COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2008-P-0674

STEPHEN D. PEABODY, INDIVIDUALLY AND AS TRUSTEE OF THE PEABODY FAMILY TRUST,

Plaintiff-Appellant,

v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,

Defendants-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF
THE SUPERIOR COURT IN ESSEX COUNTY

BRIEF OF THE APPELLEES MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.

MARTHA COAKLEY
ATTORNEY GENERAL

Seth Schofield, BBO No. 661210
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@state.ma.us

May 11, 2012

TABLE OF CONTENTS

ADDENDUM TABLE OF CONTENTS

Addendum Table of Contents — Continued Tab

TABLE OF AUTHORITIES

Page

Cases

Table of Authorities – Continued Page

Table of Authorities – Continued Page

MassDEP Administrative Decisions

Statutes

Table of Authorities – Continued Page

Regulations

Table of Authorities – Continued Page

Other Authorities

STATEMENT OF ISSUES

Stephen Peabody proposes to construct a single family home and a gravel driveway and parking area seaward of his existing house on the undeveloped coastal sand dune closest to the beach on Plum Island, Newbury--the primary coastal dune. The Commissioner of the Massachusetts Department of Environmental Protection denied Peabody's request for a permit under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, and its coastal wetlands regulations, because, *inter alia*, the project will have an "adverse effect" on the dune by disturbing vegetative cover and interfering with the dune's ability to move landward and laterally in response to natural forces. The issues presented are routine:

1. Is the Commissioner's interpretation of the regulations that govern work on coastal dunes reasonable, where it is based on the regulations' scientifically driven text and purposes, which demand strict scrutiny of proposed projects on undeveloped primary coastal dunes to ensure that they will not have an "adverse effect" on the dune's ability to respond to natural forces?

2. Did the Commissioner conclude correctly that Peabody's proposed construction project will not comply with the regulations governing work on a primary coastal dune, where the project will have "adverse effects" on the undeveloped dune's ability to function and the regulations do not allow Peabody to compensate for those effects by stabilizing other parts of the dune?

STATEMENT OF THE CASE

"[L]ook! here come the crowds, pacing straight for the water. . . . Strange! Nothing will content them but the extremist limit of the land."[1] And so it is here: Peabody seeks judicial review under G.L. c. 30A, § 14 of a Final Decision of the Department's Commissioner that denied his application to construct a house on a coastal sand dune. Administrative Record (AR) 1713.[2] In his Complaint, Peabody also alleged that the permit denial violated the equal protection and substantive due process clauses of the U.S. Constitution and effected a regulatory taking under both the U.S. and the Massachusetts Constitutions, Record Appendix (RA) 19-22, but, on the Department's motion to dismiss those claims (RA 7), Peabody agreed to dismiss them. RA 121.[3] After a hearing on Peabody's motion for judgment on the pleadings and its own

---

[1] HERMAN MELVILLE, MOBY-DICK 18 (Charles C. Walcutt ed., Bantum Classic 2003)(1851).

[2] The Administrative Record was filed as Record Appendix Exhibit Volumes I through IV.

[3] Following the dismissal of his constitutional claims, Peabody filed a civil rights action against the agency and it's Commissioner in the U.S. District Court for Massachusetts claiming again that the permit denial violated the U.S. Constitution's equal protection and substantive due process clauses. *See* Civil Action No. 08-10105 (D. Mass.). That action remains stayed pending the outcome of this case.

independent review of the Record, the Superior Court (Fahey, J.) denied Peabody's motion in a written decision and entered a judgment affirming the Commissioner's Final Decision. RA 104-19, 120.

Peabody timely noticed this appeal in 2007. RA 123. Later, however, he sought and obtained a stay of his appeal pending a final decision from the Department on his request for a variance from the WPA. App. Ct. Doc. Nos. 2-35. The Department's Commissioner issued a Final Decision denying Peabody's variance request on April 12, 2011 and a Final Decision on Reconsideration affirming that denial on December 27, 2011.[4] Peabody chose not to file a new Complaint under G.L. c. 30A, § 14 to challenge the Final Decision on Reconsideration, which, among other things, rejected his claim that the Department has treated his proposed project differently than other similarly situated projects.[5] With the variance proceedings concluded, Peabody asked this Court to lift the stay of this appeal.

---

[4] Both of those decisions, together with the other administrative decisions cited in this brief, are included in the Addendum.

[5] *Compare* Final Decision on Recons. at 29-33, *In re Peabody*, DEP No. WET-2008-063 (2011), *with* Peabody Br. 36-37. This finding is binding here. *See Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 844 (2005).

STATEMENT OF LEGAL AND FACTUAL BACKGROUND

I. THE WETLANDS PROTECTION ACT AND ITS REGULATIONS

The Wetlands Protection Act (WPA), G.L. c. 131, § 40, and its regulations, 310 C.M.R. §§ 10.00-10.60, create a comprehensive program for the protection of wetland resource areas within the Commonwealth. *Healer v. Dep't of Envtl. Protection*, 73 Mass. App. Ct. 714, 716 (2009)("The Act was created to protect wetlands from destructive intrusion."). To accomplish its purpose, the Act prohibits the alteration of "any bank . . . coastal wetland, [or] beach . . . bordering on the ocean," except in compliance with a permit, also known as an order of conditions, issued by a municipality's conservation commission, or a superseding order of conditions (SOC), issued by the Department. G.L. c. 131, § 40 ¶1; 310 C.M.R. § 10.02(1)(a)-(f). To effectuate the WPA's purpose, the Legislature delegated broad rulemaking authority to the Department. G.L. c. 131, § 40 ¶31. Pursuant to that authority, the Department has issued regulations that establish performance standards for defined resource areas. *Ten Local Citizen Group v. New England Wind, LLC*, 457 Mass. 222, 224 (2010).

A person who plans to alter a protected wetland resource area must first file a Notice of Intent (NOI) with the relevant municipality's Conservation Commission. 310 C.M.R. § 10.02(2)(a). In those proceedings, the project proponent must demonstrate that either the area where the work is proposed is not significant to the interests of the Act or, if the area is significant, that the proposed work "will contribute to the protection of" specified interests. § 10.03(1)(a)(1)-(2). The Conservation Commission can issue an Order of Conditions imposing restrictions on the project so that it complies with the performance standards or it can deny the project if it determines that the project cannot be conditioned to meet the standards. § 10.05(5)-(6)(b). Enumerated parties may challenge the Commission's decision by asking the Department to issue an SOC, § 10.05(7), and they may then request an adjudicatory hearing contesting the SOC. § 10.05(7)(j).

A. The Coastal Wetlands Regulations Protect Coastal Dunes on Barrier Beaches to Prevent Storm Damage and Flooding.

In the wake of the coastal damage left behind by the Blizzard of 1978, the Department promulgated performance standards for coastal wetlands "to ensure

that development along the coastline is located, designed, built and maintained in a manner that protects the public interests in coastal resources." 310 C.M.R. § 10.21; *see also id.* § 10.10(2). Those regulations create performance standards for defined resource areas, including coastal banks, barrier beaches, and dunes, which an applicant must satisfy to obtain project approval. *E.g.*, 310 C.M.R. §§ 10.21-10.37 (coastal wetlands regulations). The Commissioner is directed to interpret those standards in a manner that protects the relevant resource area and its specified characteristics to the "maximum extent practicable." § 10.21.

A barrier beach is "a low-lying strip of land generally consisting of coastal beaches and coastal dunes," 310 C.M.R. § 10.29(2), and a coastal dune is "any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action and storm overwash." § 10.28(2). Both of these resource areas are significant to the statutory interests of storm damage prevention and flood control. §§ 10.28(1), 10.29(1); *see also* G.L. c. 131, § 40 ¶18. "Barrier beaches protect landward areas" by acting as "a buffer to storm waves and to sea levels elevated by storms."

§ 10.29(1). Critical to a barrier beach's ability to perform this function is its ability to migrate landward, which is occurring across the Commonwealth due to reduced sediment volume, rising sea levels, wind, storm overwash, and tidal processes. *Id.* Coastal dunes react to these changes by eroding and accreting in response to changes in the shoreline and replenishing beach sediment loss with new sand. § 10.28(1). Dunes that border on beaches cannot "protect inland coastal areas [and properties] from storm damage and flooding," unless they are allowed to maintain their volume and to change their "shape to conform to natural wind and water flow patterns[,]" which includes "mov[ing] landward at the rate of shoreline retreat." *Id.*

B. The Coastal Wetlands Regulations Afford Heightened Protection to the Dune Closest to the Beach--the Primary Coastal Dune.

"All coastal dunes are likely to be significant to storm damage prevention and flood control, and all coastal dunes on barrier beaches and the coastal dune closest to the coastal beach in any area are *per se* significant to storm damage prevention and flood control." 310 C.M.R. § 10.28(1)(emphasis added). As the Department noted years ago, the regulatory text

draws a distinction between the "dune closest to a coastal beach," known, due to its location and importance, as the "primary" coastal dune, and secondary dunes that form behind the dune closest to the beach. *See id.*[6] The regulatory import of this distinction is that the presumption that the primary coastal dune is significant to storm damage prevention and flood control is not rebuttable while the presumption that secondary dunes are significant to those interests is. *See id.* § 10.28(1).

The Commissioner may not approve work on a coastal dune unless the project proponent demonstrates that the project will "not have an adverse effect on the . . . dune" by, *inter alia*, "(b) disturbing vegetative cover so as to destabilize the dune" or "(d) interfering with the landward or lateral movement of the dune." 310 C.M.R. § 10.28(3)(a)-(f). An adverse effect is "a greater than negligible change in the resource area or one of its characteristics or factors that diminishes the value of the resource area to one or more of the interests . . . as determined by the

[6] *In re LaFrance*, DEP No. 84-36, at *1 n.4 (1993) ("the regulations draw a distinction between the dune that is closest to the coastal beach, and other dunes. . . . The former generally is referred to by the Department as the primary dune.").

issuing authority." § 10.23, at 356. "Negligible effect," in turn, "means small enough to be disregarded." *Id*. In contrast, the regulations establish a less exacting standard "when a building already exists upon" the coastal dune. § 10.28(4). In that case, the regulations dictate that "a project accessory to the existing building may be permitted, provided that such work . . . *minimizes* the adverse effect on the coastal dune." *Id.* (emphasis added).

II. PEABODY'S PROPOSED PROJECT ON A PRIMARY COASTAL DUNE ON PLUM ISLAND--A BARRIER BEACH.

In 1997, Peabody purchased two adjoining parcels of land, held under common ownership since at least 1952, located at 14 51st Street, Newbury. AR 769, 989. As part of this transaction, Peabody also acquired an existing three-bedroom house located on lot 207. His house has an unimpeded view of the Atlantic Ocean, *see* AR 93 (photo looking out from house), 669 (plan depicting lots), 910 (photo of house), and was relocated from a point seaward of its current location in 1967 due to shoreline erosion. *E.g.*, AR 667, 1732. In 2000, Peabody transferred the seaward portion of the property (lots 208, 209, and 210) to the Peabody Family Trust for nominal consideration. AR 669, 987.

Later that year, Peabody submitted a Notice of Intent to the local Conservation Commission requesting approval to construct a new 1,080-square foot (ft^2) three-bedroom house with a 576 ft^2 deck, all on pilings, together with a gravel driveway and parking area, an in-ground septic system, and a well seaward of his existing house. AR 386, 412-19 (plans for house), 669 (plan depicting house location), 1714. Peabody has since "eliminated the need for the on-site septic system" and the well. AR 1718.

Plum Island is a barrier beach and, as Peabody recognized, "one of the most environmentally diverse areas in the region." AR 551. The proposed project site abuts the Atlantic Ocean (AR 93, 571, 770) and will impact several resource areas protected by the regulations, including a barrier beach, a coastal dune, and a coastal beach. AR 1714. As Peabody has himself acknowledged, "[a]ll potential [project] impacts are limited to the dune closest to the coastal beach on a barrier beach," which is also known as the primary coastal dune due to its location. *See* AR 543. In other words, the project will permanently alter an undeveloped primary coastal dune on a barrier beach. *See* AR 618, 904.

Plum Island and its beaches and dunes are continually influenced by natural forces, such as coastal storms, high tides, and sea currents. AR 1728-29. As Peabody recognized in 2003, for example, south of his property, "[t]he erosion problem, losses of cottages, serious reduction in lot sizes and total loss of some seaward lots is acute." AR 569. The situation has not improved, with one recent decision noting that "Plum Island is experiencing what engineers now refer to as 'severe coastal erosion.'"[7]

III. THE ADMINISTRATIVE PROCEEDINGS

On March 29, 2001, the Newbury Conservation Commission issued an Order of Conditions allowing Peabody's proposed project. AR 68. Abutting property owners, however, timely asked the Department to issue a superseding order of conditions prohibiting it. AR 1714-15. On March 15, 2002, the agency's Northeastern Regional Office issued a negative Order denying the project, because it found, *inter alia*, that the project "did not meet the minimum performance standards of the . . . Act . . . and that the proposed

[7] *Florio v. Bd. of Assessors of Newbury*, 2011 Mass. App. Tax Bd. 725, 731, 734, 777-78 (June 29, 2011), http://www.mass.gov/anf/docs/atb/2011/11p725.doc (allowing stigma based tax abatement for property owners on Plum Island due to erosion).

project will not contribute to the protection of the [Act's] statutory interests" of flood control and storm damage prevention. AR 468, 473. Peabody subsequently requested an adjudicatory hearing to challenge the permit denial. AR 478.

The administrative magistrate initially stayed the adjudicatory proceedings so that Peabody could comply with the Massachusetts Environmental Policy Act (MEPA). AR 161.[8] After Peabody completed the MEPA process (AR 490, 525, 531, 685), the parties identified eight issues for adjudication. AR 1004. Most of those issues have been resolved and are no longer in dispute. *E.g.*, AR 1162 (No. 7), 1653 (No. 8). The issues identified during the adjudicatory proceedings that remain at issue here are: (1) whether Peabody's proposed dune re-vegetation plan will assure the stability of the dune and compliance with 310 C.M.R. § 10.28(3)(b) and (2) whether Peabody's project will interfere with the landward movement of the dune in violation of 310 C.M.R. § 10.28(3)(d). AR 1006.

Both Peabody and the Department submitted pre-filed direct and rebuttal testimony for each of their

[8] Peabody acknowledged this regulatory obligation (*compare* AR 158 ¶7, *with* Peabody Br. 6 n.2), which was also explained in the SOC. AR 474.

three witnesses: Stanley Humphries (AR 324, 880); Kevin Klein (AR 347, 886); and William Decie (AR 369, 902) for Peabody, and David Ferris (AR 781, 937); James Sprague (AR 787, 930), and Rebecca Haney Inglin (AR 801, 918) for the agency. An administrative magistrate at the Division of Administrative Appeals (DALA) heard live testimony over three days. AR 1008, 1164, 1416. At the conclusion of the administrative proceedings, the magistrate issued a recommended decision, which recommended that the Department's Commissioner approve the project with conditions. AR 1629.

Two months later, the Commissioner issued a Tentative Decision, which, among other things, adopted certain aspects of the Recommended Decision, but disagreed with the DALA magistrate's recommendation that Peabody's project would comply with the coastal dune performance standards. AR 1669, 1670, 1671-73. Following the filing of objections and oral argument, AR 1704, 1711, the Commissioner issued a modified version of the Tentative Decision as his Final Decision. AR 1713. There, he again adopted many of the magistrate's recommendations (AR 1714, 1715), but rejected the magistrate's recommendation regarding the

project's compliance with the coastal dune performance standards. RA 1715. Noting that his "interpretation of the legal standard . . ., as well as giving different weight to various parts of the evidence, accounts for [his] differences with the Recommended Decision," RA 1728 n.19, he found that: (1) the proposed project site is unstable and subject to cycles of erosion and accretion; (2) the proposed project will have an adverse effect on the dune's ability to move; (3) the proposed project will have an adverse effect on vegetation and destabilize the dune; (4) the proposed conditions will not protect the WPA's interests; and (5) his decision is consistent with prior decisions. AR 1718, 1729, 1732, 1744-37.

SUMMARY OF THE ARGUMENT

I.A. The Department's Commissioner, not the administrative magistrate, is responsible for making an independent determination of the issues, construing the applicable regulations, and issuing a Final Decision. While the Commissioner disagreed with the magistrate's recommendation, his disagreement did not rest on the magistrate's credibility determinations. Instead, the Commissioner rejected the magistrate's

recommended conclusions based on his different interpretation of the legal standard. (pp. 22-25).

I.B. Consistent with past decisions, the Commissioner concluded that the regulations do in fact distinguish between the "dune closest to the coastal beach" and other secondary dunes and then, based on that distinction, identified the dune closest to the coastal beach as "the primary coastal dune." The Commissioner's analysis reflects a reasonable interpretation of the regulatory text, which itself, as Peabody concedes, establishes an "exceptionally high bar." (pp. 25-29).

I.C. The coastal dune performance standards demand that no project shall have an "adverse effect" on specified dune functions. In construing the regulations, the Commissioner reasonably concluded that a person proposing to alter an undeveloped primary dune cannot compensate for adverse effects on one part of the dune by planting new vegetation on other parts of the dune. (pp. 30-33).

I.D. The Commissioner also did not deny Peabody's project based on Executive Order 181, which prohibits new construction on primary coastal dunes on barrier beaches. Rather, the Commissioner's sole reference to

that Order was made to confirm the conclusion he had already made--Peabody's proposed project does not comply with the coastal dune performance standards. The latter conclusion was based on a site-specific application of the performance standards to Peabody's proposed project, which is all that prior decisions require. (pp. 34-35).

II.A. Peabody has conceded that his proposed project will permanently alter a coastal dune and that all of the associated impacts are "limited to the dune closest to the coastal beach on a barrier beach"--the primary coastal dune. Despite these concessions, the Commissioner conducted his own, independent evaluation of the written plans in the Record and reached the same conclusion. Under the regulations, a primary coastal dune on a barrier beach is *per se* significant to storm damage prevention and flood control. (pp. 36-38).

II.B. The Commissioner concluded correctly that the project location is subject to ongoing cycles of erosion and accretion. To reach that conclusion, the Commissioner reviewed data revealing dramatic, historical fluctuations in the shoreline's location on the adjacent barrier beach. As additional support, he

also relied on Record evidence, submitted and corroborated by Peabody, that Peabody's existing house was moved landward in the 1960s along with other neighboring houses, because they were threatened by erosion. (pp. 38-42).

II.C. The Commissioner concluded correctly that Peabody's proposed project will have an adverse effect on the dune's ability to move landward and laterally. Peabody's claim that this conclusion was infected by the Commissioner's failure to account for the elimination of the septic system is specious, because the Commissioner explicitly acknowledged that fact, but disagreed with its significance. The Commissioner also, quite reasonably, concluded that constructing a gravel driveway and parking area on the dune will prevent the dune from moving. (pp. 43-45).

II.D. The Commissioner concluded correctly that Peabody's proposed project will also have an adverse affect on the dune's vegetation and thereby destabilize the dune. Here again, the Commissioner relied on Record evidence and his own expertise to reach that conclusion, which Peabody does not seriously dispute. Instead, Peabody leans on his plan to compensate for these adverse effects by planting

dune grass on other areas of the dune, but that plan is foreclosed by the Commissioner's interpretation of the regulations. (pp. 45-47).

II.E. Finally, the Commissioner also considered the conditions Peabody claims will allow his project to be approved, and concluded reasonably that neither a condition requiring Peabody to remove the entire house if it is threatened by erosion nor the proposed vegetation and associated monitoring plan that he had already rejected would in fact allow Peabody's proposed project to comply with the coastal dune performance standards. (pp. 47-49).

ARGUMENT

Judicial review of the Commissioner's Final Decision is limited. The Court reviews the Final Decision "only to determine whether the [] decision was unsupported by substantial evidence, arbitrary and capricious, or otherwise based on an error of law." *Friends & Fishers of Edgerton Great Pond, Inc. v. Dep't of Envtl. Protection*, 446 Mass. 830, 836 (2006). The statute directs courts to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred upon it." G.L. c. 30A, § 14(7). In

other words, "[i]t is a standard of review [that is] 'highly deferential to the agency." *Friends & Fishers*, 446 Mass. at 836. And it is also well settled that Peabody has the burden to "demonstrate the invalidity of" the Final Decision. *Marion v. Div. of Med. Assistance*, 68 Mass. App. Ct. 228, 231 (2007). That is a "heavy" burden, *Box Pond Ass'n v. Energy Facilities Siting Bd.*, 435 Mass. 408, 412 (2001), and one that he has not met here.

Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6). This "is [also] a standard of review [that is] 'highly deferential to the agency.'" *Hotchkiss v. State Racing Comm'n*, 45 Mass. App. Ct. 684, 695-696 (1998) (citation and quotation omitted). And an agency "decision is not arbitrary and capricious unless there is no ground which 'reasonable [persons] might deem proper' to support it." *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 684-85 (1996) (citations omitted, brackets in original). In either case, this Court "is not empowered to make a de novo determination of the facts, to make different credibility choices, or to

draw different inferences from the facts found by the [Commissioner]." *Pyramid Co. of Hadley v. Architectural Barriers Bd.*, 403 Mass. 126, 130 (1988). The Court's role "is limited to [determining] 'whether a contrary conclusion is not merely a possible but a necessary inference from the findings.'" *Duarte v. Comm'r of Revenue*, 451 Mass. 399, 408 (2008).

Since the Department's Commissioner is charged with primary responsibility to administer and enforce the WPA, G.L. c. 131, § 40 ¶31, his interpretation of both the Act and the regulations are entitled to substantial deference. *City Council of Agawam v. Energy Facilities Siting Bd.* 437 Mass. 821, 828 (2002) (courts "give[] agencies broad discretion to interpret statutes that they enforce, lending 'substantial deference' to their interpretations."); *Hurst v. State Ballot Law Comm'n*, 428 Mass. 116, 120 (1998) ("An agency's interpretation of its own regulation is entitled to 'substantial deference.'"). Here again, this Court "must give due weight to the [Department's] experience, technical competence, and specialized knowledge in the field of [wetlands protection]." *Fioravanti v. State Racing Comm'n*, 6 Mass. App. Ct. 299, 302 (1978). Indeed, courts may not disturb the

agency's interpretation of its own regulations, unless the "interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious." *Box Pond Ass'n*, 435 Mass. at 416 (citation omitted).

The Department agrees that "the [overarching] issue [in this case] is whether [Peabody's proposed] Project [can] be conditioned to meet [the] applicable performance standards." Peabody Br. 39. Accordingly, the Commissioner, in a thoughtful 26-page decision, faithfully construed the scientifically and policy derived coastal dune performance standards, undertook a thoughtful, independent review of the Record, and concluded that Peabody's proposed Project *will* have an adverse effect on the primary coastal dune at issue. This Court should affirm the Commissioner's Final Decision, because, as the Superior Court held (AR 104), the Final Decision is consistent with the WPA and its regulations, is not arbitrary and capricious, and is supported by substantial evidence.

I. THE COMMISIONER CORRECTLY INTERPRETED AND APPLIED THE PERFORMANCE STANDARDS FOR WORK ON PRIMARY COASTAL DUNES ON BARRIER BEACHES TO PEABODY'S PROPOSED PROJECT.

A. The Commissioner, Not the Administrative Magistrate, is Responsible for Construing the WPA and its Regulations and Deciding Whether a Proposed Project Will Comply with the Wetlands Performance Standards.

Peabody makes much of the fact that the Commissioner reached a different conclusion than the administrative magistrate on whether the project meets the coastal dune performance standards. Peabody Br. 15. His reliance on the decision of the magistrate instead of the decision of the Commissioner, however, is misplaced. The Commissioner's decision is the Final Decision of the Department and therefore the decision before this Court for review. The agency's regulations make this clear by defining the "final decision" as the "decision issued by the Commissioner." 310 C.M.R. § 1.01(14)(b); *see also New England Wind*, 457 Mass. at 228 ("[W]e note that the recommendation was not the final decision of the department."). In contrast, the role of the administrative magistrate ends once they have conducted the hearing, compiled the record, and submitted a recommended decision for consideration by

the Commissioner. A. CELLA ET AL., ADMINISTRATIVE LAW AND PRACTICE § 349, at 656 (1986 & Supp. 2011).

The Commissioner's rejection of the magistrate's conclusion is consistent with Massachusetts case law. It is, after all, well settled that the Commissioner "retains the ultimate authority to make an independent determination of the issues," *Boston Police Superior Officers Fed'n v. Boston*, 414 Mass. 458, 464 (1993) (citing CELLA, *supra*, at § 349), and to adopt, "reject or modify the hearing officer's decision, findings, or rulings." CELLA, *supra*, at § 349; *see also New England Wind*, 457 Mass. at 231. Indeed, "the [C]ommissioner's interpretation of [the] regulations is conclusive at the agency level, and is the only interpretation that is entitled to deference by the reviewing court." *New England Wind*, 457 Mass. at 228.

Peabody complains bitterly that the Commissioner improperly ignored the administrative magistrate's credibility determinations. Peabody Br. 16-28. This contention is also misplaced. As the Commissioner acknowledged, "[t]he findings of an administrative magistrate are entitled to some deference, particularly when based on determinations of credibility, and [he] must explain his reasons" for

arriving at a different conclusion than the magistrate. AR 1716 n.6 (citing *Vinal v. Contributory Ret. Bd.*, 13 Mass. App. Ct. 85, 96-101 (1982) and *Morris v. Bd. of Reg. in Med*., 405 Mass. 103, 111 (1989)). Accordingly, here, as in *New England Wind*, 457 Mass. at 232, the Commissioner did in fact articulate his reasons for reaching a different conclusion than the magistrate and that conclusion, as the Commissioner also noted, did not rest on his rejection of any of the magistrate's purported credibility determinations. AR 1716 & n.6, 1733 n.24).[9] Rather, the Commissioner rejected the magistrate's recommended *conclusions*. Indeed, as the Commissioner explained, "I believe that my interpretation of the

[9] Indeed, the magistrate's recommendation did not turn on witness credibility. Rather, the magistrate's findings were based on her view of the relevancy and reliability of certain expert testimony and documentary evidence. AR 1642-44, 1716 n.6; *see also Lisbon v. Contributory Ret. Bd.*, 41 Mass. App. Ct. 246, 253 n.7 (1996)(Commissioner in same position as magistrate to review documentary evidence and reach own conclusion). And while the magistrate did discount Inglin's testimony, she was not referring to Inglin's pre-filed direct or rebuttal testimony, which was technical and scientific in nature and which was not challenged by Peabody on credibility grounds, but rather testimony the magistrate elicited at the hearing about observations of wave overwash at the site. AR 1287-99. Since the Commissioner did not rely on those observations, AR 1733 n.24, the magistrate's comments on Inglin's credibility are irrelevant. *Compare*, *e.g.*, Peabody Br. 21.

legal standard set by the regulations, as well as giving different weight to various parts of the evidence, accounts for my differences with the Recommended Decision." AR 1728 n.19; *see also id.* 1716 & n.16, 1733 n.26. And, as is addressed next, his different view of the legal standard necessarily affected the way he viewed the evidence. AR 1733 n.24, 1735 n.28.

B. The Commissioner Applied the Performance Standards for Coastal Dunes and Not, as Peabody Suggests, Some New, *Ad Hoc* Standard Devised for the Occasion.

To a large extent, Peabody's argument identifies certain terms and statements in the Commissioner's Final Decision and then inflates them well beyond their significance. His arguments are thus directed at a highly distorted version of the Decision. In particular, Peabody argues that the Commissioner conjured a new resource area when he described the dune at issue as a "primary coastal dune on a barrier beach" to "lay the groundwork . . . to ignore the facts and law to reach his desired conclusion." Peabody Br. 33, 35. Not so.

The regulatory text forecloses Peabody's argument that the Commissioner lacked a regulatory basis to

characterize the dune at issue as "primary." Peabody Br. 34. As both the Commissioner's Final Decision and past Department decisions recognize, the regulations draw a distinction between "the coastal dune closest to the coastal beach" and other secondary or "back" dunes. 310 C.M.R. § 10.28(1); AR 1716 ("clearly draws a distinction"), 1719 n.12 ("secondary dunes" and "stable back dunes"), 1722 ("language distinguishes"). And "[t]he former generally is referred to by the Department as the primary dune." *LaFrance*, DEP No. 84-36 at *1 n.4; *see also In re Nelson*, DEP No. 92-140, at *4 (1994)(finding that the dune closest to the beach is the primary coastal dune).[10] In other words, the agency uses the term "primary coastal dune" as shorthand for the dune that is "closest to the coastal beach."[11]

---

[10] There is thus simply nothing too Peabody's argument that the Department engaged in "rulemaking by permit," Peabody Br. 26, which is, in any event, a lawful exercise of agency discretion. *See Brookline v. Comm'r of Dep't of Envtl. Quality Eng'g*, 387 Mass. 372, 379 (1982)("Like any administrative agency, the [DEP] may, at its discretion, announce and apply new rules and standards in an adjudicatory proceeding" (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202-204 (1947)).

[11] To the extent it is not otherwise obvious, the Department's use of the word primary to reference the dune closest to the coastal beach is consistent with that word's plain meaning. WEBSTER'S THIRD NEW INT'L

Here, the dune at issue also happens to be located on a barrier beach, and the Commissioner's decision merely recognizes that fact: the dune closest to a barrier beach is the primary coastal dune on a barrier beach in fact. AR 1725; *see also infra* 36. While Peabody argues that the Commissioner used this fact to create a new resource area with stricter standards, he points to nothing in the Commissioner's decision that suggests that the Commissioner did anything other than apply the applicable coastal dune performance standards to his proposed project. AR 1728-36.

The performance standards for work on a primary coastal dune on a barrier beach are purposefully strict. As the Commissioner found, and Peabody concedes (Br. 39), those regulations establish an "exceptionally high bar." AR 1726. That high bar is rooted in the regulation's "no adverse effect" standard. 310 C.M.R. § 10.28(3)(work "shall not have an adverse effect"). Indeed, as the Commissioner recognized, "the performance standards do not prohibit any work, they prohibit any adverse effect on the

---

DICTIONARY 1800 (2002)(defining primary as "something that stands first in order, rank, or importance").

coastal dune and barrier beach." AR 1728. The no adverse effect standard requires the Commissioner to decide whether the impacts to the "resource area or one of its characteristics" are "small enough to be disregarded." 310 C.M.R. § 10.23, at 356. And, the determination of what effects are small enough to be disregarded is, of course, a matter of judgment that resides with the Commissioner. This is the test Peabody had to meet, which again, by its plain terms, sets "an exceptionally high bar." AR 1726.[12]

The heightened protection the "no adverse effect" test and the coastal dune performance standards afford primary coastal dunes ("per se significant") reflects a science and policy-based judgment that primary dunes cannot prevent storm damage and control flooding

[12] The administrative magistrate applied a different, incorrect standard, which Peabody continues to press. Peabody Br. 27-28, 44. From the outset, the magistrate decided that "what is important is will a wave reach the site of this project." AR 1065: 23-34. And then, in her recommended decision, she held: "[f]or purposes of deciding whether the performance standards for coastal dunes are met, 'what is relevant is the size of the wave that may be expected to reach the dune.'" AR 1641 (citation omitted). The Commissioner concluded that this test "is less relevant for a highly variable shoreline such as" the one at issue. AR 1733. The Commissioner was too generous, the standard was irrelevant, as it pertains to a question not at issue here. *In re Dunn*, DEP No. 89-072, at *12-14 (1996) (evaluating compliance with 310 C.M.R. § 10.28(3)(c)).

unless they can function naturally--that is, retreat with the barrier beach and conform to wind, tides, waves, and sea level rise to dissipate storm energy and protect inland properties. 310 C.M.R. § 10.28(1). In this respect, as the Commissioner noted, "[c]oastal dunes and barrier beaches differ from all other resource areas" because "they are inherently dynamic and almost certain to change, even over relatively short periods of time." AR 1719. Because of their dynamic nature, "[t]he regulations are designed to prohibit alterations which . . . interfere with these natural processes, with some flexibility in the context of existing residential structures." *Id.* The stringency of the regulations, thus "reflect[s] the policy determination that siting new structures, including pile supported structures for residential use, will likely interfere with the natural functioning of the dune absent some demonstration that the dune functions atypically due to site considerations[,]" which, as is discussed more fully below, is not the case here. *Id.*

C. The Commissioner's Conclusion that Project Proponents Cannot Mitigate Adverse Effects on One Section of an Undeveloped Coastal Dune By Planting Vegetation on Another Section Constitutes a Reasonable Interpretation of the Regulations.

Peabody's attack on the Commissioner's conclusion that the coastal dune regulations do not authorize Peabody to "compensate for the disturbance of dune vegetation by providing additional vegetation in other areas at the site" (AR 1717) fares no better than his first attack on the Commissioner's construction of the regulations. Indeed, just like his initial foray, Peabody has not attempted to ground his argument on the regulatory text. Instead, he attempts to elide the interpretive issue by characterizing it as an evidentiary one. Peabody Br. 45. That effort is misdirected.

Relevant here is the coastal dune performance standard that dictates that projects "shall not have an adverse effect on the coastal dune by . . . disturbing the vegetative cover so as to destabilize the dune." 310 C.M.R. § 10.28(3), (3)(b). In this case, Peabody proposed to "replicate" or mitigate the permanent alteration of the dune's vegetation by planting additional vegetation on other parts of his

and his neighbor's properties. *See* AR 904 ¶3, 905 ¶9. That, of course, is tantamount to arguing that one can compensate for a breach in a rampart by raising the height of its other parts, which makes no sense. And, indeed, nowhere do the coastal dune regulations suggest that a project proponent "can compensate for the disturbance of dune vegetation" on one part of an undeveloped primary coastal dune by planting additional vegetation on another part. AR 1717. That is not surprising given the dynamic character of this resource area. *See* AR 1719.

In fact, as the Commissioner noted (AR 1717, 1735 n.28), when the agency has determined that replication or mitigation is scientifically justified it has made that intention explicit in the regulatory text. 310 C.M.R. §§ 10.55(4)(b) (allowing "replacement" of bordering vegetated wetlands), 10.58(4) (allowing "mitigation" for riverfront areas). But, as noted above, the agency did not include such an express proviso in the coastal dunes performance standards, and it is axiomatic that "where the [agency] has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *Commonwealth v. Gagnon*, 439 Mass. 826, 833 (2003).

Thus, the Commissioner's decision not to imply one constitutes a reasonable interpretation of the regulation, which is entitled to substantial deference.

The Commissioner's interpretation is also not "at odds" with the more general benefits of revegetating dunes. Peabody Br. 44-45. Rather, as explained above, his interpretation is based on the regulation's text and the policy-laden judgment that planting new vegetation cannot "justify new development." AR 1735. The Department's decisions bear out this distinction, which is premised on the difference between work on a developed dune and work on an undeveloped one, such as the dune at issue here. AR 1716 n.7, 1717 n.9, 1719 n.12.[13] The agency's decision in *Stanley*, for example, reflects that distinction, *see* AR 1717 n.19, where the project consisted of replacing three existing buildings with one pile supported one. *Stanley*, 8 DEPR

[13] Peabody's own witnesses acknowledged this distinction in *In re Stanley*, 8 DEPR 72, 74, 76 (2001) (noting that Humphries testified that transplanting grass from one location to a less vegetated area "*will not offset* beachgrass loss where it now grows") and in *In re Lepore*, DEP No. 2003-092, at *12 (2004) (noting that Decie testified that DEP should approve the reconstruction of a house on a coastal dune on *Plum Island* because it did not involve construction on an undeveloped coastal dune).

at 72, 77.[14] Similarly, in *In re Kelly*, the Commissioner found: "[i]n the case of the demolition and replacement proposed here, I conclude that the standard of no adverse impact can be met if there is a *net reduction* of adverse impact to the dune system." DEP No. 82-42, at *6 (1983) (emphasis added). The concept of netting, which the agency has applied to already developed dunes, allows mitigation, because it leads to a net improvement in the dune's ability to function. AR 1719 n.12. In contrast, applying a mitigation standard to undeveloped dunes undermines the dune's ability to function, because it does not eliminate the adverse effect at the construction site. *E.g.*, RA 935, 1511: 17-18 (DEP's Sprague stating, "[i]t won't provide the same function at that same spot.").

[14] The Department's decision in *In re Milligan*, DEP No. 2009-044 (2010), does not help Peabody either. Peabody Br. 46-47. *Milligan* approved a seasonal kayak rack for a period of three years, not a permanent house and a gravel driveway and parking area, and the project was designed "to improve the condition of the existing dune[,]" which had been "damaged" by "the pre-existing [unapproved] storage." *Milligan* at *5, 7.

D. The Commissioner's Final Decision Did Not Deny Peabody's Project Based on Executive Order 181 and is Consistent with the Department's Past Decisions.

Peabody also argues that the Commissioner relied on Executive Order 181 to deny his Project, Peabody Br. 47, but a fair reading of the Final Decision reveals that the Commissioner referenced that Order as a means to highlight the significance of the coastal dune performance standards, not to deny the project outright. AR 1727.[15] Indeed, Peabody does not point to anything in the Final Decision that suggests that the Commissioner based his application of the performance standards to Peabody's proposed project on that Order. AR 1728-36 (applying performance standards). Indeed, if the Commissioner had, his decision would have been quite brief, because the Order prohibits all development on "primary coastal dune areas of barrier beaches." Exec. Order 181 ¶4, *quoted by* AR 1727. Instead, the Commissioner's 26-page Decision thoughtfully applied the applicable coastal dune performance standards and arrived at a decision that

[15] The Order recognizes that: (1) human alteration of dunes impairs their ability to prevent storm damage; (2) unwise coastal development has caused death and economic loss; and (3) taxpayers, far removed from coastal areas, are forced to subsidize development in these high hazard areas. Exec. Order 181, at Preamble.

is supported by both the regulations and substantial evidence. AR 1713-38.

Nevertheless, as the Commissioner recognized, and as past decisions demonstrate, the application of the performance standards, even to a primary coastal dune, depends on the facts. *See*, *e.g.*, *Stanley*, 8 DEPR at 72 (allowing project to replace three existing residential buildings on a primary coastal dune with one new pile supported building); *In re Dunn*, DEP No. 89-072 (1996) (denying application to construct a single family house on pilings, a septic system, and a driveway on a coastal dune and barrier beach); *In re French*, DEP No. 92-068 (1995) (denying application to replace and enlarge existing septic system on a primary coastal dune on a barrier beach); *In re McKallagat & Grinnell*, DEP No. 88-19 (1988) (denying application to construct single duplex dwelling, septic system and well, along with revegetation plan on Plum Island).[16] A site specific application of the performance standards is all Peabody could fairly expect, and it is what he received.

[16] This decision was later vacated on procedural grounds. *In re McKallagat & Grinnell*, DEP No. 88-019, at *1 (1989).

II. THE COMMISSIONER CONCLUDED CORRECTLY THAT PEABODY'S PROPOSED PROJECT WILL HAVE AN "ADVERSE EFFECT" ON A PRIMARY COASTAL DUNE AND THAT THE PROJECT CANNOT BE CONDITIONED TO COMPLY WITH THE PERFORMANCE STANDARDS.

A. Peabody's Proposed Project Will Permanently Alter a Primary Coastal Dune on a Barrier Beach.

Peabody does not seriously dispute the fact that he proposes to permanently alter a primary coastal dune. Indeed, he has conceded both that the proposed project will "permanently" alter 1,986 square feet, *see* Peabody Br. 31; AR 904, and that "[a]ll potential impacts are limited to the dune closest to the coastal beach on a barrier beach." AR 543. And, as explained above, the dune closest to the coastal beach is, due to its geographic location and its role as the "first line of defense against storm damage," the primary coastal dune on a barrier beach. AR 1719-20, *see also id.* 514; *supra* pp. 25-27. By definition, therefore, Peabody proposes to permanently alter a resource area that the performance standards deem irrefutably significant to storm damage prevention and flood control, as Peabody has also conceded. Peabody Br. 14, *see also* 310 C.M.R. § 10.28(1).

Not content, however, to rely on Peabody's concessions, the Commissioner reviewed the topography

and dune profile at the project location to reach his own independent conclusion about the landward extent of the primary dune--characterized specifically here as a "mound-type primary dune." AR 1723-24, *see also id.* 826 (depicting dune types), 1254: 3-5 (Haney Hr'g Test.). To do so, the Commissioner reviewed plans submitted by Peabody and the Department depicting the profile of the dune at the proposed project location. AR 1724. Based on that review, he determined that the landward extent of the primary coastal dune, known as the dune's heel, extends landward of the proposed project location, as indicated by a distinct drop in the surface elevation from approximately 20 feet to less than 10 feet at a point inland of Peabody's existing house. AR 1724 (referring to plans at AR 670 and AR 1413).[17] His determination is corroborated by Peabody's admission--"[a]ll potential impacts are limited to the dune closest to the coastal beach," AR 543--and reinforced by the federal flood insurance

[17] Despite acknowledging that "[a]ll potential impacts are limited to the dune closest to the coastal beach (AR 543)" and specific requests from the Office of Coastal Zone Management and the Department (AR 516, 521), Peabody refused to delineate the landward extent of the dune, claiming it was not possible because there "is no distinct change in slope." AR 576. If he had delineated the dune further landward, however, he would have discovered what the Commissioner did.

program's definition of "primary frontal dune." AR 1724 (citing 44 C.F.R. § 59.1); *see also id.* 1723 n.14 (discussing federal regulations). The Commissioner was, of course, in as good a position as the magistrate to review these plans and draw any reasonable inferences from them--credibility and demeanor were irrelevant.[18]

B. Peabody's Proposed Project Site is Subject to Cycles of Erosion and Accretion.

Peabody makes a scattershot attack on the Commissioner's conclusions regarding the stability of the project site and its history of erosion and accretion. Peabody Br. 22-28. His attack is misplaced, however. In the Final Decision, the Commissioner found that "the primary dune at the site is situated in an area that is still undergoing active erosional and depositional processes, in large part due to human intervention." AR 1728-29. Before reaching this conclusion, the Commissioner again conducted an

[18] Peabody complains at length that the Commissioner relied improperly on another plan delineating the "Wetland Resource Areas" on Plum Island that the magistrate found unreliable, Peabody Br. 19-20, but that is not true. The Commissioner noted only that he had "reached the same conclusion" as that Plan. AR 1724 (referring to plan at AR 1411, excerpted at AR 866). Thus, he cited that plan as further support of his own conclusion, not as the only support for it.

independent review of Peabody's evidence and admissions, and explained why his conclusion differed from the magistrate's. AR 1730. And, in that regard, unlike the magistrate, *see* AR 1643, the Commissioner placed greater weight on the site's history and the shoreline change data, as reflected in Peabody's own exhibits. AR 1729-30.

The Commissioner thus noted that the dune at the project location formed in the late 1800s due to the construction of a jetty to the north. AR 1729; *see also id.* 567-70 (noting accretion of 1,250 feet and showing growth on plan). Since that extensive period of accretion, however, the shoreline has been affected by significant short-term cycles of erosion and accretion. AR 571-72 (Peabody's plan depicting shoreline change). As the Commissioner found, the plans illustrate that the shoreline eroded by 28 feet between 1928 and 1953, that it grew by 90 feet between 1953 and 1978, that it eroded again by 55 feet between 1978 and 1994, and that it grew again by 105 feet between 1994 and 2000. AR 1730, *see also id.* 570-73. Unlike the magistrate, however, the Commissioner was not convinced that the long term average of -0.03 ft/yr from 1928 to 1994 evidenced a stable shoreline.

AR 1730; *see also id.* 828 (CZM Shoreline Change Data). Instead, he concluded that the average long-term shoreline change "masks" the very real short-term cycles. AR 1730.[19] That, of course, makes sense, since a long-term average says nothing about what happens from year to year on a barrier beach like Plum Island, which is exposed directly to storms, ocean currents, and sea level rise. *See*, *e.g.*, 310 C.M.R. § 10.29(1).[20]

Peabody also criticizes the Commissioner for relying--as further support for his conclusion about the active nature of the site--on hearsay evidence indicating that Peabody's current house, along with three other nearby houses, were moved landward in the 1960s because they were threatened by erosion. Peabody Br. 21-25. Peabody, however, submitted the letters

---

[19] The Commissioner's conclusion appears to have been prescient. *See*, *e.g.*, *supra* p.11 n.7 and accompanying text (describing recent "severe erosion" on Plum Island); James Haddadin, *Plum Island Homes Imperiled by December Blizzard*, NEWBURYPORT CURRENT, Dec. 29, 2010, http://www.wickedlocal.com/newburyport/newsnow/x1458580063/Plum-Island-homes-imperiled-by-December-blizzard#axzz1uWb72Uh0(describing imperiled house just North of Peabody's property)(last visited 5/10/2012).

[20] This point is highlighted by both the Commissioner in his Decision, *see* AR 1719 n.13 (discussing example of shoreline change on Nantucket at AR 929), and the State agency's guidance on interpreting the data it maintains, which states, "*[i]n no case* should the long-term shoreline change rate be used exclusively before the short-term rates and contributing factors are understood and assessed." AR 928 (emphasis added).

containing the uncontroverted historical information himself as exhibits to his witnesses' pre-filed testimony, AR 381, 665, 666, 667, and it would certainly be odd to allow a party to object to its own evidence based on their retrospective regrets. *See Commonwealth v. Haley*, 363 Mass. 513, 517 (1973) (hearsay given its probative force when objection waived). Indeed, Peabody's claim is nothing more than an "attempt to convert the consequences of [his own] unsuccessful trial tactics . . . into alleged errors by the [Commissioner]." *See Commonwealth v. Johnson*, 374 Mass. 453, 465 (1978).

Even if Peabody had not affirmatively submitted this evidence himself, "[s]ubstantial evidence may be based on hearsay *alone* if that hearsay has 'indicia of reliability.'" *Covell v. Dep't of Social Servs.*, 439 Mass. 766, 786 (2003) (emphasis added). Here, of course, the Commissioner did not rely on hearsay alone, but, even so, the hearsay does exhibit indicia of reliability. Again, the letters note that Peabody's existing house was relocated landward from its prior location, along with several other houses, in 1967, because erosion was threatening the homes. AR 667, *see also id.* 662, 665. The same letter also notes that the

ocean surged around the existing house (located landward of the proposed house) and neighboring houses in 1978. AR 667. As the Superior Court concluded, "a review of the entire record . . . discloses that the neighbors' statements corroborate each other and remain unrebutted by Peabody." RA 115.[21] Indeed, instead of rebutting them, Peabody agreed with them, stating "that no damage occurred from moving the previous house." AR 612. The Superior Court also correctly rejected Peabody's alternative argument that, under the agency's procedural rules, the letters should have been excluded because their authors were not made available for cross-examination, for the basic reason that the letters did not constitute testimony. RA 115; Peabody Br. 22-23. Based on this record, it certainly was not error for the Commissioner to rely on this evidence as *additional* support for his conclusion regarding the active nature of the proposed project's location.

[21] Peabody was also given a chance to rebut observations elicited during the hearing concerning wave action and overwash at the property, *see* AR 1310-11, 1368 (allowing rebuttal testimony regarding, e.g., 1265:16-24, 1289-93), but instead of attempting to controvert the direct observations with competing observations, Peabody's witness simply analyzed a data set and concluded it was "unlikely" that the DEP witness could have made such observations. AR 1379.

C. Peabody's Project Will Have an Adverse Effect on the Dune's Ability to Move Landward and Laterally.

Next, Peabody complains that the Commissioner's finding that the project will adversely affect the dune's ability to move is arbitrary, because the Commissioner failed to account for (1) the elimination of the septic system or (2) the fact that the proposed project would be constructed on a pile foundation. Peabody Br. 30-31. But he did not. Rather, the Commissioner explained: "While revising the plans to eliminate the septic system would reduce the disturbance of vegetation during construction and the potential erosion from waves, identifying the remaining impacts as limited to nine pilings *understates* the scope of the revised project and its effects over time." AR 1718 (emphasis added).[22] As the Commissioner went on to explain, Peabody's characterization ignores the adverse effects caused by the gravel driveway and parking area and the shade from both the house and deck. AR 1718, *see also id.* 669 (plan depicting project site).

[22] To the extent Peabody intended to suggest that pile supported houses presumptively comply with the performance standards, *see* Peabody Br. 31, the Commissioner confuted that claim too. AR 1716 & 7.

In particular, the Commissioner found that the gravel driveway and parking area will prevent the dune from migrating and thereby adversely effect the dune's ability to function. AR 1718. This finding is consistent with the testimony of both Peabody's witness, who stated that the gravel will prevent the dune from eroding, *see* AR 1148: 16-20, and the agency's witness: "Q: If . . . gravel or crushed stone is placed on the dune underneath Mr. Peabody's [proposed] house, will that portion of the dune still be able to move laterally? A. No. The purpose of the stone is to keep the sand in place." AR 1565-66: 19-24, 1. The Commissioner's finding is also consistent with his prior decisions. In *Dunn*, for example, he found "that the hardening of the driveway/parking area will interfere with the landward movement of the dune." *Dunn*, DEP No. 89-072, at *15. And in *In re Kelly*, the Commissioner prohibited the construction of a parking area and the removal of any sand from underneath a pile supported house because it would impact the dune's ability to move. DEP No. 82-42, at *2, 3-4 (1983).[23] Based on this evidence and on the

[23] *Stanley* is not to the contrary. There, a pile supported structure and a parking area were allowed,

agency's past decisions, one certainly cannot say that the Commissioner's conclusion that these impacts are "not small enough to be disregarded" was an unreasonable one. 310 C.M.R. § 10.21 (defining no "adverse effect"). While Peabody argues that there is conflicting evidence in the Record, the Commissioner was entitled to make a choice between "two fairly conflicting views" and the "court may not displace" that choice. *S. Worcester Reg' Sch. Dist. v. Labor Rel. Comm'n*, 386 Mass. 414, 420 (1982).

D. Peabody's Proposed Project Will Have an Adverse Effect on Vegetative Cover so as to Destabilize the Dune.

The Commissioner also concluded that the permanent alteration of 1,986 square feet of a presently unaltered primary coastal dune would have an adverse effect by "disturbing vegetative cover so as to destabilize" the dune. AR 1736; *see also* 310 C.M.R. § 10.28(3)(b). In support of this conclusion, the Commissioner found that, in addition to the house, shade from the proposed deck will impair the growth of dune grass and thereby "affect the form of the dune to

---

because the structures were built on a developed dune and the "pilings [would] allow for lateral and landward movement that *does not now exist*" due to the presence of pre-existing structures. 8 DEPR at 77 (emphasis added).

some extent." AR 1736. He also concluded that a new house would likely increase human traffic on the dune and further impair dune grass growth. *Id.* And, while he acknowledged that the gravel driveway may limit the impact of destroying dune grass, he concluded that the same gravel area would adversely affect the dune's ability to trap sand and otherwise function naturally. *Id.*[24] Indeed, he concluded that the proposed permanent removal of vegetation could lead to localized "weakening, slumping, or blow out which would allow water to reach further inland." *Id.* These impacts are indisputably adverse to dune function.

Peabody does not seriously dispute the Commissioner's conclusion on this issue, and Peabody's witnesses in fact conceded that the destruction of dune grass under the house and parking area will have at least some adverse impact on the dune. AR 337, *see*

[24] This conclusion is consistent with *Dunn*, where the Commissioner determined: (1) a gravel driveway would not trap sand and sediment like vegetation or compensate for vegetation loss; (2) the proposed plantings would not replace the function performed by the existing vegetation, and (3) the "removal of . . . vegetation would . . . increase[] erosion and" decrease dune stability. DEP No. 89-072, at *10-11. And, his conclusion is also consistent with the Department's expert, who noted that sand would not accumulate in the parking area under the house and that the gravel would impair the dune's ability to move landward. AR 1547: 10-16, 1548: 13-22 (Sprague).

also id. 619, 1509: 6-7. Instead, Peabody clings to his fragile belief that he can substitute for the loss of dune stability in the permanently altered area of the dune by planting grass in other areas. Peabody Br. 31-32; *see also* AR 337 ("A vegetative plan will compensate for the negative effect on beach grass removed . . . ."). This, of course, is akin to robbing Peter to pay Paul. Because of the weight Peabody placed on this claim, the Commissioner in fact noted that "[i]n large measure, this case presents the issue of whether, under the regulations, an applicant can compensate for the disturbance of dune vegetation by providing additional vegetation in other areas at the site." AR 1717. And, on that issue, as explained above, *see supra* Part I.C, the Commissioner answered no, thereby foreclosing Peabody's mitigation theory.

E. Peabody's Proposed Project Cannot Be Conditioned to Protect the Interests of the Act.

Finally, Peabody argues, and the Magistrate agreed, that his project can comply with the performance standards if it is conditioned to require him both to remove the house if the dune erodes back to the pilings and to monitor the success of the revegetation plan over a period of years. AR 1644,

1647 (recommended decision). As the SJC made clear long ago, however, "[a]though the [WPA's] protected interests are stated with some specificity, the statute is silent with respect to what may or may not constitute 'protection.'" *Citizens for Responsible Envtl. Mgmt. v. Attleboro Mall*, 400 Mass. 658, 669 (1987). In other words, the Commissioner is responsible for determining what conditions will protect the interests of the Act and here he concluded that the proposed conditions would not do so, based, in large part, on the reasons discussed above.

In particular, the Commissioner first concluded that a condition requiring Peabody to remove his house in the event of erosion would not satisfy the performance standards, because it rests on the unrealistic assumption that he could remove the house before a storm or related erosion destroyed it. AR 1738. That condition also does nothing to eliminate the project's adverse effects on the dune's ability to otherwise function naturally. Next, the Commissioner concluded that, as explained above, the regulations do not allow revegetation in the circumstances of this case, *see supra* Part I.C, and, in any event, he would not commit the agency to oversight of Peabody's

compliance with a long-term monitoring requirement. AR 1736.[25] That decision, of course, also falls squarely within the Commissioner's vast discretion to decide how best to allocate the agency's resources "among competing priorities." *Worcester v. Labor Relations Comm'n*, 438 Mass. 177, 182 (2002).

In the end, Peabody ignores the fact that the Department's mission is concerned with protecting the environment, and not, as Peabody seems to believe, with protecting a project proponent's ability to construct a new home on an active primary dune on a barrier beach. "By placing limitations on new development, particularly on oceanfront lots with primary dunes, the regulations adopted in 1978 reflect a considered public policy of providing a high level of protection to dunes to preserve their natural functions for the public interests they serve" (AR 1720), and the Commissioner's Final Decision here is entirely consistent with those purposes.

[25] It is true, as Peabody claims (Br. 29), that he would be responsible for hiring a wetlands scientist to evaluate the success of the plantings, but he ignores the fact that the Department is responsible for reviewing the reports and visiting the site to ensure compliance. In fact, the agency's expert confirmed that homeowners have failed to comply with similar requirements in the past. AR 1537: 21-22.

CONCLUSION

For the forgoing reasons, this Court should affirm the Superior Court's decision to affirm the Commissioner's Final Decision.

Respectfully submitted,

MARTHA COAKLEY
ATTORNEY GENERAL

Seth Schofield, BBO No. 661210
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@state.ma.us

May 11, 2012

12-05.11 [3] - DEP BIOpp. - Peabody [fnl].doc

MASS. R. A. P. 16(K) CERTIFICATION

I, Seth Schofield, certify that the foregoing Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Seth Schofield

Seth Schofield