

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

[Filed: February 14, 2018]

PERRYWINKLE REALTY, LLC and :  
PERRYWINKLE MARINE, LLC :

V. :

C.A. No. WC-2010-0647

MICHAEL TIKOIAN, in his capacity as :  
Chairperson of the Coastal Resources :  
Management Council, and :  
KAREN SUE, INC. :

**DECISION**

**TAFT-CARTER, J.** In this administrative appeal, Perrywinkle Realty, LLC and Perrywinkle Marine, LLC (collectively, Perrywinkle), seek judicial review of a final agency decision of the Rhode Island Coastal Resources Management Council (CRMC or the Council). The decision of the CRMC approved Karen Sue, Inc.’s (Karen Sue) application for the extension of its existing commercial fishing dock and aquaculture facility located in South Kingstown, Rhode Island. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

**I**

**Facts and Travel**

In December 2007, Karen Sue filed a Category B application with CRMC seeking approval of a plan to expand its existing private commercial pier and proposed Marina Perimeter Limit (MPL) for property located in Snug Harbor on the west side of Point Judith Pond. (Dec. 17, 2007 Letter, CRMC Hr’g Package 9-10; Map of Application Site, CRMC Hr’g Package 21). Karen Sue’s existing dock extends forth from 54 Perrywinkle Road, South Kingstown, Rhode Island. (CRMC Decision, Findings of Fact ¶ 1). Specifically, the application proposes to expand

the existing pier with two forty-foot floating dock extensions and one eighty-foot long fixed pier extension to facilitate the continued docking of two eighty-foot long commercial fishing vessels and the expansion of permitted aquaculture. *Id.* at ¶¶ 4, 5.

Perrywinkle owns property across Perrywinkle Road and operates a marina. (CRMC Decision, Findings of Fact ¶ 7). Perrywinkle timely objected to the application, and hearings were held before the full Council on July 28, 2009 and September 8, 2009. (CRMC Decision 1).

During the July 28, 2009 hearing, Perrywinkle's counsel raised the issue of the littoral boundaries within Snug Harbor. Specifically, counsel argued that Karen Sue's proposed development would interfere with Perrywinkle's littoral rights, and that the determination of littoral boundaries between the parties was a question for the Superior Court. (Hr'g Tr. 62:9-63:17, July 28, 2009.) In opposition, counsel for Karen Sue argued that the plan was consistent with how the surrounding area had developed. (Hr'g Tr. 70:22-72:13, July 28, 2009.)

Chairman Tikoian of the CRMC acknowledged that Karen Sue and Perrywinkle had a threshold dispute over the littoral boundaries, and noted the CRMC's lack of jurisdiction over this issue: "[i]f we sit here for an hour-and-a-half or two hours and argue back and forth on the uses, you still have an issue of the lines. [The CRMC] can't make the decision on the lines." (Hr'g Tr. 72:15-18, July 28, 2009.) Ultimately, the parties agreed to continue the July 28, 2009 hearing to September 8, 2009 to give Perrywinkle time to file a declaratory judgment action with respect to the littoral boundary issues and to discuss a possible resolution with Karen Sue. (Hr'g Tr. 77:13-21, 86:7-15, July 28, 2009).

At the September 8, 2009 hearing, Perrywinkle notified the Council that it had in fact

filed a declaratory judgment action in Superior Court.<sup>1</sup> (Hr’g Tr. 26:5-17, Sept. 8, 2009). Nevertheless, the Council proceeded to a hearing on Karen Sue’s application and took testimony from Donald Roebuck, Karen Sue’s president; David Roebuck, president of Salt Pond Oyster Company; and Gregory Roebuck, P.E., who prepared the plans for the application and was accepted as an expert civil engineer by the Council. *Id.* at 50:15-60:19, 61:8-64:11, 65:3-68:16. All three witnesses testified in support of Karen Sue’s application.

The Council approved Karen Sue’s application and issued a written decision on August 16, 2010. (Hr’g Tr. 79:6-13, Sept. 8, 2009.) On September 3, 2010, Perrywinkle refiled its complaint from its September 4, 2009 declaratory judgment action (C.A. No. 2010-0646). On the same day, Perrywinkle also filed the administrative appeal now before this Court.

## II

### Standard of Review

Section 42-35-15 of the Administrative Procedures Act governs the standard of review for appeals to the Superior Court from a determination by an administrative agency. Pursuant to the Act:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error or law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

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<sup>1</sup> Perrywinkle filed its complaint in the initial declaratory judgment action on September 4, 2009 (C.A. No. WC-2009-0619). A stipulation was filed and the case was closed on September 3, 2010.

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 42–35–15(g).

While the exhaustion of administrative remedies is generally considered a condition precedent to judicial review under the Act, § 42–35–15(a) “specifically provides that ‘utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law’ is not precluded by its provisions.” *Town of Richmond v. R.I. Dep’t of Env’tl. Mgmt.*, 941 A.2d 151, 156 (R.I. 2008). Furthermore, with respect to the filing of both an appeal and a declaratory judgment, our Supreme Court has recognized “that a party is not precluded from proceeding under the UDJA, particularly when ‘the complaint seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers, or that the agency or board had no jurisdiction.’” *Bellevue-Ochre Point Neighborhood Ass’n v. Pres. Soc’y of Newport Cty.*, 151 A.3d 1223, 1231 (R.I. 2017) (quoting *Tucker Estates Charlestown, LLC v. Town of Charlestown*, 964 A.2d 1138, 1140 (R.I. 2009) (internal citations and quotations omitted)).

### III

#### Analysis

Rhode Island courts have long recognized the right of a riparian landowner to “wharf out.” *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999). “Under this doctrine, the riparian land owner has the right to construct whatever wharf or dock is necessary to gain access to navigable waters, as long as such construction does not interfere with navigation or the rights of other riparian land owners.” *Id.* at 1260 (citing *Nugent, ex. rel. Collins v. Vallone*, 91 R.I. 145, 150, 161 A.2d 802, 805 (1960)).

The CRMC has exclusive jurisdiction to approve wharf or dock construction in tidal waters. *See Town of Warren*, 740 A.2d at 1285 (holding that the CRMC has exclusive

jurisdiction over non-commercial boating wharves in tidal areas); *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162 (R.I. 2003) (clarifying that the CRMC's jurisdiction also preempts a municipality's attempt to prevent construction of commercial docks or wharves). However, the judiciary has always retained jurisdiction over the determination of riparian or littoral rights. *See, e.g., Carr v. Carpenter*, 22 R.I. 528, 48 A. 805, 807 (1901) (recognizing the riparian rights of an owner of property adjacent to water); *Hall v. Nascimento*, 594 A.2d 874, 876 (R.I. 1991) (applying *Carr* to determine littoral rights where the dredging of a bay revealed new land); *RICO Corp. v. Town of Exeter*, 787 A.2d 1136, 1144 (R.I. 2001) (finding the Superior Court, not the zoning board, possessed subject matter jurisdiction to determine nonconforming land rights in a declaratory action). The Court determines riparian and littoral rights under a standard of reasonableness. *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14, 312); *see also* Catherine Robinson Hall, *Rhode Island State Survey*, WATER AND WATER RIGHTS 4, at 1 (3d ed. 2009).

Neither party disputes the Superior Court's jurisdiction over the rights of the case. Indeed, at the July 28, 2009 hearing, the CRMC acknowledged that there appeared to be a threshold dispute over littoral boundaries. (Hr'g Tr. 72:14-18, July 28, 2009.) Furthermore, the issue of whether Karen Sue's application before the CRMC unreasonably interfered with Perrywinkle's littoral rights will have a determinative effect on the pending administrative appeal. Our Supreme Court has recognized "that the validity or applicability of an agency rule or practice may be decided in an action for declaratory relief, notwithstanding the fact that an administrative hearing was requested." *Town of Richmond*, 941 A.2d at 156 (citing *Newbay Corp. v. Annarummo*, 587 A.2d 63, 65-66 (R.I. 1991)). Here, the determination of the littoral boundaries is a fundamental issue to be addressed in the first instance. Accordingly, the Court

will exercise its discretion to hear Perrywinkle's action for declaratory judgment on the littoral boundaries between the parties prior to ruling on the pending administrative appeal.

#### **IV**

#### **Conclusion**

Therefore, the Court exercises its discretion to hear and decide the declaratory judgment action in *Perrywinkle Realty v. Karen Sue, Inc.*, WC-2010-0646, prior to ruling on this pending administrative appeal. Counsel shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**CASE NO:** WC-2010-0647

**COURT:** Washington County Superior Court

**DATE DECISION FILED:** February 14, 2018

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

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For Defendant: Joseph DeAngelis, Esq.; Peter F. Skwirz, Esq.; Anthony DeSisto, Esq.