COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 27, 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 ON RECONSIDERATION

INTRODUCTION

The Petitioner Stephen D. Peabody, Trustee of Peabody Family Trust ("Mr. Peabody"), requests that I reconsider my April 12, 2011 Final Decision in this appeal, affirming former MassDEP[1] Commissioner Laurie Burt's earlier decision 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"). Mr. Peabody had sought the Variance 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

[1] "MassDEP" is the acronym for the Massachusetts Department of Environmental Protection, also referred to as "the Department" in this Final Decision on Reconsideration.

single family home on wood pilings at the Site ("the proposed Project").

As discussed in detail in my Final Decision, former Commissioner Burt properly denied Mr. Peabody's Variance Request because he failed to prove: (1) that his proposed mitigation measures would allow his proposed Project to be conditioned to contribute to the protection of the relevant MWPA interests of storm damage and flood control; and (2) that the denial of his Variance Request would result in a regulatory taking of his real property. See Final Decision, at pp. 25-34 (regarding Issue No. 1) and pp. 34-53 (regarding Issue No. 2). Nevertheless, Mr. Peabody requests that I reconsider my Final Decision claiming that it (1) was issued under "procedural irregularities and violations of time standards and the Department's regulations"; (2) "contains errors of fact and law"; (3) "is not . . . based on the entire record, nor . . . on substantial evidence or the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs"; (4) "is replete with errors, omissions, and misrepresentations of the facts"; (5) "exceeds [my authority as] the [Department's] Commissioner under the [MWPA]"; and (6) "is an abuse of discretion, [and] arbitrary and capricious . . . ." See Mr. Peabody's Motion for Reconsideration, at pp. 1-3.

In his Motion for Reconsideration, Mr. Peabody discusses the voluminous record of his SOC and Variance Appeals in considerable detail, claiming that the record neither supports the decisions of my predecessor Commissioners rejecting his SOC Appeal and Variance Request, nor my Final Decision affirming the denial of his Variance Request. In order to ensure that my Final Decision was sound, the Chief Presiding Officer and I have performed a searching, additional review of the evidence. Based on that review, I continue to find that Mr. Peabody's

claims lack merit, and, accordingly, his Motion for Reconsideration of my Final Decision is denied.

DISCUSSION

I. MR. PEABODY'S PROCEDURAL IRREGULARITY AND TIME STANDARDS CLAIMS LACK MERIT.

A. The Department's Adjudicatory Proceeding Regulations Do Not Contain a "Constructive Approval" Provision.

At pp. 3-5 of his Motion for Reconsideration, Mr. Peabody contends that he should prevail in this appeal because the appeal was not resolved within six months of the appeal's filing in accordance with 310 CMR 10.05(7)(j)8. This claim fails for the simple reason that the Department's Adjudicatory Proceeding Regulations governing resolution of Wetlands Permit and Variance Appeals do not contain a "constructive approval" provision, unlike zoning and subdivision control laws, and a recently enacted law governing State agency approvals. See e.g. G.L. c. 40A, § 15;[2] G.L. c. 41, § 81U;[3] G.L. c. 43E, §§ 1-8.[4] Thus failure to issue a decision within a prescribed timeline does not dictate a decision in the appellant's favor.

---

[2] G.L. c. 40A, § 15 provides in relevant part that:

> . . . Any appeal to a [local] board of appeals from the order or decision of a [local] zoning administrator . . . shall be taken within thirty days of the date of such order or decision or within thirty days from the date on which the appeal, application or petition in question shall have been deemed denied in accordance with . . . [G.L. c. 40A, § 13], as the case may be . . . . The decision of the board [of appeals] shall be made within one hundred days after the date of the filing of an appeal, application or petition, except in regard to special permits, as provided for in [G.L. c. 40A, § 9]. The required time limits for a public hearing and said action, may be extended by written agreement between the applicant and the board of appeals. A copy of such agreement shall be filed in the office of the city or town clerk. Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition. . . .

[3] GL c. 41, § 81U provides in relevant part that:

> . . . After the hearing required by [G.L. c. 41, § 81T] and after the report of [the local] health board or officer or lapse of forty-five days without such report [on a definitive plan of subdivision], the [local] planning board shall approve, or, if such plan does not comply with the subdivision control law or the rules and regulations of the planning board or the recommendations of the health board or officer, shall modify

B. Mr. Peabody Acquiesced or Contributed To the Delay Of Final Resolution of This Administrative Appeal.

Mr. Peabody takes issue with the observation in the Final Decision "that Mr. Peabody acquiesced or contributed to the delay of the appeal's resolution" beyond the six month time frame of 310 CMR 10.05(7)(j)8. Final Decision, at p. 5, n. 4. While this is not

---

> and approve or shall disapprove such plan. . . . The planning board shall file a certificate of its action with the city or town clerk, a copy of which shall be recorded by him in a book kept for the purpose, and shall
>
> send notice of such action by registered mail, postage prepaid, to the applicant at his address stated on the application. . . . .
>
> In the case of a nonresidential subdivision where a preliminary plan has been duly submitted and acted upon or where forty-five days has elapsed since submission of the said preliminary plan, and then a definitive plan is submitted, the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within ninety days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. . . .
>
> In the case of a subdivision showing lots in a residential zone, where a preliminary plan has been acted upon by the planning board or where at least forty-five days has elapsed since submission of the preliminary plan, an applicant may file a definitive plan. The failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action on the definitive plan within ninety days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. . . .
>
> In the case of a subdivision showing lots in a residential zone, where no preliminary plan has been submitted and acted upon or where forty-five days has not elapsed since submission of such preliminary plan, and a definitive plan is submitted, the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant within one hundred thirty-five days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. . . .

[4] G.L. c. 43E is the Massachusetts Expedited State Permitting Act enacted by the Legislature in 2010. See St. 2010, c. 240, § 107. Under G.L. c. 43E, § 2 state agencies, including the Department:

> shall complete permit reviews and final decisions within 180 days, or 210 days for permit processes requiring a public comment period, subject to an extension under [G.L. c. 43E, § 5], for projects that are in: (i) priority development sites designated under chapter 43D; (ii) located within a growth district [as defined by G.L. c. 43E, § 1]; (iii) provided the applicant has received a certificate indicating the completion of the process under [G.L. c. 30, §§ 61 to 62H]; and (iv) provided neither the project nor any portion of the project shall be in a wetland as defined by section 40 of [the MWPA], tidelands as defined by [G.L. c. 91, § 1], priority habitat as delineated by the division of fisheries and wildlife under [G.L. c.] 131A or an area of critical environmental concern as designated by the secretary of energy and environmental affairs.

In accordance with the narrow circumstances set forth above, G.L. c. 43E provides that "[f]ailure by any [state agency] to take final action on a permit or approval within the 180-day or 210-day period or extended time, if applicable, shall be considered a grant of the permit requested of that [agency]. . . ." G.L. c. 43E, § 3.

strictly relevant to the outcome of the Final Decision, I reviewed the issue in further detail and note the following:

Mr. Peabody filed this appeal on September 16, 2008. Under 310 CMR 10.05(7)(j)7.b & 7.h, a one day Adjudicatory Hearing to resolve the issues in the appeal was to be conducted by the Presiding Officer within 120 days or four months after the appeal's filing, i.e. by January 14, 2009. Under 310 CMR 10.05(7)(j)8, the six month appeal resolution deadline was March 16, 2009.

On September 9, 2008, the original Presiding Officer in the case issued a Scheduling Order that scheduled the appeal for a one day Adjudicatory Hearing on Tuesday, January 13, 2009, which was within the four month deadline of 310 CMR 10.05(7)(j)7.b & 7.h.[5] The Adjudicatory Hearing commenced on January 13, 2009, but was not completed because two of Mr. Peabody's witnesses, Jeanne McHugh ("Ms. McHugh") and Mitchell Silverstein ("Mr. Silverstein"), failed to attend the Hearing to be cross-examined on their respective Pre-filed Testimony in the case. Mr. Peabody knew well in advance of the Adjudicatory Hearing that witnesses who filed Pre-filed Testimony in support of his claims had to appear at the Hearing for cross-examination by the Department. He was put on notice of that requirement by the original Presiding Officer in her Scheduling Order of September 9, 2008; in the Pre-Screening Conference that she conducted with the parties on November 5, 2008 to ascertain the issues for resolution in the appeal; and in her Pre-Screening Conference Report and Order of November 10, 2008 that incorporated Mr. Peabody and the Department's Joint Statement of Issues for resolution in the appeal. The original Presiding Officer's Pre-Screening Conference Report and

[5] In this Final Decision on Reconsideration I also refer to the Adjudicatory Hearing as the "Variance Adjudicatory Hearing" to differentiate it from the prior Adjudicatory Hearing conducted in Mr. Peabody's SOC Appeal.

Order also established the parties' respective deadlines for filing Pre-filed Testimony, confirmed the Adjudicatory Hearing date of January 13, 2009, and noted the six month appeal resolution deadline of March 16, 2009.

The failure of Mr. Peabody's witnesses, Ms. McHugh and Mr. Silverstein, to attend the January 13, 2009 Adjudicatory Hearing for cross-examination would have authorized the original Presiding Officer to strike their Pre-filed Testimony from the Administrative Record. See 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). The original Presiding Officer did not strike Ms. McHugh's and Mr. Silverstein's Pre-filed Testimony. Instead, without objection from the Department, the original Presiding Officer granted Mr. Peabody's motion to have a second day of Adjudicatory Hearing so that Ms. McHugh and Mr. Silverstein could appear for cross-examination.

Without objection from Mr. Peabody, the second day of the Adjudicatory Hearing occurred on March 19, 2009— three days after expiration of the six month appeal resolution deadline of March 16, 2009. On the second day of the Adjudicatory Hearing, Mr. Peabody's witness, Mr. Silverstein, appeared for cross-examination, but his other witness, Ms. McHugh, did not. Final Decision, at p. 4, n. 2. As a result, Ms. McHugh's Pre-filed Testimony was stricken from the Administrative Record, as were portions of Mr. Peabody's Pre-filed Testimony that relied on statements that Ms. McHugh purportedly made to him regarding the real estate market on Plum Island. Id.

The second day of Adjudicatory Hearing concluded on March 19, 2009. Pending at the conclusion of the Adjudicatory Hearing were the parties' cross-motions to strike certain testimonial and documentary evidence introduced at the Adjudicatory Hearing. Without objection from Mr. Peabody, the original Presiding Officer did not issue her ruling on the parties' cross-motions to strike evidence until July 27, 2009-- 130 days after conclusion of the Adjudicatory Hearing and 133 days after expiration of the six month appeal resolution deadline of March 16, 2009.[6]

Also without objection from Mr. Peabody, the original Presiding Officer issued an Order on July 28, 2009 directing the parties to file Proposed Findings of Fact and Conclusions of Law by August 28, 2009 to assist her in drafting a Recommended Final Decision in the appeal. As a result of separate motions to extend time filed by Mr. Peabody and the Department, the filing deadline was extended to September 11, 2009. Mr. Peabody and the Department subsequently filed their respective Proposed Findings of Fact and Conclusions of Law on September 11, 2009.

As of March 2010, and without objection from Mr. Peabody, the original Presiding Officer had not yet issued a Recommended Final Decision in the appeal. At that time, the original Presiding Officer transferred to the Department's Office of General Counsel ("OGC") to commence her new duties as a Deputy General Counsel for the Department. Final Decision, at p. 4. At all times during the pendency of this appeal, OGC has represented the Department in the appeal as legal counsel.

As I explained in my Final Decision, resolution of this appeal was assigned to the Chief

[6] The original Presiding Officer denied the cross-motions to strike.

Presiding Officer in accordance with 310 CMR 1.01(14)(c) following the original Presiding Officer's assumption of her new duties in OGC in order to ensure the separate and different functions of the OGC and the Office of Appeals and Dispute Resolution ("OADR"). Final Decision, at p. 4. As I explained in my Final Decision, this adjudicatory rule of procedure provides in relevant 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." Final Decision, at pp. 4-5.

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. Final Decision, at p. 5. 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. Id.[7]

The Chief Presiding Officer had planned to issue a Tentative Decision 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. Final Decision, at p. 5, n. 4. For at least three months prior to issuance of the Chief Presiding Officer's Tentative Decision on October 1, 2010, Mr. Peabody was fully aware that the Chief Presiding Officer had assumed responsibility of the appeal from the prior Presiding Officer, and did not object to the Chief Presiding Officer having assumed that responsibility. This is reflected in

[7] I succeeded former Commissioner Burt as the Department's Commissioner in January 2011 and issued the Final Decision in April 2011 affirming her denial of Mr. Peabody's Variance Request after my own review of the record.

Chief Presiding Officer's electronic mail ("e-mail") messages to the parties during that period, and Mr. Peabody's response.

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. Final Decision, at p. 5, n. 4. The e-mail message made it clear that he would be issuing decision for the Department's Commissioner's review in the case. In response, on September 14, 2010, Mr. Peabody forwarded an e-mail message to OADR's Case Administrator that did not raise any concerns or objections that the Chief Presiding Officer would be issuing the decision. See Exhibit attached to Mr. Peabody's Motion for Reconsideration. While Mr. Peabody's e-mail message did state that "[i]t ha[d] been a[n] extremely long time since the record was closed," the record set forth above reveals that he acquiesced or contributed to the delay of the appeal's resolution. Moreover, the record also reveals Mr. Peabody only asserted his "procedural irregularity" and time standards claims after the Chief Presiding Officer issued a Tentative Decision rejecting Mr. Peabody's claims in the appeal. Again, while it is regrettable this case took so long to be resolved, there were multiple reasons for this.

C. The Department's Commissioner, Not the Presiding Officer, Is the Final Agency Decision-Maker In This Administrative Appeal.

Mr. Peabody claims at pp. 3-5 of his Motion for Reconsideration that it is a procedural irregularity for the Chief Presiding Officer to have issued a Tentative Decision in this case where another Presiding Officer had conducted the Variance Adjudicatory Hearing. Mr. Peabody's claims fail for several reasons.

First, Mr. Peabody only objected to the Chief Presiding Officer assuming adjudicatory responsibility in the case after the Chief Presiding Officer issued his Tentative Decision of October 1, 2010 rejecting Mr. Peabody's claims in the appeal. Mr. Peabody first raised this issue on October 22, 2010 when he filed his objections to the Chief Presiding Officer's Tentative Decision. Mr. Peabody's objection to the Chief Presiding Officer's entry in the case was untimely and should have been raised well before the Chief Presiding Officer issued his Tentative Decision. Cf. Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 548-49 (1998) ("[a] party, knowing of a ground for requesting disqualification [of a judge], cannot be permitted to wait and decide whether he [or she] likes the subsequent treatment that he [or she] receives [from the judge]"). This finding is well supported by the long standing rule that "[n]o attorney and no litigant may use a 'heads I win, tails you lose' strategy with [a judge]" by adopting a strategy of holding back objections to the judge's role in the case and then asserting the objections "when [favorable rulings] are not forthcoming" from the judge. Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 464 (1991).

Second, Mr. Peabody's objections to the Chief Presiding Officer's assumption of adjudicatory responsibilities in the case also fail because the change in Presiding Officers was required to ensure the separate and different functions of the OGC and OADR after the original Presiding Officer joined OGC in the managerial capacity as Deputy General Counsel. As noted above, OGC has served as the Department's legal counsel at all times during the pendency of this appeal.

Lastly, Mr. Peabody's objections to the Chief Presiding Officer's assumption of

adjudicatory responsibilities in the case also fail because it is the Department's Commissioner who is the final decision-maker in all administrative appeals, not the Presiding Officer assigned to the case. It is a well settled principle that "the [Department's] commissioner determines 'every issue of fact or law necessary to the [final] decision[,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended [or tentative] decision, with a statement of reasons.'" Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., at 457 Mass. at 228.

It is also well settled that that the Department's Commissioner may reject the Presiding Officer's findings of fact, including credibility assessments, provided the Final Decision "[contains] a considered articulation of the reasons underlying that rejection." Morris v. Board of Registration in Medicine, 405 Mass. 103, 111(1989), citing, Vinal v. Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85, 99-102 (1982); New England Wind, supra, 457 Mass. at 231. The Commissioner may also accept the Presiding Officer's factual findings, but reach a different conclusion than that of the Presiding Officer, based on the Commissioner's expertise and evaluation of the evidence introduced at the adjudicatory hearing. Udemba v. Board of Registration of Hazardous Waste Cleanup Professionals, Memorandum and Order Pursuant to Rule 1:28 (March 14, 2011), 2011 Mass. App. Unpub. LEXIS 312, at 4-5,[8] citing, Strasnick v.

[8] Decisions issued by the Appeals Court pursuant to its Rule 1:28 after February 25, 2008 may be cited for their persuasive value. Chase v. Curran, 71 Mass. App. Ct. 258, 260-61 n.4 (2008).

Board of Registration In Pharmacy, 408 Mass. 654, 662 (1990), and D'Amour v. Board of Registration in Dentistry, 409 Mass. 572, 585 (1991).

Here, contrary to what Mr. Peabody implies in Motion for Reconsideration, I did not "rubber stamp" the Chief Presiding Officer's Tentative Decision rejecting Mr. Peabody's claims in this appeal. While I agreed with the Chief Presiding Officer's conclusion that Mr. Peabody had failed to prove his claims in the appeal, I reached my own conclusion based on my expertise and evaluation of the evidence as introduced at the Variance Adjudicatory Hearing.[9] My evaluation of the evidence and findings were set forth in detail in my Final Decision in accordance with the requirements of G.L. c. 30A, § 11(8) that "[e]very [final] agency decision shall be in writing or stated in the record[,] [and] . . . shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision . . . ."[10] See Final Decision, at pp. 26-34 (regarding Issue No. 1) and 38-53 (regarding Issue No. 2); See also below, at pp. 14-33 (regarding Issue No. 1) and 33-51 (regarding Issue No. 2). As discussed in the next section, Mr. Peabody's contentions at pp. 6-28 of his Motion for Reconsideration that there is no evidentiary and legal basis for my findings are without merit.

[9] The Supreme Judicial Court has ruled that when a final agency decision-maker relies on his or her expertise to evaluate the evidence introduced at the adjudicatory hearing, the decision-maker "must put in the record the basis for that expertise." D'Amour, supra, 409 Mass. at 585. Accordingly, I put the following on the record regarding my expertise and that of my predecessor Commissioners: I have 25 years of substantial experience in environmental and land use law and litigation. See http://www.mass.gov/dep/about/bio.htm. Most of my experience (21 years) has been in the private sector. Id. My predecessor at the Department, former Commissioner Burt who denied Mr. Peabody's Variance Request, had nearly 30 years of significant private sector experience in environmental law prior to serving as the Department's Commissioner from September 2007 to January 2011. See http://www.foleyhoag.com/newscenter/presscenter/2007/07/foley-hoag-congratulates-laurie-burt-072007.aspx. Robert W. Golledge, Jr., the Department's Commissioner in January 2006 and author of the Final Decision issued that month in Mr. Peabody's previous administrative appeal rejecting Mr. Peabody's proposed Project also has substantial experience in environmental matters, especially in wetlands issues. See http://www.vehicletest.state.ma.us/newsletters/03Sept.pdf.

[10] 310 CMR 1.01(14)(b) contains the same requirement.

II. THE FINDINGS AND RULINGS OF THE FINAL DECISION ARE AMPLY SUPPORTED BY THE EVIDENTIARY RECORD IN THE CASE.

A. The Evidentiary Record Supports My Conclusion In The Final Decision That Mr. Peabody Failed To Prove That His Proposed Mitigation Measures Would Allow His Proposed Project To Be Conditioned To Contribute To The Protection Of The Relevant MWPA Interests Of Storm Damage And Flood Control.

1. The Final Decision Cites the Superior Court's Judgment Affirming Former Commissioner Golledge's January 2006 Final Decision As Background Information to This Variance Appeal.

As my Final Decision notes at pp. 1-2 and 18-21, in January 2006 former Department Commissioner Robert W. Golledge ("former Commissioner Golledge") rejected Mr. Peabody's proposed Project on SOC review 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 June 2007, the Superior Court affirmed former Commissioner Golledge's January 2006 Final Decision in response to Mr. Peabody's request for judicial review of the Decision pursuant to G.L. c. 30A, § 14. Mr. Peabody's appeal of the Superior Court's judgment is currently pending in the Appeals Court.

In this Variance Appeal, Mr. Peabody has repeatedly cited to the Administrative Record of the SOC Appeal to support his claims here.[11] Notwithstanding his citation to that Record, Mr. Peabody contends at pp. 5-6 of his Motion for Reconsideration that I should not have cited the Superior Court's judgment in my Final Decision rejecting his Variance Appeal. In doing so, Mr. Peabody has not addressed the Department's argument that "[t]he Superior Court['s] [judgment]

[11] Mr. Peabody's citation to the Administrative Record of the SOC Appeal includes his citing portions of the testimony that the Department's witnesses, James Sprague ("Mr. Sprague") and Rebecca Haney ("Ms. Haney"), gave at the SOC Adjudicatory Hearing. See Mr. Peabody's Motion for Reconsideration, at pp. 8-9. As discussed below, at pp. 26-28 and 32, n.21, Mr. Peabody's characterizations of Mr. Sprague's and Ms. Haney's testimony lack merit.

'is final and has preclusive effect regardless of the fact that it is on appeal.'" See Department of Environmental Protection's Opposition to Petitioner's Motion for Reconsideration, at p. 2.[12] Regardless of the Department's argument, Mr. Peabody appears to be under the impression that I relied upon the Superior Court's judgment as evidence to support my Final Decision rejecting his Variance Appeal. His impression is incorrect because I cited the Superior Court's judgment as background information to former Commissioner Burt's denial of Mr. Peabody's Variance Request. I clearly made findings in Mr. Peabody's Variance Appeal based on the testimonial and documentary evidence that was introduced at the Variance Adjudicatory Hearing; I did not rely on the Superior Court's judgment for that purpose. See Final Decision, at pp. 26-34; See also below, at pp. 14-33 (regarding Issue No. 1) and 33-51 (regarding Issue No. 2).

2. The Testimony of the Department's Witnesses Refuted Mr. Peabody's Claim.

It is undisputed that Mr. Peabody only called one witness at the Variance Adjudicatory Hearing in support of his mitigation claim: himself. Final Decision, at pp. 26-29. It is also undisputed that he is not a wetlands expert. Id. I noted that in my Final Decision. Id., at p. 26. However, contrary to Mr. Peabody's assertion at p. 6 of his Motion for Reconsideration, I did not reject his mitigation claim "because he failed to present testimony of a 'Wetlands Expert.'" I rejected the claim because Mr. Peabody failed to demonstrate that his proposed mitigation measures would 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. Final Decision, at pp. 26-34.

[12] In support of its argument, the Department cited O'Brien v. Hanover Insurance Company, 427 Mass. 194, 201 (1998), where the Supreme Judicial Court ("SJC") adopted the Federal rule and rule of majority of States "that a trial court judgment is final and has preclusive effect regardless of the fact that it is on appeal." See also Campos v. Van Houtum, 45 Mass. App. Ct. 918, 919 (1998) (defendant's prior criminal conviction for failure to carry workers' compensation insurance that was on appeal barred defendant from re-litigating issue in civil trial as to whether plaintiff was defendant's employee).

At best, he demonstrated that his proposed mitigation measures would reduce the proposed Project's damage to the coastal dune but that is not the standard. Id.

At the Variance Adjudicatory Hearing, Mr. Peabody failed to rebut the probative and substantial evidence that the Department's two witnesses, Lisa Rhodes ("Ms. Rhodes") and Michael Stroman ("Mr. Stroman"), presented refuting Mr. Peabody's mitigation claim. Id., at pp. 29-31 (Ms. Rhodes), 31-34 (Mr. Stroman). Undisputedly, Ms. Rhodes and Mr. Stroman have nearly 50 years of combined professional experience in the wetlands area. Id.

Contrary to Mr. Peabody's assertion at p. 12 of his Motion for Reconsideration, Ms. Rhodes' pre-filed testimony ("PFT") did not consist "entirely [as] a summary or paraphrasing of excerpts" of former Commissioner Golledge's January 2006 Final Decision denying Mr. Peabody's proposed Project on SOC review and former Commissioner Burt's September 2008 decision denying his Variance Request. As discussed at p. 31 of my Final Decision and below, at pp. 15-17, Ms. Rhodes presented highly probative testimony demonstrating that Mr. Peabody's proposed mitigation measures would not allow the Project to be conditioned so as to contribute to the protection of the relevant MWPA interests of storm damage and flood control.

Ms. Rhodes' PFT contains 34 paragraphs of testimony. The first eight paragraphs (¶¶ 1-8) evidence her substantial professional experience in the wetlands area, which Mr. Peabody failed to refute at the Variance Adjudicatory Hearing. The next 15 paragraphs of Ms. Rhodes PFT (¶¶ 9-24) provide important background information to Mr. Peabody's Variance Request, specifically, the history of Mr. Peabody's proposed Project beginning with his August 2000 filing of a Notice of Intent ("NOI") with the Town of Newbury Conservation Commission ("NCC") and concluding with former Commissioner Burt's September 2008 denial of his

Variance Request. These paragraphs set forth in detail former Commissioner Golledge's reasons in January 2006 for rejecting Mr. Peabody's proposed Project for failure to meet the regulatory performance standards for work in a coastal dune under the Wetlands Regulations at 310 CMR 10.28(3)(b). See Ms. Rhodes' PFT, ¶¶ 11-15.

In the remaining paragraphs of her PFT, Ms. Rhodes explained in detail former Commissioner Burt's grounds for denying Mr. Peabody's Variance Request, including that he had failed to demonstrate that his proposed mitigation measures would 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. Id., at ¶¶ 23-24. Ms. Rhodes also provided testimony demonstrating that former Commissioner Burt's finding was correct and supported her testimony by submitting a copy of an SOC that the Department had issued to other applicants in September 2006 rejecting their proposed construction of a single family home "on the same reach of primary dune in Plum Island." Id., at ¶¶ 27-34; Exhibit B to Ms. Rhodes' PFT. I noted and summarized Mr. Rhodes' testimony at p. 31 of my Final Decision, and do so again here to demonstrate even further that Mr. Peabody's claims about Ms. Rhodes' PFT are without merit. 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.

With respect to Mr. Stroman's testimony, Mr. Peabody has also misconstrued that testimony at pp. 12-13 of his Motion for Reconsideration. Contrary to Mr. Peabody's assertions, Mr. Stroman also presented highly probative testimony refuting Mr. Peabody's mitigation claim. My Final Decision, at pp. 32-34, summarized Mr. Stroman's testimony in detail, and I do so again here to demonstrate even further that Mr. Peabody's claims about Mr. Stroman's testimony are without merit.

At the Variance Adjudicatory Hearing, 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 to 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.

Although Mr. Stroman did not present evidence of a specific overwash event that has occurred at Mr. Peabody's property, he did present evidence of "[a] notable example of an impending overwash event . . . 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 testified on cross-examination that because the dune system on Plum Island is approximately eight miles long, he considers the one mile distance between Plum Island Center and Mr. Peabody's property to be relatively close. He supported his testimony with a map attached as Exhibit 3 to his PFT that demonstrates "the relationship between the subject parcel and the location of the severe coastal erosion underway in the central developed portion of Plum Island." Mr. Stroman's PFT, ¶ 17.

Mr. Stroman also supported his testimony with print and video news reports from

local news media organizations such as the Boston Globe, the Daily News of Newburyport, the Boston Channel, and CBS Radio (Boston). Id., and Exhibits 4-5 attached to Mr. Stroman's PFT. Contrary to Mr. Peabody's inaccurate description of the video news report at p. 12 of his Motion for Reconsideration, the video news report shows a storm damaged residence in Plum Island Center that was demolished because it was a safety hazard to the surrounding residences. Additionally, one of the print news reports (Exhibit 5 to Mr. Stroman's PFT) discusses erosion problems on 55th Street on Plum Island, just four blocks north of Mr. Peabody's property on 51st Street. This print news report begins by stating: "Residents on 55th Street on Plum Island are wondering how much longer before their homes crumble into the sea, fearing it will take just one more storm for their piece of Plum Island to wash away."

In sum, all of the news reports attached to Mr. Stroman's PFT document that erosion is occurring within the vicinity of Mr. Peabody's property, rather than at a distant location as he contends at pp. 12-13 of his Motion for Reconsideration. Mr. Peabody has done nothing to cause me to conclude that these news reports fail to meet the evidentiary standard of G.L. c. 30A, § 11(2) that "[e]vidence [in hearings on administrative appeals] . . . be admitted and given probative effect . . . if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." Indeed, these news reports demonstrate that erosion and dune destabilization problems on Plum Island are matters of common knowledge, and have existed quite some time as Mr. Peabody's Draft Environmental Impact Report ("DEIR") during MEPA review of his proposed Project pointed out. Mr. Peabody's DEIR noted "erosion problems, losses of cottages, serious reduction on lot sizes, and total loss of some lots further

south along Plum Island." In the Matter of Stephen D. Peabody, Docket No. 2002-053, Final Decision, 13 DEPR 37, 44 (January 25, 2006).

In conclusion, I stand by my finding at p. 34 of the Final Decision "that Mr. Peabody's evidence on [the mitigation issue] is far outweighed by the persuasive testimony of Ms. Rhodes and Mr. Stroman."

3. The Decie Letter Does Not Prove that the Proposed Project Meets Applicable Standards.

Mr. Peabody asserts in his Motion for Reconsideration that "[t]he underlying record in this case . . . is replete with expert evidence in support of [his] proposed project, including evidence that mitigation has been undertaken or proposed such that the proposed project can be conditioned so as to contribute to the protection of interests of MWPA." Mr. Peabody's Motion for Reconsideration, at p. 6. In support of his assertion, Mr. Peabody relies on the contents of a December 15, 2007 letter written by wetlands expert William Decie ("Mr. Decie"). Id., at pp. 6-7. Mr. Peabody contends that the letter also proves "that there is no evidence of overwash or erosion at [Mr. Peabody's] property." Id.

As my Final Decision previously noted at p. 28, there are a number of evidentiary limitations concerning Mr. Decie's letter. First, unlike the Department's witnesses and wetlands experts, Ms. Rhodes and Mr. Stroman, Mr. Decie did not testify and face cross-examination at the Variance Adjudicatory Hearing. Second, Mr. Decie's letter does not constitute sworn pre-filed testimony of a witness. Lastly, Mr. Decie's letter does not prove that Mr. Peabody's proposed mitigation measures would allow his proposed Project to be conditioned to protect MWPA interests, including the relevant interests of storm damage and flood control, because the 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.

Also, contrary to Mr. Peabody's assertion, Mr. Decie's letter does not state that "there is no evidence of overwash or erosion at the property." On this issue, as explained in the Final Decision and above, the Department's witness, Mr. Stroman provided testimony and exhibits to demonstrate that overwash events and erosion are commonplace on Plum Island. See Mr. Stroman's PFT, ¶¶ 16-17. As discussed above, at pp. 19-21, Mr. Stroman did not present evidence of a specific overwash event that has occurred at Mr. Peabody's property, but he did present evidence of severe coastal erosion that has occurred in the vicinity of Mr. Peabody's property.

It is also important to note that Mr. Peabody failed to show how any alleged lack of evidence of overwash or erosion on his property at a given time in the past is relevant to proving that his proposed mitigation measures would 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. As explained in the Final Decision and above, the testimony of Department's witnesses, Mr. Stroman and Ms. Rhodes, effectively refuted Mr. Peabody's claims.

4. The Public Information on Newbury's Municipal Internet Website Provides Important Background Information Concerning Long Standing Erosion Issues on Plum Island and Is Supported by Other Evidence in the Record.

At p. 7 of his Motion for Reconsideration, Mr. Peabody takes exception to my Final

Decision citing public information on a municipal internet website maintained by the Town of Newbury ("Newbury") entitled "Plum Island Erosion Information."[13] See Final Decision, at p. 10. Mr. Peabody contends that my citation to this municipal internet website "is an egregious example of the [my] relying on facts not in the record of this case to support the Final Decision." Mr. Peabody's claim is overblown.

I cited the public information on the Newbury municipal internet website for background purposes only, and in the context of a detailed legal discussion in the Final Decision of the purpose of the MWPA and the Wetlands Regulations, including the protection of barrier beaches, a wetlands resource area. See Final Decision, at pp. 6-11. Citing the Wetlands Regulations, I stated in the Final Decision that a barrier beach is "a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast," and that "[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. . . ." Final Decision, at pp. 8-9.

In my discussion of barrier beaches, I noted that "Plum Island, the locus of Mr. Peabody's proposed Project, is a barrier beach protected by the MWPA and the Wetlands Regulations." Final Decision, at pp. 9-10. I supported that statement by citing a reported 2010 administrative decision of MassDEP[14] and the public information on the Newbury municipal internet website that Mr. Peabody takes issue with in his Motion for Reconsideration. I did not

[13] See Plum Island Erosion Information, http://www.townofnewbury.org/Pages/plum_island_erosion.

[14] See 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.

rely upon that public information to find against Mr. Peabody in his Variance Appeal. In any event, the presence of longstanding erosion problems on Plum Island is detailed in information that I did rely upon— Ms. Rhodes' and Mr. Stroman's PFT. See Final Decision, at pp. 29-31 (Ms. Rhodes's PFT) and 31-34 (Mr. Stroman's PFT); and above, at pp. 15-21.

5. Mr. Peabody's Claims Concerning the Final Decision's Reference to Land Subject to Coastal Storm Flowage, a Wetlands Resource Area Protected By the MWPA and Wetlands Regulations, Are Without Merit.

At p. 7 of his Motion for Reconsideration, Mr. Peabody contends that my Final Decision "repeat[s] the error [of] the [Chief Presiding Officer's] Tentative Decision at 4 that [Mr. Peabody's] additional mitigation is insufficient because the property 'contains land subject to coastal storm flowage [("LSCSF")].'"[15] He also contends that "[t]here is absolutely no evidence to support this statement," that "the Department [has not] submitted any evidence over the past 10 years or more to support this statement," and that he submitted evidence in the SOC Adjudicatory Hearing "conclusively demonstrat[ing]" that LSCSF is not present on his property. Mr. Peabody's Motion for Reconsideration, at p. 7. Mr. Peabody's claims are without merit.

Neither the Chief Presiding Officer nor I rejected Mr. Peabody's mitigation claim in his Variance Appeal because his Property contains LSCSF. See Tentative Decision, at pp. 7-21;

---

[15] As my Final Decision notes at p. 10, LSCSF is defined by the Wetlands Regulations at 310 CMR 10.04 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); Final Decision, at p. 10. 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; Final Decision, at p. 10. 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; Final Decision, at pp. 10-11.

Final Decision, at pp. 6-11, 26-34. Both the Chief Presiding Officer and I simply noted, as former Commissioners Golledge and Burt had done previously in their respective January 2006 and September 2008 decisions rejecting Mr. Peabody's SOC appeal and denying his Variance Request, that LSCSF is one of several Wetlands resources that exist at Mr. Peabody's Property, the others being coastal beach, coastal dune, and barrier beach. Id.; Peabody, supra, 13 DEPR at 37; Decision on Request for Variance (September 2, 2008), at p. 1.[16] Under the Wetlands Regulations, all of these Wetlands resources are likely to be significant, or are significant to storm damage prevention and flood control. Tentative Decision, at pp. 7-21; Final Decision, at pp. 6-11, 26-34. Here, Mr. Peabody's mitigation claim was rejected in his Variance Appeal because he failed to prove that his proposed mitigation measures in connection with the coastal dune Wetlands resource area would allow his proposed Project to be conditioned to contribute to the protection of the relevant MWPA interests of storm damage and flood control. Id. As noted in my Final Decision and above, Ms. Rhodes' and Mr. Stroman's testimony in the Variance

[16] In his January 2006 Final Decision rejecting Mr. Peabody's SOC Appeal, former Commissioner Golledge stated the following:

> The applicant seeks to construct a pile supported house . . . on Plum Island[,] . . . directly on the Atlantic Ocean. Plum Island is a barrier beach, and the lot contains several resource areas protected under the Department's wetlands regulations: coastal beach, coastal dunes, barrier beach, and land subject to coastal storm flowage. . . .

13 DEPR at 37 & 45 (emphasis supplied). In her September 2008 decision denying Mr. Peabody's Variance Request, former Commissioner Burt stated that "[i]n addition to its barrier beach location,[Mr. Peabody's] Property is entirely comprised of a primary coastal dune and contains land subject to coastal storm flowage" and that the Wetlands Regulations at "310 CMR 10.02(1) establishes jurisdiction over each of these three coastal wetland resource areas." September 2008 Variance Decision, at p. 1.

Adjudicatory Hearing conducted in Mr. Peabody's Variance Appeal amply proves this point.

6. Mr. Sprague's and Ms. Haney's Testimony in the SOC Adjudicatory Hearing Does Not Assist Mr. Peabody's Case.

On p. 8 of his Motion for Reconsideration, Mr. Peabody insists that James Sprague ("Mr. Sprague"), one of the Department's witnesses in the SOC Adjudicatory Hearing, supports his position in this proceeding. Specifically, Mr. Peabody contends that Mr. Sprague "admitted . . . under oath [at the SOC Adjudicatory Hearing] that [Mr. Peabody's] revised proposal was not inadequate as to the areas proposed to be re-vegetated or as to the type or amount of plants, that any adverse impact from temporary alterations would not warrant denial, and that the project could be conditioned to meet the applicable performance standards." Mr. Peabody's Motion for Reconsideration, at p. 8.

Mr. Sprague did not testify that Mr. Peabody's proposed mitigation measures would allow his proposed Project to contribute to the protection of the MWPA interests of storm damage prevention and flood control. While Mr. Sprague expressed no quarrel with the amount of area that Mr. Peabody proposed to re-vegetate, Administrative Record of SOC Appeal, at p. 1533, lines 17-24, or with the type of plantings proposed for the re-vegetation because the plantings were indigenous to dunes, Id., at p. 1535, lines 12-24, Mr. Sprague made it clear that Mr. Peabody's re-vegetation plan would not warrant approval of Mr. Peabody's proposed Project. Specifically, Mr. Sprague was asked on cross-examination by Mr. Peabody's counsel whether Mr. Sprague "would . . . change [his] opinion that the re-vegetation plan [was] inadequate to protect the interests of the [MWPA]." Administrative Record of SOC Adjudicatory Hearing, at p. 1518, lines 17-24. Mr. Sprague responded by stating that he would

not change his opinion "[b]ecause he [did not] believe that the . . . areas proposed for planting [would] fully be available as a stability measure." Id.

Mr. Sprague also testified in the SOC Adjudicatory Hearing that "unlike the requirement for . . . replication [of Bordering Vegetated Wetlands ("BVW")] to mitigate for the loss of that wetland and its function, it is not applicable to or synonymous with replicating lost areas of dune grass." Id., at p. 935. He also testified that "[a]lthough planting of dune grass and vegetation does help stabilize a dune in the areas of planting, it does not mitigate for the loss of vegetation in that portion of the dune to be denuded and destabilized." Id.; See also, pp. 1543-47. He also testified that "although a well-vegetated dune does provide for some stability enhancement, it does not abate over wash and erosion in areas of denuded dune such as the one at issue here" and that "during coastal storm events, even stabilized dunes are subject to severe erosion." Id., at p. 935. By way of example, he pointed to "south of [Mr. Peabody's] site on Plum Island, [where] well-vegetated coastal dunes eroded back 150 feet during the No Name Storm of 1991." Id.; See also, pp. 1543-47. He also noted that "several areas on Plum Island with vegetated dunes eroded back 20 feet during a December 2003 storm" and that "[d]uring the same storm, large stretches of dune fencing were also destroyed." Id., at p. 935. In short, Mr. Sprague's testimony does not assist Mr. Peabody here.

At p. 8 of his Motion for Reconsideration, Mr. Peabody also claims that the Department's other witness at the SOC Adjudicatory Hearing, Rebecca Haney ("Ms. Haney"), was found to be non-credible by the DALA Magistrate who conducted the Hearing and that the Magistrate struck her testimony from the record. Mr. Peabody's claims are not true because the DALA Magistrate neither found Ms. Haney's testimony lacking credibility nor struck her testimony from the

Administrative Record of the SOC Appeal. See former Commissioner Golledge's January 2006 Final Decision, at 13 DEPR at 38, n.6; In the Matter of Stephen D. Peabody, Docket No. 2002-053, Ruling on Petitioner's Motion to Strike Testimony and Notice of Continued Hearing (Bonnie Cashin, Administrative Magistrate), 2004 MA ENV LEXIS 99, at 1, 4-7 (August 11, 2004). Indeed, the DALA Magistrate denied Mr. Peabody's Motion to Strike Ms. Haney's testimony. 2004 MA ENV LEXIS 99, at 5-6.

7. EEA's Approval of Mr. Peabody's Environmental Impact Report Does Not Prove that His Proposed Project Meets the Applicable Standards.

At p. 8 of his Motion for Reconsideration, Mr. Peabody contends that my "Final Decision purports to cite from the MEPA review [of his proposed] project, but . . . fails to include the fact that the Secretary of EOEA approved Mr. Peabody's Environmental Impact Report pursuant to MEPA . . . ." Mr. Peabody's claim is without merit.

In my Final Decision, I noted that "[d]uring 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")." Final Decision, at p. 16. My Final Decision also noted that EEA subsequently approved Mr. Peabody's Environmental Impact Report, but the approval did not constitute a decision approving his proposed Project on the merits. It is well settled that EEA approval of an Environmental Impact Report does not mean that a proposed project meets applicable permitting standards. Final Decision, at pp. 17-18, n. 14. Instead, it only means that the project's proponent

has adequately described the environmental impacts and addressed mitigation. As the MEPA Regulations at 301 CMR 11.01(1)(b)[17] state:

> MEPA review is an informal administrative process that is intended to involve any interested Agency or Person as well as the Proponent and each Participating Agency. The [EEA] Secretary conducts MEPA review in response to one or more review documents prepared and filed by a Proponent. The Secretary's decision that a review document is adequate or that there has been other due compliance with MEPA and 301 CMR 11.00 means that the Proponent has adequately described and analyzed the Project and its alternatives, and assessed its potential environmental impacts and mitigation measures. A Participating Agency retains authority to fulfill its statutory and regulatory obligations in permitting or reviewing a Project that is subject to MEPA review, which does not itself result in any formal adjudicative decision approving or disapproving a Project.

See also 301 CMR 11.01(3)(b) ("MEPA and [the MEPA Regulations] do not alter the review or permitting authority of any Agency or any Federal, municipal, or regional governmental entity over, or otherwise alter the applicability of any statutes and regulations to, a Project").

In short, as the MEPA Regulations make clear, EEA's MEPA review of Mr. Peabody's proposed Project does not in any way demonstrate that he was entitled to a Variance from MWPA requirements.

8. Mr. Peabody Failed to Prove that the Department Has Previously Approved Development Projects Similar to His Proposed Project.

Mr. Peabody claims at pp. 10-11 of his Motion for Reconsideration that there are properties on Plum Island "similarly situated" to his property "involving new construction (and footprint expansions), which have been permitted by the Department" under the MWPA and the Wetlands Regulations and permitted with fewer mitigation measures than those that he has

[17] Note 14 at pp. 17-18 of the Final Decision contains a typographical error in that the regulation cited should be 301 CMR 11.01(1)(b) rather than 310 CMR 11.01(1)(b).

proposed for his Project. This is not correct.

First, Mr. Peabody has ignored prior administrative precedent cited in my Final Decision, In the Matter of Giles H. Dunn and Gail W. Dunn,[18] a case where the Department rejected the proposed construction of a residential dwelling on pilings and associated work on a primary dune and barrier beach adjacent to an existing house (a situation similar to Mr. Peabody's case here), because the project's proponents failed to demonstrate that the project could be conditioned to further the MWPA regulatory interests of storm damage prevention and flood control. See Docket No. 89-072 (SOC Appeal), Final Decision 1996 MA ENV LEXIS 98 (September 10, 1996); Docket No. 89-072R (Variance Appeal), Final Decision, 4 DEPR 219, 222, 1997 MA ENV LEXIS 5 (December 17, 1997). Just as Mr. Peabody's case, the Department rejected the proposed project in Dunn twice: first on SOC review and then when the project's proponents sought a Variance. Id.

Mr. Peabody has also ignored the Department's September 2006 SOC rejecting the proposed construction of a single family home at 39 Fordham Way and "on the same reach of primary dune in Plum Island." See Exhibit B to Ms. Rhodes' PFT. A copy of the SOC rejecting the project was attached to Ms. Rhodes' PFT at the Variance Adjudicatory Hearing. Id.

Mr. Peabody's "similarly situated" properties claim also fails because he did not support the claim with probative evidence. For example, the information in Exhibit 7 of Mr. Peabody's Variance Adjudicatory Hearing exhibits ("Exhibit 7") does not prove the claim because the information consists of a mere one-half page summary of files that he purportedly reviewed at the Newbury Conservation Commission ("NCC") and Newbury Building Department for eight properties on Plum Island. See Mr. Peabody's Pre-filed Rebuttal Testimony ("Mr.

[18] See Final Decision, at pp. 11.

Peabody's Rebuttal PFT"), ¶¶ 1-7; Exhibit 7 of Mr. Peabody's Variance Adjudicatory Hearing Exhibits. Mr. Peabody's one-half page summary sheet in Exhibit 7 simply states that each of the eight projects "[were] conditioned by DEP." Exhibit 7 of Mr. Peabody's Variance Adjudicatory Hearing Exhibits. But, Mr. Peabody's representation in Exhibit 7 that all eight projects "[were permitted and] conditioned by DEP" is misleading or inaccurate.

For example, Mr. Peabody's Exhibit 7 represents that the Department permitted the Fox, McCarthy, and Richey projects. The Department, however, did not issue SOCs for the Fox, McCarthy, and Richey projects because the SOC requests were withdrawn. See Exhibit 1 to the January 2009 Affidavit of Michael Abell submitted by the Department at the Variance Adjudicatory Hearing ("Mr. Abell's Affidavit").[19]

Mr. Peabody's Exhibit 7 also represents that the Department permitted the Novak and McKallagat projects when actually the Department denied them. Exhibit 1 to Mr. Abell's Affidavit.[20]

Lastly, with respect to the remaining projects listed in Exhibit 7 (Hughes/Zarella,

---

[19] Mr. Abell is an Environmental Analyst and member of the Department's Wetlands Program. See Mr. Abell's Affidavit, ¶ 1.

[20] The Novak project had proposed construction of a single family home on Northern Boulevard on Plum Island, and the McKallagat project had proposed removal of a gravel parking lot and construction of a single duplex dwelling and septic system and well in an area of coastal dune and barrier beach located on four lots along Northern Boulevard on Plum Island. See Novak v. Department of Environmental Protection, Worcester Superior Court, Civil Action No. 94-2511, 6 Mass. L. Rep. 268, 1996 Mass. Super. LEXIS 124 (October 15, 1996); In the Matter of Eugene Novak and Christine Florio, Docket No. 95-022, Final Decision, 1997 MA ENV LEXIS 125 (January 30, 1997); In the Matter of John A. McKallagat and Chandler R. Grinnell, Docket No. 89-19, Memorandum and Order of Dismissal (October 31, 1989), at p. 1; McKallagat v. DEQE, Essex Superior Court, Civil Action No. 88-1365 (March 30, 1989). On appeal, the Superior Court vacated the Department's SOCs denying these projects on different grounds. Id. The court vacated the SOC denying the Novak project because the party who had made the SOC request had failed to serve a copy of the request upon the project's proponents within 10 days of the NCC's Order of Conditions ("OOC") approving the project, and the court vacated the SOC denying the McKallagat project because the SOC had been issued more than 70 days after the Department had received the SOC request. Id.

Leone, and Nee), Mr. Peabody failed to present probative evidence that the projects are "similarly situated" as his proposed Project. With respect to the Huges/Zarella project, Mr. Peabody introduced several photographs in evidence (Exhibits 1 and 4 to his PFT) that purportedly depicted grass growing under the raised structures and decks at that project. Contrary to Mr. Peabody's assertion, these photographs do not prove that his proposed Project can be approved and conditioned by the Department to advance the MWPA regulatory interests of storm damage prevention and flood control. Mr. Stroman testified in the Variance Adjudicatory Hearing that these photographs do not prove that the deck that Mr. Peabody proposes to construct as part of his proposed Project will not impact the dune below it. Mr. Stroman's PFT, ¶ 10.

In sum, Mr. Peabody failed to prove that the projects listed in Exhibit 7 demonstrate that his proposed Project can be approved and conditioned by the Department to further MWPA regulatory interests of storm damage prevention and flood control. Specifically, Mr. Peabody failed to show that the projects listed in Exhibit 7 disturbed undeveloped dunes; did not destabilize dunes; and were approved and conditioned by the Department so as to contribute to the protection of the MWPA regulatory interests of storm damage prevention and flood control.[21]

[21] Mr. Peabody's attempt to prove that these projects were approved and conditioned by the Department under the MWPA and the Wetlands Regulations by citing Mr. Sprague's cross-examination testimony from the SOC Adjudicatory Hearing is to no avail. See Mr. Peabody's Motion for Reconsideration, at p. 10, n. 11. On cross-examination, Mr. Sprague was questioned by Mr. Peabody's counsel whether he was aware of any projects that the Department had approved along the seaward side of Plum Island. Administrative Record of SOC Appeal, at p. 1571, lines 21-24; p. 1572, lines 1-24; p. 1573, lines 1-7. Mr. Sprague responded by stating that "at most probably . . . seven [projects] . . . [had been] before the Department" and "most got a final order to some degree." Id., at p. 1572, lines 11-24; p. 1573, lines 1-7. Mr. Sprague stated that "before the Department" did not mean that the Department had approved the projects. Id. He provided no specifics. While it is possible that he was referring to the Novak and McKallagat projects for which the Department issued SOC denials that were later vacated by the Superior Court, See above, at pp. 33-34, n.21, it is uncertain what Mr. Sprague meant, and, accordingly, Mr. Peabody cannot prove his mitigation claim by speculation and conjecture.

Finally, Mr. Peabody insists at p. 9 of his Motion for Reconsideration that his proposal to eliminate the septic system, redesign the driveway and deck, and use of various best management practices for dune stabilization meets the standard. Mr. Stroman testified to the contrary, and I find his testimony is credible. As previously discussed above and in the Final Decision, Mr. Stroman 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.

B. The Evidentiary Record Supports My Conclusion In the Final Decision that Denial of Mr. Peabody's Variance Request Will Not Result In A Regulatory Taking of His Real Property.

The second issue in Mr. Peabody's Variance Appeal was whether denial of his Variance

Request would result in a regulatory taking of his real property. See Final Decision, at pp. 34-53. Contrary his assertions at pp. 13-27 of his Motion for Reconsideration, Mr. Peabody failed to prove this claim at the Variance Adjudicatory Hearing. Id. Legal principles governing private property takings by the government and substantial evidence in the Variance Adjudicatory Hearing record support my finding in the Final Decision that denial of Mr. Peabody's Variance Request will not result in a regulatory taking of his real property. Id.

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

As the Final Decision notes at p. 37, "[t]o determine whether a regulatory taking has occurred, it is first necessary to decide the 'relevant parcel' to which the [government] regulation [at issue] is applicable." Blair v. Department of Conservation and Recreation, 457 Mass. 634, 642 (2010), citing, Giovanella v. Conservation Commission of Ashland, 447 Mass. 720, 726-731 (2006). "[T]he 'relevant parcel' has consistently been held [by federal and Massachusetts courts] 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, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002) ("Lake Tahoe"). "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 Transportation Co. v. New York City, 438 U.S. 104, 130-31 (1978) ("Penn Central"); 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.

At pp. 14-17 of his Motion for Reconsideration, Mr. Peabody takes issue with my finding in the Final Decision that former Commissioner Burt properly examined Parcels One and Two of Mr. Peabody's Land as one unit of real property in assessing Mr. Peabody's regulatory taking claim. Specifically, he contends at p. 14 of his Motion for Reconsideration that Parcels One and Two should be treated separately because the Final Decision treating them as one unit of real property erroneously relies on Giovanella, supra. He contends that Giovanella is distinguishable from his case because the plaintiff owner in Giovanella "was not . . . aware until after he purchased [his] property that it consisted of two separate parcels" whereas Mr. Peabody "purchased [his] property with the knowledge that it consisted of two separate parcels . . . ." Mr. Peabody also contends Giovanella is also different from his situation because the plaintiff owner in Giovanella sold one of the parcels and in doing so "created [his] hardship relating to the wetlands on second parcel that prevented him from obtaining a permit" to develop the second parcel. Mr. Peabody's attempts to distinguish Giovanella from his case fail.

While it is true that the plaintiff owner in Giovanella purchased land that he thought was one single lot and later discovered consisted of two lots, this fact was not determinative of the SJC's ruling in Giovanella that both lots be treated as one single unit of real property in assessing the plaintiff owner's takings claim. Neither was the fact that the plaintiff owner sold one of the lots after the local conservation commission rejected his proposal to develop one of the lots. Indeed, as explained below, at the pp. 45-47, the plaintiff owner sold the lot in question at a substantial profit dooming both his categorical taking claim and the claim that he suffered severe

adverse economic impact as a result of the municipality's rejection of his proposed development of the lot that he retained.

Moreover, contrary to Mr. Peabody's assertions at pp. 14-17 of his Motion for Reconsideration, the evidence at the Variance Adjudicatory Hearing overwhelming demonstrates that former Commissioner Burt properly examined Parcels One and Two of Mr. Peabody's Land as one unit of real property in assessing Mr. Peabody's regulatory taking claim. This evidence is set forth in the Final Decision and includes the following:

Parcels One and Two are contiguous pieces of real property that Mr. Peabody purchased at the same time in August 1997 by one quitclaim deed for a lump sum of $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").[22] Parcel One is a landward real property consisting of a single lot (Lot 207) and containing a single family three-bedroom home that existed at the time of Mr. Peabody's purchase of the property. 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 is a seaward real property consisting of three undeveloped lots (Lots 208, 209, and 210). Id. When Mr. Peabody purchased Parcels One and Two, the single family home on Parcel One had a septic system partially located on Parcel Two where Mr. Peabody is proposing the Project at issue. Id.

Mr. Peabody financed his August 1997 purchase of Parcels One and Two by obtaining a $190,000.00 mortgage from a private lender: Patriot Funding, LP of Framingham, Massachusetts ("Patriot"). Mortgage, August 11, 1997, Recorded in Book 14261, Pages 233-39

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

in the Southern Essex District Registry of Deeds ("August 1997 Mortgage").[23] Six months after purchasing the Land (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").[24] It is well settled that the purpose of homestead protection and homestead laws is to allow homeowners to protect their homes from the reach of creditors. See Shamban v. Masidlover, 429 Mass. 50, 53 (1999); Dwyer v. Cempellin, 424 Mass. 26, 29-30 (1996). Homestead laws are to be construed liberally for the purpose of protecting homeowners and their families. Id. Accordingly, when he filed his Declaration of Homestead for Land in March 1998, Mr. Peabody sought to protect both Parcels One and Two from the reach of his creditors by claiming that he occupied the Land as his principal residence.

The evidence at the Variance Adjudicatory Hearing also revealed that in April 2000, Mr. Peabody transferred Parcel Two for nominal consideration to the Peabody Family Trust ("the Trust"), a nominee trust. Mr. Peabody is the Trust's Trustee and controls the Trust's assets. It is common legal knowledge that a nominee trust is an entity created for tax purposes to hold legal title to real property. See Apahouser Lock & Sec. Corp. v. Carvelli, 26 Mass. App. Ct. 385, 388 (1988); Roberts v. Roberts, 419 Mass. 685, 687 (1995). Thus, it is reasonable to conclude that Mr. Peabody transferred Parcel Two to the Trust to obtain more favorable tax treatment in connection with his ownership of Parcels One and Two. Put another way, the fact Mr. Peabody

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

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

transferred Parcel Two to the Trust for nominal consideration in March 2002 and established a separate address of 16 51st Street for Parcel Two does not demonstrate that Parcels One and Two should be analyzed separately when performing a takings analysis.

The evidence at the Variance Adjudicatory Hearing also revealed that after Mr. Peabody transferred Parcel Two to the Trust in April 2000, Newbury continued to tax Parcels One and Two as one unit of real property until 2003. Mr. Peabody's PFT, ¶ C17, at p. 5. While Parcels One and Two were being taxed as one unit of real property, Mr. Peabody sought approval from the NCC in August 2000 for his proposed Project on Lot 208 of Parcel Two (the Site). Mr. Peabody's PFT, ¶ C12, at p. 4; ¶ C16, at p. 5. He also sought approval from the Town of Newbury Board of Health and the Department to construct a septic system for the proposed home called for in his proposed Project. Id., ¶ C14, at p. 5. While it is true that the NCC and the Newbury Board of Health approved Mr. Peabody's permit requests, those approvals are not evidence that his proposed Project can be permitted under the MWPA and the Wetlands Regulations to contribute to the wetlands interests of storm damage prevention and flood control because the Department is the final approving authority under the MWPA when local approvals are appealed to the Department. See Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717 (2009) (Department is "the final say" on permit approvals under the MWPA).

The evidence at the Variance Adjudicatory Hearing also revealed that in December 2002, while Parcels One and Two continued to be taxed by Newbury as one unit of real property, Mr. Peabody, through his attorney, requested in a letter to the Department that the land area comprising Parcel One and the Site on Parcel Two be combined to calculate total acreage

required under 310 CMR 15.000 ("Title 5") for nitrogen loading for the Site's proposed septic system. Letter of Mr. Peabody's attorney, Michael A. Leon, December 11, 2002 ("December 2002 Letter").[25] Combining the properties enabled Mr. Peabody to meet the one acre requirement of 310 CMR 15.214(2) for nitrogen loading.[26]

Lastly, Mr. Peabody's contention at pp. 14-17 of his Motion for Reconsideration that Parcels One and Two should be treated separately because he purportedly intended to develop the Site on Parcel Two when he purchased the Land in 1997, also fails. I do not believe that a subjective intent to treat property as separate parcels can rebut the actions in which the landowner in fact treated them as one unit of real property. In addition, for such subjective intent to be probative, the landowner would have to show that the intent was a reasonable investment-backed expectation. As discussed in the Final Decision at pp. 47-48, and below, at pp. 46-49, the evidence introduced at the Variance Adjudicatory Hearing reveals that Mr.

---

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

[26] 310 CMR 15.214(2) provides that:

> [n]o system serving new construction in areas where the use of both on-site systems and drinking water supply wells is proposed to serve the facility shall be designed to receive or shall receive more than 440 gallons of design flow per day per acre from residential uses except as set forth at 310 CMR 15.216 (aggregate flows) or 15.217 (enhanced nitrogen removal).

(emphasis supplied). Title 5 defines an acre of land as "a unit of land measure equal to 40,000 square feet . . . ." and defines a "facility" as:

> [a]ny real property (including any abutting real property) and any buildings thereon, which is served, is proposed to be served, or could in the future be served, by a system or systems, where:
> (a) legal title is held or controlled by the same owner or owners; or
> (b) the local Approving Authority or the Department otherwise determines such real property is in single ownership or control pursuant to 310 CMR 15.011 (aggregation).

310 CMR 15.002.

Peabody's purported intent to develop the Site was not a reasonable investment-backed expectation.

In conclusion, I stand by my finding in the Final Decision at p. 40 that former Commissioner Burt properly examined Parcels One and Two as one unit of real property in assessing Mr. Peabody's regulatory taking claim.

2. Mr. Peabody Failed to Prove a Categorical Taking.

At pp. 18-22 of his Motion for Reconsideration, Mr. Peabody repeats his assertion made in the Variance Adjudicatory Hearing that denial of his Variance Request amounts to a categorical taking of his property. His claim is without merit.

First, Mr. Peabody did not set forth the legal standard for the claim. The legal standard is set forth at p. 37 of the Final Decision. A categorical taking "arises where [application of] a [governmental] regulation is such that the [property] 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 v. Peabody, 417 Mass. 299, 304, n.9 (1994).

In my Final Decision, I correctly rejected Mr. Peabody's categorical taking claim because there is a single family home within his property, and, accordingly, there is an economically viable use and no categorical taking. Final Decision, at p. 40; Compare Blair, supra ("denial of [plaintiffs'] application for a variance [from requirements of Massachusetts Watershed Management Act] was plainly not a categorical taking [because] plaintiffs retain[ed] title to the property[,] inhabit[ed] a single-family house on it[,] [and] . . . [were] not been deprived of all viable economic use of the property"). My rejection of the claim was also correct because Mr. Peabody failed to demonstrate that the value of his property is so diminished as to be of no value

to or of no profitable use by him. Final Decision, at pp. 44-45. His expert real estate appraiser witness at the Variance Adjudicatory Hearing, Stephen Ingemi, Jr. ("Mr. Ingemi"), testified that "the highest and best use of the subject [property as a non-buildable lot] would be its assemblage with an abutting lot for additional yard space" and that its market value would be $145,000.00. [Pre-filed] Testimony of Stephen Ingemi (December 3, 2008) ("Mr. Ingemi's PFT"), ¶ B.7, at pp. 4-5; ¶ D.1, at p. 9. Mr. Ingemi's valuation certainly differs from Mr. Peabody's contention from the outset of his Variance Appeal that Parcel Two is worthless if it cannot be developed with a single-family home as he proposes.[27] Mr. Ingemi's valuation also suggests that Mr. Peabody has more than a "token interest" in the property. Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754, 763, 764 n.16 (2005) (plaintiff's real estate appraiser valuation of undeveloped lot as $23,000.00 as "unbuildable" vs. $346,000.00 "as buildable for a three bedroom dwelling" demonstrated "more than a 'token interest' in the property" by plaintiff because "[it] did not take into account uses allowed in the [applicable zoning] district, either as of right or by special permit, which . . . could make the property 'an income producing proposition.'")

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 owner challenged the Board's decision in court

[27] 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.

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. Undisputedly, he could potentially sell the property, or keep it as open space to preserve the highly valued oceanfront location of his single family home situated on Parcel One directly behind Parcel Two. Keeping the property as open space also helps him realize the flood control and storm damage prevention benefits the undeveloped primary coastal dune on Parcel Two provides for his single family

home on Parcel One.

3. Mr. Peabody Failed to Prove a Regulatory Taking Under The Three Prong Test.

Having failed to prove a categorical taking, Mr. Peabody must meet the standard of a conventional regulatory taking claim that assesses whether "[governmental] regulation substantially restricts the owner's use of the property so that the regulation 'goes too far.'" See Final Decision, at pp. 36-37. As explained in the Final Decision, this assessment is made using 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. Id. Here, contrary to his assertions at pp. 22-27 of his Motion for Reconsideration, the consideration of these factors indicates that Mr. Peabody failed to establish that the denial of his proposal to develop the Site in Parcel Two with a single-family home amounts to a taking of the property. Id., at pp. 40-53.

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

As explained in the Final Decision, at pp. 40-41, the first prong of the three prong test considers the economic impact of the government regulation at issue on the claimant by comparing "the value of th[e] [claimant's] property 'before and after the alleged taking.'" Blair, 457 Mass. at 645, citing, Giovanella, supra, 447 Mass. at 725, 734. The courts have established that the economic impact must be severe before a taking has occurred. E.g., Blair, supra; Gove, supra, 444 Mass. at 762-63; Giovanella, supra, 447 Mass. 734-35; 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 131-33. 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.

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. Giovanella, supra (finding no taking after decrease in value of twenty-nine percent, from $452,700.00 to $319,000.00); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004), cert. denied, 543 U.S. 1188, 125 S. Ct. 1406 (2005) (finding no taking after decreases in value of seventy-eight per cent and ninety-two per cent on two combined lots); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178 (Fed. Cir. 1994) (finding categorical taking after ninety-nine per cent diminution in value, from $ 2,658,000.00 to $ 12,500.00); Ciampitti v. United States, 22 Cl. Ct. 310, 320 & n.5 (1991) (finding no taking after decrease in value of twenty-six per cent, from $19 million to $14 million).

Contrary to his assertions at pp. 22-23 of his Motion for Reconsideration, the economic impact of the wetlands regulations here on Mr. Peabody falls far short of a figure constituting a taking. Even if I use the appraisal number proffered by Mr. Peabody's appraiser, Mr. Ingemi, that the market value of the property at issue as a non-buildable lot is $145,000.00, Mr. Peabody still does not prevail on his taking claim. While that figure is a significant reduction from Mr. Ingemi's appraisal figure of $1,325,000.00 as a buildable lot, the cases cited above establish that the diminution does not amount to a taking.

In addition, Mr. Ingemi's appraisal numbers are not consistent with Newbury's real estate tax assessments for Parcels One and Two. I reached this conclusion in the Final Decision by

using the same real estate tax assessment methodology employed by the SJC in Giovanella, supra, to determine the values in that case of Lots 1 and 2.[28] Here, the evidence introduced at the Variance Adjudicatory Hearing established that Parcels One and Two were assessed by the Town of Newbury for a total of $1,255,200.00 in January 2006 when former Commissioner Golledge issued his Final Decision rejecting Mr. Peabody's proposed Project on SOC review. Final Decision, at pp. 45-46. Parcel One was assessed at $712,400.00 and Parcel Two was assessed at $542,800.00. Id., at p. 46. Assuming for argument's sake that Parcel Two was rendered valueless by former Commissioner Golledge's 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. Id.

Lastly, as discussed previously in the Final Decision, at pp. 46-47 and above, at pp. 41-43, Mr. Peabody's valuation claim is further undercut by the major difference of opinion that he has with his own expert real estate appraiser witness, Mr. Ingemi. Mr. Peabody contends that Parcel Two is worthless if it cannot be developed with a single-family home as he proposes, but Mr. Ingemi testified at the Variance Adjudicatory Hearing that "the market value of the Subject Property as a non-buildable lot is $145,000.00."

[28] Although the Department did not present testimony from an expert real estate appraiser at the Variance Adjudicatory Hearing, Mr. Peabody had the burden of proof and I was not required to accept the testimony of Mr. Peabody's appraiser as conclusive on valuation, especially where the appraiser's valuation of $1,325,000.00 for the property as a buildable lot was questionable. See Final Decision, at pp. 50-52; and below, at pp. 46-49. Also, although I have addressed Mr. Peabody's regulatory taking claim in the Final Decision and here, the claim need not be reached because under the Variance regulation at 310 CMR 10.05(10)(a), Mr. Peabody must prove both (1) that he has proposed mitigating measures that will allow his proposed Project to be conditioned so as to contribute to the protection of the interests of MWPA; and (2) that the variance is necessary to avoid an Order that so restricts the use of his property as to constitute an unconstitutional taking without compensation. As discussed in detail in the Final Decision and above, Mr. Peabody did not meet his burden of proof on the mitigation issue.

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

As explained at pp. 47-48 of the Final Decision, the second prong of the three prong test considers the extent to which the government 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. It is well settled that "[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.

Here, contrary to his assertions at pp. 23-26 of his Motion for Reconsideration, Mr. Peabody did not have reasonable investment-backed expectations when he purchased the Land in August 1997. As explained in the Final Decision, at p. 48, 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. He admitted on cross-examination at the Variance Adjudicatory Hearing that prior to purchasing the Land, he reviewed the requirements of the MWPA, the Wetlands Regulations, Title 5, and Newbury's zoning rules and regulations. As a result, he knew or should have known that the MWPA, the Wetlands Regulations, Title 5, and Newbury's zoning rules and regulations could make further development of the Site difficult or impossible.

Although Mr. Peabody claims that several real estate professionals advised him to purchase the Land, only one of those individuals, Mr. Silverstein, testified at the Variance Adjudicatory Hearing. As noted previously, Ms. McHugh did not testify at the Variance

Adjudicatory Hearing and, as a result, her PFT was stricken for failure to attend the Hearing. Final Decision, at p. 4, n.2. Although he testified, Mr. Silverstein did not prove that Mr. Peabody had reasonable investment-backed expectations when he purchased the Land in August 1997. Mr. Silverstein admitted on cross-examination that he had never sold homes on Plum Island, but had only sold and leased real properties in Suffolk County, Massachusetts. Final Decision, at p. 49, n.27. He also admitted that he did not advise Mr. Peabody that Parcel Two was developable; that he did not consult with the Newbury Building Inspector regarding zoning restrictions on the property; and that he did not discuss with Mr. Peabody the applicability of State and local environmental and land use regulations governing the property. Id.

Mr. Peabody's lack of reasonable investment-backed expectations is also evidenced by his failure to assess wetlands law restrictions at the time of his August 1997 purchase of the property. When he purchased the property, the Department had denied wetland approvals to at least two single family homes on Plum Island prior to that time. See notes 20 and 21, at pp. 31 and 32 above. In addition, it was a matter of common knowledge in 1996 that homes on Plum Island faced erosion problems.[29] I find that a reasonable developer, contemplating the purchase of the property on a coastal dune on Plum Island would have obtained competent advice to determine whether the Department's wetlands laws, regulations, policies, and precedents would allow for the contemplated use. Mr. Peabody apparently performed no such due diligence, and therefore, his expectation of building a single family house on a dune, if one existed, was not reasonable.

Mr. Peabody's lack of reasonable investment-backed expectations to develop the Site is

[29] See notes 20 and 21, at pp. 31 and 32 above. Former Commissioner Golledge also noted in his January 2006 Final Decision rejecting Mr. Peabody's SOC Appeal that wetlands regulations restricting development on coastal dunes date back to 1978. See 13 DEPR at 39.

also evidenced by the ambiguity of local zoning restrictions on the property that were in effect when he purchased it in 1997, and his failure to obtain a competent zoning opinion. As of the date of his August 1997 purchase, Parcel Two was zoned by Newbury as Agricultural-Residential ("AR"). The lot contains 15,682 square feet (0.36 acres), but the AR zone requires a minimum of 40,000 square feet for development of a residential dwelling. Article VI, § 97-6.B, Newbury Zoning Bylaws; Final Decision, at pp. 49-50. While it is true that the parcel was grandfathered from that provision under Article X, § 97-10B of the Newbury Zoning Bylaws, a complication arises because the property is also subject to the zoning requirements of Plum Island Overlay District ("PIOD"). Article IV, § 97-4D, Newbury Zoning Bylaws; Final Decision, at p. 51.

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. Final Decision, at p. 51, citing Article IV, § 97-4D(5)(i) and Article X, § 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.)

As noted in the Final Decision, at pp. 51-52, the Newbury Zoning Code was enacted in 1959. 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 Administrative Record of SOC Appeal, at pp. 985-990. 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.

It is unclear whether the PIOD's restrictive grandfathering provision supersedes the more liberal grandfathering provision in the AR zoning district. The Newbury Zoning Bylaws suggest this is the case, as the Bylaws state that "the provisions of § 97-10B of the Zoning By-law shall not apply in the PIOD" and that "the construction of single family residences in the PIOD shall be governed by G.L. c. 40A § 6, paragraph 4." Article IV, § 97-4D(5)(i), Newbury Zoning By-Laws. Article II, § 97-2.C and Article IV, § 97-4.A(1) also provide that "[a]ll applicable regulations, whether Federal, State, or local, if more restrictive, shall also apply." Hence, if the PIOD's restrictive grandfathering provision governs, the lot in question here is unbuildable because it is not grandfathered from the AR zoning district's 40,000 square foot lot size requirement.

In any event, I find that any reasonable developer, reviewing the Newbury Zoning Bylaws, would have sought a competent written determination that his property could be developed consistently with the applicable provisions of the Bylaws, in particular the AR zoning district's lot size provisions. Mr. Peabody submitted no evidence of such due diligence, such as obtaining a building permit or a zoning opinion. His after-the-fact conversation between his appraiser and the Newbury Building Inspector does not suffice.

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

As explained in the Final Decision, at p. 52, the third prong of the takings test 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.

It is well settled that the purpose of the MWPA and the Wetlands Regulations is to promote the common good: protection of "wetlands from the destructive intrusion usually associated with . . . development." Southern New England Conference Assoc. of Seventh-Day Adventists v. Burlington, 21 Mass. App. Ct. 701, 706 (1986). Among the important public interests advanced by the MWPA and the Wetlands Regulations are storm damage prevention and flood control. FIC Homes of Blackstone, supra, 41 Mass. App. Ct. at 673 ("there is no question that [preventing storm damage and providing flood control] are legitimate state interests"); Peabody, supra, 13 DEPR at 45 ("primary coastal dune on a barrier beach [is] a highly protected [wetlands] resource area under the [MWPA] because of its contribution to the public interests of storm damage protection and flood control"); Dunn, supra, 4 DEPR at 222, 1997 MA ENV LEXIS 5, at 19-20; 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). Moreover, the MWPA and the Wetlands Regulations are "use-neutral," meaning that "if a parcel has been properly denominated wetlands, all use [of the parcel] is barred (or limited to activities compatible with the wetlands) without regard for the type of use intended, the propriety of the use in other circumstances or the identity of the landowner." Burlington, supra, 21 Mass. App. Ct. at 706.

Here, application of the MWPA and the Wetlands Regulations do not result in a physical appropriation of Mr. Peabody's real property. He still owns Parcel Two, and as such, he can

exclude others from the property. He can also choose to sell the property or keep it as open space seaward of his house on Parcel One and realize the flood control and storm damage prevention benefits the undeveloped primary coastal dune on Parcel Two provides for his house on Parcel One.

Additionally, contrary to Mr. Peabody's assertions at pp. 26-27 of his Motion for Reconsideration, malevolent intentions are not behind the Department's denial of his proposed Project because application of the MWPA and the Wetlands Regulations to his proposed Project serve the important public interests of storm damage prevention and flood control. The testimony of the Department's wetlands experts, Ms. Rhodes and Mr. Stroman, demonstrated that denial of Mr. Peabody's proposed Project furthers the important wetlands interests of storm damage prevention and flood control. To sum up, in the words of former Commissioner Golledge:

> The applicant seeks to construct a pile supported house . . . on Plum Island[,] . . . directly on the Atlantic Ocean. Plum Island is a barrier beach, and the lot contains several resource areas protected under the Department's wetlands regulations: coastal beach, coastal dunes, barrier beach, and land subject to coastal storm flowage. . . . At issue . . . is the siting of the project where all potential impacts are entirely within the dune closest to the coastal beach, also known as the primary coastal dune. . . . I deny the project because it fails to meet the performance standards for work on a primary coastal dune on a barrier beach, a highly protected resource area under the [MWPA] because of its contribution to the public interests of storm damage protection and flood control. . . . In doing so, I reaffirm the Department's commitment to the protection of public health and safety that would otherwise be jeopardized by unsound coastal development. . . .

13 DEPR at 37 & 45. I concur with former Commissioner Golledge.

CONCLUSION

As demonstrated in the Final Decision and in this Final Decision on Reconsideration, Mr. Peabody's proposed Project has received extensive review during the past decade from a

multitude of Department staff, including several wetlands experts and three Commissioners (myself included) who have all rejected the proposed Project because it cannot be conditioned to contribute to the protection of the relevant MWPA interests of storm damage and flood control. In addition, the January 2006 Final Decision of former Commissioner Golledge in Mr. Peabody's previous SOC Appeal has been thoroughly reviewed and affirmed by the Superior Court on judicial review pursuant to G.L. c. 30A, § 14. In sum, I am confident that the Department has reached the correct result in rejecting Mr. Peabody's proposed Project.

NOTICE OF FINAL DECISION ON RECONSIDERATION

A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

_____

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
Julie Pruitt Barry Nutter, McClennen & Fish LLP World Trade Center 155 Seaport Blvd. Boston, MA 02210 jpbarry@nutter.com	APPLICANT/PETITIONER Peabody Family Trust
Deirdre Desmond, Esq. MassDEP/Office of the General Counsel One Winter Street Boston, MA 02108 Deirdre.desmond@stat.ma.us	DEPARTMENT
Michael Stroman MassDEP – Bureau of Resource Protection 1 Winter Street Boston, MA 02108 michael.stroman@state.ma.us	DEPARTMENT
Doug Packer Newbury Conservation Commission Town Hall 25 High Road Newbury, MA 01951 conscom@townofnewbury.org	CONCOM Newbury Conservation Commission