

**NOTIFY** 15

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2284CV2606

RICHARD COREY, Trustee<sup>1</sup>

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION & others<sup>2</sup>

MEMORANDUM OF DECISION FOR ORDER FOR DEFENDANT'S JUDGMENT ON  
THE PLEADINGS

The plaintiff, Richard Corey ("Corey"), acting as Trustee of Twenty-One Commercial Wharf Nominee Trust, has filed this action against the Massachusetts Department of Environmental Protection ("The Department"), Nantucket Island Land Bank ("NILB"), and Nantucket Conservation Commission as to an appeal of the October 17, 2022, Final Decision in Department of Environmental Protection ("DEP") Office of Appeals and Dispute Resolution ("OADR") Docket No. WET-2019-005. Both the plaintiff and the defendants have filed for a motion for judgment on the pleadings, pursuant to Mass. R. Civ. P. 12(c). After hearing and careful review, plaintiff's motion is DENIED, and the defendants' motion is ALLOWED.

BACKGROUND

Corey had filed an appeal concerning the Department's wetlands permit which was issued to NILB. The determination which allowed for the permitting, approved a proposal to redevelop property which NILB owns in the downtown area of Nantucket. NILB's property, 17 Commercial Wharf, is composed of two parcels of land with a combined area of approximately 8,700 square feet. The property is a solid fill wharf that extends into Nantucket Harbor, and a

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<sup>1</sup> of Twenty-One Commercial Wharf Nominee Trust

<sup>2</sup> Nantucket Islands Land Bank, and Nantucket Conservation Commission

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stone riprap that frames the wharf on the three seaward sides. Corey's property is located at 21 Commercial Wharf and is a single-family residence which is not directly adjacent to the property on 17 Commercial Wharf. The proposed project was to secure permanent public access to the downtown Nantucket waterfront. The project would repair and reconstruct an existing stone revetment, construct a floating dock, install a gangway, construct a boardwalk, brick parking areas, dredge with associated grading, and include landscaping and utilities.

The plaintiff argues that the Department has prejudiced his substantial rights, and its Decision exceeds the Department's statutory authority, is based on error of law, is arbitrary and capricious, and is unwarranted given the evidence. Corey argues that the coastal bank of the property is incorrectly delineated, is *per se* significant, and that the project fails to comply with applicable performance standards. Corey and NILB both called expert witnesses to testify in front of the Department's Presiding Officer, where a Final Decision was issued in reaffirming the permitting for NILB. Corey then asked this court for judicial review pursuant to M.G.L. c. 30A §14(1).

## DISCUSSION

### **I. Standard of Review**

A party may appeal an administrative decision pursuant to G. L. c. 30A, § 14. A party which brings forth the appeal bears the burden of demonstrating both that the decision's invalidity and that their substantial rights have been prejudiced. G. L. c. 30A, §14(7); *Healer v. Department of Env'tl. Prot.*, 75 Mass. App. Ct. 8, 12-13 (2009). However, the court is at an impasse when reviewing agency's determinations. Deference should be given to the agency hearing officer's fact-finding role, which include "her right to draw reasonable inferences from

the facts found.” *Massaiot Indus. Corp. v. Massachusetts Comm’n Against Discrimination*, 91 Mass. App. Ct. 208, 210 (2017) (internal citations omitted).

The court may only set aside a decision by an agency if the decision is arbitrary and capricious, or unsupported by substantial evidence. G. L. c. 30A § 14(7). If there is an absence of substantial evidence, the court may set aside the decision of an administrative agency. *Cobble v. Commissioner of Dep’t of Social Servs*, 420 Mass. 385, 390 (1999). Substantial evidence is such that a “reasonable mind might accept as adequate to support a conclusion.” G. L. c. 30A §1(6); *Cobble*, 420 Mass. at 390. An arbitrary and capricious decision is one where there are no grounds in which a reasonable person may deem proper to support the result. *Garrity v. Conservation Com’n of Higham*, 462 Mass. 779, 793 (2012) (internal cites omitted). Deference is given to agencies for statutory and regulatory interpretation, because of the “experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred upon in.” *Flint v. Commissioner of Public Welfare*, 412 Mass. 416, 420 (1992) (internal citations omitted).

## II. Analysis

### a. *The Coastal Bank’s Delineation*

The Presiding Officer’s delineation of the coastal bank in the Final Decision was not arbitrary and capricious. As the defendants highlighted in their motion, the Presiding Officer’s decision was made after hearing testimony from multiple expert witnesses that were offered by both parties.

The Final Decision takes into consideration all the testimony provided. After hearing the expert testimony and comparing applicable Guidance for “*Applying Massachusetts Coastal Wetland Regulations*” and caselaw, the Presiding Officer made her decision as to which expert

opinion to rely on for the correct delineation of the Coastal Bank. See 310 CMR 10.30. The Officer's findings also state that the plaintiff's witness, Mr. Young's, incorrect definition and subsequent delineation provided in his testimony undermined his credibility. Accordingly, there was substantial evidence for the agency's decision, which was not made frivolously. Therefore, the court shall defer to the agency's Final Decision.

*b. The Coastal Bank's Significance*

When determining if the Coastal Bank was a significant sediment source, the Presiding Officer referred again to 310 CMR 10.30(1). Coastal Banks that supply sediment to coast beaches, coastal dunes, and barrier beaches are per se significant to storm damage prevention and flood control. Again, the Officer relied on expert testimony from both sides to make her decision.

In her findings, she referred to the expert testimony, while consulting 310 CMR 10.30. Additionally, because she rejected the plaintiff's claims that the Coastal Bank's delineation was incorrect due to Mr. Young's testimony, she felt as if his testimony in this matter was not credible. She utilized the opinions of other experts while making this decision. Hence, this decision was supported by substantial evidence.

*c. Application of 310 CMR 10.00 and Applicable Performance Standards*

Because the Court is affirming the Presiding Officer's findings above— due to the fact they are supported by substantial evidence— the plaintiff's final argument is without merit. The Presiding Officer provided a detailed explanation as to why the proposed project's application of the performance standards for Coastal Banks was compliant, and it was supported by substantial evidence. The Presiding Officer understood that the Department's findings were supported by substantial evidence, and this Court agrees. She compared existing precedent, considered the testimony from the proffered experts, and examined photographs provided by the parties.

Although this level of examination was not needed, this further supports that the Presiding Officer's decision was not arbitrary and capricious.

**ORDER**

The Court hereby **ORDERS** that Corey's motion for judgment on the pleadings is **DENIED**, the Defendant's Cross Motion is **ALLOWED**. Accordingly, the court hereby **DECLARES** that the Department's decision regarding the coastal bank and project on 21 Commercial Wharf was lawful and not arbitrary and capricious, and as such the Department's decision is **AFFIRMED**.



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Michael P. Doolin  
Associate Superior Court Justice

January 31, 2024