Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET#: **ESCV2011-02122-A**

RE: Tzitzenikos et al v Department of Environmental Protection et al

TO: Seth Schofield, Esquire
Office Atty Gen- Env. Protection
One Ashburton Place
Boston, MA 02108

NOTICE OF DOCKET ENTRY

You are hereby notified that on **11/01/2012** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS - Plaintiffs' motion for judgment on the pleadings is DENIED. Judgment of dismissal shall enter. (Timothy Feeley, Justice). Copies mailed 11/1/2012
Dated at Salem, Massachusetts this 1st day of November, 2012.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 744-5500

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-02122-A

MILTIADES TZITZENIKOS and
PHYLLIS TZITZENIKOS,
Plaintiffs

vs.

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Defendant

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

This is an appeal of the final decision of the Massachusetts Department of Environmental Protection ("MassDEP") pursuant to G. L. c. 30A, § 14. This litigation arises out of a vacant parcel of property owned by plaintiffs Miltiades and Phyllis Tzitzenikos (the "plaintiffs") at 30 Annapolis Way, Newbury, Massachusetts (the "property"). The location is better know as Plum Island. Plaintiffs requested permission from Newbury officials to build a single family home (on piles) on the property (the "project"). Permission was granted. A Superseding Order of Conditions ("SOC") issued by MassDEP's Northeast Regional Office denied the

project. The SOC was issued pursuant to the Massachusetts Wetlands Protection Act, G. L. c. 131, § 40 (the "Act"), and the Wetlands Regulations, 310 CMR 10.00 *et seq*. (the "wetlands regulations"). After an adjudicatory hearing, and after the written decision of the Presiding Officer (the "Officer") recommending denial of the project (AR 726-756), MassDEP denied the project (AR 759-760). At the hearing, the parties submitted pre-filed direct and rebuttal testimony in writing. Plaintiffs called a coastal geologist with degrees in geology and marine science, as well as Miltiades Tzitzenikos. MassDEP called a coastal geologist with degrees in geology and coastal geology, as well as an environmental analyst with a degree in natural resource science. This appeal followed, and now before the court, as required in Chapter 30A appeals, in addition to the administrative record [D. 8], is plaintiffs' motion for judgment on the pleadings. [D. 13]. A non-evidentiary hearing was held on October 11, 2012. Plaintiffs have been represented by counsel throughout this litigation. For the reasons discussed below, plaintiffs' motion for judgment on the pleadings is **DENIED** and entry of judgment of dismissal shall be entered on the docket of the court.

BACKGROUND

Plaintiffs seek to construct a house, driveway, and walkway on the landward (western) side of Annapolis Way, the closest parallel street to the beach on the ocean

side of Plum Island. One row of houses, one of which is owned by plaintiffs, currently exists on the seaward (eastern) side of Annapolis Way, between the street and the beach. A row of houses also stand on the landward (western) side of Annapolis Way, an equal distance from the beach as plaintiffs' property. The plaintiffs' property has always been vacant, but its neighboring properties contain houses that are not raised on pilings. The plaintiffs' property became buildable only recently, when the town extended sewers to the area.

The proposed house would have a footprint of 728 square feet, a 382 square foot deck, and would be elevated eight feet above grade, on nine, eighteen inch pilings. The site is 170 feet from the coastal beach. Plaintiffs purchased the property in 1973, and fill from a construction project was deposited to bring the property approximately level with Annapolis Way, but with steep western and northern slopes. The property is densely vegetated with American Beachgrass. The only use of the property over the years has been for additional neighborhood parking.

REGULATORY FRAMEWORK

No person shall "remove, fill, dredge, or alter any . . . coastal wetland, dune, flat marsh meadow or swamp bordering on the ocean or . . . without filing written notice of his intention to so [do], including such plans as may be necessary . . . and without receiving and complying with an order of conditions . . ." G. L. c. 131, § 40.

Barrier beaches and coastal dunes are wetlands resource areas protected by the Act and the wetlands regulations. A barrier beach is defined by the wetlands regulations as:

> a narrow low-lying strip of land generally consisting of coastal beaches and coastal dunes extending roughly parallel to the trend of the coast. It is separated from the mainland by a narrow body of fresh, brackish or saline water or a marsh system. A barrier beach may be joined to the mainland at one or both ends.

310 CMR 10.29(2).

A coastal dune is defined as:

> any natural hill, mound or ridge of sediment landward of a coastal beach deposited by wind action or storm overwash. Coastal dune also means sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control.

310 CMR 10.28(2).

The preamble to the regulation's definition of coastal dune includes the following:

> All coastal dunes are likely to be significant to storm damage prevention and flood control, and all dunes on barrier beaches and the coastal dunes closest to the coastal beach in any area are per se significant to storm damage prevention and flood control. Coastal dunes are also often significant to the protection of wildlife habitat.
>
> Coastal dunes aid in storm damage prevention and flood control by supplying sand to coastal beaches. Coastal dunes protect inland coastal areas from storm damage and flooding by storm waves and storm elevated sea levels because such dunes are higher than the coastal beaches which they border. In order to protect this function, coastal dune volume must be maintained while allowing the coastal dune shape

to conform to natural wind and water flow patterns.

Vegetation cover contributes to the growth and stability of coastal dunes by providing conditions favorable to sand deposition.

* * *

When a proposed project involves the dredging, filling, removal or alteration of a coastal dune, the issuing authority shall presume that the area is significant to the interests of storm damage prevention, flood control and the protection of wildlife habitat. This presumption may be overcome only upon a clear showing that a coastal dune does not play a role in storm damage prevention, flood control or the protection of a wildlife habitat, and if the issuing authority makes a written determination to that effect.

310 CMR 10.28(1)

When a coastal dune is determined to be significant to storm damage prevention, flood control or the protection of wildlife, the following, among other provisions, applies.

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune;

(b) disturbing the vegetative cover so as to destabilize the dune;

(c) causing any modification of the dune form that would increase the potential of storm or flood damage;

(d) interfering with the landward or lateral movement of the dune;

(e) causing removal of sand from the dune artificially; or

(f) interfering with mapped or otherwise identified bird nesting habitat.

310 CMR 10.28(3). An adverse effect is defined as follows:

> Adverse effect means 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 specific interests of M. G. L. c. 131, § 40, as determined by the issuing authority. "Negligible" means small enough to be disregarded.

310 CMR 10.23.

The burden of proof at the adjudicatory hearing was on the plaintiffs (by a preponderance of the evidence) to demonstrate "that the area is not significant to the protection of any of the interests identified in M. G. L. c. 131, § 40." 310 CMR 10.03(1).

CHAPTER 30A STANDARD OF REVIEW

Judicial review of an appeal from an agency decision is limited to the administrative record. G. L. c. 30A, § 14(5); see also *Cohen* v. *Board of Registration in Pharm.*, 350 Mass. 246, 253 (1966). The party challenging the decision of the agency bears the burden of demonstrating that the decision is invalid. *Merisme* v. *Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The court's approach is "one of judicial deference and restraint, but not abdication." *Arnone* v. *Commissioner of Dep't of Soc. Servs.*, 43 Mass. App. Ct. 33, 34 (1997) (further citation omitted). When reviewing an agency decision, the court is required to give "due weight to the experience, technical competence, and

specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The agency's decision must be supported by substantial evidence. *Id.* In assessing whether the underlying evidence is substantial, the court cannot displace an agency's decision between two fairly conflicting views, even though the court may have justifiably made a different decision. *Hotchkiss* v. *State Racing Comm'n*, 45 Mass. App. Ct. 684, 695-696 (1998). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion taking into account whatever in the record detracts from its weight." *Lycurgus* v. *Director of Div. of Employment Sec.*, 391 Mass. 623, 627-628 (1984) (internal quotations omitted). The court must consider the record as a whole, but as long as the agency's findings are properly supported, the decision will not be disturbed by a reviewing court. *Tri-County Youth Programs, Inc.* v. *Acting Deputy Dir. of the Div. of Employment & Training*, 54 Mass. App. Ct. 405, 408 (2002).

General Laws Chapter 30A, § 14(7) provides in pertinent part:

> The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is –
>
> (a) in violation of constitutional provisions; or

(b) in excess of the statutory or jurisdiction of the agency; or

(c) based on an error of law; or

(d) made upon unlawful procedure; or

(e) unsupported by substantial evidence; or

(f) unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or

(g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

DISCUSSION

Plaintiffs make two arguments in support of their Chapter 30A appeal of the final decision of MassDEP, denying their project. First, they contend that the hearing officer made an error of law. G. L. c. 30A, § 14(7)(c). More specifically, they contend that the hearing officer used a definition of a "primary frontal dune" that is not included in MassDEP's regulations. Second, they contend that the decision of the hearing officer, adopted and made final by MassDEP, is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(e). This second contention has several subparts. Plaintiffs contend that (1) allegations of adverse impacts are speculative and without credible evidence; (2) the denial is inconsistent with other approvals of reconstruction

of single-family homes in coastal dunes; (3) reliance on *In the Matter of Peabody*, Final Decision, 13 DEPR 37 (2006) is misplaced due to distinguishing facts; and (4) disregarded plaintiffs' expert witness's credible testimony that the project meets MassDEP's performance standards for work in a stable dune.

1. Primary Frontal Dune

Plaintiffs concede that the property is part of a coastal dune, as that term is defined in the state regulations. 310 CMR 10.28(2). There is also no dispute that the project will occur on a barrier beach. 310 CMR 10.29. As plaintiffs themselves state: "The dispute in this case is whether the dune on the property is a primary dune closest to the beach or whether the landward boundary of the primary dune ended prior to the Property near the eastern Property boundary [i.e., at Annapolis Way]." If not a primary dune, plaintiffs argue that regulatory standards should not be applied as stringently as they are for a primary dune. If a primary dune is involved, the regulatory/performance standards are so stringent that it is unlikely that the project could go forward. Thus, as a matter of fact, the crucial determination for the Officer was whether the property is on a primary coastal dune or a back or secondary dune.[1]

Plaintiffs contest the Officer's determination that the property is on a primary

[1]Secondary dunes develop landward of a primary dune, and are not per se significant to storm damage and flood control.

coastal dune from both a legal and factual perspective. Legally, plaintiffs claim that the Officer made an error of law and used a federal definition of primary frontal dune in determining that the property is located on a primary dune. The court disagrees that the Officer made any error of law. The Officer, with support in the record, determined that in delineating the landward edge of the primary dune, there is no material difference between the terms primary dune and primary frontal dune. Thus, the Officer properly relied in part on the analysis, information, and data that were earlier generated in delineating the primary frontal dune for FEMA purposes. MassDEP's expert, Rebecca Inglin ("Inglin"), defined a primary frontal dune, which she testified was synonymous with primary dune, as a:

> continuous or nearly continuous mound or ridge of sand with relatively steep seaward and landward slopes immediately landward and adjacent to the beach and subject to erosion and overtopping from high tides and waves during major coastal storms. The inland limit of the primary frontal dune occurs at a point where there is a distinct change from a relatively steep slope to a relatively mild slope.

Thus, the Officer did not incorporate the federal definition of primary frontal dune into state regulations. Rather, he determined, by accepting Inglin's expert opinion, that the federal and state terminologies were interchangeable and refer to the same geological feature. Thus, the Officer defined the state regulatory concept of primary dune by adopting an established federal definition describing the same geological

feature. He did nothing more than use a federal definition of the same geological feature where state regulations establish the concept of a primary dune but do not provide a specific definition. More important than the definition, and also appropriate in this case, the Officer, understanding the two geological features to be identical, determined that certain analysis, information, and data generated for federal purposes could be relied upon in part by him in determining the landward edge of the primary dune.[2] The Officer arrived at an appropriate legal definition for state regulatory purposes and permissibly relied on information and data generated for a geological feature that is identical to the state regulatory definition of primary dune. In fact, plaintiffs do not argue that the definition used is not accurate, but that it comes from federal rather than state law. There was no legal error.

Factually, the Presiding Officer found as follows: "I find that a preponderance of the evidence shows the landward edge of the primary dune is west of the site, and thus the entire site is part of a primary dune." As a factual matter, the question for this court is whether the finding is supported by substantial evidence, and is not arbitrary, capricious, or an abuse of discretion. In other words, the standard of review

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[2]The Officer acknowledged that certain conclusions by FEMA about the landward limit of the primary frontal dune on Plum Island were not yet final, and were not binding on him. The Officer made it clear that he was merely considering the analysis and underlying information and date as pieces of evidence, as opposed to binding determinations. He also understood that Inglin conducted an independent review of the site, instead of merely relying upon the analysis and conclusions previously issue by FEMA.

of the Officer's factual finding is one of deference.

The Presiding Officer accepted the testimony of MassDEP's experts, Inglin and Michael Abell, over the contrary views of plaintiff's expert, Peter Rosen ("Rosen"). See *Hotchkiss*, 45 Mass. App. Ct. at 695-696 (court cannot displace an agency's decision between two fairly conflicting views, even though the court may have justifiably made a different decision). Inglin has been extensively involved for nearly twenty years in the delineation of dunes, and providing technical assistance for over 150 projects in several coastal areas, including Plum Island, of which she has significant knowledge.

In delineating the primary dune in this case to include the property, Inglin relied on three sources of corroborating evidence: (1) field work specific to this particular site ; (2) topographic Geographic Information Systems ("GIS") technology utilizing Light Detection and Ranging ("LIDAR") data [AR 307] generated during her delineation of the primary frontal dune for Plum Island; and (3) and a cross-sectional analysis of the site [AR 309]. From these sources of information, Inglin concluded that the landward limit of the primary dune for this site was consistent with the primary frontal dune delineation she performed [AR 313], and that the landward

limit of the dune is approximately thirty two feet west of (behind) the site.[3]

The cross-sectional analysis [AR 309] captures the dispute between the competing experts. Rosen, on behalf of plaintiffs, is of the view that the eastern edge of Annapolis Way is the landward edge of the primary dune. In fact, the cross section shows a slope from the high point of the dune to the eastern edge of Annapolis Way. Inglin calls that slope a mere modulation or ridge line on the upper part of the primary dune. In fact, the cross-section shows an upward slope starting at the western edge of Annapolis Way, staying fairly level over plaintiffs' property, and then descending in a pronounced slope to a much lower level (slightly below beach level) than Annapolis Way.

It is not this court's function under Chapter 30A to pick between competing experts on the merits of their respective views. Rather, it is this court's function to access the Officer's choice of expert opinions for substantial support in the record, and to ensure that the choice is not arbitrary, capricious, or an abuse of discretion.

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[3]The FEMA primary frontal dune delineation prepared in May 2007 [AR 313], well before plaintiffs decided to build on the property, is interesting. The delineation is not a straight line, and is not an equal distance from the beach at all points. There are properties further away from the beach than plaintiffs's property that are inside the landward edge of the dune, and in fact, the delineation line is much closer to the beach in spots than it is at plaintiffs' property. If the property were located about ten lots to the south, it would be outside the delineated primary frontal dune. The house directly behind the property, on the landward side, is outside the delineated dune. Thus, the delineation by FEMA seems to be fair and objective, appears to follow a natural and variable geological feature, rather than a road or other manmade feature, and certainly was not drawn to disadvantage plaintiffs.

Under that deferential standard of review, the Officer's reliance on Inglin, rather than Rosen, and his determination that the property is part of a primary dune, passes review under Chapter 30A.

2. Other Issues

The primary dune issue, both legally and factually, is the most serious, and most seriously contested issue raised by plaintiffs in this action. Because the determination that the property is part of a primary dune determines the stringency of the application of performance standards, once the per se significant standard is applicable, plaintiffs have a difficult if not impossible burden to meet to demonstrate that the Officer's decision is not supported by substantial evidence. They have not met that burden. The Officer found that the project would not comply with the performance standards because it would adversely impact: (1) the ability of the waves to remove sand from the dune; (2) the landward or lateral movement of the dune; (3) the vegetative cover, destabilizing the dune; and (4) the site's ability to further the interests of preventing storm or flood damage. The Officer's findings were supported by substantial evidence. Inglin testified that the shoreline is receding and the crest of the primary dune will be topped by waves, resulting in westward migration of the primary dune's crest and more frequent events that directly impact the site. She testified to ongoing erosion of the primary dune, calling it significant erosion of the

beach and seaward side of the dune. The entire vegetated dune that used to lie in front of the house on the seaward side of Annapolis Way (also owned by plaintiffs) has eroded to the point where it has eroded underneath the deck of the house. Supported by expert opinion, it cannot be said that the adverse impacts are speculative and without credible evidence. Moreover, plaintiffs' argument that the Officer disregarded credible evidence to the contrary from Rosen is not determinative, as long as the Officer's finding of adverse impacts is supported by substantial evidence, as it is in this case.[4] Simply put, the Officer had a right to find Inglin's testimony about erosion and accretion in the vicinity of the property to be more reliable and worthy of greater weight than Rosen's testimony on behalf of the plaintiffs.

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[4]Plaintiffs argument that MassDEP's denial of this project is inconsistent with approvals of reconstruction of homes in coastal dunes is also not persuasive. The regulations are applied differently to reconstruction projects. Plaintiffs do not seek to reconstruct an existing structure. They seek to build a new house on a vacant lot.

ORDER

Plaintiffs' motion for judgment on the pleadings is **DENIED**. Judgment of dismissal shall enter.

Timothy Q. Feeley
Associate Justice of the Superior Court

November 1, 2012

Commonwealth of Massachusetts
County of Essex
The Superior Court

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CIVIL DOCKET# **ESCV2011-02122**

Miltiades Tzitzenikos,
Phyllis Tzizenikos
vs
Massachusetts Department of Environmental Protection,

JUDGMENT

This action came on before the Court, Timothy Feeley, Justice, presiding, and the Court having issued a Memorandum of Decision and Order on Plaintiffs' Motion for Judgment on the Pleadings, and upon consideration thereof:

It is **ORDERED and ADJUDGED:**

That the decision of the Massachusetts Department of Environmental Protection be AFFIRMED and that the complaint be and hereby is DISMISSED.

Dated at Salem, Massachusetts this 1st day of November, 2012.

Thomas H. Driscoll Jr.,
Clerk of the Courts

By:.....
Assistant Clerk

Copies mailed 11/01/2012

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Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# **ESCV2011-02122**

RE: **Tzitzenikos et al v Department of Environmental Protection et al**

TO: Seth Schofield, Esquire
Office Atty Gen- Env. Protection
One Ashburton Place
Boston, MA 02108

NOTICE OF JUDGMENT ENTRY

This is to notify you that a judgment in the above referenced action has been entered on the docket. A copy of the judgment is enclosed.

Dated at Salem, Massachusetts this 1st day of November, 2012.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY:.....
Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 744-5500