STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 29, 2014)

SAVE THE BAY, INC.	:	
	:	
v.	:	**C.A. No. PC-2014-1685**
	:	
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; FOUR TWENTY CORPORATION	:	

DECISION

CARNES, J. Appellant, Save the Bay, Inc. (hereinafter Save the Bay), appeals the March 6, 2014 decision of the State of Rhode Island Coastal Resources Management Council (CRMC), approving the application by Four Twenty Corporation (Four Twenty) to move an existing dwelling nineteen feet closer to wetland on its property at 1444 Ocean Road in Narragansett, Rhode Island. Jurisdiction in this instant matter is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

The case at hand has a compelling and unique history.[1] The underlying situation began at a point when Four Twenty purchased the lot designated as 1444 Ocean Road and hired a site

[1] Due in large part to this history, the associated circumstances, and the impact of the instant administrative appeal upon the existing trespass case with the abutting landowner, this Court received the instant case with a request from Four Twenty and others to proceed on an "expedited basis." For these reasons, this Court undertakes to address all issues presented by the parties, notwithstanding that any one of said issues, by itself, may be dispositive.

engineer to survey the property and produce a site development plan. After this survey was conducted, Four Twenty obtained a building permit and assent from CRMC in 2008. See R. 69-75 (original CRMC Assent). With the proper paperwork in hand, Four Twenty proceeded to build a home overlooking the ocean. There was just one problem—the survey was incorrect. Four Twenty had built its home on the abutting lot, a lot it did not own. The abutting lot owner, a charitable trust, brought suit against Four Twenty for trespass. Ultimately, after an appeal to the Rhode Island Supreme Court, the abutting lot owner obtained an order directing Four Twenty to remove the home and all other improvements to the land.[2] As such, Four Twenty was faced with a choice: it could either simply demolish the home it spent over $600,000 building or move the home onto the lot it did own.

Four Twenty's property contains coastal wetland and barrier beach. (R. 5.) Therefore, it needed to obtain assent from CRMC before it could relocate its home. See R.I. Admin. Code 16-2-1:100.1 (requiring "Council Assent . . . for any alteration or activity any portion of which extends onto the most inland shoreline feature or its 200 foot contiguous area" and defining "shoreline feature" as, inter alia, coastal beaches and coastal wetlands). Specifically, Four Twenty needed to obtain variances as per Section 120 of the Coastal Resources Management Program (CRMP) with relation to both buffer and setback. See R.I. Admin. Code 16-2-1:120(A) (outlining the criteria for a variance); 16-2-1:140(B) (describing setback requirements), and 16-2-1:150(D)(2) (expounding buffer zone standards).

Section 120 of the CRMP provides that:

> "the application shall . . . be granted a variance only if the Council finds that the following six criteria are met.

[2] For a more complete restatement of the facts in that case, refer to Rose Nulman Park Found. v. Four Twenty Corp., 93 A.3d 25, 26-28 (R.I. 2014).

> "(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) necessary to allow a reasonable alteration or use of the site.
> "(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. . . .
> "(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." R.I. Admin. Code 16-2-1:120(A)

CRMC has been tasked by the legislature "to preserve, protect, develop, and, where possible, restore the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long range planning and management designed to produce the maximum benefit for society from these coastal resources" as well as to "secure the rights of the people of Rhode Island to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values." G.L. 1956 § 46-23-1. From this mandate, the CRMP was created, setting forth guidelines to protect this state's bountiful seaside treasures.

Here, in order to create an environmentally conscious proposal, Four Twenty hired Natural Resource Services, Inc. to aid it in creating a plan designed to comport with the CRMP. See R. 29-56 (Written Narrative in Support of Assent Application). Natural Resource Services, Inc. distilled the facets of this proposal in its report (NRS Report), id., which was contained within Four Twenty's application and reviewed by both CRMC staff and Council. (R. 2, 6.)

The NRS Report comprehensively addresses the six variance criteria, setting forth the ways in which the design features contained within its proposal are specifically formulated to limit disruption to the surrounding environment. (R. 31-33.) The NRS Report further attempts to craft a plan that, taken holistically, would integrate itself seamlessly into the overarching schema of the CRMP. (R. 36-53.)

As mentioned earlier, this proposal entails moving the house nineteen feet closer to the coastal wetland. (R. 7) (CRMC Staff Biologist's Report.) Accordingly, the NRS Report sets forth various implementations designed to prevent significant adverse environmental impacts resulting from construction on the property. To avoid filling any of the wetland, Four Twenty proposed building a steel bridge to allow access to the home. (R. 32.) In order to ensure growth of native plants beneath the bridge, the design includes open grates to allow light penetration. Id. This proposed bridge would also utilize a minimalist configuration of steel girders so as to not interfere with the passage of wildlife across the coastal wetland. Id. Similarly, the driveway is to be constructed entirely of permeable materials to facilitate stormwater infiltration into the wetland ecosystem. Id. To avoid nutrient loading, the proposed septic system applies a bottomless sand filter to optimize nitrogen removal. (R. 46, 122.) This septic system is also to be placed as close to Ocean Road as possible to maximize its distance from the wetland areas. (R. 8.)

In its Staff Biologist's Report assessing Four Twenty's proposal, CRMC stated that with regard to the fifth criterion for variance, the hardship was not due to the action of Four Twenty. (R. 8.) Rather, it found that an "'honest mistake' was made as opposed to a 'willful act' which [in turn] created the need for additional variances." (R. 8.) However, with respect to the first and second criteria for variance, CRMC staff cited concerns regarding the extent of the variances

requested and the possibility that the proposed bridge could interfere with plant growth underneath. (R. 7.) As such, despite the design features contained within the NRS Report, CRMC staff found that Four Twenty's plan, as proposed, "is **NOT** consistent with Parts Two and Three of the Coastal Program," and that the project would "result in additional environmental impacts beyond those already approved" in the previous assent. (R. 8.)

Notwithstanding these reservations, CRMC staff deferred to CRMC Council in assenting to the variances requested, stating that it did "not object to the . . . application," and instead recommended certain additional stipulations to be implemented if CRMC Council was to accept the proposed plan. (R. 9-10.) These stipulations included both a conservation easement and a pedestrian right-of-way that would allow access to the shore. (R. 9-10.) CRMC staff noted in its report that with respect to the original application—the proposal to build the house that was ultimately constructed and thereafter ordered to be removed from the abutting lot—it had similarly deferred to the Council and that their assent had been conditioned on a similar conservation easement. (R. 6.) Perhaps most importantly, CRMC staff also recommended the wetland restoration plan outlined by Leland Mello of Natural Resource Services, Inc., which had been filed as an addendum to the original proposal shortly before the Staff Biologist's Report was released. (R. 10; 17-24.)

As such, as a part of its full proposal to the CRMC Council, Four Twenty produced, in Exhibit C, its specific plan to restore the wetland habitat on its lot—a proposal that, as mentioned supra, was recommended by the CRMC Staff Biologist's Report. (R. 17-24.) This plan included removing and mulching the invasive common reed (*Phragmites australis*) repeatedly over a period of three years as well as spending over $56,000 purchasing and installing native wetland

plants to restore the habitat to its original state in order to confer the benefit of greater wetland filtration to the area. Id.

In response to the application by Four Twenty for the variance, CRMC received three objection letters. The first, penned by Save the Bay, echoed the concerns of CRMC staff insofar as it cites potential issues with the bridge, the extent of the variances requested, and nutrient loading. (R. 84-85.) Save the Bay's letter also discussed its concerns about global warming and sea level rise, stating that following its projections the "dwelling's footprint [may be] at water's edge by 2100." (R. 85.) Save the Bay also contended that the undue hardship endured by Four Twenty is a result of their own actions—i.e. building the house on the wrong lot—and, as such, the requested variances cannot be granted. Id. The second letter, sent by Surfrider Foundation, similarly cites reservations regarding potential wetland degradation and states that a smaller house may leave less of an impact on the surrounding area. (R. 86-87.) The third letter, from abutting neighbor Mary Bourassa, in a similar vein objects to the potential disturbance of the wetland habitat. (R. 88.)

At the hearing on February 11, 2014, CRMC began by discussing undue burden in the context of an honest mistake. They referred to a memorandum sent in with the proposal by Four Twenty's attorney, citing DeFelice v. Zoning Bd. of Review of North Providence, 96 R.I. 99, 189 A.2d 685 (1963), wherein the Rhode Island Supreme Court upheld a decision of a zoning board finding that in the light of an honest mistake by a homeowner in building his home too close to the lot line, it was not arbitrary for the zoning board to decide that the homeowner would suffer an unnecessary hardship without a variance. (R. 96-98.) Four Twenty's attorney then discussed the extensive wetland restoration project proposed as well as the lack of alternatives for siting the home on the property. (R. 98-101.)

Next, CRMC heard from objectors Jane Austin and Tom Kutcher, acting as representatives of Save the Bay. (R. 101-102.) Tom Kutcher claimed that "putting the septic system right uphill from this wetland is the death knell to this wetland." (R. 104.) He went on to explain that the wetland on Four Twenty's property is full of the invasive common reed which, especially under high nitrogen conditions, has the capability to proliferate and outcompete native species. Id. Mr. Kutcher admitted that, regardless of whether Four Twenty moved its home, this common reed invasion would be inevitable. (R. 106.) Mr. Kutcher also raised issues with the potential sea level rise, stating that it is "CRMC's obligation . . . to protect subsequent owners from those dangers." (R. 105.)

In response to a question by Vice Chairman Lemont, David Reis, Supervising Environmental Scientist for CRMC staff, stated that this project would not sound the death knell for the wetlands as Save the Bay alleged. (R. 118-119.) He went on to say,

> "I believe that there will be some impacts, some cumulative impacts, but I don't believe that one septic system bordering a wetland of that nature is going to put it over the edge. There is a lot more development, higher level development bordering many small coastal ponds in the State. I mean, a freshwater wetland, based on my education, we were taught that it could absorb 450 pounds per acre of nitrogen per year, so it has some intrinsic ability to treat nitrogen. What you don't want to do is what [Save the Bay] said, is put it over the edge. We want to preserve its ability to treat that nitrogen but not tax it to the point where it can't anymore, it's beyond its ability to do so. I mean, I haven't done any calculations, but when I look at that situation, it's bordered by several houses, the house to the north is very close, it probably predates the Council's regulations. It is the type of things we deal with every day as staff. We have many circumstances out there that are very close to wetland beaches, that are high density development that we have to deal with every day and people are in our office asking for additions and modifications and that type of thing and we have to consider that the buildings are already there, they predate the program, they're entitled to some work on those existing structures, knowing that it's not the best thing for the environment, but we have to find that balance every day, and this

> is a very difficult decision for me, but when I look at the whole picture of what we deal with every day, it is not the end of environmental protection in the State of Rhode Island. It's a bad circumstance, I am not comfortable making this recommendation, but I have to offer the Council my best professional judgment, and I just believe that there is a real unique circumstance here that calls for people just to use their judgment in a case like this."[3] (R. 119-20.)

Next, Councilman Affigne questioned Reis on the issue of sea level raised by Save the Bay:

> "Mr. Affigne: . . . You said that you thought the wetland could support . . . additional nitrogen per process. That's with existing conditions. What about changing conditions with storm damage or rising sea levels, is there any change in the capacity of that wetland to process additional nitrogen?
>
> "Mr. Reis: The wetland is always going to be subject to change. There are environmental conditions that are always changing, particularly with [c]oastal storms. Again, wetlands have some ability to process nitrogen. That's why we protect wetlands, because they basically serve as a sink for certain nutrients, and then they recharge groundwater that we all rely upon for our drinking water supplies, and so they have those values and we try to protect them to the best of our ability. So, again, it appears to be a fairly small watershed with not a high level of density surrounding it in that small watershed. So, I don't believe that, just based on my judgment, that that wetland is going to go over the edge from one additional septic system. There also is an advanced technology type system that removes at least 50 percent of the nitrogen. We have many areas of that state they're still on septic pools and old septic systems, they are very high levels, that cause more impact and you would expect them in a situation like this. I am just trying to take a holistic approach." (R. 121-22) (emphasis added).

Mr. Reis also reiterated the fact that CRMC already had approved "this type of development" in its previous assent of Four Twenty's plans. (R. 123.) Upon motion to grant the assent, Reis lent his support to the application following a proposal that all recommended

[3] This Court notes that the record reflects Reis' careful consideration of the facts presented in the instant application as well as his gravitas in grappling with the potential ramifications of assent.

stipulations be applied. (R. 118-120; see also R. 93.) ("My recommendation is no objection."). CRMC granted the assent on a vote of 6-2. (R. 125.)

In CRMC's decision dated March 6, 2014, CRMC set forth nine Findings of Fact and three Conclusions of Law. (R. 2-4.) Paragraph 6 of the Findings of Fact sets forth that CRMC "adopts and incorporates the findings made by the CRMC staff. The [CRMC] Council finds based upon the staff reports this is a unique and extreme situation, which based upon the CRMC staff recommendations warrants approval. The [CRMC] adopts those recommendations in full." (R. 3.)

In response to this assent, Save the Bay filed a Complaint on April 2, 2014, appealing CRMC's decision and alleging that CRMC failed to make adequate findings of fact and conclusions of law as per §§ 42-35-15(g) and 42-35-12. Save the Bay also alleges that the decision was made in excess of CRMC's statutory authority and is clearly erroneous in light of the record. In alleging injury, Save the Bay states in its First Amended Complaint, "Plaintiff's members specifically include residents of the Town of Narragansett. Those members who reside on and/or who use the waters near the subject structure will suffer injuries in fact." (First Am. Compl. 3.) Four Twenty responds that Save the Bay lacks standing to bring the instant appeal. Both Four Twenty and Save the Bay have filed memoranda with this Court.

II

Standard of Review

This Court "sits as an appellate court with a limited scope of review" when reviewing decisions by administrative agencies such as CRMC. Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). This Court may reverse, modify, or remand an agency's decision if the:

> "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).

This Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Id. Indeed, standing in its appellate role, this Court is "limited to an examination of the record to determine whether 'some' or 'any' legally competent evidence exists to support" the agency decision. Mine Safety, 620 A.2d at 1259 (citing Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988)); see also Arnold v. R.I. Dep't. of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003) (holding that legally competent 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") (internal citations omitted.) As such, this Court may not reverse a decision unless it is "totally devoid of competent evidentiary support in the record," Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981), or any reasonable inferences that can be drawn from the record. Guarino v. Dep't. of Soc. Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980).

With regard to questions of law, this Court conducts its review de novo. Arnold, 822 A.2d at 167. However, this Court must afford an agency "great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency." Town of Richmond v. R.I. Dep't. of Envtl. Mgmt., 941 A.2d 151, 157 (R.I. 2008) (internal citations omitted).

III

Analysis

A

Standing

As a preliminary matter, this Court must address Four Twenty's claim that Save the Bay has no standing to bring this appeal. Standing serves as an "access barrier that calls for the assessment of one's credentials to bring suit." Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n, 452 A.2d 931, 932 (R.I. 1982). To find standing, the court must determine "whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to ensure concrete adverseness that sharpens the presentation of the issues upon which the court depends for an illumination of the questions presented." Id. at 933 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). As such, "when standing is at issue, the focal point shifts to the claimant, not the claim," McKenna v. Williams, 874 A.2d 217, 226 (R.I. 2005), and the claimant must show that he "has a stake in the outcome that distinguishes his claims from the claims of the public at large." Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008). It is the appellant that holds "the burden of setting the judicial machinery in motion by establishing that he is aggrieved[.]" Blackstone Valley, 452 A.2d at 934 (citing 3 Davis, Administrative Law Treatise § 22.08 (1958)).

It is well established that a person is aggrieved when he or she has suffered an "injury in fact, economic or otherwise." In re Town of New Shoreham Project, 19 A.3d 1226, 1227 (R.I. 2011). An injury in fact is defined as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Mruk v. Mortg. Elec. Registration Sys., Inc., 82 A.3d 527, 535 (R.I. 2013) (quoting Lujan v.

Defenders of Wildlife, 504 U.S. 555, 560 (1992)). This injury in fact requirement is "essential even in cases that are brought allegedly to protect the public interest." Operation Clean Gov't v. R.I. Comm'n on Judicial Tenure & Discipline, 741 A.2d 257, 262 (R.I. 1999).

In order for an organization to establish standing, it must show that its "members would otherwise have standing to sue in their own right." In re New Shoreham, 19 A.3d at 1227 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)). Indeed, "[m]ere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved[.]'" Blackstone Valley, 452 A.2d at 933 (quoting Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

In order to assert standing, Save the Bay claims that its "members who reside on and/or who use the waters near the subject structure will suffer injuries in fact." (First Am. Compl. 3.) It makes no claim as to what such an "injury in fact" would be. See Mruk, 82 A.3d at 535 (stating that an injury in fact must be "concrete and particularized"). It is Save the Bay's burden to demonstrate that its members are aggrieved by setting out facts that support a particularized injury. See Blackstone Valley, 452 A.2d at 934 (holding that is the appellant's burden to demonstrate that he or she is aggrieved before the "judicial machinery" will be set in motion). Here, Save the Bay does not meet its burden of demonstrating an "injury in fact" simply by amending its Complaint to recite the term "injur[y] in fact." (First Am. Compl. 3.)

Additionally, as Save the Bay's objections—e.g. the extent of the variances requested, the potential for septic runoff to further degrade surrounding coastal ecosystems, and the possible impact of sea level rise on the property—match the drawbacks of the proposal considered by CRMC when granting the assent, there is no support for the contention that the injury is

personalized. See Bowen, 945 A.2d at 317 (holding that the injury alleged must be personal and distinct from public interest). Rather, "the harm [Save the Bay's members] claim to have suffered—[interference with their use of the waters near Four Twenty's property]—arises from riparian and littoral rights that are vested equally in all members of the community." Meyer v. City of Newport, 844 A.2d 148, 151 (2004) (holding that plaintiffs had no standing to challenge the construction of a marina interfering with their personal use of a wharf as their rights in the wharf were not distinct from the rights held by the general public); see also W. Warwick Sch. Comm. v. Souliere, 626 A.2d 1280, 1284 (R.I. 1993) (holding that no standing existed where "taxpayers failed to show any actual or concrete wrong beyond a general grievance common to all taxpayers").

Save the Bay relies on the Rhode Island Supreme Court's decision in East Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 569, 376 A.2d 682, 687 (1977) for the proposition that it has, in essence, been granted carte blanche standing to challenge any CRMC decision. (Reply Mem. 1.) This Court is not persuaded by this argument. See In re New Shoreham, 19 A.3d at 1228-29 (holding that an environmental organization's "significant interest" in a problem is insufficient to establish standing and that such policy concerns are best addressed in the political arena). The Rhode Island Supreme Court has held that "an agency vested with regulatory powers is essentially the guardian of the public interest." Akroyd v. R.I. Dep't of Emp't Sec. Bd. of Review, 585 A.2d 637, 639 (R.I. 1991). Indeed, CRMC has been directed to "preserve, protect, develop, and, where possible, restore the coastal resources of the state for this and succeeding generations" of Rhode Islanders. Sec. 46-23-1. As such, the general assembly, through its imprimatur, has already created a body to protect Rhode Island's coastal resources, the CRMC.

Furthermore, in East Greenwich Yacht Club, Save the Bay alleged an actual injury—that the construction of an enormous high rise apartment along the shore would cause an aesthetic harm to its members. 118 R.I. at 564, 376 A.2d at 685 (citing Sierra Club, 405 U.S. at 727 (holding that injury of aesthetics qualifies as an injury in fact)). Here, however, there will be no looming skyscraper interfering with Narragansett's seaside vista. Rather, Four Twenty's proposal only entails moving an existing house on a strip of shoreline that is already dotted with houses. (R. 27.)

Even assuming, arguendo, that Save the Bay has pleaded an injury personal to its members, this Court can only speculate regarding the injury alleged here. Based on its objections at the CRMC hearing, such an injury could relate to the potential proliferation of the invasive common reed and the sea level rise. Both contentions are insufficient to establish injury. Firstly, with regard to the invasive plants, even if the Save the Bay members who make use of the water near Four Twenty's property notice the proliferation of common reed as distinct from the native reeds and suffer an aesthetic injury as a result, Save the Bay has admitted that even without Four Twenty relocating its home, this invasion of common reed is inevitable. (R. 106); see Mruk, 82 A.3d at 535 (citing Lujan, 504 U.S. at 561) (finding that for an injury to constitute an "injury in fact" for the purposes of standing, it must be "redress[able] by a favorable decision[]"). Secondly, it is apparent to this Court that, through the extensive wetland restoration plan agreed to by Four Twenty, development will serve to halt, rather than accelerate, the propagation of such invasive species. (R. 17-24.)

Save the Bay has also claimed in its objection before CRMC that, with sea level rise, the ocean will be at the foot of Four Twenty's house by 2100 and that it is "CRMC's obligation . . . to protect subsequent owners from those dangers." (R. 105.) Such a projection is not sufficient

to allege injury in fact. Save the Bay would, in essence, be claiming standing under the theory that in eighty-six years, if sea level rise follows the most generous of models and if the home's owner at the time happens to be a Save the Bay member and if that homeowner's basement floods, there will be an injury in fact. Such a scenario contains too many "ifs" to provide standing; the injury alleged cannot be "conjectural or hypothetical." Mruk, 82 A.3d at 535 (citing Lujan, 504 U.S. at 560); see also Lujan 504 U.S. at 563-64 (holding that an environmental activist's hope to one day travel to Africa to see an endangered Nile crocodile that could be rendered extinct from the federal government's role in aiding construction of a dam was insufficient to establish injury in fact). As such, this Court remains mindful that "[t]here are no better or worse plaintiffs, only those with or without a claim." Blackstone Valley, 452 A.2d at 934 (internal citations omitted). Save the Bay has no claim.

It should be noted that "on rare occasions, [this Court has] overlooked the question of standing and proceeded to determine the merits of a case because of substantial public interest in having a matter resolved[.]" In re New Shoreham, 19 A.3d at 1227 (citing Blackstone Valley, 452 A.2d at 933). This is not such a rare occasion. Moving a house over nineteen feet is not a matter of substantial public interest. Compare In re New Shoreham, 19 A.3d at 1229 (finding that a large offshore wind project did not involve a substantial enough public interest to present such a "rare occasion"), with Ret. Bd. of Emps.' Ret. Sys. of Providence v. City Council of Providence, 660 A.2d 721, 726 (R.I. 1995) (finding such a "rare occasion" in order to "address issues of substantial importance to the members of the retirement system and, indeed, to all the taxpayers of the city of Providence").

This Court denies and dismisses Save the Bay's appeal for lack of standing. In light of the unique nature of the instant case, the Court will go on to address the remaining issues of Save the Bay's appeal. See n.1.

B

Sufficiency of Findings of Fact

Save the Bay has alleged that CRMC is in violation of its statutory duty to state sufficient findings of fact in its decision. In accordance with § 42-35-12, CRMC must, in its final decision,

> "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.

The sine qua non of the requirement for findings of fact in an agency decision is guidance for the judiciary on appeal. See JCM, LLC v. Town of Cumberland Zoning Bd. of Review, 889 A.2d 169, 176 (R.I. 2005) (holding that findings of fact are a precondition to meaningful administrative or judicial review); East Greenwich Yacht Club, 118 R.I. at 568, 376 A.2d at 687 (holding that "[t]he absence of required findings makes judicial review impossible"). If the CRMC "fails to disclose the basic findings upon which its ultimate findings are premised, [this Court] will neither search the record for supporting evidence nor will [this Court] decide for [it]sel[f] what is proper in the circumstances." Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968). However, it is not required that each administrative decision set out "basic findings in precise or specific language." Id. at 45, 241 A.2d at 816. Indeed, the decision need only follow "minimal requirements[,]" setting out findings that are "factual rather than conclusional[.]" May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970) (holding in the context of an analogous requirement for zoning decisions).

Here, in its decision, CRMC states that it "adopts and incorporates the findings made by the CRMC staff. The Council finds based upon the staff reports this is a unique and extreme situation, which based upon the CRMC staff recommendations warrants approval. The Council adopts those recommendations in full." (R. 3.) Although the CRMC Staff Report says that Four Twenty failed to meet the first two criteria for a variance, the staff did "not object to the application," and instead, made certain recommendations to be implemented if the CRMC Council was to accept the proposed plan. (R. 7, 9-10.)

Although the decision is not fastidiously clear, this Court can reasonably discern that in light of the acceptance of staff recommendations—i.e. the agreed upon conservation easement and pedestrian easement as well as the extensive wetland restoration plan submitted as an addendum to the application originally reviewed by the staff—CRMC found the proposal by Four Twenty to comport with its CRMP and that the plan will not result in significant adverse environmental impacts, thus rendering it qualified for a variance. See Hooper, 104 R.I. at 45, 241 A.2d at 816 (holding that findings need not be set out in "precise or specific language"); G. H. Waterman & Co. v. Norberg, 122 R.I. 825, 832, 412 A.2d 1132, 1136 (1980) (stating that "[t]he federal [APA] contains a similar provision" and that "[c]ourts have construed both the federal provision and its state counterpart as not requiring a separate, express ruling on each proposed finding"); Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) ("The agency must articulate a rational connection between the facts found and the choice made. . . . While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (internal citations omitted); Piney Mountain Coal Co. v. Mays, 176 F.3d 753, 762 (4th Cir. 1999) ("If a reviewing court can discern what the [agency] did

and why [they] did it, the duty of explanation is satisfied.") (internal citations omitted); Della Valle v. U.S. Dep't of Agric., 626 F. Supp. 388, 395 (D.R.I. 1986) (holding that "the basis for an administrative finding need not be expressed with fastidious clarity").

By incorporating the staff-recommended stipulations, the CRMC decision here explains the basis upon which it has decided to grant the variance. Cf. Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council, 536 A.2d 893, 895 (R.I. 1988) (overturning CRMC's decision where "[n]one of [its] findings address[ed] the impact of the alteration upon the [variance] criteria"); East Greenwich Yacht Club, 118 R.I. at 568, 376 A.2d at 687 (finding an "absence of required findings" where the decision merely stated "the evidence shows" for its basis). As such, this Court concludes that CRMC's decision was not in violation of § 42-35-12.

Moreover, assuming arguendo that the findings of fact were deficient in some procedural way, this Court would still not necessarily remand the decision to CRMC. See Sakonnet, 536 A.2d at 897 ("To delay the administrative process further by remanding the case to CRMC for additional consideration of a petition filed seven years ago would prejudice the right of the petitioner to a final adjudication of his petition within a reasonable period."); Ratcliffe v. Coastal Res. Mgmt. Council, 584 A.2d 1107, 1111 (R.I. 1991). Four Twenty obtained its original assent to build from CRMC on November 25, 2008. Now, almost six years later, it has finally received assent to build on its rightful property. If this Court were to remand this decision for purely procedural reasons, it might only serve to prejudice and further delay Four Twenty in its use of the land. See G.H. Waterman, 122 R.I. at 832, 412 A.2d at 1136 (refusing to remand where, in light of the circumstances, requiring a clarification of findings would constitute an "insist[ence] upon a needless compliance with ritual[]").

C

Sufficiency of the Evidence

Along with its argument that CRMC set forth insufficient findings of fact in its decision, Save the Bay also contends that CRMC's grant of the assent was clearly erroneous in view of the reliable, probative, and substantial evidence on the entire record.

Standing in an appellate role, this Court is "limited to an examination of the record to determine whether 'some' or 'any' legally competent evidence exists to support" the agency decision. Mine Safety, 620 A.2d at 1259. Legally competent evidence is "more than a scintilla but less than a preponderance," in essence, enough for a reasonable mind to make a conclusion. Arnold, 822 A.2d at 167 (internal citations omitted.) As such, this Court may not reverse a decision unless it is "totally devoid of competent evidentiary support in the record[.]" Milardo, 434 A.2d at 272. Per the mandate of the general assembly, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Sec. 42-35-15(g).

Here, without any expert opinion to the contrary, CRMC was presented with evidence that, in the words of Reis, the proposed septic system would not "put [the wetland] over the edge," (R. 119.) especially in light of its "advanced technology type system that removes at least 50 percent of the nitrogen [from the waste in the septic system.]" (R. 122.) The proposed bridge was also designed to minimize its impact on the environment, with grates to allow light penetration for the plants underneath and an open design to allow wildlife access. (R. 32.) To fight the spread of the invasive common reed, Four Twenty had also crafted a sweeping restoration plan to return native plants to the coastal wetland ecosystem. (R. 17-24.) Additionally, the pedestrian and conservation easements helped the project conform to the

CRMP's stated goal to "secure the rights of the people of Rhode Island to the use and enjoyment of the natural resources of the state[.]" Sec. 46-23-1(b)(2).

Furthermore, this Court recognizes its limitations—it does not purport to hold any nuanced expertise in coastal management nor is it able, unlike Supervising Environmental Scientist David Reis and other members of CRMC, to view the instant application in light of the CRMP holistically, especially considering the barrage of applications that CRMC staff must handle daily. See R. at 119; Robert E. Derecktor of R.I., Inc. v. United States, 762 F. Supp. 1019, 1022 (D.R.I. 1991) ("Where an agency's decision is highly technical, and specialized knowledge is required, judicial deference is necessary."). As such, this Court finds that there was sufficient legally competent evidence on the record to support a finding that Four Twenty's proposal conforms with the goals of the CRMP and would not result in significant adverse environmental impacts.

Additionally, there is adequate evidence on the record to support CRMC's conclusion that the past assent placing the home on an abutting lot was premised on an honest mistake. Staff biologist David Reis stated before CRMC that "the engineer that prepared the initial survey has been before this Council many times, he's well known by us, and, you know, he does a good job, we never had this issue before." (R. 93.) Reis also reiterated his familiarity with Four Twenty and its diligence and honesty when working alongside CRMC. (R. 94); see Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993) (stating that deference with regard to credibility determinations must be given to those that sit closest to the evidence). CRMC Councilman Hudner also noted that "[t]here's a feeling from the staff, who worked with these people repeatedly, through the years, that this is an honest mistake." (R. 114-15); see In re Proposed Town of New Shoreham Project, 25 A.3d 482, 504 (R.I. 2011) (holding that credibility

determinations are "an assessment that remains within the province of the [agency]"). As no evidence was presented that Four Twenty had surreptitiously built its home on the abutting lot as a means of obtaining CRMC approval, this Court similarly upholds CRMC's decision in this respect. As such, this Court finds, in light of the entire record, that the CRMC decision is not clearly erroneous.

D

Honest Mistake Not Action of Applicant

Save the Bay contends that CRMC's decision was made in excess of its statutory authority when it found that Four Twenty's honest mistake did not qualify as a "prior action of the applicant" as per R.I. Admin. Code 16-2-1:120(A)(5). This Court must give substantial deference to an agency's interpretation of its own rules and regulations. Gonzales v. Oregon, 546 U.S. 243, 255 (2006); State v. Cluley, 808 A.2d 1098, 1103 (R.I. 2002). It is well settled that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991). Where there exists more than one reasonable interpretation as to the meaning of a regulation, "the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized." Gallison v. Bristol Sch. Comm., 493 A.2d 164, 166 (R.I. 1985).

In finding that "[t]he requested variances to the applicable standards are not due to any prior action of the applicant[,]" (R. 3.) CRMC relied on the Rhode Island Supreme Court's decision in DeFelice, 96 R.I. at 99, 189 A.2d at 685. (R. 57-58.) In that case, applicants

obtained a building permit to construct an addition to their home. DeFelice, 96 R.I. at 100-01, 189 A.2d at 686. After the foundation had been laid, the neighbors obtained a restraining order stating that the addition was too close to the lot line in violation of the zoning ordinance. Id. at 101, 189 A.2d at 686. Thereafter, the zoning board granted the variance, finding "that the applicants had acted in good faith [and] that neither they nor their agents were aware at the time of the erection of the addition that it extended out . . . in violation of . . . the zoning ordinance[.]" Id. at 103, 189 A.2d at 687. The Court commented that "the board had the power and authority to grant a variance if the facts warranted such action, and [the Court] think[s] [the facts] did in this case." Id. at 103, 189 A.2d at 688.

Here, the facts are indeed strikingly similar to those of DeFelice. Four Twenty had obtained all proper permits to build and substantially completed construction before it was discovered that construction had commenced on the wrong lot. CRMC found that Four Twenty made an "honest mistake" with regard to the position of their lot line. (R. 8.) There was no indication on the record that Four Twenty knew it was building the home on the wrong lot; rather, Four Twenty has incurred substantial detriment precisely because it built its home on the wrong lot.

In following the Rhode Island Supreme Court's directive, this Court must give deference to CRMC with regard to their interpretation of regulations contained within the CRMP. See Gallison, 493 A.2d at 166. As such, when the regulations set forth that a variance will not be granted if the hardship is "due to any prior action of the applicant," this Court finds that CRMC was reasonable in construing this section to mean any prior conscious action. As in DeFelice, the assent "was granted because the [CRMC] believed that the mistake made in locating the [home] was not a conscious mistake but one which in the circumstances was understandable."

96 R.I. at 104, 189 A.2d at 688; see also Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998) (holding that "the Superior Court reviews the decisions of a [zoning] board of review under the 'traditional judicial review' standard applicable to administrative agency actions[]").

To support its contention that CRMC was in error in finding that the hardship was not created by Four Twenty, Save the Bay draws this Court's attention to a footnote in Rose Nulman Park Found., where the Rhode Island Supreme Court "f[ound] it curious" that "in spite of the money [Four Twenty] planned to expend based on [the site engineer's] plan, [it] failed to make any inquiry as to the significance of the caveat on [the] site development plan that it was a Class III survey." 93 A.3d at 31 n.7. However, the Rhode Island Supreme Court has stated that "it is not the role of a trial justice to attempt to read 'between the lines' of our decisions." Fracassa v. Doris, 876 A.2d 506, 509 (R.I. 2005). Rather, in Rose Nulman Park Found., the Court spoke forthrightly when it held that Four Twenty's "reliance on [the engineer's] site development plan was justified." 93 A.3d at 31; see also Fracassa, 876 A.2d at 509 (stating that "opinions of [the Rhode Island Supreme Court] speak forthrightly and not by suggestion or innuendo). As such, the Court did not hold that Four Twenty did not make an honest mistake as a matter of law. Due to the latitude an agency is afforded in interpreting its own regulations, this Court finds that CRMC's decision was not made in excess of its statutory authority.

E

Denial of Save the Bay's Request for Stay

Furthermore, Save the Bay has requested that this Court stay CRMC's assent. "[T]his Court will not issue a stay unless the moving party makes a 'strong showing' that (1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public

interest." Town of N. Kingstown v. Int'l Ass'n of Firefighters, Local 1651, AFL-CIO, 65 A.3d 480, 481 (R.I. 2013) (internal citations omitted). As discussed supra, Save the Bay lacks standing and thus cannot prevail on the merits of its appeal. As such, Save the Bay's request for a stay is denied.

IV

Conclusion

As a threshold matter, this Court finds that Save the Bay has no standing to bring the instant appeal. Additionally, in its discussion of the merits of the appeal, this Court determines that CRMC set forth sufficient findings of fact as per § 42-35-12. Further, this Court concludes that CRMC's decision was not in excess of its statutory authority or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Substantial rights of Save the Bay have not been prejudiced. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Save the Bay, Inc. v. State of Rhode Island Coastal Resources Management Council and Four Twenty Corporation**
CASE NO:	**PC-2014-1685**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 29, 2014**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**S. Paul Ryan, Esq.** **Alexandra Graskemper, Esq.**
For Defendant:	**Lauren E. Jones, Esq.** **Brian A. Goldman, Esq.**