

Noted

COMMONWEALTH OF MASSACHUSETTS

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GENERAL COURT
ADMINISTRATIVE LAW DIVISION

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 10-2495-B

JOHN VAN LOAN

VS.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

Notice sent
7/28/2011
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**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

(sc)

This is an action by plaintiff John Van Loan ("plaintiff") for judicial review, pursuant to G. L. c. 30A, § 14, of a final decision of defendant Massachusetts Department of Environmental Protection ("DEP") approving a Superseding Order of Conditions ("SOC") issued under the Wetlands Protection Act, G. L. c. 131, § 40. The SOC denied the plaintiff's request to raze an existing building in a salt marsh in Newbury, Massachusetts, and replace it with a new home in the same marsh.

As an initial matter, the scope of this court's review must be limited to a determination of whether an error of law occurred, inasmuch as the plaintiff failed to submit a copy of the transcript of the agency's evidentiary hearing and, thereby, waived any claim that the final decision was not supported by substantial evidence. See *Covell v. Dept. of Social Services*, 439 Mass. 766, 782-83 (2003); Superior Court Standing Order 1-96. Courts "ordinarily accord an agency's interpretation of its own regulations considerable deference." *Ten Local Citizens Group v. New England Wind, LLC*, 457 Mass. 222, 228 (2010). A court "will not overturn an agency's interpretation of its own regulation and statutory mandate unless that 'interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.'" *Shelales v. Director of Office*

of Medicaid, 75 Mass. App. Ct. 636, 640 (2009), quoting *Box Pond Assn. v. Energy Facilities Siting Bd.*, 435 Mass. 408, 416 (2001). “So long as the agency’s interpretation of its regulations and statutory mandate is rational, and adhered to consistently, it should be respected.” *Boston Police Superior Officers Federation v. Boston*, 414 Mass. 458, 462 (1993). The party challenging an agency’s interpretation of its own regulations and mandate has a “formidable burden” of showing that the interpretation is not rational. *Northbridge v. Natick*, 394 Mass. 70, 74 (1985), quoting *Greenleaf Fin. Co. v. Small Loans Regulatory Bd.*, 377 Mass. 282, 293 (1979). Thus, the court cannot entertain any argument by the plaintiff as to the lack of substantial evidence before the agency, only the rationality of the decision.

The plaintiff invites this court to declare that the DEP misinterpreted its definition of a “salt marsh” under 310 CMR § 10.32(2); he argues that, because the vegetative species *Phragmites*, rather than the “[d]ominant plants” of *Spartina patens* and/or *Spartina alterniflora* cited in the regulation, predominated on his property, the property cannot be defined properly as a salt marsh. The court need not enter this aquatic thicket, however, because, even if the plaintiff’s land were regulated as a Bordering Vegetated Wetland as opposed to a salt marsh, as he urges, the DEP committed no error of law in finding that the plaintiff’s proposed construction cannot go forward as a permissible “limited project” under 310 CMR § 10.53(3)(I), which allows only “maintenance, repair and improvement (but not substantial enlargement)” of existing structures.¹ The agency very reasonably concluded that a project that would consist of a complete demolition and removal of the existing building and a new construction accomplished

¹Moreover, declaratory relief is inappropriate where Chapter 30A review is available. See *School Comm. of Franklin v. Comm’r. of Educ.*, 395 Mass. 800, 807-08 (1985); *McLellan v. Comm’r. of Correction*, 29 Mass. App. Ct. 933, 934 (1990); *Rosenfeld v. Bd. of Health of Chilmark*, 27 Mass. App. Ct. 621, 624 (1989).

with new materials did not constitute a "limited project." For this reason alone, the plaintiff cannot prevail in his administrative appeal as a matter of law.

ORDER

For all the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that the plaintiff's motion for judgment on the pleadings be **DENIED** and that the complaint be **DISMISSED**.



Linda E. Giles,
Justice of the Superior Court

Dated: July 27, 2011