

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: May 4, 2018)

802 PARTNERS, LLC

:

v.

:

C.A. No. PC-2013-4940

:

COASTAL RESOURCES MANAGEMENT

:

COUNCIL and THE CITY OF NEWPORT

:

:

DECISION

**TAFT-CARTER, J.** In this administrative appeal, 802 Partners, LLC (802 Partners) seeks judicial review of a final agency decision of the Rhode Island Coastal Resources Management Council (CRMC or the Council). The decision approved the City of Newport’s (City) application for the extension of an existing public pier located in Newport Harbor. Jurisdiction is pursuant to G.L. 1956 § 42–35–15 of the Administrative Procedures Act (APA).

**I**

**Facts and Travel**

The City owns and maintains a right-of-way on a parcel of land known as the Ann Street Pier. (Application at 2) There are no plat or lot numbers associated with the property because it simply consists of a roadway and right-of-way. *Id.* The existing public dock consists of 210 linear feet. *Id.* at 5.

The Ann Street Pier abuts a City-owned property known as the “Armory.” *Id.* at 6. The City, with the help of a \$713,000 Boating Infrastructure Grant from the United States Department of Fish and Wildlife, plans to develop the property into a “transient boating facility on the beach-level at the Harbor Center (Newport Armory).” *Id.* This facility calls for “personal

hygiene facilities (showers and toilets) as well as storage lockers and laundry facilities for boaters arriving in Newport Harbor.” *Id.*

On May 17, 2010, CRMC received an application from the City seeking an assent to perform work at the Ann Street Boating Facility. *Id.* at 1. Specifically, the City was seeking to “[i]ninstall necessary piles and approximately 393 linear feet of concrete floating docks for public boating facility.” *Id.* at 5. Two marinas adjacent to the Ann Street Pier, 802 Partners to the north of the pier and Newport Onshore Marina (NOS) to the south of the pier, and an adjacent hotel, Forty 1° North, LLC, objected to the application (collectively, Objectors).

On January 24, 2012, the CRMC conducted its first hearing on the application.<sup>1</sup> Before any testimony was taken, counsel for CRMC brought three procedural issues to CRMC’s attention, one of which concerned the littoral rights of the parties and whether the CRMC should consider the application without first deciding those rights. (Tr. I at 15-16) A counsel for the Objectors pointed out that there existed a dispute with respect to the littoral rights and the littoral boundaries of the parties, and he maintained that the proposed pier expansion would “substantially and unreasonably interfere[] with the littoral rights and existing uses of the objectors” which have been established for many years. *Id.* at 53-54. He posited that because CRMC did not have jurisdiction to resolve the dispute, it should wait for the issue to be resolved, either by agreement of the parties or by the Superior Court. *Id.* He further asserted that the proposed dock extension also would have “significant navigational impacts” on existing abutters. *Id.* at 56.

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<sup>1</sup> The hearings in this matter were conducted by the full CRMC on January 24, 2012 (Tr. I) and February 14, 2012 (Tr. II), and by a subcommittee of the CRMC on April 16, 2012 (Tr. III); May 3, 2012 (Tr. IV); June 5, 2012 (Tr. V); June 19, 2012 (Tr. VI); July 18, 2012 (Tr. VII); August 22, 2012 (Tr. VIII); September 12, 2012 (Tr. IX); November 15, 2012 (Tr. X); and May 14, 2013 (Tr. XI).

However, after being informed that there was no current littoral rights dispute in Superior Court, Chairwoman Livingston of the CRMC decided “to forge ahead” with the hearing. *Id.* at 73-76. The Council then heard testimony from former City Manager, Edward F. LaVallee, *id.* at 83-109, and Chairman of the Newport Waterfront Commission, Hank Kniskern. *Id.* at 110-147.

On February 7, 2012, the Objectors filed a declaratory relief action with respect to the littoral boundary issues in the Newport Superior Court. *See 802 Partners, LLC, et al., v. City of Newport, et al.*, C.A. No. NC-2012-0056 (filed February 7, 2012). At the next CRMC meeting, the Objectors sought a stay of the proceedings pending the outcome of the Superior Court action. (Tr. II at 7-8) However, although recognizing that the littoral rights issue would have to be decided by the Superior Court, Chairman Livingston denied the stay and decided to proceed with the matter. *Id.* at 22-23. Thereafter, the Council voted to approve a motion to deny the stay. *Id.* at 26.

At the hearings, a CRMC subcommittee heard further testimony from various witnesses, who were both for and against the application: Mr. Kniskern (Tr. III at 22-70); Newport Harbormaster Timothy Mills, *id.* at 71-123 and Tr. VIII at 807-10; Structural Civil Engineer Ronald Bourne (Tr. IV at 131-219); Narragansett Harbormaster John Edward Downey (Tr. V at 231-94); Supervising Civil Engineer for the CRMC, Kenneth W. Anderson (Tr. VI at 305-413); Managing Director of 802 Partners, Peter Borden (Tr. VII at 427-93); Marina Manager at Forty 1° North, Mark DelGuidice, *id.* at 494-567; Newport Onshore Marina Manager, William Vye, *id.* at 568-665; and Master Pilot Bruce Fisher (Tr. VIII at 676-807). After the formal witnesses had testified, the CRMC subcommittee opened the hearing up for public comments. (Tr. VIII at 812-37).

On November 15, 2012, the CRMC subcommittee voted to approve the Application. (Tr. X at 898) Thereafter, on May 14, 2013, the full Council voted to approve the application. (Tr. XI at 57) On September 9, 2013, the CRMC issued a written decision on the matter. *See* CRMC Decision.

## II

### Standard of Review

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

“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

“(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 APA, § 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 Envtl. Mgmt.*, 941 A.2d 151, 156 (R.I. 2008) (quoting § 42-35-15(a)).

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

The Objectors have raised many issues on appeal, one of which is that the CRMC acted arbitrarily and capriciously when it denied the Objectors a stay pending the outcome of the littoral rights litigation between the parties. Specifically, they contend that the CRMC acted arbitrarily and capriciously when it ignored its established procedural policy of staying its proceedings to first allow for the resolution of related littoral boundary disputes in Superior Court. As a result, they maintain that this Court should vacate the CRMC's decision.

In response, the City asserts that CRMC proceedings and Superior Court proceedings are mutually exclusive, and the Superior Court's consideration of the littoral rights should not have any bearing on the CRMC's right to move forward. It further asserts that there is no requirement for it to follow past traditions or practices if they were inappropriate for the circumstances of the case.

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 1258 (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).

The parties do not, and cannot, dispute the Superior Court's jurisdiction over the determination of the littoral rights of the parties in the declaratory judgment action. Indeed, at the hearings on January 24, 2012 and February 14, 2012, the CRMC acknowledged that there appeared to be a threshold dispute over littoral boundaries. (Tr. I at 73-76 and Tr. II at 22-23) Furthermore, the issue of whether the City's application before the CRMC unreasonably interfered with the Objectors' 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 before this Court which will address the merits of the appeal. Accordingly, the Court will reserve issuing a decision in the instant matter until such time as the declaratory judgment action determines the parties' littoral rights.

## IV

### Conclusion

Accordingly, the Court reserves its decision in the pending administrative appeal from the CRMC so that the Superior Court may hear and decide the declaratory judgment action in *802 Partners, LLC*, C.A. No. NC-2012-0056. Counsel shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**COURT:** **Providence County Superior Court**

**DATE DECISION FILED:** **May 4, 2018**

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

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