STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: October 25, 2018]

RODNEY J. LEBRECQUE	:	
	:	
v.	:	
	:	**C.A. No. PC-2014-2508**
STATE OF RHODE ISLAND	:	
COASTAL RESOURCES	:	
MANAGEMENT COUNCIL,	:	
ANNE MAXWELL LIVINGSTON,	:	
in her capacity as CHAIR of the	:	
COASTAL RESOURCES	:	
MANAGEMENT COUNCIL;	:	
GROVER J. FUGATE, in his capacity	:	
as EXECUTIVE DIRECTOR of the	:	
COASTAL RESOURCES	:	
MANAGEMENT COUNCIL;	:	
PAUL MERCURIO, and CAROL	:	
MERCURIO	:	

DECISION

PROCACCINI, J. Before this Court is the appeal of Rodney J. Lebrecque (Mr. Lebrecque) from a final decision of the State of Rhode Island Coastal Resources Management Council (the Council) approving an application by Appellees Paul and Carol Mercurio (Mercurios) to construct a dwelling on their lot located on Glenwood Avenue in the Town of Narragansett, Rhode Island. The Court entered a Decision on this matter on February 16, 2016, in which this Court remanded the matter to the Council to make further findings of fact consistent with the Decision. This Court has retained jurisdiction and now reviews the Additional Findings of Fact presented by the Council. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

In 1997, the Mercurios purchased a substandard, undeveloped lot (the Property) in a residential neighborhood located on Glenwood Avenue in the Town of Narragansett, Rhode Island. The Property contains approximately 4760 square feet of land.[1] A damaged revetment, or retaining wall, forms the eastern boundary of the Property along the Rhode Island Sound. Glenwood Avenue borders the Property to the west. The Property is located within 200 feet of the Rhode Island shoreline and falls under the jurisdiction of the Rhode Island Coastal Resources Management Program (the CRMP). CRMP § 100.1. Pursuant to the CRMP, any residential development on the Property is subject to a twenty-five foot coastal buffer zone[2] (the Buffer Zone) as well as a fifty foot minimum construction setback (the Setback). CRMP §§ 140 and 150. Additionally, the Property is located within a "V19 Flood Zone," or high hazard flood area.

In 2003, the Mercurios applied to the Council for a Preliminary Determination to ascertain whether they could construct a single-family twenty-foot-by-thirty-two-foot residence on the lot (the Project). Council staff (the Staff) recommended denying the Project, finding that Project would require "significant variances" from the CRMP Setback and Buffer Zone. The Mercurios nevertheless applied to the Town of Narragansett Zoning Board (the Board) requesting a special use permit and dimensional variances. The Board denied the Mercurios' application and the Mercurios appealed the Board's decision to the Superior Court. On appeal, the Court held that the Board had exceeded its statutory authority and erroneously analyzed the

[1] The Property is located in an R-10 zoning district, which requires a minimum lot size of 10,000 square feet. Despite this requirement, the Property qualifies as a substandard lot of record because it pre-existed the zoning ordinance amendment creating the R-10 zone.

[2] CRMP § 150 defines a coastal buffer zone as "land area adjacent to a Shoreline (Coastal) Feature that is, or will be, vegetated with native shoreline species and which acts as a natural transition zone between the coast and adjacent upland development."

application under the CRMP's variance criteria. *Mercurio v. The Zoning Bd. of Review of Narragansett*, No. WC 2006-0056, 2007 WL 4471143, at *15 (R.I. Super. Nov. 20, 2007). The Court overturned the Board's decision and remanded the matter to the Board with instructions to grant the special use permit and dimensional variances. *Id.*

Following the appeal, the Mercurios applied to the Council seeking final approval of the Project as well as variances from the Setback and Buffer Zone (the Project Application). The Council opened a public notice and comment period and set a hearing date for the Project Application. The Staff's engineering, biology and geology departments each reviewed the Mercurios' Project Application and submitted memoranda recommending that the Council deny the Project.

The Staff Engineer concluded that the Property was too small to support the Project. He determined that in light of the Property's location in a V19 Flood Zone, the Project posed significant adverse environmental impacts to the surrounding area and would be very vulnerable during storm events. Likewise, the Staff Geologist recommended that the Council deny the Project Application and noted that even if the Mercurios repaired the revetment, the Property was likely to experience significant erosion and further loss of land "within the mere [eight foot] [S]etback." (Appellant's Ex. 8, at 4.)

The Council held a hearing on the Project Application on February 12, 2013, in which Dr. David R. Carchedi (Dr. Carchedi), a civil engineer; Dr. Peter S. Rosen (Dr. Rosen), a coastal geologist; and Mr. Mercurio, all testified in support of the Project Application. During the hearing, Doctors Carchedi and Rosen refuted the opinions of the Staff and testified that the Project would not pose any danger to the environment or to neighboring properties. *See* Hr'g Tr. 50:1-4, Jan. 28, 2014. The Council also heard from Mr. Lebrecque, a property owner who owns

a residence located directly across from the Property, who testified in opposition to the Project Application. At the end of the hearing, the Council approved the Project Application with the added condition that the residence be raised an additional two feet above FEMA requirements. *Id.* at 108:11-12.

On May 1, 2014, the Council issued a final written decision (the Final Decision) approving the Project Application. The Final Decision contained thirty Findings of Fact and three Conclusions of Law. In the Final Decision, the Council stated that the Staff's primary objection to the Project was the risk of erosion to the Property due to the proximity of the proposed residence to the shoreline. Final Decision ¶ 7. However, the Council explained that the Mercurios' experts disagreed with the Staff's findings. *Id.* ¶ 15. The Council noted that Doctors Carchedi and Rosen had testified that the repaired revetment would not result in adverse environmental impacts to the shoreline. *Id.* ¶¶ 16-24. Rather, Doctors Carchedi and Rosen had each testified that the Project—especially the revetment repair—would benefit the Property and surrounding area from erosion and storm surge. *Id.* The Council also noted that Dr. Carchedi had testified that the variances requested were the minimum relief necessary to construct the Project. *Id.* ¶ 17. The Council stated that its members had considered and debated the credibility of the Staff's recommendations as well as the testimony of Dr. Carchedi and Dr. Rosen. *Id.* ¶ 25. Ultimately, the Council concluded that based on the totality of the scientific evidence presented, the Mercurios had met the burden of proof necessary for the Council to grant the variances and approve the Project Application. *Id.* ¶ 26.

Following the issuance of the Final Decision, Mr. Lebrecque timely filed an appeal to this Court. On appeal, Mr. Lebrecque argues that the Council's Decision was made upon unlawful procedure and is clearly erroneous in view of the reliable, probative, and substantial evidence on

the whole record. Specifically, Mr. Lebrecque contends that 1) the Council made insufficient findings of fact to support its Decision in violation of §§ 42-35-12 and 42-35-15(g); 2) the Decision was clearly erroneous because the Council disregarded the conflicting recommendations of the Staff; and 3) the Project Application did not meet the sixth element of the CRMP's variance criteria because the Mercurios' hardship was self-created.

On February 16, 2016, this Court entered a Decision on this matter in that it found the Council's Findings of Fact were insufficient to support its Decision such that its Decision was in violation of statutory authority. As such, the Court found that substantial rights of the Appellant had been prejudiced and remanded the matter to the Council directing it to make further findings of fact that address the specific evidence that led it to approve the Project, and to relate how such evidence met *each* of the CRMP's six variance criteria. The Court also noted that, because the Council's Findings of Facts were insufficient for judicial review, it would not reach the merits of the Appellant's remaining arguments pertaining to whether the Council's Decision was clearly erroneous and whether the Mercurios' hardship was self-created.

II

Standard of Review

This Court's review of the Council's decision is governed by chapter 35 of title 42, entitled the Administrative Procedures Act. *See Vito v. Dep't of Envtl. Mgmt.*, 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15(g) provides:

> "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."

When reviewing a decision under the Administrative Procedures Act, this Court may not substitute its judgment for that of the agency on questions of fact. *Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan*, 755 A.2d 799, 805 (R.I. 2000). The Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." *Barrington Sch. Comm. v. R.I. State Labor Relations Bd.*, 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981).

However, in order for the Court to apply this deferential standard, an agency's decision must contain sufficient findings of fact. *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 8 (R.I. 2005). The Rhode Island Supreme Court has held that "[a] satisfactory factual record is not an empty requirement." *JCM, LLC v. Town of Cumberland Zoning Bd. of Review*, 889 A.2d 169, 176 (R.I. 2005). The parties to the decision and the reviewing court "are entitled to know the reasons for the board's decision in order to avoid speculation, doubt, and unnecessary delay." *Hopf v. Bd. of Review of Newport*, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967). As such, agencies "should make express findings of fact and should pinpoint the specific

evidence upon which they base such findings." *Id.* Moreover, an agency's factual findings must be more than "merely conclusional, and the application of the legal principles must be something more than the recital of a litany." *JCM, LLC*, 889 A.2d at 176-77 (internal quotations omitted).

When an agency fails to make sufficient findings of fact, "the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." *Bernuth v. Zoning Bd. of Review of New Shoreham*, 770 A.2d 396, 401 (RI. 2001); *see also Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council*, 536 A.2d 893, 897 (R.I. 1988) ("[E]ven if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and for the reasons stated by the agency") (internal citation omitted). Agency decisions which do not adequately set out the reasons for denying or granting relief or point out the evidence on which a decision is based are subject to remand for clarification. *Hopf*, 102 R.I. at 289, 230 A.2d at 428.

III

Analysis

Sufficient Findings of Facts

Mr. Lebrecque argues that the Final Decision violates §§ 42-35-12 and 42-35-15(g) because the Council did not specifically address whether the Project Application met each of the six variance criteria in its Findings of Fact and Conclusions of Law. Upon review of the Additional Findings of Fact in Support of Decision provided by the Council, this Court disagrees.

Council decisions must comply with the requirements of § 42-35-12, which provides in pertinent part that, "[a]ny final order shall include findings of fact and conclusions of law,

separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Sec. 42-35-12. In order to grant a variance from the Setback and Buffer Zone, the Council must find that an application meets the following six criteria:

> "(1) The proposed alteration conforms with applicable goals and policies of the Coastal Resources Management Program.
>
> "(2) The proposed alteration will not result in significant adverse environmental impacts or use conflicts, including but not limited to, taking into account cumulative impacts.
>
> "(3) Due to conditions at the site in question, the applicable standard(s) cannot be met.
>
> "(4) The modification requested by the applicant is the minimum variance to the applicable standard(s) . . .
>
> "(5) The requested variance to the applicable standard(s) is not due to any prior action of the applicant or the applicant's predecessors in title. With respect to subdivisions, the Council will consider the factors as set forth in (B) below in determining the prior action of the applicant.
>
> "(6) Due to the conditions of the site in question, the standard(s) will cause the applicant an undue hardship. In order to receive relief from an undue hardship an applicant must demonstrate inter alia the nature of the hardship and that the hardship is shown to be unique or particular to the site. Mere economic diminution, economic advantage, or inconvenience does not constitute a showing of undue hardship that will support the granting of a variance." CRMP § 120(A).

In its Conclusions of Law, the Council stated that the "record reflects that the evidentiary burdens of proof as set forth in the Coastal Resources Management Program have been met for this project." Final Decision ¶ 3. Regarding the six variance criteria, the Council's written Decision states that the Project:

> "a) Does conform with the applicable goals and policies in Parts Two and Three of the CRMP;

> "b) Will not result in significant adverse environmental impacts or use conflicts;
>
> "c) That due to the conditions at the site, the applicable standard cannot be met;
>
> "d) The modification requested by the applicants is the minimum variance to the applicable standards necessary to allow a reasonable alteration or use of the site;
>
> "e) The requested variance to the applicable standard is not due to any prior action of the applicants or the applicants' predecessor in title;
>
> "f) Due to the conditions of the site in question the standard will cause the applicants undue hardship." *Id.* ¶ 27(a)-(f).

Although the Final Decision first presented by the Council to the Court only made factual findings concerning two of the six variance criteria, the Council has since supplemented their Decision to include Findings of Fact related to the remaining four criteria. For the sake of clarity, this Decision will address each criteria in numerical order.

In the Additional Findings of Fact in Support of Decision, the Council noted that the "staff's primary concern regarding variance criteria [one] related to the scenic impact of this project." Additional Findings of Fact ¶ 2. The Council also addressed the fact that the Staff and the Mercurios' geologist, Dr. Rosen, presented conflicting evidence regarding the Project and erosion effects on the Property. While the Staff provided evidence that the Project would permit erosion to occur, Dr. Rosen presented evidence that "erosion is unlikely to occur under current conditions, based on his observations that the area is relatively flat and that the land behind the revetment currently existing on the lot had not eroded significantly in the last two decades." *Id.* ¶¶ 3, 5. Additionally, the Mercurios' engineer, Dr. Carchedi, testified that the Project is in conformity with the applicable goals and policies of the CRMP. *Id.* ¶ 6. Dr. Rosen similarly

testified that "the CRMP does not require a structure to be built to withstand a 100 year storm event, but rather requires that it meet applicable building code requirements specifically designed to ensure the integrity of the structure," and noted that the Project would "comply with much stricter building code, engineering, and FEMA standards." *Id.* ¶ 4. Ultimately, the Council weighed the credibility of the Staff and the Mercurios' experts—determining that the testimony and reports of the Mercurios' experts was more credible—and found that the Project conforms with the applicable goals and policies of the CRMP as required by the first variance criteria.

In the Final Decision, the Council discussed the conflicting opinions of the Staff and the Mercurios' experts regarding variance criteria two in depth. The Council noted the Staff's conclusion that the Project would "pose significant adverse environmental impacts both to the feature and to other properties in the vicinity." Final Decision ¶ 10. The Council also made findings regarding the Staff's conclusion that the repaired revetment would not protect the shoreline from erosion of land during storm events. *See id.* ¶¶ 7-14. The Council further noted that the Staff had presented evidence that the Project was likely to endanger lives and nearby property during storm events due to its location in a flood zone and close proximity to the shoreline. *Id.*

Next, the Council noted that Doctors Rosen and Carchedi disagreed with the Staff's conclusions. *Id.* ¶ 15. The Council discussed the Doctors' testimony that the Project would improve shoreline stability and that the residence would withstand storm events better than surrounding houses. *Id.* ¶¶ 16, 20-24. The Council also made findings that Doctors Rosen and Carchedi had both testified that the shoreline in front of the Property was "completely stable;" however, without repairs, the revetment would fail and the Property would erode. *Id.* ¶¶ 19-20. Specifically, the Council noted that Dr. Rosen had testified that, in his opinion, "there would be

no adverse environmental impacts from the project." *Id.* ¶ 24. After weighing the testimony of the Staff and the Mercurios' experts, the Council found that the Project would not result in significant adverse environmental impacts. *See id.* ¶¶ 25, 27(b).

With respect to variance criteria three, the Council found that there was evidence presented showing the "dimensions of the small lot are such that it would be impossible for the project to comply with CRMC's buffer and set-back requirements." Additional Findings of Fact ¶ 11. Moreover, the Council found that Dr. Carchedi testified that "compliance with CRMC's buffer and set-back requirements would require the Mercurio home to be built to 'zero' dimension" and that the application for a variance was "the least amount of relief to ask for in order to still get a structure on the lot." *Id.* ¶ 12. Accordingly, the Council found Dr. Carchedi's testimony to be credible and found that the application met variance criteria three.

Regarding variance criteria four, the Council found that Dr. Carchedi had testified that the "variance requested was the minimum necessary based upon, *inter alia*, the applicant having received relief from the [twenty-five foot] setback required by the local zoning board." Final Decision ¶ 17. As such, the Council found that the Project satisfied variance criteria four. *Id.* ¶ 27(d).

The Council found, with regard to variance criteria five, that there simply was no evidence presented in the record to support the notion that the Mercurios or their predecessors in title modified the Property or took any action thereon, which would thereby necessitate the variances they seek before the CRMC. Additional Findings of Fact ¶ 15. As this is the case, the Council found that the application meets the requirements of variance criteria five.

Finally, the Council found that evidence was presented that due to the conditions of the site, the applicable buffer and set-back standard will cause the applicant an undue hardship.

Id. ¶ 18. Dr. Carchedi testified that "strict compliance with the current buffer and set-back requirements, without variances, would require the Mercurios to essentially build a house of 'zero' dimension, thereby precluding the Mercurios from building any permanent residential structure on their property, which was the reason they purchased the property." *Id.* ¶ 19. The Council further found that the Mercurios, without the requested variances, "would be precluded from deriving any use or enjoyment from their property, specifically the ability to build a home on the vacant lot that they have owned for 18 years." *Id.* ¶ 20. The Council concluded that, due to the conditions of the site in question, the standard set-back and buffer requirements would cause the Mercurios an undue hardship, and therefore, the application meets the sixth variance criteria.

In opposition to this particular finding by the Council, Appellant argues that the sixth criteria could not be met because the Mercurios' hardship was self-created.

Appellant's argument to this point would suggest that the Mercurios created their own hardship by the mere purchase of a substandard lot. The Court finds that this argument is adequately addressed by the Council's finding in respect to criteria five of CRMP § 120(A)[3]; however, it will briefly address the merits of the argument for clarity. The self-created hardship rule is more frequently addressed in the context of zoning board decisions, wherein Rhode Island courts have frequently held that the simple purchase of a property that is known to be substandard and may require zoning relief at some later date—as we have in this case—does not qualify as the type of prior action contemplated by the self-created hardship rule. *Sciacca v. Caruso*, 769 A.2d 578, 584-85 (R.I. 2001); *see DeStefano v. Zoning Bd. of Review of City of*

[3] The language of criteria five requires the council to find that "[t]he requested variance to the applicable standard(s) is not due to any prior action of the applicant or the applicant's predecessors in title." CRMP § 120(A)(5).

Warwick, 122 R.I. 241, 247, 405 A.2d 1167, 1171 (1979) (criticizing reliance "upon the fact that the petitioners allegedly knew that the lot in question was undersized at the time they made the purchase," a factor that "cannot be employed as support for the denial of an application" for dimensional relief). Other than the purchase of the property in substandard condition, there is no evidence to suggest that the Mercurios acted in any affirmative way to cause the hardship onto themselves.

To the extent that Appellant relies on the Rhode Island Supreme Court decision in *Alegria v. Keeney*, 687 A.2d 1249, 1254 (R.I. 1997), the Court finds this reliance misplaced. The Court held that the plaintiff could not recover under a takings theory for potential economic gains which went unrealized because the plaintiff was unable to acquire the variances necessary to develop his lot. The Court reasoned that the plaintiff purchased the lot knowing that the necessary variances might not be granted, and was therefore precluded from recovering under a takings theory. *Id.* at 1253. The Court in no way suggested that such variances must not be granted simply because the person seeking a variance knew that a variance would be required to develop a piece of property. *Id.* As such, Appellant's argument fails and the Council's finding that the sixth criteria was satisfied is sufficient.

After a careful weighing of the evidence, the Council found the testimony and reports of the Mercurios' experts more credible in every respect. There is no indication that the Council misconstrued such evidence or improperly attributed weight to any one piece of evidence. Ultimately, the Council concluded that given the Additional Findings of Fact coupled with the initial Findings of Fact contained in the May 1, 2014 Decision, "the proposed activity does not have a reasonable probability of causing detrimental impact upon the coastal resources of the State of Rhode Island." (Final Decision at 5; Additional Findings of Fact at 4.)

Accordingly, this Court finds that the record contains substantial evidence that a reasonable mind could accept as adequate to support the Council's decision on the § 120(A) criteria. *Ctr. for Behavioral Health, R.I., Inc. v. Barros*, 710 A.2d 680, 684 (R.I. 1998). The Council's Decision is therefore not arbitrary, capricious, or clearly erroneous in view of the evidence on the record. *See* § 42-35-15(g)(5), (6).

IV

Conclusion

After review of the entire record, this Court finds that the Council's Findings of Fact were sufficient to support its Decision such that said Decision was not in violation of statutory authority. This Court finds that the CRMC's granting of Appellees' application for a variance was neither in violation of its statutory authority, nor was it clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. This Court further finds that the Mercurios' hardship was not self-created, and, therefore, met the sixth element of the CRMP's variance criteria.

Counsel shall prepare an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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COURT:	Providence Superior Court
DATE DECISION FILED:	October 25, 2018
JUSTICE/MAGISTRATE:	Procaccini, J.
ATTORNEYS:	
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For Defendant:	Anthony DeSisto, Esq. Joseph DeAngelis, Esq.