

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

BARNSTABLE, ss.

CASE NO. 15 MISC. 000386 (KCL)

PAUL JOUBERT, BEVERLY HAND,)
JEANNE EKASALA, PASQUALE TETI)
as Trustee of the 5 White Cap Realty Trust)
and as Trustee of the White Cap)
Condominium Association, MAUREEN)
SHEEHAN as Trustee of the Maureen)
Sheehan Trust, PAUL SCHNEIDER and)
SHARON SCHNEIDER as Trustees of the)
Diane Realty Trust, VASILOS)
POULOS as Trustee of the Vasilos Poulos)
Revocable Inter-Vivos Trust, IRENE)
DAVIS, DARRELL DAVIS, and the)
MANAGING BOARD OF THE)
SANDWICH SHORES CONDOMINIUM)
ASSOCIATION,)

Plaintiffs,)

v.)

TOWN OF SANDWICH and FRANK)
PANNORFI, RALPH VITACCO, SUSAN)
JAMES, ROBERT ELLIS and PETER)
BEAUCHEMIN as members of the Town)
of Sandwich Board of Selectmen,)

Defendants.)

**MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION**

Introduction

The plaintiffs are homeowners along the landward (southern) border of the western side of Town Neck Beach in Sandwich — a town-owned public beach that lies between their homes and Cape Cod Bay. Over the years,¹ as the result of natural causes — storms, winds, tides, and

¹ The Town acquired the beach by eminent domain in 1909.

currents — Town Neck Beach has eroded over 300 feet, leaving little “upland” (*i.e.*, land above the mean high water mark) in this section and none at all (just sand exposed at low tide) along one large stretch.²

Erosion continues — perhaps as much as fifty feet in this section in the last three years. The plaintiffs’ homes are threatened and, without major remedial measures, may well be lost or rendered uninhabitable in the near future. The plaintiffs have already spent considerable sums on remedial efforts of their own and could do so again at any time.³ But an opportunity recently arose that seemed to address their problem.

The Army Corps of Engineers is dredging the Cape Cod Canal and, in the normal course of events, would take the material so dredged and dump it in Cape Cod Bay. The material to be dredged is primarily sand, suitable for deposit on beaches. The Town thus contacted the Corps to see if it could acquire that sand. The Corps was willing, and also to share in the cost of its deposit, so long as a study was done showing that the intended use would benefit the public, and so long as certain associated measures were taken.

A study was done for depositing the sand along the western side of Town Neck Beach — the area in front of the plaintiffs’ homes — and subsequently approved by the Corps. *Cape Cod Canal, Town Neck Beach, Sandwich, Massachusetts, §204 Detailed Project Report and Environmental Assessment for Beneficial Use of Dredged Materials from Maintenance Dredging* (Jun. 2015) (hereafter, “§204 Report”). The plaintiffs, of course, were delighted. But as a condition for its contribution to the cost of this work, the Corps required that permanent public access easements be put in place for the beach areas so benefited, either by grant from the

² Shorefront property involves two types of land, “upland” (the area above the mean high water mark) and “flats” (the area between the mean low water and mean high water marks), sometimes called the “beach” or “shore.” See *Storer v. Freeman*, 6 Mass. 435, 439 (1810); *Houghton v. Johnson*, 71 Mass. App. Ct. 825, 828, 829 (2008).

³ There is nothing in the record that indicates any action by the Town or its boards to discourage or prevent any beach protection work by the plaintiffs on their own property.

affected homeowners or by eminent domain, and the Town so informed the plaintiffs, requesting a voluntary grant.⁴ See Affidavit of Sandwich Town Manager George Dunham (Oct. 5, 2015).⁵ The plaintiffs were willing to give *temporary* easements during the sand deposit process, at least for the deposit activity itself, but several whose participation was necessary refused to give *permanent* easements, contending they could not legally be required to do so and that such a permanent grant would adversely affect their property values. They likely now regret this refusal.⁶

Regretted or not, the choice is now out of their hands. Events have moved forward. The availability of this sand — over 150,000 cubic yards — is a one-time event. The Corps will not be dredging again for the foreseeable future. The sand cannot be kept in a pile, available for later use. It will either be sold to the Town for immediate placement on a Bay-side beach, or dumped in the sea. It must all go in a single location to be effective. Faced with tight deadlines (bids for the Corps' dredging contracts are due October 19, 2015 and the final destination of the sand must

⁴ The price to be paid for depositing the sand along the beach is the difference between the cost of dredging it from the Canal and dumping it at sea (the "Federal base plan") (*i.e.*, what the Corps would pay anyway), and the additional cost that would be incurred in putting it on the beach. If the easements were put in place, the Corps was willing to pay 65% of this additional cost, with the Town only responsible for the remaining 35%. Without the "public access" easements, the Town must pay 100% of the additional cost. With additional associated costs, and a margin to cover possible over-runs, the difference is apparently \$1.25 million.

⁵ The plaintiffs have moved to strike the portions of the Dunham affidavit regarding the Corps' easement requirement as inadmissible hearsay. For purposes of this preliminary injunction motion (I make no ruling on *other* purposes or proceedings in which it may be offered), I DENY the motion to strike. Hearsay may be considered in connection with preliminary injunction motions, *see Planned Parenthood League v. Operation Rescue*, 406 Mass. 701, 712 (1990), and the Corps' requirement of public access easements as a condition for its payment of 65% of the cost is adequately corroborated by other materials in the record, including the form of the proposed easement document itself which, according to the Town, originated with the Corps. The motion to strike also challenged various engineering opinions by Mr. Dunham as beyond his competence as a layperson. These aspects of the motion have been mooted by the defendants' submission of an affidavit from their professional engineer, Kirk Bosma. Affidavit of Kirk Bosma, P.E. (Oct. 8, 2015).

⁶ To be fair, the precise scope of the permanent easement was not as defined as it could have been. But the particulars could have been negotiated, and there is nothing in the record that indicates any serious attempt at negotiation by the plaintiffs. It is hard to see how a limited public easement would diminish property value more than the loss of the home to the ocean.

There is also nothing in the record that indicates an unwillingness by the Town to negotiate compensation for the easements, nor any evidence that the plaintiffs sought to negotiate such compensation. Town Meeting had authorized the taking of the easements by eminent domain if necessary, so compensation was available.

be identified for the purpose of those bids), the Town no longer had time to conduct a full §204 study for a new location, nor time to accomplish a contested eminent domain taking to obtain the necessary easements over the plaintiffs' properties. Instead, it determined that depositing the sand on the *eastern* side of Town Neck Beach would protect not only that area but also the downtown and Route 6A, now exposed to wintertime storm flooding, and went to Town Meeting for authorization to spend the full \$1.7 million cost of the sand for that location.⁷ Town meeting so voted, giving the Selectmen the authority to proceed with the alternative plan. *See* Ex. 1, showing the two locations.⁸ No easements are required for the alternative location because all of the relevant property is Town-owned.

Contending that depositing the sand in front of their houses is by far the *better* plan, that the Town has an affirmative obligation to protect their homes from erosion, and, for those reasons, the expenditure of the \$1.7 million from the Town's Community Preservation Act funds on the alternative location is a misuse of those funds, the plaintiffs brought this suit. The relief sought is an order directing the Town to go forward with the \$1.7 million expenditure, but to deposit the sand in front of the plaintiffs' homes in accordance with the §204 plan, *not* in the alternative location. Because events cannot wait on any normal, or even expedited, case schedule, they have now moved for a preliminary injunction directing the same relief.

The Town opposes this request, raising questions about the jurisdiction of this court to even hear this case. It contends that the plaintiffs have no likelihood of success, or even a viable cause of action. It asserts that the balance of harms favors the Town, and the public interest

⁷ \$1.7 million is the full cost to acquire the sand, *i.e.* the additional cost over and above the cost of the Federal Base Plan (the cost of dredging and dumping the sand in the sea), which the Corps will pay in any event. What has been lost is the 65% share of that \$1.7 million that the Corps would have paid had the §204 plan gone forward with easements in place.

⁸ The alternative location (the eastern side of Town Neck Beach) is indicated by the double-pointed arrow on Ex. 1. The §204 location (the western side of the Beach, in front of the plaintiffs' properties) is the cross-hatched area to the left of the arrow.

likewise. If an injunction *is* granted, it seeks a bond in the amount of at least \$6.2 million — the minimum likely cost of obtaining the same amount of sand elsewhere, and then depositing it in the alternative location.⁹ See Second Affidavit of Kirk Bosma, P.E. (Oct. 14, 2015).

The case was originally filed in this court, then removed to federal court, and, after its constitutional claims were voluntarily dismissed, remanded back to this court. The materials submitted in connection with the preliminary injunction motion are extensive and have all been reviewed and considered. In addition, the court held a two hour hearing on the motion at which the parties fully explained their positions and contentions, followed by supplemental filings on points raised by the court.

Based on all this, for the reasons more fully set forth below, the plaintiffs' motion for preliminary injunction is **DENIED**.

The Preliminary Injunction Standard

Preliminary injunctions are governed by Mass. R. Civ. P. 65(b). To prevail on a request for preliminary injunctive relief, the moving party bears the burden of showing that:

- it has a substantial likelihood of success on the merits,
- it will suffer irreparable injury unless the injunction issues,
- its injury, or threatened injury, outweighs whatever injury the proposed injunction may cause the party being enjoined, and
- if issued, the injunction would not be adverse to the public interest.

⁹ The difference between that amount and the \$1.7 million cost of the sand from the Corps is due to two reasons. First, to the extent the Town is paying for the sand at all (the raw material), it is paying at a steeply-discounted rate. Unlike sand owned by a commercial enterprise that sells sand as its business, *this* sand, in its location at the bottom of the Cape Cod Canal, is a nuisance, not an asset. It is an impediment to navigation which the Corps wants to remove. It is thus, effectively, giving it away. Second, the Town does not have to pay for its dredging or most of the transport. Those are part of the Federal Base Plan, which the Corps is paying. Basically, all the Town is paying is the additional cost incurred for putting it on the beach rather than dumping it at sea, and whatever additional transportation cost would be involved with its deposit on the beach.

GTE Products Corp. v. Stewart, 414 Mass. 721, 722-23 (1993); *Town of Brookline v. Goldstein*, 388 Mass. 443, 447 (1983); *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616-17 (1980).

If an injunction is entered, unless “good cause” is shown to the contrary, the court must require “the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Mass. R. Civ. P. 65(c).¹⁰ This typically takes the form of a bond.

Generally speaking, if the requisite criteria have been met, the goal of a preliminary injunction is to “maintain the situation in *status quo* until the merits can be determined.” See *Thayer Co. v. Binnall*, 326 Mass. 467, 479 (1950) (emphasis added). Where a requested injunction would result in a *change* to the *status quo* (i.e. where a *mandatory* injunction is sought), a somewhat higher standard may apply. As noted in *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 743-44 (2nd Cir. 2000):

In most cases, a party seeking a preliminary injunction must demonstrate: (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor. In some cases, a significantly higher standard applies. The moving party must make a “clear” or “substantial” showing of a likelihood of success in two instances: where (1) the injunction sought is mandatory, i.e. “will alter, rather than maintain, the *status quo*”; or (2) the injunction sought “will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits.” *Jolly v. Coughlin*, 76 F. 3d 468, 473 (2nd Cir. 1996).

Under either standard, “[t]he burden of showing the likelihood of success on the merits is on the party seeking the preliminary injunction.” *Robinson v. Sec’y of Admin.*, 12 Mass. App. Ct. 441, 451 (1981). In this case, both lead to the same result.

¹⁰ The only persons or entities excepted from this requirement are the United States, the Commonwealth, any political subdivision of the Commonwealth, and any officer or agency of any of them. *Id.*

Discussion

Jurisdiction

I begin with the question of this court's subject matter jurisdiction over this dispute. The plaintiffs assert I have it, citing *Backman v. Lilly*, Land Court Case No. 116033, Decision (May 29, 1992) (Sullivan, J.), in which Judge Sullivan assumed, without expressly deciding, that the Land Court had jurisdiction over the erection of a shorefront stone groin because it allegedly caused the plaintiff's beachfront property "to be scoured of sand, rocks to be deposited therein[,] and the shoreline to be eroded." *Id.* at 1. The jurisdictional theory in *Backman*, as best I can discern, was that the defendants' actions affected the boundary line of the plaintiff's land, causing it to shrink, and thus brought the case within G.L. c. 185, §1(k) ("all cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved, including actions for specific performance of contracts."). The case was not appealed, so the jurisdictional theory was not tested.

I have doubts about *Backman's* jurisdictional underpinning. Its theory would sweep up any number of tort- and contract-based cases where the *consequence* was an effect on the plaintiff's shoreline (negligent construction of the stone groin for example, or breach of contract to build it in the right place), which no one would think of as a "Land Court case" involving *determination* of a right, title or interest in land. The dredged sand, even if it eventually will be deposited *somewhere*, does not give rise to a "right, title or interest" claim in its potential location in and of itself. At this point, it is simply the subject of a municipal contract. Its deposit may preserve or create land, but that is the consequence, not the underlying cause of action. Here, as discussed more fully below, the cause of action is the validity of the municipal contract to purchase the sand and place it in the alternative location.

Land Court jurisdiction is thus an interesting question, but it has not yet been fully briefed. Moreover, there will not be time to transfer the case to Superior Court, or seek interdepartmental assignment as a Justice of that court, before the preliminary injunction decision needs to be made.¹¹ In light of this, for present purposes, since I deny the requested injunction on independent grounds, I assume, without deciding, that I have jurisdiction to hear the preliminary injunction motion. I thus proceed to the merits of that motion.

Likelihood of Success on the Merits

Reduced to essentials, as articulated at the hearing, the plaintiffs' cause of action is "misuse of public funds." The "misuse" does not arise from the purchase of the sand itself. The plaintiffs are all in favor of that purchase. Rather, in the plaintiffs' view, the misuse is the expenditure of \$1.7 million from the Town's Community Preservation Act funds to deposit the sand on the west side of the beach rather than in front of the plaintiffs' homes on the east, which they contend is the far better location. At issue, then, is the validity of a municipal contract, and the relief requested is, in practical effect, this court's re-writing of that contract.

Rather than bringing a "ten taxpayer" lawsuit to enjoin the illegal expenditure of public funds, *see* G.L. c. 40, §53 (a theory which has a series of problems, not the least this court's clear lack of subject matter jurisdiction¹² and the fact that the plaintiffs do not wish to enjoin the expenditure, but rather to re-direct it), the plaintiffs fashion this action around theories of "duty", which they say the Town breached and can only be remedied by re-directing the sand. This duty arises, they contend, in three ways: (1) from the "eminent domain" deed by which the Town acquired Town Neck Beach in 1909, (2) from an alleged "duty" of a littoral landowner to take

¹¹ If there are doubts about the jurisdictional validity of my ruling on this motion, I can seek such an interdepartmental assignment with retroactive effect. *See Ritter v. Bergmann*, 72 Mass. App. Ct. 296, 301 n. 9 (2008).

¹² Ten taxpayer lawsuits must be brought in the Superior Court or the Supreme Judicial Court. *See* G.L. c. 40, §53.

affirmative measures to prevent erosion on bordering landward properties, and (3) from the Community Preservation Act itself, which the plaintiffs say, in this instance, requires the expenditure of its funds on the plaintiffs' location. I disagree.

First, the Town Neck Beach deed contains no affirmative covenant benefiting the landward properties in any way, and certainly none obligating the Town to keep the beach substantially intact. *See* Deed, Taking of Land by the Town of Sandwich for a Public Playground (Mar. 23, 1909). The Town *bought* the beach for full consideration.¹³ *Id.* It was not a gift, much less a gift with conditions. The "maintenance" language cited by the plaintiffs in support of their "affirmative duty" contention ("does take in fee the land hereinafter described for the purpose of maintaining a Public Playground for the use of said Inhabitants") is simply a description of the public purpose behind the expenditure of funds, and cannot, in any reasonable reading, be construed as an irrevocable assumption of a duty to keep a public beach, in that location, for all time. Town meetings, like all legislatures, are assumed to act in the context of the world around them. Beaches are not stable. They accrete and erode and, occasionally, disappear entirely. *See, e.g., White v Hartigan*, 464 Mass. 400, 407-408 (2013). In the absence of express language to the contrary, the deed cannot be construed to include any affirmative obligation of "maintenance" in the sense the plaintiffs contend.

Second, there is no "duty" of a littoral landowner to take affirmative measures to prevent erosion on bordering landward properties. The plaintiffs cite *Lummis v. Lilly*, 385 Mass. 41 (1982) as imposing such a duty, but I read that case differently. Rather than a broad ruling imposing a duty to take *affirmative preventative measures* in such cases (an enormous burden to place on any shorefront owner, given the constant natural ebb and flow of the sea — *see White*,

¹³ The deed recites consideration of \$500, and there is nothing in the record to indicate that this was anything less than the property's fair market value at that time. Beachfront property values on the Cape have reached their current stratospheric levels only within the last few decades.

supra),¹⁴ *Lummis* simply holds that a littoral landowner cannot make *changes* on his land that result in adverse effects on other landowners unless those changes are a “reasonable use” of that land. Thus, in *Lummis*, the issue was whether the construction of a stone groin (which altered the flow of shorefront waters) was such a reasonable use, and both its reasoning and every case cited dealt with man-made changes. There is nothing to suggest that the *Lummis* court intended to go beyond that to impose a duty to take affirmative steps to fight the forces of nature, I am aware of no case so holding, and I see no basis to do so. The story of King Canute may be apocryphal, but its central lesson still teaches. See Henry, Archdeacon of Huntington: *Historia Anglorum* (Diana Greenway, Editor), Clarendon Press Oxford Medieval Texts (1996) (account of King Canute and the tides).

So far as the record shows (and as the plaintiffs conceded at the hearing), the placement of the sand in the alternative location (down drift from the §204 location in front of the plaintiffs’ homes) will not change what is currently happening to the plaintiffs. It will not protect their

¹⁴ This case is a perfect example of the burdens such a duty would impose. Without the fortuitous availability of the dredged sand and the Corps’ subsidy, it would cost the Town between \$7.91 and \$9.12 million to purchase this sand on the open market and have it placed on Town Neck Beach. See Second Affidavit of Kirk Bosma P.E. (Oct. 14, 2015). It is one thing to have a duty not to cause unreasonable harm as a result of a change you wish to make to your shorefront, and quite another to be required to fight nature when you would rather simply let it take its course.

Even though it had no *obligation* to do so, the Town has not stood idly by while the beach erodes. As set forth in the affidavit of its Town Manager, George Dunham, “[t]he Town has gone to extensive efforts to address erosion at Town Neck Beach, at both the east and west ends, for decades. These efforts include, but are not limited to: dune restoration projects in 1990 and 2004, using material dredged from [the] Cape Cod Canal by local power plants; the initiation in 2011 of a long-term re-nourishment program that is meant to place 400,000 cubic yards of sand onto the beach — which has received all required federal, state and local permits, making it the largest municipal re-nourishment project since the early 1970’s; obtaining a \$300,000 grant in 2014 to pursue the creation and permitting of an off-shore sand source for periodic dredging; engagement in 2006 of a ‘Section 111’ program with the Army Corps of Engineers to analyze the impact of the Canal jetty to identify long-term solutions which could place partial responsibility for addressing beach erosion with the Corps; as well as emergency measures to make temporary repairs to the beach’s protection systems in response to severe storms over the past few years. In addition, the Town has sought permitting and funding for several re-nourishment projects that were not awarded, and the Board of Selectmen has listed beach and dune re-nourishment as a top priority for many years in its Long Range Plan which is presented annually to Town Meeting and printed in the Warrant.” Affidavit of George Dunham at 4-5, ¶15 (Oct. 5, 2015).

properties or make them better, but it will not make them worse. The Town has thus not breached any duty to the plaintiffs arising from its status as a littoral property owner.

The plaintiffs' last theory is premised on a claim that the Town is misusing Community Preservation Act funds to have the sand deposited in the alternative location. If I understand it correctly, that theory is this: (1) the CPA funds must be spent on a proper public purpose to benefit the community, (2) the §204 study establishes that depositing the sand in front of the plaintiffs' homes meets that purpose, (3) the placement of sand in that location is the *best* place to put it, and (4) the Town has not demonstrated that the alternative location is better, or has even sufficiently been studied to conclude that it will have the benefits claimed.

There is no established route of appeal from the Town's decision. For purposes of this motion, I accept the plaintiffs' contention that the decision is administrative (a decision of the Town's Selectmen) rather than legislative (a vote of Town Meeting) since the Town Meeting vote authorized the deposit of the sand anywhere that re-nourishes the beach, leaving the location to the discretion of the Selectmen. *See* Town of Sandwich Special Town Meeting Warrant (Aug. 31, 2015). Review is thus by *certiorari* (G.L. c. 249, §4) and the standard of review "may vary according to the nature of the action for which review is sought." *Forsyth Sch. for Dental Hygienists v. Bd. of Registration in Dentistry*, 404 Mass. 211, 217 (1989).

If the decision is adjudicatory in nature, in the absence of substantial legal error, the "substantial evidence" standard of review is applied.¹⁵ *See Durbin v. Bd. of Selectmen of Kingston*, 62 Mass. App. Ct. 1, 5-6 (2004). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 6 (internal quotation

¹⁵ This case does not involve a "legal error" in the sense the standard contemplates (*i.e.*, a decision not authorized by applicable law). As noted above, no one challenges the right of the Town to use Community Preservation Act funds to purchase this sand and place it on Town Neck Beach for protective purposes. The dispute is over the *location* of the ultimate placement of that sand and the adequacy of the factual basis for the Town's choice.

omitted). Under that test, “the reviewing court is not empowered to make a *de novo* determination of the facts, to make different judgments as to the credibility of witnesses, or to draw different inferences from the facts; it cannot disturb a choice made below between two fairly conflicting inferences or views of the facts, even if it might justifiably make a different choice were the case before it *de novo*.” *Id.* at 6 (internal citation omitted). Moreover, to grant relief in *certiorari*, the court must find that the decision “resulted in manifest injustice to the plaintiff” or “adversely affected the real interest of the general public.” *Id.* at 5 (internal quotation omitted).

If the decision is entirely within the board’s discretion, *certiorari* review is limited to a determination of whether the board acted “arbitrarily and capriciously.” *See id.* at 5, n. 7.

It is not immediately clear which category this decision falls within, “adjudicatory” or “discretionary” (for recent case law suggesting it may be “discretionary,” *see Cumberland Farms Inc. v. City Council of Marlborough*, ___ Mass. App. Ct. ___, Appeals Court Case No. 14-P-1612, *slip op.* at 3-5).¹⁶ For purposes of this motion, however, it does not matter. The plaintiffs are unlikely to prove that the Board’s decision failed either test.

The plaintiffs contend that the Board’s decision was based solely on spite — its anger that the plaintiffs refused to grant the requested public access easements. I disagree. The Board may have been exasperated at the plaintiffs’ refusal to accept what seemed, at least to the Board, a reasonable and necessary trade-off for protection of their homes.¹⁷ But it was not “spiteful.”

¹⁶ *Cumberland Farms* suggests that the difference turns on whether factual findings are necessary to the validity of the decision, or whether the decision is in an area left to the board’s complete discretion. Here, Town Meeting left the location of the placement of the sand to “the direction of the Board of Selectmen” — seemingly discretionary. *See* Town of Sandwich Special Town Meeting Warrant (Aug. 31, 2015). It then went on to say, however, that the purpose of its authorization was for “designing and constructing a beach renourishment, restoration and resiliency project on Town Neck Beach”, which suggests the need for the Board to make a factual determination that the location it chose would fulfill that purpose. *See id.*

¹⁷ The plaintiffs claim that the Corps did not, in fact, insist on public access easements as a condition of its 65% sharing in the cost to place the sand on the beach, but the evidence thus far in the record is to the contrary. In

The evidence shows that the Board was under severe time constraints and acted reasonably, in good faith, given those constraints. *See* Affidavit of George Dunham, Town Manager (Oct. 5, 2015). It had engineers from the Woods Hole Group (the same engineers it has worked with on beach erosion issues for over fifteen years) study the alternative location (the eastern portion of Town Neck Beach), and they, as well as the Town's Director of Natural Resources, concluded that (1) due to the deteriorated condition of the beach and dune system in that area, "potential flooding from future storms will more likely inundate the marsh system that abuts the east end of Town Neck Beach and threaten the surrounding infrastructure, homes and businesses," (2) "[r]estoration of the dunes and barrier beach in this area [*i.e.*, the placement of the sand as directed by the Board of Selectmen] would directly contribute to the reduction in flooding potential in the downtown area and other areas surrounding the marsh system," and (3) "[t]he increased resilience of the dune/beach system would reduce the probability of overwash and breaching in this area, which is a major contributor to flooding potential." Affidavit of Kirk Bosma, P.E. (Oct. 8, 2015). These were the findings and opinions presented to the Board at the time it made its decision, and now corroborated in affidavits presented to this court. *See* Affidavit of George Dunham (Oct. 5, 2015) and Affidavit of Kirk Bosma, P.E. (Oct. 8, 2015).

The question before me is not which location is the *better* one for placement of the sand. Nor was that question, in an *objective* sense, the necessary question for the Board to decide in order for its decision to be valid. Boards have discretion in decisions of this type, and so long as those decisions are supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion," they pass *certiorari* review. *Durbin*, 62 Mass. App. Ct. at 6. I find, based both on the evidence put before the board and now, through the Dunham and Bosma

any event, the Town reasonably thought so and, in addition, reasonably believed that the Anti-Aid Amendment to the State Constitution precluded this particular project unless public access easements were obtained. *See* Affidavit of George Dunham, Town Manager (Oct. 5, 2015).

affidavits, before me, that the Board's decision was so supported. I thus find that the plaintiffs have not demonstrated a likelihood of success on the merits in their claims to have that decision vacated and replaced by the injunction they seek.

Irreparable Harm and the Balance of Harms

I need not go further to discuss the other elements necessary for the entry of an affirmative preliminary injunction, but I do so for the sake of completeness. I thus turn next to the questions of irreparable harm and the balance of harms.

I fully appreciate the harm that may result to the plaintiffs if the sand is not placed in front of their homes. Outside of the death or illness of a loved one, there can be few things more distressing than watching a home disappear into the waves, powerless to do anything about it. The Town suggests that the plaintiffs are free to take private measures to protect their homes, but those are unlikely to be as comprehensive and effective as the deposit of this sand all along the western side of the beach. If nothing else, it solves the challenge of getting a coordinated response and agreement on the scope and cost of the necessary remedial measures from all the affected homeowners.

The Town, however, will *also* be harmed if the sand is re-directed away from the eastern side of the beach to the western. So far as the record shows, there is only so much sand, it can only effectively be put in one of these locations, and a failure to put it on the eastern side (the side the Selectmen have chosen) leaves the downtown and Route 6A areas exposed to storm and wintertime flooding that would otherwise be avoided.

Given this, on the present record, I cannot say that the plaintiffs' harm outweighs the Town's and, on *certiorari* review where the Town itself has made that judgment and I must

accept that judgment where, as here, it is based on substantial evidence and was not arbitrary and capricious, I cannot overturn that judgment. Nor would I as a matter of discretion.

The Public Interest

Town Meeting has left the location of the sand to the discretion of the Board of Selectmen. The Board — an elected body, chosen by the citizens of the Town to govern its affairs — has unanimously chosen the eastern location. The “public” has thus spoken and, as discussed above, on “such evidence as a reasonable mind might accept as adequate to support a conclusion” (the “substantial evidence” test, *see Durbin*, 62 Mass. App. Ct. at 6). The plaintiffs are thus unlikely to show that the “public interest” is otherwise.

Bond

Since the motion for preliminary injunction has been denied, the question of security is moot. In the interests of completeness, I will thus say only this. Had the injunction issued, I would have required a bond in some amount, and would not have set its amount without a further hearing.

Conclusion

For the foregoing reasons, the plaintiff's motion for preliminary injunction is **DENIED**.

The findings and rulings contained herein are necessarily preliminary in nature. Thus, these findings and rulings are neither intended, nor should they be construed, as having any precedential weight or effect in further proceedings in this case, all of which shall be determined in the light of the evidence offered and admitted on those occasions. Should further-developed evidence or circumstances warrant, any party may move for the modification or dissolution of this order at any time.

SO ORDERED.

By the court (Long, J.)

Attest:

Dated: 16 October 2015

Deborah J. Patterson, Recorder

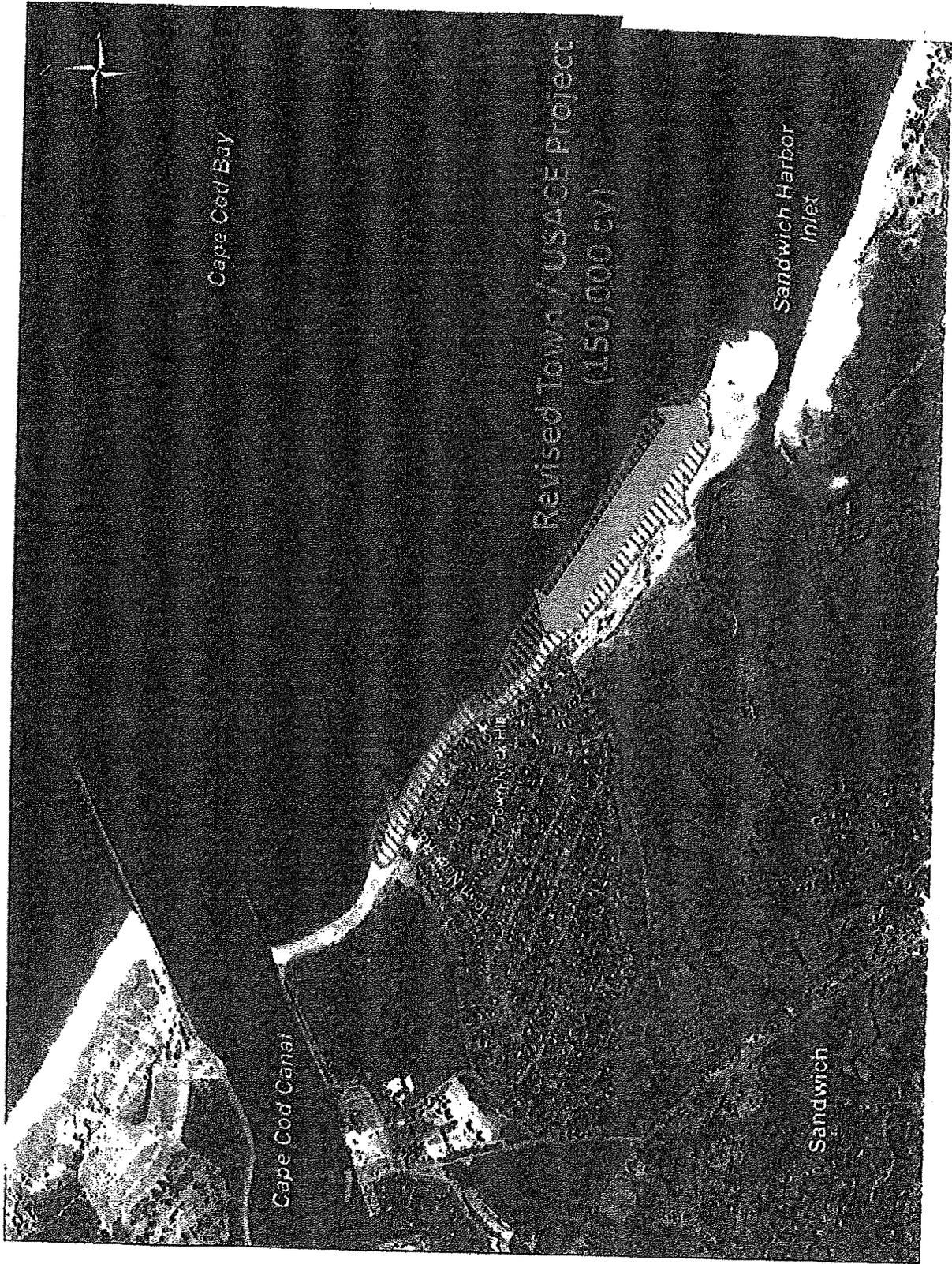


EXHIBIT 1