STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 24, 2016)

KEVIN DELANE and SUZANNE DELANE	:	
	:	
V.	:	**C.A. No. PC-2015-1920**
	:	
R.I. COASTAL RESOURCES MANAGEMENT COUNCIL	:	

DECISION

LICHT, J. Appellants—Kevin Delane and Suzanne Delane (collectively, the Delanes)—have appealed from a final decision of the R.I. Coastal Resources Management Council (CRMC) denying the Delanes' Petition for Regulation Change. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

The subject matter of this dispute is a two-acre, undeveloped lot located on West Beach Road in Charlestown, Rhode Island (the Delane Property). The current configuration of the Delane Property is the result of an administrative subdivision which took place in August 2000. Originally, the eastern portion of the Delane Property consisted of several small lots (Lots 203-211), which were owned by Robert Frost (Mr. Frost). Mr. Frost also owned a parcel containing approximately three acres of land (Parcel 301), which bordered Lots 203-211 to the west. On December 1, 1999, Mr. Frost filed an administrative subdivision site plan (Site Plan), which proposed merging Lots 203-211 with a portion of Parcel 301, thereby creating the Delane Property. The Site Plan proposed a right of way across Lot 301 in order to provide the Delane

Property with access to West Beach Road. Mr. Frost recorded the Site Plan in the Charlestown land evidence records on August 3, 2000. In June of 2000, Mr. Frost sold Parcel 301 to Frank and Laurie Chumley, who constructed a residential dwelling on the lot. In June of 2001, Mr. Frost sold the Delane Property to the Delanes.

Due to its location within the Salt Pond Watershed, the Delane Property is subject to the jurisdiction of the CRMC's Salt Pond Region Special Area Management Plan (Salt Pond SAMP). The CRMC promulgated the Salt Pond SAMP to "provide for the integration and coordination of the protection of natural resources, the promotion of reasonable coastal-dependent economic growth, and the improved protection of life and property . . ." G.L. 1956 § 46-23-6(1)(v)(B)(I). Specifically, the CRMC's objective in promulgating the Salt Pond SAMP was to "address the challenge of a growing population and the need for innovative land-use controls to address the impacts of existing and proposed development on the salt ponds." Salt Pond SAMP § 100(A). The Salt Pond SAMP covers properties within the salt pond watershed in the towns of Westerly, Charlestown, South Kingstown, and Narragansett, Rhode Island. Id. at § 100(B). Properties subject to the Salt Pond SAMP fall within three different classifications: 1) Self-Sustaining Lands; 2) Lands of Critical Concern; and 3) Lands Developed Beyond Carrying Capacity. Id. at § 130(B)(3).

The Delane Property is classified as Lands of Critical Concern defined as:

> "presently undeveloped or developed at densities of one residential unit per 120,000 square feet. These lands may be adjacent to or include one or more of the following: sensitive areas of the salt ponds that are particularly susceptible to eutrophication and bacterial contamination; overlie wellhead protection zones or aquifer recharge areas for existing or potential water supply wells; areas designated as historic/archaeologic sites; open space; areas where there is high erosion and runoff potential; habitat for flora and fauna as identified through the Natural Heritage Program,

> large emergent wetland complexes, and U.S. Fish & Wildlife lands; and fisheries habitat." Id. at § 920.1(B)(1)(a).

Pursuant to the Salt Pond SAMP, Lands of Critical Concern must meet certain setback and buffer zone requirements. Id. at §§ 920.1(B)(2)(f) and (g). Specifically, the Salt Pond SAMP requires that all activities that take place within 200 feet of a coastal feature on Lands of Critical Concern, have a 225 foot minimum setback[1] (Setback Regulation). Id. at § 920.1(B)(2)(f). The Setback Regulation does not apply to properties which were subdivided prior to April 12, 1999 (Setback Grandfather Clause). Id. The Salt Pond SAMP further requires that all activities that take place within 200 feet of a coastal feature on Lands of Critical Concern have a 200 foot buffer zone[2] (Buffer Zone Regulation). Id. at § 920.1(B)(2)(g). The Buffer Zone Regulation does not apply to properties which were subdivided prior to November 27, 1984 (Buffer Zone Grandfather Clause). Id. Property owners whose land does not qualify for the Setback and Buffer Zone Grandfather Clauses may also apply for a Special Exception from the CRMC to obtain relief from the Setback and Buffer Zone Regulations. Id. at §§ 920.1(B)(2)(f) and (g). In order to receive a Special Exception, an applicant must demonstrate that

> "l) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as

---

[1] The CRMC's Coastal Resources Management Plan (CRMP) defines a setback as "the minimum distance from the inland boundary of a coastal feature at which an approved activity or alteration may take place." CRMP § 140(A).

[2] A buffer zone is defined as a

> "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. A Coastal Buffer Zone differs from a construction setback (Section 140) in that the setback establishes a minimum distance between a shoreline feature and construction activities, while a buffer zone establishes a natural area adjacent to a shoreline feature that must be retained in, or restored to, a natural vegetative condition." CRMP § 150(A)(1).

> opposed to individual or private interests. The activity must be one or more of the following:
>
> > "(a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities, however, this exception shall not apply to activities proposed on all classes of barriers, barrier islands or spits except as provided in 210.2.D.9;
> >
> > "(b) a water-dependent activity that generates substantial economic gain to the state; and/or
> >
> > "(c) an activity that provides access to the shore for broad segments of the public.
>
> "2) All reasonable steps shall be taken to minimize environmental impacts and/or use conflict.
>
> "3) There is no reasonable alternative means of, or location for, serving the compelling public purpose cited." CRMP § 130(A).

In 2006, the Delanes sought a Preliminary Determination from the CRMC regarding their plans to construct a single-family dwelling (the Project) on the Delane Property. In April 2007, the CRMC issued a Preliminary Determination, which raised questions regarding the suitability of the Delane Property for the proposed development. The CRMC noted that the Delane Property, which was subdivided after 1999, was not exempt from the Setback and Buffer Zone Regulations. Because the Project as proposed did not meet the Setback and Buffer Zone Regulations, the CRMC determined that the Project required that the Delanes apply for a Special Exception.

On October 3, 2013, the Delanes filed a Petition for a Regulation Change (Petition) in which they requested that the Salt Pond SAMP be amended to clarify that the Setback and Buffer Zone Regulations did not apply to parcels which were the subject of an administrative subdivision, as opposed to a major or minor subdivision. On March 10, 2014, CRMC Coastal

Policy Analyst, James Boyd (Mr. Boyd), issued a report recommending that the CRMC deny the Petition (Boyd Report). In his report, Mr. Boyd noted that granting the Petition could potentially affect nearly 326 undeveloped parcels designated as Lands of Critical Concern. Ex. 6, at 10. Mr. Boyd asserted that the unintended consequences of granting the Petition "could prove disastrous in the effort to reduce secondary and cumulative impacts . . . due to additional residential development occurring that will impact water quality in tributaries and the salt ponds." Id. at 11. Thus, Mr. Boyd concluded that the Petition was not consistent with the goals of the Salt Pond SAMP. Id.

On March 18, 2014, the Planning and Procedures Subcommittee (Subcommittee) held a hearing to consider the Petition. The Subcommittee heard from Mr. Boyd, who testified as to the contents of his report. The Subcommittee also heard from the Delanes' counsel who argued that because the administrative subdivision had consolidated property to create the Delane Property rather than creating additional lots, it should be exempt from the Setback and Buffer Zone Regulations as "a special subset of subdivision." Subcommittee Hr'g Tr. 16:5-7, Mar. 18, 2014.

On October 29, 2014, the Subcommittee issued a written recommendation which found that adopting the Petition would increase residential density in lands of critical concern and would be inconsistent with the policies of the Salt Pond SAMP. On March 10, 2015, the CRMC held a hearing on the Petition. After considering the Petition, the Subcommittee's recommendation and the arguments by the Delanes' counsel, the CRMC voted to deny the Petition. On April 9, 2015, the CRMC issued a written decision (Final Decision) containing twenty-three findings of fact and three conclusions of law.

In its Final Decision, the CRMC noted that when it drafted the definitions section of its CRMP—specifically the definitions of the terms "subdivision" and "re-subdivision"—it intended

that those definitions be consistent with the Rhode Island Land Development and Subdivision Review Enabling Act of 1992, G.L. 1956 §§ 45-23-25, et seq. (Subdivision Act). Final Decision at ¶ 9. The CRMC found that because an administrative subdivision results in a change in lot lines, it constitutes a subdivision as that term is defined in the Subdivision Act. Id. at ¶ 12. Moreover, after reviewing the evidence before it, the CRMC accepted the Subcommittee's conclusion that adopting the Petition would increase residential density in Lands of Critical Concern and be inconsistent with the policies of the Salt Pond SAMP. Id. at ¶ 20. Therefore, the CRMC denied the Delanes' Petition and concluded that the Delane Property, which was subject to an administrative subdivision in 2000, was not exempt from the Buffer Zone and Setback Regulations and that the Project required a Special Exception. Following the issuance of the Final Decision, the Delanes timely filed an appeal to this Court.

On appeal, the Delanes argue that the CRMC's Final Decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, the Delanes contend that 1) the CRMC incorrectly interpreted the CRMP as well as the Subdivision Act when it determined that administrative subdivisions were not exempt from the Setback and Buffer Zone Regulations; and 2) that there is no legally competent evidence in the record to support the CRMC's finding that the Petition would be inconsistent with the residential reduction policies of the Salt Pond SAMP.[3]

[3] This Court also notes that in their brief, the Delanes argued that the CRMC's decision not to grant the Petition would result in a regulatory taking of their property. However, at oral argument, the Delanes conceded that such a claim is premature at this time given that the Delanes have not yet requested—nor been denied—a Special Exception. See Woodland Manor III Assocs. v. Keeney, 713 A.2d 806, 812 (R.I. 1998) ("'Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.'" (quoting U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985))). Accordingly, the Court does not address the Delanes' takings argument in this Decision.

II

Standard of Review

This Court's review of the CRMC's Final 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). Courts are 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., 424 A.2d 646, 647 (R.I. 1981).

Even though this Court reviews questions of law de novo, "it is also true that [the court] give[s] deference to an agency's interpretation of an ambiguous statute that it has been charged with administering and enforcing, provided that the agency's construction is neither clearly erroneous nor unauthorized." Town of Burrillville v. Pascoag Apartment Assocs., LLC, 950 A.2d 435, 445 (R.I. 2008). Thus, while not controlling, an agency's interpretation of its own rules or regulations is entitled to substantial deference. Id. at 445-46; see also State v. Cluley, 808 A.2d 1098, 1104 (R.I. 2002) (finding that deference to an agency's interpretation of its own regulations required the court "to presume the validity and reasonableness of that construction until and unless the party challenging its interpretation proved otherwise"). Further, "'where the agency's specialized knowledge is involved . . . the court should grant broader deference and uphold the agency's conclusion if the conclusion is rationally based."' R.I. Higher Educ. Assistance Auth. v. Sec'y, U.S. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991) (quoting Bldg. and Constr. Trades Dep't., AFL–CIO v. Brock, 838 F.2d 1258, 1266 (D.C. Cir. 1988)).

Such deference is accorded even if an alternative, equally reasonable interpretation exists. Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993). However, a court "will not apply a statute in a manner that will defeat its underlying purpose." Arnold v. R.I. Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 169 (R.I. 2003). Ultimately, a court's deference to an agency's interpretation depends on the "'persuasiveness of the interpretation, given all the attendant circumstances.'" Town of Burrillville, 950 A.2d at 446 (quoting Unistrut Corp. v. State Dep't of Labor and Training, 922 A.2d 93, 101 (R.I. 2007)).

III

Analysis

As a threshold matter, this Court notes the peculiar procedural posture of this case. The Delanes originally filed a Petition for a Regulation Change requesting that the CRMC amend the Salt Pond SAMP, which the CRMC denied. On appeal, the Delanes essentially argue that the CRMC erred when it declined to grant the Petition and thus alter its own regulations. On appeal of an agency decision, courts may review an agency's interpretation of a regulation to determine whether that interpretation conforms to the law. See Cluley, 808 A.2d at 1104. However, this Court questions whether it has the authority to require that the CRMC enact a regulation. Ultimately, however, this appeal does not require the Court to analyze whether it has the authority to determine if the CRMC's denial of the Petition was in error, because the Delanes have also challenged the CRMC's interpretation of the Salt Pond SAMP, which is definitely within the Court's jurisdiction. Accordingly, this Court will analyze in turn the Delanes' remaining arguments regarding the CRMC's interpretation of the CRMP and Salt Pond SAMP and whether the CRMC's Final Decision was based on legally competent evidence.

A

CRMC's Interpretation of the CRMP

First, the Delanes argue that the CRMC incorrectly interpreted the CRMP as well as the Subdivision Act when it determined that an administrative subdivision was not exempt from the Setback and Buffer Zone Regulations. In response, the CRMC argues that based upon the definitions contained in the CRMP as well as the Subdivision Act, an administrative subdivision constitutes a type of subdivision and therefore is not exempt from the Setback and Buffer Zone Regulations.

Courts review questions of statutory interpretation de novo. See Unistrut Corp., 922 A.2d at 98 (citation omitted). However, "when the administration of a statute has been entrusted to a governmental agency, deference is due to that agency's interpretation of an ambiguous statute unless such interpretation is clearly erroneous or unauthorized." Id. at 99 (citation omitted). CRMC's regulations define the term "subdivision" as "the division of a lot, tract, or parcel of land into two (2) or more lots . . . [i]t also includes re-subdivision and when appropriate to the context, shall relate to the process of subdividing or to land subdivided." CRMP § 320(A)(2). The CRMP also provides that the CRMC's regulations should be read consistently with the applicable provisions of the Subdivision Act. See id. at § 320(A)(3). Accordingly, turning to the Subdivision Act, an administrative subdivision is defined as the "[r]e-subdivision of existing lots which yields no additional lots for development, and involves no creation or extension of streets. The re-subdivision only involves divisions, mergers, mergers and division, or adjustments of boundaries of existing lots." Sec. 45-23-32(2). Moreover, the term "subdivision" is defined as

> "[t]he division or re-division, of a lot, tract or parcel of land into two or more lots, tracts, or parcels. Any adjustment to existing lot lines of a recorded lot by any means is considered a subdivision. All re-subdivision activity is considered a subdivision. The division of property for purposes of financing constitutes a subdivision." Sec. 45-23-32(52).

The Delanes argue that because the first sentence of § 45-23-32(52) describes a subdivision as a re-division resulting in the creation of two or more lots, an administrative subdivision is not a true subdivision because it merely changes lot lines. However, the Delanes' argument appears to ignore the second sentence of § 45-23-32(52), which states that an action that merely results in an adjustment of lot lines—in other words, an administrative subdivision—is likewise considered a subdivision. Id. Thus, under the plain language of the Subdivision Act,

administrative subdivisions are included within the general definition of a subdivision. See Unistrut Corp., 922 A.2d at 98 ("When a statute is clear and unambiguous we are bound to ascribe the plain and ordinary meaning of the words of the statute and [a court's] inquiry is at an end."). Therefore, it is irrelevant that an administrative subdivision does not result in the creation of more lots. See 83 Am. Jur. Subdivision Controls § 399 at 401 (2013) ("The concept of subdivision is not always restricted in its application to a division of land into separate lots."). Moreover, as with a minor or major subdivision, an administrative subdivision must go through a comprehensive approval review process. Sec. 45-23-37(a)-(g). Changing lot lines requires the approval of an administrative officer—who is a municipal official—because the altered lots must conform to the requirements of the city or town's zoning and planning regulations. See id. at § 45-23-37(a). Thus, there is no question that an administrative subdivision constitutes a subdivision.

It is uncontested that the CRMP must be read consistently with the provisions of the Subdivision Act. Therefore, the CRMC's determination that administrative subdivisions are subdivisions for the purposes of the CRMP is not clearly erroneous. See In re Lallo, 768 A.2d 921, 926 (R.I. 2001) ("[W]here the provisions of a statute are unclear or subject to more than one reasonable interpretation, 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.") (citation omitted). Accordingly, the Court upholds the CRMC's interpretation of the CRMP.

B

Legally Competent Evidence

The Delanes argue that there is no legally competent evidence in the record to support the CRMC's factual conclusion that granting the Petition would be inconsistent with the residential reduction policies of the Salt Pond SAMP.

In determining whether competent evidence exists in the record to support the CRMC's Final Decision, the Court cannot substitute its judgment for that of the CRMC concerning questions of fact. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). Rather, this Court must determine whether the agency relied on legally competent evidence to support its findings. Id. "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Id. The Court is required to uphold the agency's conclusions if, considering the record as whole, competent evidence exists. Id.

In making its Final Decision, the CRMC relied on the Boyd Report as well as testimony heard before the Subcommittee. Final Decision at ¶ 20. The CRMC noted that population density and the distribution of residential development have a direct impact on water quality within the Salt Pond watershed. Id. at ¶ 15. Citing to the Boyd Report, the CRMC found that exempting administrative subdivisions from the Setback and Buffer Zone Regulations would result in an increased number of buildable lots that could negatively affect the water quality of the Salt Pond watershed.[4] Id. at ¶ 20. The CRMC also noted that comments submitted by the Salt Ponds Coalition, the Audubon Society of Rhode Island, the Shady Harbor Fire District, and the Town of South Kingstown Planning Department corroborated the Boyd Report's findings.

[4] This Court notes that, in his report, Mr. Boyd relied on GIS mapping data provided by the Towns of Charlestown and South Kingstown when he determined that at least 326 undeveloped parcels designated as Lands of Critical Concern would potentially be exempt from the Setback and Buffer Zone Regulations if the CRMC granted the Petition.

Id. The CRMC further noted that the Salt Pond SAMP was adopted primarily for the purpose of protecting the coastal salt ponds from water quality problems through reducing the density of development along the watershed. Id. at ¶ 15. Therefore, the CRMC concluded that adopting the Petition would be inconsistent with the goals of the Salt Pond SAMP. Id. at ¶ 21.

The record indicates that the CRMC relied on competent evidentiary support when it determined that granting the Petition would be contrary to the policies of the Salt Pond SAMP. In making its decision, the CRMC relied on its own regulations, sworn testimony, as well as reports generated by CRMC Staff. Therefore, the Court cannot find that the CRMC's factual conclusions are completely devoid of evidentiary support. See Durfee, 621 A.2d at 209 (holding that "[w]hen an administrative agency both hears evidence and issues a final decision . . . a reviewing court should reverse factual conclusions . . . only when they are totally devoid of competent evidentiary support") (internal quotation marks omitted). As such, this Court finds that the CRMC's Final Decision was based on legally competent evidence.

IV

Conclusion

After review of the entire record, this Court finds that the CMRC's Final Decision denying the Delanes' Petition was not clearly erroneous. Substantial rights of the Delanes have not been prejudiced. Accordingly, this Court affirms the CRMC's Final Decision. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Kevin Delane and Suzanne Delane v. R.I. Coastal Resources Management Council**
CASE NO:	**PC-2015-1920**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 24, 2016**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Melissa M. Horne, Esq.**
For Defendant:	**Anthony DeSisto, Esq.** **Peter F. Skwirz, Esq.**