

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. BACV2011-00314

SCOTT GLASS, TRUSTEE OF THE  
HILL AND DALE NOMINEE TRUST

vs.

COMMONWEALTH OF MASSACHUSETTS,  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

INTRODUCTION

Plaintiff filed this action against the Massachusetts Department of Environmental Protection (the "Department") pursuant to M.G.L. c. 30A § 14, challenging a final decision of the Department, which denied Glass' proposed project of building an 85-foot rock scour protection revetment on his coastal property. Before this court is Plaintiff's motion for judgment on the pleadings, requesting the court to issue an order which requires the Department to issue a Superceding Order of Conditions allowing his project to proceed. For the following reasons, Plaintiff's motion for judgment on the pleadings is DENIED. Defendant's cross motion is ALLOWED and the Department's decision is AFFIRMED.

BACKGROUND

A motion for judgment on the pleadings may be granted only where no issue of material fact exists and where the movant is entitled to judgment as a matter of law. A review of the

pleadings reveals the following information.

Plaintiff is the owner of waterfront property, located at 10 Sedge Lane in Chatham, Massachusetts, that was damaged in a 2007 storm, and sought permission from the Department to build an 85-foot rock revetment on said property. Plaintiff alleges that construction of the revetment is required to protect his house, which sits approximately 125 feet from the coast and was constructed prior to August 10, 1978.

On August 11, 2009, the Department issued a Superceding Order of Conditions, which upheld the decision of the Chatham Conservation Commission to deny the project. Following Plaintiff's appeal, the Department issued a final decision on April 26, 2011. This appeal is based on three sections of the State Wetlands Regulations: whether the project meets the performance standards for work on a coastal bank at 310 CMR 10.30(3); whether it meets the requirements of 310 CMR 10.24(5)(a) for work in an Area of Critical Environmental Concern ("ACEC"); and whether the project complies with the performance standards for work in or within 100 feet of a salt marsh at 310 CMR 10.32(3).

Glass alleges that his proposed project complies with each of the above regulations, and the Department's decision is based upon erroneous interpretations of the regulations, lacks substantial evidence, and reaches conclusions that are arbitrary and capricious.

The Department alleges that it properly denied Glass' proposal, applied the correct legal standards, and is supported by substantial evidence.

## DISCUSSION

### I. Standard of Review

When an action is brought pursuant to the provisions of Chapter 30A § 14, the court may

review the decision only to determine if the agency decision is (1) based upon an error of law, is (2) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, or (3) is unsupported by substantial evidence. M.G.L. c. 30A § 14(7). The statute directs the court to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred upon it." *Id.*

## II. Compliance with the Wetlands Regulations

Plaintiff correctly argues that when deciding if a proposed revetment on a coastal bank should be permitted pursuant to 310 CMR 10.30(3), it is necessary that the project meet three standards: (1) The revetment is required to prevent storm damages to the house, which was constructed prior to 1978; (2) The revetment is designed and constructed to minimize adverse effects on adjacent or nearby coastal beaches due to changes in wave action; and (3) The applicant has demonstrated that no method of protecting the building other than the proposed revetment is feasible.

Plaintiff's claim that the final decision (that the revetment is not "required" to protect his house), is arbitrary and capricious is based on the Department's explanation that the revetment must be "necessary" to prevent storm damage to the house. Plaintiff incorrectly attributes the Department's use of the word "necessary" to mean that it considers the regulations to require an imminent threat to the building in order to satisfy the standard.

As the Department argues, and this court agrees, its interpretation that the revetment must be "necessary" to prevent storm damage has the same meaning as that it is "required" to prevent storm damage to the house, and because the building sits significantly far away from the top of the bank, a revetment is not required to prevent storm. The court agrees that the Department did

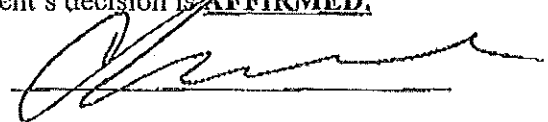
not misinterpret the regulation to require Glass to give evidence that his house was in "imminent danger" as he alleges, but instead it simply argued that "denial is warranted where an 'anticipated loss may never occur' and there was no evidence in support of an imminent threat to the building." Admin. Record at pg. 520. It is clear from the administrative record that the use of the term "imminent threat" was not an attempt by the Department to create a stricter standard than had been written into the regulation, but merely to give an example of why Glass had not satisfied the existing standard.

Additionally, Glass claims that the final decision, that the project does not meet the performance standards for work in an ACEC or Salt Marsh, are unsupported by the evidence and arbitrary and capricious, respectively. Upon a review of the record, this court agrees with the Department that its decisions were in fact supported by substantial evidence, reasonable, and entitled to substantial deference. Therefore, this court declines to issue judgment on the pleadings.

**ORDER**

For the foregoing reasons, Plaintiff's motion for judgment on the pleadings is **DENIED**.

Defendant's cross motion is **ALLOWED** and the Department's decision is **AFFIRMED**.



Christopher J. Muse

Justice of the Superior Court

Dated: November 30, 2011