still left with a value of $712,400.00 for Parcel One. Id. This amounts to a forty-three percent decrease in total combined property value, not close to the amount required for a possible regulatory taking.

It is also important to note that while Mr. Peabody contends that Parcel Two is worthless if it cannot be developed with a single-family home as he proposes,[24] his real estate appraiser witness, Mr. Ingemi, disagrees with him because he testified that "the market value of the Subject Property as a non-buildable lot is $145,000.00." [Pre-filed] Testimony of Stephen Ingemi (December 3, 2008) ("Mr. Ingemi's PFT"), ¶ D.1, at p. 9. This valuation suggests that Mr. Peabody has more than a "token interest" in the property. Gove, supra, 444 Mass. at 763. While it is true that Mr. Ingemi testified that in his opinion "the market value of the Subject

[23] In court, real estate tax assessments by municipalities may be introduced in evidence in property taking cases as evidence of the fair market value of the real estate purportedly taken by the government. See G.L. c. 79, § 35. While this rule of evidence need not be observed in this administrative appeal, See G.L. c. 30A, § 11(2), real estate tax assessments by municipalities are nevertheless "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs," Id., and, as a result, former Commissioner Burt and the Chief Presiding Officer properly considered the Newbury real estate assessments discussed above in rejecting Mr. Peabody's taking claim.

[24] See Mr. Peabody's Appeal Notice[appealing former Commissioner Burt's Variance Denial] (September 16, 2008) ("Appeal Notice"), at p. 1. In his Appeal Notice, Mr. Peabody contended that "[he was]] appealing [former Commissioner Burt's] decision [because] it ha[d] rendered worthless property that previously had a market value in excess of $1.6 million . . . ." Appeal Notice, at p. 1.

Property as a buildable lot is $1,325,000.00,"[25] his opinion, as discussed below, is based on a faulty interpretation of the Newbury Zoning Bylaws and G.L. c. 40A, § 6, which limit the property's development.

b. Mr. Peabody Failed to Prove the Second Prong of the Three Prong Test.

As discussed previously, the second prong of the three prong test considers the extent to which the regulation at issue has interfered with the claimant's distinct investment-backed expectations. Blair, 457 Mass. at 641, 646; Leonard v. Brimfield, supra, 423 Mass. at 156. The courts have established a high bar for analyzing a claimant's purported investment-backed expectations. Id. In the words of one court, the SJC, "[a] property owner's investment-backed expectations must be reasonable and predicated on existing conditions . . . . It must be more than a "unilateral expectation or an abstract need.'" Leonard v. Brimfield, supra, 423 Mass. at 154 (plaintiff "could not have had a reasonable, investment-backed expectation that she would have been permitted to subdivide . . . flood plain property" because "she purchased the property subject to the restrictions on building in a flood plain"); Blair, 457 Mass. at 641, 646 (DCR's denial of variance did not interfere substantially with the plaintiffs' investment-backed expectations because "the plaintiffs . . . built a single-family house on a lot zoned for that purpose, and ha[d] been denied merely the ability to install a larger beach or lawn on eight per cent of their property").

Additionally, a claimant cannot be compensated for property rights he or she never had. Leonard v. Brimfield, supra, 423 Mass. at 154; Gove, supra, 444 Mass. at 765-66. As a result, the courts will consider whether the landowner knew or should have known the land was

[25] Mr. Ingemi's PFT, ¶ C.1, at p. 7.

subject to regulation when the landowner took title, and whether he or she paid less as a result, in determining whether investment-backed expectations were reasonable. W.R. Grace & Co.-Conn. v. Cambridge City Council, 56 Mass. App. Ct. 559, 574 (2002); FIC Homes, 41 Mass. App. Ct. at 693-94.

Here, Mr. Peabody's taking claim also fails because he did not have reasonable investment- backed expectations when he purchased the Land in August 1997. His investment-backed expectations at that time and in August 2000, when he filed the NOI with the NCC seeking approval of the proposed Project on the Site in Parcel Two, should have been tempered by the Wetlands Protection Act, the Wetlands Regulations, the Title 5 Regulations, and local zoning laws. The Wetlands Regulations applicable to Mr. Peabody's proposed Project were initially promulgated in 1978. The applicable Title 5 Regulations governing the installation of septic systems were promulgated in 1995. The septic system serving the house located on Parcel One was located on the Site in Parcel Two when Mr. Peabody purchased the Land and remains in the same location. His lender's appraisal report from 1997 placed Mr. Peabody on actual notice that the Wetlands Protection Act, the Wetlands Regulations, Title 5, and zoning rules and regulations could make further development of the Site difficult or impossible. Commissioner's Variance Decision, at pp. 10-11.[26]

Another consideration for determining the reasonableness of Mr. Peabody's investment-backed expectations is whether he paid a higher price for the two-parcel Land based on an ability to build on the seaward parcel. Giovanella, supra; Gove, supra. Mr. Peabody's purchase price of $285,000.00 for the Land in August 1997 is comparable to the $249,800.00 value for the Land

[26] Mr. Peabody testified on cross-examination at the Hearing that prior to purchasing the property, he reviewed the requirements of the MWPA, the Wetlands Regulations, Title 5, and Newbury's zoning rules and regulations.

assessed by the Newbury Town Assessor in that year. Commissioner's Variance Decision, at p. 11. Approximately $35,000.00 above assessed value is not a sufficient amount to suggest that Mr. Peabody's purchase price reflected an ability to build a new house on the Site in Parcel Two that could yield hundreds of thousands or millions of dollars upon sale.[27] In fact, Mr. Peabody's purchase price in August 1997 more likely reflected a property subject to strict zoning and environmental regulations that would prohibit new development. Local zoning laws should also have tempered Mr. Peabody's investment-backed expectations.

In his June 30, 2008 letter to the Department, Mr. Peabody asserted that he reviewed Newbury zoning laws in effect at the time of purchase and conferred with the Newbury Building Department, attorneys, and a real estate agent to determine that at least one, and possibly all three open lots in Parcel Two could be developed. Commissioner's Variance Decision, at p. 11. However, Parcel Two was zoned by Newbury as Agricultural-Residential ("AR") when Mr. Peabody purchased it in August 1997. Id.; See Mr. Peabody's Hearing Exhibit No. 9.[28] Mr. Peabody would not be able to build a single family home as of right on the Site in Parcel Two because it only contains 15,682 square feet (0.36 acres). Id. The AR zone requires a minimum of 40,000 square feet and 125 feet of parcel frontage for development of a residential dwelling.

[27] It is also important to note that Mr. Peabody's real estate advisor, Mr. Silverstein, who purportedly advised Mr. Peabody on his purchase of the property at issue, testified on cross-examination at the Hearing that he had never sold homes on Plum Island, but had only sold and leased real properties in Suffolk County, Massachusetts. Mr. Silverstein's Cross-Examination Testimony (March 19, 2009). He also testified on cross-examination that he did not advise Mr. Peabody that Parcel Two was developable. Id. He also testified that he did not consult with the Newbury Building Inspector regarding zoning restrictions on the property, and did not discuss with Mr. Peabody the application of State and local environmental and land use regulations governing the property. Id.

[28] Mr. Peabody's Hearing Exhibit No. 9 contains a copy of § 97-6, Use Restrictions, Article III A-R District Use Regulations of the Newbury Zoning Code. As of November 15, 2007, these provisions have been codified in the following sections of the Newbury Zoning Bylaws: § 97-2B(2)(a) (Use Districts); § 97-3C(1)(a) (Regulations of Use Districts); § 97-6B (Dimensional Regulations). See http://www.townofnewbury.org/Pages/Newbury%20Bylaws.pdf.

Id. Simply stated, the AR zoning designation for the Land defeats Mr. Peabody's taking claim based on reasonable, investment-backed expectations. Leonard v. Brimfield, supra (presumed ability to subdivide and develop flood plain property after purchase not a reasonable, investment backed expectation because zoning law requiring special permit to construct was in existence at time of purchase); Dunn, supra, 4 DEPR at 224, 1997 MA ENV LEXIS 5, at 29-30 (taking claim rejected because property owners' only reasonable investment-backed expectation when they purchased the property was the possibility of obtaining a permit under the MWPA and Wetlands Regulations authorizing their proposed project but "they were . . . on notice from time that they acquired the property, however, that a permit might be denied, and that denial was a certainty if a project they proposed could not be conditioned to protect relevant wetlands interests").

The lack of reasonable investment-backed expectations is also evidenced by the fact that Parcel Two is not entitled to zoning "grandfathering" under either the Newbury Zoning Bylaws or Section 6 of the Massachusetts Zoning Act, G.L. c. 40A.[29] Contrary to the assertions of Mr. Peabody's real estate appraiser witness, Mr. Ingemi,[30] Parcel Two is not entitled to the zoning

[29] As of November 15, 2007, the zoning grandfathering provisions of the Newbury Zoning Bylaws are set forth in § 97-10 of the Bylaws. See http://www.townofnewbury.org/Pages/Newbury%20Bylaws.pdf

[30] See Mr. Ingemi's PFT, ¶ B.6, at p. 4; Mr. Ingemi's Rebuttal PFT, ¶¶ B.1 and B.2, at p. 2. Mr. Ingemi's pre-filed testimony contending that Parcel Two is entitled zoning grandfathering under the Newbury Zoning Bylaws and G.L. c. 40A, § 6 is based on a conversation that he purportedly had with Sam Joslin, Newbury's Zoning Enforcement Officer ("ZEO") on an unspecified date. Id. Through this hearsay, Mr. Peabody has attempted to make the ZEO an expert witness on behalf of a private party—Mr. Peabody. It is well settled that government employees such as the ZEO may testify in litigation as fact witnesses but not as expert witnesses on behalf of private parties. See Pittsfield Airport Commission, supra, 2010 MA ENV LEXIS 89, at 42 ("government employees . . . may generally be called as fact witnesses, but not expert witnesses [on behalf of private parties]"); Exxon Shipping Co. v. U.S. Dep't of the Interior, 34 F.3d 774, 779 (9th Cir. 1994) (Federal Rules of Civil Procedure "prevent private parties from exploiting government employees as tax-supported pools of experts"); Bogan v. City of Boston, 489 F.3d 417, 423 (1st Cir. 2007), citing, Church of Scientology of Boston v. I.R.S., 138 F.R.D. 9, 12-13 (D. Mass. 1990) ("heads of agencies are normally not subject to depositions."). Accordingly, the Chief Presiding Officer properly rejected this portion of Mr. Ingemi's pre-filed testimony. The Chief Presiding Officer also properly rejected this portion of Mr. Ingemi's testimony because, as discussed above, it was based on an erroneous application of the zoning grandfathering provisions of the Newbury Zoning Bylaws and G.L. c. 40A, § 6, and thus failed to a present a reasonable prospect that a single family home could be built on Parcel Two as proposed by Mr. Peabody. See Skyline Homes, Inc v.

grandfathering under either the Newbury Zoning Bylaws or G.L. c. 40A, § 6 for the following reasons.

Parcel Two is located in the Plum Island Overlay District established in the Newbury Zoning Bylaws. Petitioner's Objections to the Tentative Decision, at p. 23.[31] The PIOD provides that the zoning grandfathering provisions in the Newbury Zoning Bylaws do not apply to the PIOD; instead, construction of single family residences in the PIOD is governed by the zoning grandfathering provisions of G.L. c. 40A § 6, paragraph 4. See §§ 97-4D(5)(i) and 97-10B, Newbury Zoning Bylaws, November 15, 2007. The fourth paragraph of G.L. c. 40A § 6 provides:

> Any increase in area [or] frontage . . . requirements of a zoning ordinance or by-law shall not apply to a lot for single . . . family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to the then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. . . (Emphasis supplied.)

The Newbury Zoning Code was enacted in 1959. See Mr. Peabody's Hearing Exhibit 9. The evidence demonstrates that Carmen and Linda Addonizio acquired Parcel Two in 1949, and an adjoining lot, now known as Parcel One, in 1952. See Adm. Rec. 985-990 of

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Commonwealth, 362 Mass. 684, 687 (1972) (trial judge properly excluded from evidence land's potential use as a source of loam where the town zoning by-law barred such a use, except by a special permit, and landowner introduced no evidence of reasonable prospect that the bar would soon be lifted); Contrast, Clifford v. Algonquin Gas Transmission Company, 413 Mass. 809, 814-22 (1992) (trial judge properly admitted in evidence plaintiff's subdivision development plan for real property begun prior to, but completed after taking, because plan was not unduly speculative or conjectural); Colonial Acres, Inc. v. North Reading, 3 Mass. App. Ct. 384, 386 (1975) (petitioner entitled to demonstrate a reasonable probability that zoning restriction prohibiting use of land as a sanitary landfill would be removed).

[31] Since November 15, 2007, the PIOD has been codified in Sections 97-2C(3), 97-2D(4), 97-4D, and 97-10 of the Newbury Zoning Bylaws. See http://www.townofnewbury.org/Pages/Newbury%20Bylaws.pdf. The Bylaws provide that the purpose of the PIOD "[is] to reduce damage to public and private property resulting from flood waters; ensure public safety by reducing threats to life and personal injury; eliminate costs associated with the response and cleanup of flooding conditions; preserve open space; and limit the expansion of nonconforming single and two family structures so as to prevent the exacerbation of existing problems with density and intensity of use." Newbury Zoning Bylaws, § 97-4D(1), November 15, 2007.

January 2006 Final Decision. Accordingly, Parcel Two was held in common ownership with Parcel One at the time of the enactment of the Newbury Zoning Code in 1959, and, as a result, the grandfathering provisions of G.L. c. 40A, § 6, paragraph 4 do not apply to Parcels One and Two.

c. Mr. Peabody Failed to Prove the Third Prong of the Three Prong Test.

Lastly, Mr. Peabody's taking claim also fails under the third prong of the regulatory taking test. As discussed previously, the third prong requires an examination of the character of the governmental action. Blair, supra. Determining the character of the governmental action examines whether the government action "amounts to a physical invasion or instead merely affects the property interest through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005), quoting Penn Cent., 438 U.S. at 104.

Here, Mr. Peabody cannot claim that the Wetlands Regulations result in a physical appropriation of his real property. Mr. Peabody still owns Parcel Two in fee simple and can exclude others from trespassing onto it. He also could sell Parcel Two to others, can enjoy Parcel Two as open space seaward of his house on Parcel One, and can realize the flood control and storm damage prevention benefits the undeveloped primary coastal dune on Parcel Two provides for his house on Parcel One. Moreover, the Wetlands Regulations applicable to Mr. Peabody's proposed Project serve important public policies of flood control, storm damage prevention, and protection of wildlife habitat. See In the Matter of Nelson, Docket No. 93-089, Final Decision, 6 DEPR 120, 124, 1999 MA ENV LEXIS 714, at 20 (May 3, 1999); Dunn, supra, 4 DEPR at 222, 1997 MA ENV LEXIS 5, at 19-20. Mr. Peabody has failed to

demonstrate that the harm he purportedly suffers from a wetlands permit denial outweighs the numerous public interests served by the Wetlands Regulations.

CONCLUSION

Based on the foregoing, former Commissioner Burt properly denied Mr. Peabody's Variance Request. Her decision is affirmed.

NOTICE OF FINAL DECISION

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Final Decision, pursuant to 310 CMR 1.01(14)(e). The motion must be filed with the OADR Case Administrator and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

Date: _____

_____
Kenneth L. Kimmell
Commissioner

SERVICE LIST

In The Matter Of:	Stephen D. Peabody, Trustee
Docket No. WET-2008-063	File No. NE 050-0562 Newbury

Representative	Party
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