Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: **ESCV2006-00299-B**

RE: Peabody Individualli v Department of Environmental Protection et al

TO: Seth Schofield, Assist Atty General, Esquire
Attorney General Office-Environm
One Ashburton Place
Boston, MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on **06/26/2007** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER On Plaintiff's motion for judgment on the pleadings (Elizabeth M. Fahey, Justice). Copies mailed 6/26/07
Dated at Salem, Massachusetts this 26th day of June, 2007.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: JoDee Doyle
Assistant Clerk

Telephone: (978) 462-4474

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Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# **ESCV2006-00299**

Stephen D Peabody, Individually and as
Trustee of the Peabody Family Realty Trust

vs

Department of Environmental Protection and
Robert W. Golledge, Jr., Commissioner of the
Department of Environmental Protection

JUDGMENT

This action came on before the Court, Elizabeth M. Fahey, Justice, presiding, on the plaintiff's motion for judgment on the pleadings on Count I, the parties having been heard, the Court having rendered a "Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings", having denied the plaintiff's motion, and upon consideration thereof,

It is **ORDERED and ADJUDGED:**

That the decision of the Commissioner of the Department of Environmental Protection be and hereby is **AFFIRMED**.

Dated at Newburyport, Massachusetts this 25th day of June, 2007.

Thomas H. Driscoll Jr.,
Clerk of the Courts

By: .....
Assistant Clerk

~~Copies mailed 06/25/2007~~

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT
CIVIL ACTION NO. 06-0299

STEPHEN D. PEABODY[1]

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION & another[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction

The plaintiff, Stephen D. Peabody, individually and as Trustee of the Peabody Family Realty Trust, brought this action challenging a decision by the Commissioner of the Department of Environmental Protection ("the DEP") denying the plaintiff's application for a permit to construct a house and related improvements on property in Newbury. In his complaint, the plaintiff seeks judicial review of the decision under G.L. c. 30A, § 14 (Count I), and claims that the decision violated his constitutional rights to substantive due process (Count II) and to equal protection (Count III), and that it amounted to a taking in violation of both the federal constitution (Count IV) and the Massachusetts Declaration of Rights (Count V). The plaintiff now moves for judgment on the pleadings on Count I. For the reasons set forth below, the Court denies the plaintiff's motion for judgment on the pleadings and affirms the DEP Commissioner's

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[1]Individually and as Trustee of the Peabody Family Realty Trust

[2]Robert W. Golledge, Jr., Commissioner of the Department of Environmental Protection

decision.

II. Background

The Court takes the following facts from the administrative record and reserves additional facts as necessary for the legal analysis.

In 1997, the plaintiff purchased oceanfront property on the northern end of Plum Island in Newbury. On the landward portion of the property is a three-bedroom house. In early 2000, the plaintiff transferred to the Peabody Family Realty Trust the seaward portion of the property ("the site").

On August 28, 2000, the plaintiff filed a Notice of Intent with the Newbury Conservation Commission ("the Conservation Commission"), proposing to construct on the site a 1,080 square foot house and a deck on nine pilings, a 300 square foot gravel driveway, a parking area under the house, a septic system and a well. The proposed construction area is 200 feet from the Atlantic Ocean and lies on a coastal dune. The project would impact four resource areas protected by the Wetlands Protection Act ("the WPA"), G.L. c. 131, § 40: a coastal dune, a coastal beach, land subject to coastal storm flowage, and a barrier beach (as Plum Island is a barrier beach).

On March 29, 2001, the Conservation Commission issued an Order of Conditions ("OOC") allowing the project. Several of the plaintiff's neighbors sought a Superseding Order of Conditions ("SOC") prohibiting the project, arguing that it would adversely affect the already unstable coastline. On March 12, 2002, the DEP's Northeastern Regional Office issued a negative SOC denying the project for failing the performance standards for work in a coastal

dune under 310 Code Mass. Regs. § 10.28(3)(b). The DEP's Northeastern Regional Office opined that (1) the plaintiff had not shown how the project would not impair the ability of the coastal dune, which the DEP called a primary coastal dune, to serve the statutory interests of flood control and storm damage prevention, and (2) the project called for the removal of existing vegetation without adequate replacement.

On March 26, 2002, the plaintiff filed with the DEP a notice of claim for an adjudicatory hearing to appeal the negative SOC. The plaintiff was requested to and did complete the procedures required under the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, §§ 61-62H. As part of the MEPA process, the plaintiff filed a Draft Environmental Impact Report ("DEIR"), in which he acknowledged that the project could affect the ability of waves to remove sand from the dune, disturb the vegetative cover so as to destabilize the dune, cause a modification 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. (A.R. 000543-000544). The plaintiff denied the likelihood that these adverse environmental impacts would occur, however, due to the "site's natural development, historical shoreline change and storm history, as well as the proposed construction techniques and mitigation measures." (A.R. 000544). The DEIR also contains a provision that

> "The Proponent (and successors) shall assume the risk of shoreline erosion on this lot and accept that neither the Town nor the Commonwealth of Massachusetts need consent to any measure which will interfere with natural processes on the property."

(A.R. 000546).

With respect to his proposed mitigation measures in the DEIR, the plaintiff asserted that the revegetation 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."

The plaintiff's DEIR also included letters from several neighbors opposing the project and the plaintiff's responses. One couple stated in their letter that in 1967, severe erosion had caused the owners of several houses, including the plaintiff's, to move their houses landward; that in 1978 what is now the plaintiff's house and others were surrounded by water; and that in 1991, water surged down the right of way. (A.R. 000667). Another neighbor also recounted that the house on the plaintiff's site and others nearby were moved "westerly and away from imminent damage" "by reason of regular tidal threats" and that more recently, a primary dune had blown in on the site and blocked his ocean view. (A.R. 000665). A third letter was submitted by a man acting on behalf of a "concerned citizens group" and reiterated that in 1967, the plaintiff's house had been moved 100 yards. The author also offered to provide photographs depicting flooding at the project site in 1998. (A.R. 000666).

In the DEIR, the plaintiff responded to these letters but did not deny that his house and others had been moved landward in 1967. Instead, the plaintiff replied,

> "A general response to the [couple's] letter is that no damage to the dune has occurred from moving the previous home. . . . If, as in the past, the dwelling and septic system are threatened by erosion, these structures will be removed form [*sic*] the site. The Proponent is proposing conditions that will require this."

(A.R. 000612).

On October 6, 2003, the Massachusetts Office of Coastal Zone Management ("CZM") weighed in on the MEPA proceedings. The CZM requested more shoreline erosion data than

that supplied by the plaintiff in the DEIR, noting, "Based on the increasing rates of erosion observed by CZM in the past ten years, the 2000 shoreline does not appear to be representative of the trends taking place along this section of the barrier beach." (A.R. 000679). In December 2003, the Secretary of the Executive Office of Environmental Affairs issued a certificate accepting the plaintiff's Environmental Impact Report ("EIR").

In July and September of 2004, an administrative magistrate of the Division of Administrative Law Appeals conducted an adjudicatory hearing over three days on the plaintiff's appeal from the negative SOC. On September 1, 2005, the administrative magistrate issued her Recommended Final Decision, concluding that the project should be approved because, *inter alia*, it could be conditioned to conform to the performance standards in the wetlands regulations for work in a coastal dune. The administrative magistrate did not give weight to the testimony regarding coastline instability by the DEP's two main witnesses, Rebecca Haney Inglin and James Sprague, because, in part, neither clarified exactly where on the plaintiff's site each had observed erosion.[3] The administrative magistrate submitted the Recommended Final Decision to the DEP Commissioner, Robert Golledge, Jr. ("the Commissioner"), for his final decision in the matter.

The parties agree that the two questions addressed by the Commissioner which remain relevant are: (1) whether the project will interfere with landward movement of the coastal dune in violation of 310 Code Mass. Regs. § 10.28(3)(d), and (2) whether the proposed revegetation plan

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[3] The DEIR site plan appears to show that the plaintiff's property is a 70 foot wide strip of land leading northeasterly to the Atlantic Ocean. (A.R. 000669).

will assure the stability of the coastal dune and comply with 310 Code Mass. Regs. §10.28(3)(b).[4] On November 1, 2005, the Commissioner issued a tentative decision in which he expressed concern that the proposed project would not satisfy the WPA and regulatory standards for coastal dunes. He explained that he was issuing the tentative decision "to allow the parties an opportunity to identify errors and to respond to findings that may not have been addressed in post-hearing briefs." The plaintiff objected to the tentative decision, and the Commissioner heard oral argument on December 22, 2005. On January 25, 2006, the Commissioner issued a 27 page Final Decision which did not significantly modify the tentative decision, and in which he again concluded that the project did not meet the performance standards to protect the barrier

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[4]The parties also flag a third issue which requires little analysis: whether the proposed septic system will protect the interests of the WPA.

By way of additional procedural background, on April 30, 2002, the Newbury Board of Health approved the plaintiff's application for a septic system permit under Title 5. On December 3, 2003, the DEP notified the plaintiff that pursuant to 310 Code Mass. Regs. § 15.003(2)(e), it was taking jurisdiction from the Newbury Board of Health with respect to the review and approval of the septic system permit. On March 24, 2004, the DEP denied the septic system permit. The plaintiff appealed from that denial and that appeal was consolidated for the purpose of administrative convenience with the plaintiff's appeal of the SOC.

The significance of the septic system at this stage, however, appears to be minimal. The plaintiff gave it only cursory attention in his memorandum in support of the motion for judgment on the pleadings, as it appears that Newbury will or can make public water and sewer systems available to the plaintiff's property and because the dispositive issue here, with or without a septic system, remains that of shoreline stability. In any event, contrary to the plaintiff's arguments, the Commissioner in his Final Decision did not ignore the plaintiff's statements at the hearing that there will be a public water and sewer system which will eliminate the proposed need for a well and septic system. Rather, the Commissioner took issue with the plaintiff's understatement of the scope of the project without the septic system. (Final Decision, p. 6). More importantly, the Commissioner concurred with the administrative magistrate's conclusions regarding the septic system and that "the septic system in this case is not within the v-zone [velocity flood zone] established by the FIRM [Flood Insurance Rate Map], and there is no basis for concluding that the flood data on which the map was based should yield a different result." For all these reasons, the plaintiff has raised no serious question regarding the Commissioner's Final Decision insofar as it relates to the septic system.

beach and the coastal dune under the wetlands regulations.

Fundamental to the Commissioner's decision are his findings about shoreline stability, which rested in part upon some of the plaintiff's DEIR submissions, including the neighbors' letters as described above, and a site plan. This plan documents the erosion of 28 feet between 1928 and 1953, the accretion of 90 feet between 1953 and 1978, the erosion of 55 feet between 1978 and 1994, and the accretion of 105 feet between 1994 and 2000. (Final Decision, p. 18, citing plan at A.R. 000669).

The Commissioner determined, based on his detailed study of the topographic data in the record, that the project would "be constructed entirely within the dune closest to the coastal beach – or primary dune –on this barrier island." (Final Decision, p. 12-13). He then underscored the importance of coastal dunes to storm damage prevention and flood control pursuant to the wetlands regulations 310 Code Mass. Regs. § 10.28.

In the Final Decision, the Commissioner explained his reasoning:

> "The applicant seeks to capitalize on recent accretion and growth of the primary dune by constructing a new house on it, accepting that it must be moved, as in the past, when erosion threatens again. While the applicant, or a subsequent owner, would assume the risk and bear the cost of this arrangement, the Department must protect the public interest in storm damage prevention and flood control. Based on the regulatory standard and support in the record on the dynamic nature of coastal processes at this site, I conclude that this project, within a primary coastal dune on a barrier beach, will adversely effect its natural process of changing form and moving laterally in response to wind and wave action; it is precisely this ability of dunes and barrier beaches to transform and migrate that sustains their ability to prevent storm damage and provide flood control, protecting more inland areas."

(Final Decision, p. 3). Turning to the mitigation goals of the revegetation plan, the Commissioner wrote,

> "In large measure, this case presents the issue of whether, under the regulations, an

applicant can compensate for the disturbance of dune vegetation by providing additional vegetation in other areas at the site. The applicant asserts, and the Department staff agrees, that planting dune . . . vegetation can stabilize the dune within the vegetated areas. On a primary dune immediately adjacent to the beach where erosion and deposition are most active, however, the planting of additional vegetation to promote dune growth in some places cannot substitute for loss of dune stability and related changes in form and volume from the project."

(Final Decision, p. 5). The Commissioner concluded:

"Based on the evidence of recent change at the site, the disturbance of the vegetative cover, and the interference with the movement of the dune, I cannot conclude that this project would not adversely affect the capacity of the dune to serve the interests of storm damage prevention and flood control."

(Final Decision, p. 7). The Commissioner further found that

"the primary dune of the site is situated in an area that is still undergoing active erosional and depositional processes, in large part due to human intervention in the natural environment. I also find that the placement of structures in this primary dune will impair its ability to migrate according to the natural forces of wind and water. I find that the placement of structures will interfere with the natural growth of dune vegetation at the site."

(Final Decision, pp. 16-17).

The plaintiff timely filed this appeal.

II. Standard of Review

Under G.L. c. 30A, § 14, a person aggrieved by a decision of an agency in an adjudicatory proceeding has the right to appeal that decision to the Superior Court, which can reverse or modify the agency decision if it determines that the substantial rights of any party may have been prejudiced because the decision is unsupported by substantial evidence, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. G.L. c. 30A, § 14 (7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate

to support a conclusion." G.L. c. 30A, § 1 (6). "In deciding whether agency findings have satisfied this standard, we do not decide questions of credibility or weigh conflicting evidentiary versions . . . and we respect the agency's expertise insofar as the drawing of inferences is concerned." *Silvia* v. *Securities Division*, 61 Mass. App. Ct. 350, 358 (2004). Consideration of whether the agency decision is supported by substantial evidence is on the entire administrative record and takes into account whatever in the record fairly detracts from the weight of the evidence. See *Arnone* v. *Comm'r of the Dept. of Social Services*, 43 Mass. App. Ct. 33, 34 (1997). A decision is not arbitrary and capricious unless there is no ground which reasonable persons might deem proper to support it. *FIC Homes of Blackstone, Inc.* v. *Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 684-685 (1996).

The party challenging an administrative decision under G.L. c. 30A, § 14, has the burden of demonstrating the invalidity of the decision. *Merisme* v. *Board of Appeals on Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989). Absent allegations of irregularities in the administrative agency procedures, judicial review of the agency's decision is confined to the administrative record. G.L. c. 40A, § 14 (5). The court reviewing the agency decision must accord due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. G.L. c. 40A, § 14 (7). The approach is one of "judicial deference and restraint, not abdication." *Fafard* v. *Conservation Comm'n of Reading*, 41 Mass. App. Ct. 565, 572 (1996).

> "It is for the agency, not the courts, to weigh the credibility of witnesses and resolve factual disputes. A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo."

School Comm. of Wellesley v. *Labor Rels. Comm'n*, 376 Mass. 112, 120 (1978) (internal quotations and citations omitted).

III. Regulatory Standards for Coastal Resource Areas

Coastal beaches, barrier beaches and coastal dunes such as those on the site of the proposed project are subject to protection under the WPA. See G.L. c. 131, § 40 ("No person shall . . . alter any . . . beach, dune, . . . or any land subject to tidal action, coastal storm flowage, or flooding . . . without filing a written notice of his intention [to do so] . . . including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of conditions. . . ."). All coastal dunes are likely to be significant to storm damage protection 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 protection and flood control." 310 Code Mass. Regs. § 10.28. The regulation imposing performance standards for coastal dunes mandates that

> "Any alteration of, or structure on, a coastal dune or within 100 foot of a coastal dune shall not have an adverse effect on the coastal dune by: (a) affecting the ability of the waves to remove sand from the dune; (b) disturbing the vegetative cover so as to destabilize the dune; (c) causing any modification of the dune form that would increase the potential for storm or flood damage; (d) interfering with the landward or lateral movement of the dune; (e) causing removal of the sand from the dune artificially; or (f) interfering with . . . bird nesting habitat."

310 Code Mass. Regs. § 10.28(3).

IV. Discussion

A. Shoreline Stability

The plaintiff contends that there was no substantial evidence to support the Commissioner's conclusions that the shoreline has "undeniably undergone significant movement in the past," that this movement may be masked by calculations of a long-term stable rate of erosion of -0.3 feet per year, and that the project cannot be conditioned to meet performance standards in such a highly variable resource area. The plaintiff strenuously challenges the Commissioner's deviations from the administrative magistrate's findings, arguing that "[a]ny attempts by DEP's witnesses to offer such evidence [of shoreline instability] were discredited by [the administrative magistrate]."

The Commissioner was not bound to accept the administrative magistrate's evidentiary assessments, and could "adopt, modify, or reject a recommended decision . . . ." 310 Code Mass. Regs. § 1.01 (14)(b). The administrative magistrate's findings on "resolution of credibility questions (i.e., that a fact is true because a witness testified to it and that witness is believable)" are entitled to substantial deference by the Commissioner, who can properly reject those findings with a "considered articulation of the reasons underlying that rejection." See *Morris* v. *Board of Registration in Medicine*, 405 Mass. 103, 110-111 (1989). The Commissioner correctly points out, however, that the administrative magistrate's findings regarding the DEP's experts were not based upon a resolution of credibility questions, but on her evaluation of the relevance and reliability of expert opinions. (Final Decision, p. 4 n. 6). That the administrate magistrate did not mention the neighbors' letters does not support the inference urged by the plaintiff, that the administrative magistrate assessed and rejected the credibility of the neighbors' statements.

The plaintiff next criticizes the Commissioner's reliance upon hearsay in the letters from neighbors describing shoreline erosion and accretion, including the 1967 landward move of several houses which nonetheless were subsequently surrounded by water, and the more recent formation of a new coastal dune between the houses and the ocean. There is no merit to the plaintiff's argument as to these letters that written testimony must be excluded from the record under 310 Code Mass. Regs. § 1.01(13)(h)(3) if a witness is not made available for cross-examination at a hearing. This regulation has no applicability here, as the letters do not constitute written testimony.

Moreover, the Commissioner is not bound by the rules of evidence observed by the courts. 310 Code Mass. Regs. § 1.01 (13) (h) 1. See also *Embers of Salisbury, Inc.* v. *Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 529 (1988). Rather, in DEP proceedings such as this,

> "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. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer."

310 Code Mass. Regs. § 1.01 (13) (h) 1. The Commissioner was the sole judge of the credibility and weight of evidence before him during the agency proceeding. See *Town of Shrewsbury* v. *Comm'r of the Department of Environmental Protection*, 38 Mass. App. Ct. 946, 948 (1995) (it was error for reviewing judge to reject administrative law judge's use of hearsay evidence without regard for its reliability and probative value).

A review of the entire administrative record discloses that the neighbors' statements corroborate each other and remain unrebutted by the plaintiff. Despite opportunities to challenge

the neighbors' accounts of erosion, accretion, and flooding at the site (in the SOC and MEPA proceedings, and at the Commissioner's invitation to responses to his tentative decision), the plaintiff has not denied that the house on his property and those on nearby properties were moved landward in 1967 when threatened with erosion or that the site for the proposed work is a relatively recently formed dune. Instead, the plaintiff replied in his DEIR to neighbors opposing the project that "no damage to the dune has occurred from moving the previous home" and he has otherwise attempted to sidestep the issue by raising nonsubstantive challenges to the neighbors' accounts, i.e., that their request for a SOC was not timely and that their statements are hearsay. Since the plaintiff agreed in his DEIR that, if the project were permitted, he would move the house at his expense if, as in the past, it were necessary due to erosion, I accept that he does not dispute the substance that homes on his and nearby lands were previously moved landward because of dune erosion. It cannot be said that the neighbors' hearsay statements are devoid of any indicia of reliability or probative value or that the Commissioner abused his discretion or otherwise erred by giving them weight. See *Embers of Salisbury, Inc.* v. *Alcoholic Beverages Control Comm'n*, 401 Mass. at 530-531. Moreover, other data submitted by the plaintiff in his DEIR, in particular the plan documenting patterns (but not specific storm-related events) of erosion and accretion on Plum Island since 1953, independently support the Commissioner's finding that the shoreline has "undeniably undergone significant movement in the past." Consequently, the Commissioner's findings relating to shoreline changes are based upon substantial evidence. See G.L. c. 30A, § 1 (6).

The rest of the plaintiff's arguments are worthy of only cursory attention. Contrary to the plaintiff's assertions, the Commissioner did articulate his reason for not accepting the plaintiff's

calculation (not methodology) regarding the "540 square foot rule" used to assess dune erosion. The Commissioner explained that the plaintiff's calculation "did not show the eroded profile, which would have sloped landward with the line on the plan showing the results of the 540 sq. ft. rule also falling further landward," and because "reliance on the present dune profile may be misplaced, given the evidence of erosion and accretion at the site." (Final Decision, p. 19).

Likewise without support is the plaintiff's claim that the Commissioner improperly relied upon Executive Order 181 in a manner outside of its limited scope or purpose. The complained-of passage from the Final Decision is the following: "Similarly, Executive Order 181, signed in 1980, states that 'At a minimum, no development shall be permitted in the velocity zones or primary dune areas of barrier beaches identified by the [DEP].'" (Final Decision, p. 15). The reference to Executive Order 181 was designed to highlight the importance of protecting coastal dunes and barrier beaches in both Massachusetts wetlands regulations and in Executive Order 181, and was not necessary to support the Commissioner's findings and conclusions, in light of the stringent standards imposed by 310 Code Mass. Regs. § 10.28 governing any adverse effects on coastal dunes, regardless of whether such dunes are primary dunes or are on barrier beaches.

B. Mitigation of Adverse Impacts

The plaintiff claims that there is no substantial evidence that the stability of the coastal dune will not be protected by the proposed revegetation plan. The problem with this argument is that it depends in large part upon the plaintiff's failed premise that the shoreline at the site has been and will remain stable. The coastal dune on the site has undergone significant changes and there was substantial evidence in the record to support the Commissioner's conclusion that the

construction of a residence on pilings directly on the coastal dune closest to the ocean would have an adverse effect on the stability of the coastal dune by disturbing vegetation so as to destabilize the dune, modifying the dune form so as to risk causing increased potential for storm damage or flooding, and interfering with the landward or lateral movement of the dune. See 310 Code Mass. Regs. § 10.28(3).

The plaintiff criticizes the Commissioner's position that planting vegetation to increase dune growth beyond what would normally occur in order to add protection to the plaintiff's property is not advisable. The Commissioner explained that Massachusetts case law instructs that retaining the natural littoral movement of sand along barrier beaches so that the volume of downdrift sediment supply remains constant is important to the lateral movement of the sediment in the dune. The Commissioner referenced evidence in the record of erosion on Plum Island south of the plaintiff's property to support his opinion that trapping sand by increased vegetation at the plaintiff's site may increase the coastal dune there but contribute to existing erosion problems further south along Plum Island.

The Commissioner, therefore, had a sufficient factual and legal basis for concluding that the proposed revegetation plan would not adequately substitute for the loss of dune stability and related alterations in dune form and volume caused by the project, and that the project could not be conditioned to meet the performance standards for coastal dunes set forth in 310 Code Mass. Regs. § 10.28(3).

In sum, the plaintiff has not met his burden of establishing that the Commissioner's decision was unsupported by substantial evidence, was an abuse of discretion, arbitrary or capricious, or otherwise not in accordance with the law.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiff's Motion for Judgment on the Pleadings is **DENIED** and judgment shall enter **AFFIRMING** the decision of the Commissioner of the Department of Environmental Protection.

EM Fahey

Elizabeth M. Fahey
Justice of the Superior Court

Dated: June 21, 2007