

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

ANDREAS LUDWIG and CARA :
LUDWIG, :
Plaintiffs :
v. :
COASTAL RESOURCES MANAGEMENT :
COUNCIL, :
Defendant :

C.A. No. WC 2009-0120

DECISION

HURST, J. This matter arises before the Court on appeal from a decision of the Coastal Resources Management Council (CRMC), which denied the application of Andreas and Cara Ludwig (the Ludwigs) to build a walkover structure on their property located at 256 Colonel John Gardner Road and identified as Assessors Plat N-S, Lot 452, Narragansett, Rhode Island (the Property). Jurisdiction is pursuant to R.I.G.L. 1956 § 42-35-15.

I

Facts & Travel

The Ludwigs own a single family residence on Bonnet Bluff in Narragansett. (Def. App. A, In re Petition of Andreas and Cara Ludwig, No. 2005-06-132, Coastal Resources Management Council, Jan. 15, 2009.) The Property, which is approximately 13,250 square feet in area, contains a two-bedroom, single-family residence, an ISDS, a deck, a shed, and a hot tub. (Def. App. F, DiPrete Engineering Associates, Inc. and John C. Carter & Co., Proposed Coastal Walkover Structure for Andreas and Cara Ludwig:

256 Col. John Gardner Road, Assessors Plat N-S, Lot 452, Narragansett, Rhode Island (hereinafter, “DiPrete & Carter Report”), June 2005, at 5.)

As a result of its location on Bonnet Bluff, a geological feature of the Property is that it contains a cliff, the elevation of which drops precipitously—approximately fifty feet. This precipitous drop separates the headland portion of the Property from the portion of the Property seaward of the top of the bluff. Id. This steep, rocky descent prevents the Ludwigs from accessing the lower portion of their Property from the headland on their Property. (Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 57:15-24.) To access the shoreline or the lower part of the Property, the Ludwigs must use an area called Fog Point, which has public access to the shoreline for Bonnet Shore residents. Id. at 144:5-15. The developed portion of the Property is located on the headland. Id.

In 2004, the Ludwigs filed an application with the Zoning Board of Review of the Town of Narragansett (Zoning Board) for a variance and special use permit to build a wooden walkover structure on their property. Id. at 50:11-16. The Zoning Board approved the application in March 2005. Id. In June 2005, the Ludwigs submitted a proposal to the CRMC to permit them to build the walkover structure from the top of the rocky bluff on their property to access the ocean below. Id. at 50:16-18. On February 13, 2007, the CRMC held a hearing on the application. At that hearing, the CRMC heard extensive evidence, including the testimony of John Carter, a registered landscape architect and certified erosion specialist; Leonard Bradley, a registered civil engineer; Joe

Klinger, a geologist; Jeff Willis, the Deputy Executive Director of CRMC; and Thomas Medeiros, a CRMC staff member.

John Carter (Carter), a registered landscape architect and certified erosion specialist, testified regarding his on-site observations of existing walkover structures north of the Property. Id. at 89:10-18, 90:14-91:8. He stated that the walkover structures north of the property do not show evidence of erosion. Id. at 134:9-16. He further testified that in the area surrounding the stairs north of the Property, there was no visual evidence of lack of plant vigor. Id. at 90:23-91:2.

In addition to testimonial evidence by Carter, the Ludwigs also presented an engineering report prepared by Carter and DiPrete Engineering Associates (DiPrete and Carter Report). (Def. App. F, DiPrete Engineering Associates, Inc. and John C. Carter & Co., DiPrete & Carter Report, June 2005.) The DiPrete and Carter Report concluded that existing walkover structures are not visible from the water, except at close range. Id. Specifically, the Report provided that from a quarter mile off shore, the existing walkover structures are barely visible, and that from the middle of the channel—a half-mile off shore—the structures are not visible at all. Id. The Report further provided that as a result of the area geography, the stairway would not be visible from the headland on Bonnet Shores. Id.; Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 64:5-16.

Further, the Ludwigs presented the testimony of Leonard Bradley (Bradley), a registered civil engineer. Bradley testified regarding the design of the proposed walkover and its anticipated impact on the bluff. (Def. App. B, Tr., In re Semimonthly Meeting,

LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 114:21-115:18.) Bradley testified that the proposed walkover would not be placed directly on the rock face, but would be elevated approximately five feet above the face. Id. The foundation system for the walkover would consist of approximately eighteen posts,¹ which would rest on half-inch diameter bolts “drilled into the rock where the rock is real stable[.]” Id. Under the proposal, the foundation would be placed after digging out loose overburden, drilling into the rock face, grouting the drill holes, and pouring a concrete footing. Id.

Bradley testified that although some vegetation would have to be cleared to construct the walkover, such a walkover would not cause or accelerate erosion on the cliff. Id. at 110:15-111:15, 113:15-18. Bradley supported that conclusion with observations that approximately seventy percent of the fifty-foot rock face at issue is bare rock, rather than vegetated; that the proposal would be to work around notable evergreen specimens on the bluff; that the proposal was to clear only a small amount of brush; and that the structure would not be placed directly on the rock face, but would be elevated approximately five feet off it. Id. at 111:1-12, 114:15-115:7.

¹ Although Bradley testified that the structure would require approximately eighteen posts, he could not say with certainty whether the actual number of posts required for the foundation of the walkover structure would exceed eighteen. A report from Thomas Medeiros, CRMC staff engineer, and Tracy Silva, CRMC staff biologist, to Grover Fugate, Executive Director, noted that it was “hard to conclude that the conduct of [building the walkover] on the face of the coastal feature will not have a reasonable probability of destabilizing the feature.” In part, that conclusion arose from the facts that “the contractor will drill any number of one inch diameter or larger holes a minimum of 3 feet into the cliff,” and that “the project plans do not detail how much of the existing vegetation is to be removed or cut in order to access the site and install the stairway.” (Def. App. 4, CRMC Decision Worksheet, CRMC File No. 2005-06-132, June 6, 2006, at 3.)

Finally, the Ludwigs presented the testimony of Joe Klinger (Klinger), a geologist. Klinger testified regarding frost-wedging and explained that frost-wedging is a phenomenon in which water, if present in pores, joints, or faulting planes, may expand and contract, thereby splitting the rock. Id. at 136:16-2. When asked if frost-wedging would pose problems if the proposed structure was constructed in accordance with the plans, Klinger responded: “I don’t think so.” Id. at 137:3-7.

The administrative record also contained a joint report of the CRMC expert engineer and biologist. That report stated that it considered the proposed walkover structure to be inconsistent with the Coastal Resources Management Program (CRMP). (Def. App. 4, CRMC Decision Worksheet, CRMC File No. 2005-06-132, June 6, 2006, at 3.) The CRMC experts opined, with regard to the likely erosional impact of the proposed project that

“CRMC Staff does not consider the proposed activity to be practical with regard to the design considerations necessary to attach a structure of this type to a nearly vertical bedrock cliff face. The ‘soft’ nature of the predominantly sedimentary rock raises concern of impact by mechanical flaking or wasting during drilling of structural connections. Alterations including drilling and pinning of steel hardware to the cliff face are considered to be permanent and adverse to the natural geological processes affecting the cliff. CRMC staff further considers the proposed location unsuitable for a structure considering its exposure to the pull force of coastal storms consistent with its ‘V’ (velocity) zone flood designation. Should the structure become damaged by coastal storms, it may not be practicable to remove the structural attachment hardware necessary to restore the cliff to its pre-project natural condition.”

Id. That report further expressed concerns with the likely impact of the construction of the stairway on existing vegetation. Id. at 4. That concern was exacerbated by the inability of the designer to provide definite project plans. Id.

The CRMC Staff also noted in the joint report that that half a mile north of the Ludwig site, a portion of the cliff face had experienced a catastrophic failure. Id. at 5. In that incident, twenty feet of cliff fell into the ocean as a result of construction next door. (Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 149:6-14.) According to the CRMC Staff, that catastrophic failure demonstrated “how dynamic the sea cliffs at Bonnet can be.” (Def. App. 4, CRMC Decision Worksheet, CRMC File No. 2005-06-132, June 6, 2006, at 3.) That catastrophic failure highlighted that options to repair or restore the cliffs following such a failure can be quite limited, both practically and technically. Id. at 5.

II

Standard of Review

When reviewing decisions of an administrative agency such as the CRMC, this Court “sits as an appellate court with a limited scope of review.” Mine Safety Appliance Co. v. Berry, 620 A.2d 1255, 1259 (R.I.1993). The scope of that review is governed by the Rhode Island Administrative Procedure Act (APA), codified at chapter 35 of title 42 of the Rhode Island General Laws. Section 42-35-15(g) of the APA 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.”

Accordingly, when reviewing an agency’s decision this Court must confine itself to a review of the record to determine if “legally competent evidence” exists to support the agency decision. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). “If competent evidence exists in the record considered as a whole, the court is required to uphold the agency’s conclusions.” Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992); see Auto Body Ass’n of R.I. v. State of R.I. Dep’t of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010). Legally competent evidence is defined as the presence of “some” or “any” evidence supporting the agency’s findings. Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988). Thus, the Court may reverse factual conclusions of administrative agencies only when they are “totally devoid of competent evidentiary support in the record.” Baker v. Dep’t of Empl’t Training Bd. of Review, 637 A.2d 360, 363 (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

This Court defers to the administrative agency’s factual determinations provided that they are supported by legally competent evidence. Arnold v. R.I. Dep’t of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). The farther away from the mouth of the funnel that an administrative official is when he or she evaluates the adjudicative process, the more deference should be owed to the fact finder. Envtl. Scientific Corp., 621 A.2d at 208. Thus, when examining the certified record, this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I., 824 A.2d 1282, 1286 (R.I. 2003). In part, this deference arises because most agencies are

presumed to have knowledge and expertise in their respective fields. Id. As a result of this deference, agencies have broad discretion in determining the weight or probative value to be given the testimony of expert witnesses. Stein, Administrative Law § 28.03.

III

Analysis

A

APA Review of CRMC Decision

The CRMC was established by the General Assembly to regulate the use of coastal waters and coastal resources. To effectuate this purpose, the General Assembly passed the CRMC enabling statute, § 46-23-1, under which the General Assembly directs the CRMC “to exercise effectively its responsibilities in the coastal zone through the development and implementation of management programs[.]” The enabling statute further designates the CRMC as the lead state agency for formulating state policies relating to the use of the land and water resources of the coastal zone. Sec. 46-23-1. “[T]he statute specifically directs the council to be guided by [a] single overriding criterion: ‘[P]reservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated.’” Milardo, 434 A.2d at 271 (quoting § 46-23-1).

As part of the implementation of this management program, the CRMC promulgated regulations. Section 100 of these regulations requires that parties proposing alterations or activities for tidal waters, shoreline features, and areas contiguous to shoreline features must obtain assent from the CRMC. Section 100 defines “shoreline features” to include coastal cliffs, cliffs, and banks, and provides the sections of the

regulations in which the prerequisites, standards, and requirements for assent are codified.

The CRMP provides that “[o]n shorelines adjacent to Type 1 waters, the Council shall prohibit construction on or alteration of coastal cliffs and bluffs and contiguous areas where such construction or alteration has a reasonable probability of causing or accelerating erosion or degrading a generally recognized scenic vista.” Sec. 210.4.C.3. To determine whether the proposed construction or alteration has a reasonable probability of increasing erosion or loss of scenic value, the CRMC considers:

- “(a) the exposure of the feature to the erosional forces of tidal currents, storm waves and storm surge flooding, wind and surface runoff, and other such natural processes;
- (b) the composition of the feature involved as well as its slope, stratigraphy, height, exposure, and vegetative cover;
- (c) existing types and levels of use and alteration;
- (d) competent geological evidence to evaluate whether natural erosion of the feature in question is a significant source of sediments to nearby headland and barrier beaches and whether the proposed construction or alteration will substantially reduce that source of sediment; and
- (e) inclusion of the feature on an accepted inventory of significant scenic or natural areas or evidence of public use and enjoyment as a scenic or natural area.”

In this matter, the CRMC denied assent under both criteria of § 210. It concluded that the proposed walkover structure introduced a reasonable probability of decreasing vegetation or causing or accelerating erosion. It further determined that the proposed walkover would degrade a generally recognized scenic vista.

1

Reasonable Probability of Causing or Accelerating Erosion

According to the Ludwigs, the CRMC Decision is clearly erroneous, arbitrary and capricious, and characterized by an abuse of discretion because the Ludwigs presented

“overwhelming evidence” that the Project would not decrease vegetation on or cause erosion to the cliff. In contrast, CRMC argues that its Decision was not clearly erroneous, arbitrary, capricious, or characterized by an abuse of discretion because the evidence before the CRMC was conflicting, thereby requiring the CRMC to make credibility determinations between the expert testimony presented by the Ludwigs and the expert opinions of the CRMC staff.

As a preliminary matter, this Court notes that under the enabling statute, the CRMC “shall be authorized to engage its own expert and outside consultants, and the council shall be empowered to use that testimony in making its decisions.” Sec. 46-23-14. CRMC testimony is part of the administrative record—council members are present, give testimony, are available for cross-examination, and if an applicant wishes to challenge or question a council member’s findings or conclusions, the applicant may do so.

At the hearing, the Ludwigs presented three experts to support the conclusion that the proposed walkover structure would not cause or accelerate erosion or decrease vegetation on the site. The Ludwigs presented the expert testimony of Carter, who opined that the proposed walkover structure would not accelerate or cause erosion or decrease vegetation on the cliff. Carter based that conclusion primarily on on-site observations of existing walkover structures north of the Property. (Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 89:10-18, 90:14-91:8.)

Nonetheless, on cross-examination, Carter could not state the extent to which the proposed structure would likely reduce light available to plant growth under the

walkover. Id. at 87:19-23. He admitted that there was a low probability that the current plant growth on the exposed cliff-face consisted of shade-loving plants. Id. at 87:11-14. Further, although he testified that there was “no lack of vegetation” under comparable structures to the north, he admitted that he has no knowledge of the plant community that existed prior to the construction of those walkover structures. Id. at 91:5-9.

The Ludwigs also presented the testimony of Bradley, a professional engineer, who testified that it was his opinion that the proposed structure, if built, would not accelerate erosion or degradation of the slope “more than mother nature already does.” Id. at 114:15-18. He based this opinion on the facts that the design called for the structure to be elevated approximately five feet above the rock bluff and to rest on a foundation system. Id. at 114:21-115:7. Under the proposed design, the walkover would rest on metal bolts “drilled into the rock where the rock is real stable.” Id. at 115:5-10. According to Bradley, where there is loose overburden, the plan called to dig out the loose overburden, drill into the rock, and pour concrete footing. Id. at 115:5-14.

Although Bradley testified that the proposal to build the walkover was to “work around” notable vegetation, he acknowledged that some vegetation would have to be cleared from the rock face to build the foundation system for the project. Id. at 111:5-12. Bradley also admitted that the proposed project would not have “zero impact” on the rock face. Id. at 121:18-21. He was unable to speak to the impact that the project would have on vegetation. Id. at 124:22-24. Further, during Bradley’s cross-examination, CRMC member Gray expressed concerns on the erosional impact that the proposed project would have on the cliff. Id. at 119:8-18, 121:6-17, 122:9-19, 123:8-15. Specifically, Gray expressed concerns that drilling eighteen, three-foot deep holes into shale, even if it

were immediately filled with grout, would accelerate erosion. Id. at 119:8-18, 121:6-17. Gray also expressed concerns about the merits of the structure itself—that even if the structure were placed as close as possible to the cliff face so as to reduce torquing on the joints, the structure would still be exposed to “very high wave action, . . . a lot of wind,” and loading on the joints. Id. at 123:8-15. In essence, the CRMC raised concerns that this exposure and loading in the joints made it more likely that the walkover structure would have a detrimental impact on the surrounding features. Id. at 121:6-123:15. Further, in response to questioning by Sullivan, another CRMC member, Bradley agreed that temperature is a physical attribute, contributes to the freeze-thaw cycle, and that temperature differentials can lead to cracking of solid rock. Id. at 126:10-22.

The Ludwigs also presented the expert testimony of Joe Klinger, a geologist, who testified that the proposed structure would not have any reasonable probability of causing or accelerating erosion on the site. Id. at 139:22-140:7. Klinger based this opinion on observation of the existing structures north of the proposed site, the plans prepared by DiPrete Engineering, and knowledge of the geology of the region. Id. at 133:24-135:23. Klinger also testified regarding frost-wedging. He explained that frost-wedging is a phenomenon in which rock or other material expands and contracts, and, if water is present in pores, joints, or faulting planes, can cause the rock to fracture, thereby splitting the rock. Id. at 136:16:2. When asked if frost-wedging would pose problems if the proposed structure was constructed in accordance with the plans, Klinger responded: “I don’t think so.” Id. at 137:3-7.

Nonetheless, on cross-exam by CRMC member Sullivan, Klinger testified that if fractures, drill holes, or other openings were to occur, and water were permitted to enter

into those fractures, drill holes, or other openings, that that would be likely to exacerbate fracturing in the rock. Id. at 141:2-8. Klinger further agreed with Sullivan that a thermal gradient—that is, the freeze-thaw cycle—could be a significant cause of fractures in a solid plane. Id. at 141:19-22.

The administrative record also contained a joint report of the CRMC expert engineer and biologist. That report stated that it considered the proposed walkover structure to be inconsistent with the CRMP. (Def. App. 4, CRMC Decision Worksheet, CRMC File No. 2005-06-132, June 6, 2006, at 3.) With regard to the likely erosional impact of the proposed project, the CRMC experts opined, that

“CRMC Staff does not consider the proposed activity to be practical with regard to the design considerations necessary to attach a structure of this type to a nearly vertical bedrock cliff face. The ‘soft’ nature of the predominantly sedimentary rock raises concern of impact by mechanical flaking or wasting during drilling of structural connections. Alterations including drilling and pinning of steel hardware to the cliff face are considered to be permanent and adverse to the natural geological processes affecting the cliff. CRMC staff further considers the proposed location unsuitable for a structure considering its exposure to the pull force of coastal storms consistent with its ‘V’ (velocity) zone flood designation. Should the structure become damaged by coastal storms, it may not be practicable to remove the structural attachment hardware necessary to restore the cliff to its pre-project natural condition.”

Id. That report further expressed concerns with the likely impact of the construction of the stairway on existing vegetation. Id. at 4. That concern was exacerbated by the inability of the designer to provide definite project plans. Id.

The joint report also noted that a catastrophic failure had affected a portion of the cliff face half a mile north of the Ludwig site. Id. at 5. In that incident, twenty feet of cliff fell into the ocean as a result of construction next door. (Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal

Resources Management Council, Feb. 13, 2007, at 149:6-14.) That catastrophic failure demonstrated “how dynamic the sea cliffs at Bonnet can be,” and highlighted that efforts to repair or restore the cliffs following such a failure can be practically and technically limited. (Def. App. 4, CRMC Decision Worksheet, CRMC File No. 2005-06-132, June 6, 2006, at 3.) That catastrophic failure. Id. at 5.

Therefore, there is probative evidence on the record supporting the CRMC’s finding that the proposed construction was likely to accelerate or cause erosion or decrease vegetation on the cliff. See Env’tl. Scientific Corp., 621 A.2d at 208; Sartor, 542 A.2d at 1082-83; see, e.g., Murphy v. Zoning Bd. of Review, 959 A.2d 535, 542 n.6 (R.I. 2008) (noting that “[i]t should go without saying that expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways,” including “examination of the expert by members of the zoning board”). This Court may not substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact. Costa v. Registrar of Motor Vehicles, 543 A.2d 1307 (R.I. 1988). Agencies are presumed to have knowledge and expertise in their respective fields, and they have wide discretion in determining the weight or probative value to be given the testimony of the expert witness. Stein, Administrative Law § 28.03. Viewing the record as a whole, this Court concludes that there is “legally competent evidence” to support the CRMC’s Decision. See Env’tl. Scientific Corp., 621 A.2d at 208.

Reasonable Probability of Degrading a Scenic or Natural Area

The Ludwigs further argue that the CRMC Decision is clearly erroneous, arbitrary and capricious, and characterized by an abuse of discretion because it concludes that the proposed construction would likely have “a reasonable probability of decreasing the scenic value.” Specifically, the Ludwigs argue at length that such a finding was error because the Property does not fall within the “Bonnet Point” Coastal Natural Area. In contrast, CRMC argues that its Decision was not clearly erroneous, arbitrary, capricious, or characterized by an abuse of discretion, because the CRMC is owed deference in the interpretation of its own regulations.

As noted above, under § 210.4.C.2(e), the CRMC may deny assent for a proposed construction or alteration that has a reasonable probability of degrading the scenic value of a site included “on an accepted inventory of significant scenic or natural areas” or enjoyed and used by the public as a scenic or natural area. Section 210 further designates a list of “coastal cliffs and bluffs as Coastal Natural Areas” and includes Bonnet Point within that list. The section states that “[a] Council priority when considering proposed alterations on or adjacent to these features is the preservation and, where possible, the restoration of their scenic qualities.”

To support their conclusion that their Property does not fall within the Bonnet Point Coastal Natural Area, the Ludwigs argue that the Property is not a tourist attraction, in that it is privately owned and inaccessible to the public, and that the scenic nature of the Property is, in and of itself, insufficient to satisfy the CRMC Definition. The

Ludwigs additionally argue that the Property cannot fall within the Bonnet Point Coastal Natural Area, because it is not at the apex of the Point.

In contrast, to support its conclusion that the Property falls within the Bonnet Point Coastal Natural Area, the CRMC relies on a report, as well as testimony, by Deputy Director Jeff Willis. In his report, Willis concluded that it was his opinion that the Ludwig Property falls within the Bonnet Point Coastal Natural Area. Specifically, he notes that the CRMP incorporated the designation of Coastal Natural Areas based on the designations of such in George Seavey's Rhode Island's Coastal Natural Areas: Priorities for Protection and Management, a technical report conducted by the New England Regional Commission. Willis stated that the fact that "the Council's water type for this entire stretch of shoreline is Type 1 and only changes to Type 2 well north of the subject property" also supported the conclusion that the subject property fell within the Bonnet Point Coastal Natural Area. He noted:

"it is reasonable to conclude that, when making a recommendation for the designation of Type 1 waters for this segment of Bonnet's shoreline, the presence of a cliff and rock outcrop on the scale of the one that represents Bonnet Point—and its implications for coastal zone management—were still significant, such that up to and including a point along the shore where a water type designation change was more reasonably designated as Type 2 waters, this Type 1 water designation was recommended to be maintained. The change to Type 2 waters occurs well north of the subject application's property location."²

² The Ludwigs additionally claim that Seavey's Handbook should be inadmissible under Rule 901(a) of the Rhode Island Rules of Evidence and under the best evidence rule. Nevertheless, as our Supreme Court has noted, "[a]n expert administrative tribunal concerned with advancing the public welfare should not be rigidly governed by rules of evidence designed for juries." DePasquale v. Harrington, 599 A.2d 314, 317 (R.I. 1991). Rather, § 42-35-10(c) "entrust[s] the hearing officer with both the ability to exercise prudence in considering evidence and the reliability that must condition its admissibility[.]" Id. Further, even if the Rules of Evidence were binding on the CRMC, the Ludwigs have misconceived the circumstances which require the invoking of the best evidence rule, and its invocation is not applicable to the facts presented in this case. The

Accordingly, Willis testified, and Executive Director Fugate concurred, that from a policy-making and regulatory drafting perspective, the change in water type, from Type 1 to Type 2, coincided with a change in the Coastal Feature from cliff area to beach area.

Moreover, although both parties in their briefs argue at length concerning the Property's status as a "Coastal Natural Area" within the CRMP, such a designation does not affect the analysis in this matter. Both parties appear to conflate the "Coastal Natural Area" designation with the "generally recognized scenic vista" standard in § 210.4.C.3. Although the CRMP states, as a policy, that it prioritizes the preservation and restoration of the scenic qualities of Coastal Natural Areas, that policy is separate and distinct from the standard governing proposed construction or alteration of Property adjacent to Type 1 waters. Rather, § 210.4.C.3(e) provides that a *consideration* that the CRMC may weigh when determining whether a proposed project has a reasonable probability of degrading a scenic vista is whether the geologic feature is included in an "accepted inventory of significant scenic or natural areas." Inclusion in such a list, however, is not dispositive, as the CRMC may also weigh "evidence of public use and enjoyment as a scenic or natural area."

Indeed, in addition to concluding that the subject property fell within the Bonnet Point Coastal Natural Area, the CRMC heard evidence that individuals engage in the public use and enjoyment of the cliffs by Bonnet Point as a scenic or natural area. In fact, the Ludwigs' own expert, Carter, testified that he engaged in recreational activities along

purpose of the best evidence rule is "to bar the admission of any evidence which by its nature indicates that there is other evidence more direct and conclusive in proving a disputed fact, strictly speaking, it is applicable only when a litigant is attempting to prove the terms of a writing." State v. Ramsdell, 109 R.I. 320, 328-29, 285 A.2d 399, 405 (1971).

the cliff. (Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 61:3-7.) Specifically, he noted that he walked along the base of the cliff, has a boat in the vicinity, and fishes and spear fishes in that vicinity. Id.

Accordingly, this Court concludes that it was not clearly erroneous for the CRMC to determine that construction of the proposed walkover would have a reasonable probability of degrading the scenic value of a site. There is probative evidence on the record supporting the CRMC's finding that the proposed construction would likely degrade a scenic vista, not only because the CRMC reasonably interpreted its regulations in concluding that the Property fell within the Bonnet Point Coastal Natural Area, but also because there was evidence on the record that individuals used or enjoyed the shore adjacent to the bluffs as a scenic or natural area. See Envtl. Scientific Corp., 621 A.2d at 208; Sartor, 542 A.2d at 1082-83.³

B

Constitutional Claims

1

Regulatory Taking

Further, the Ludwigs argue that the CRMC Decision should be reversed because it represents an unconstitutional taking of private property for public use without just

³ This Court further notes that the CRMP provides an additional basis on which the CRMC was justified in denying assent. Section 200.1.C.3 states: "In Type 1 waters, activities and alterations including . . . excavation on abutting shoreline features are all prohibited unless the primary purpose of the alteration or activity is to preserve or enhance the area as a natural habitat for native plants and wildlife or a beach renourishment/replenishment project." The parties do not dispute that the cliffs at issue in this case are shoreline features abutting Type 1 waters.

compensation under both the Rhode Island and United States Constitutions. Specifically, the Ludwigs claim that the CRMC Decision, which declines to issue assent for the walkover project, constitutes a regulatory taking because it prevents the Ludwigs from accessing a substantial portion of their property from the developed portion of their property on the headland. In response, the CRMC maintains that this claim must fail both because a regulatory takings claim is not appropriate in the context of an APA appeal, and because in inverse condemnation actions, recovery is limited to compensation for the constructive taking: that is, it does not entitle the landowner to reversal of an agency decision.

Within the framework of this action, this Court cannot and does not address claims that the landowner may have based upon the theory of inverse condemnation. See Milardo, 434 A.2d at 268-70. The Ludwigs contend that the denial of assent deprives them of the beneficial use of their property. Appropriate relief for such an alleged deprivation, however, is limited to just compensation and not, as the Ludwigs seek, reversal of an agency decision. See United States v. General Motors Corp., 323 U.S. 373, 378 (1945); E & J, Inc. v. Redevelopment Agency of Woonsocket, R.I., 405 A.2d 1187 (1979). Because the CRMC had no statutory authority to compensate plaintiff, however, no purpose would have been served by introducing extensive evidence in order to determine whether a factual underpinning could be established upon which a claim for inverse condemnation might be based in respect to the subject property. See Milardo, 434 A.2d at 268-70. Accordingly, this Court declines to address this issue herein.

Rights of Fishery and Privileges of the Shore Under Article I, Section 17

The Ludwigs further argue that the CRMC Decision unconstitutionally interferes with their privileges of the shore in violation of the Rhode Island Constitution. Specifically, they argue that the project is the only possible means by which they can reach their shorefront land and that the CRMC denial therefore deprives them of their access, denying them the exercise of their constitutional rights. The CRMC, in contrast, argues that the Decision does not implicate Article I, Section 17 of the Rhode Island Constitution, because the denial of the cliff walkover structure implicates only the Ludwigs' desire to have perpendicular access to the shore, rather than the public's right to pass along the shore beneath the mean high-tide-line to exercise privileges of the shore.

Article I, Section 17 of the Rhode Island Constitution provides:

“The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have heretofore been entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration.”

Although the provision does not define “the privileges of the shore” to which the people of the state had been entitled, our Supreme Court, in Jackvony v. Powel, held that “at the time of the adoption of our Constitution, “privileges of the shore” included “a public right of passage along the shore, at least for certain proper purposes and subject, very possibly, to *reasonable* regulation by acts of the general assembly in the interests of the people of the state.” 67 R.I. 218, 21 A.2d 554, 556-58 (1941). In that case, the Court further explained that under this right, the State maintains governmental control of the lands

below the high-water mark, “for the benefit of the public, in order to protect the public rights of passage or other rights on the shore[.]” Id.; see R.I. Motor Co. v. City of Providence, 55 A. 696 (1903); Allen v. Allen, 19 R.I. 114, 32 A. 166, 167 (1895). That holding was affirmed in 1982 in State v. Ibbison, in which our Supreme Court again noted that the mean-high-tide line is “the landward boundary of the shore for the purposes of the privileges guaranteed to the people of this state by our [C]onstitution.” 448 A.2d 728, 732 (R.I. 1982).

Accordingly, Article I, Section 17 of the Rhode Island Constitution does not apply in this instance. In their application before the CRMC, the Ludwigs seek to construct a private stairway. (Def. App. F, DiPrete & Carter Report, June 2005.) In fact, Leonard Bradley, the Ludwigs’ witness, testified that the walkover “wouldn’t be used by the public[.]” (Def. App. B, Tr., In re Semimonthly Meeting, LLC, State of Rhode Island and Providence Plantations Coastal Resources Management Council, Feb. 13, 2007, at 106:9-12.) As noted in Jackvony, however, the “privileges of the shore” provision refers to the right of the public to go along the shore below the high-water mark, not the “rights of owners of the upland just above the line of mean high tide to cross the shore to the tidewater[.]” 67 R.I. 218, 21 A.2d at 557. Furthermore, the Ludwigs do not seek access to constitutionally protected area—land beneath the mean high-water mark—but rather to their privately owned Property above the mean high-water mark. See State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 607 (R.I. 2005) (concluding article I, section 17 of the Rhode Island Constitution was not implicated when defendant “had left the shoreline and was walking inland when he decided to enter the breachway to float home”).

IV

Conclusion

After review of the entire record, the Court finds that the CRMC's Decision contains substantial evidence sufficient to support its findings. Further, this Court concludes that the CRMC's Decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Substantial rights of the Appellants have not been prejudiced. Thus, the appeal of the CRMC's Decision is denied. Regarding the Constitutional claims, this Court notes that an APA appeal is an inappropriate proceeding in an inverse condemnation claim. Accordingly, this Court declines to address this issue herein. The Article I, Section 17 claim is dismissed, as section 17 of the Rhode Island Constitution is inapplicable to the facts of this case. Counsel for the prevailing parties shall submit Orders in accordance with this Decision.