STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: August 15, 2013)

PZ REALTY, LLC	:	
	:	
v.	:	**C.A. No. WC 2012-0057**
	:	
THE COASTAL RESOURCES MANAGEMENT COUNCIL OF THE STATE OF RHODE ISLAND	:	

DECISION

CARNES, J. In this administrative appeal, appellant PZ Realty, LLC (Appellant or PZ Realty) challenges a decision by the Coastal Resources Management Council of the State of Rhode Island (the CRMC) which effectively denied the Appellant's application for an Assent to construct a single-family home on property in Charlestown, Rhode Island. The CRMC determined that the Appellant's application required a Special Exception as a result of a re-subdivision of the Appellant's property, and the Appellant concedes that it cannot meet the requirements for a Special Exception. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Agency Background

The CRMC was created statutorily by the Rhode Island General Assembly to preserve and protect the coastal resources of this State. See G.L. 1956 § 46-23-1, et seq. The CRMC's primary responsibility is "the continuing planning for and management of the resources of the state's coastal region." Sec. 46-23-6(1)(i). Our Supreme Court has recognized that the CRMC is guided by a "single overriding criterion." Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 271 (R.I. 1981). "(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." Id. at 271 (citing § 46-23-1). "[T]he CRMC has been given the authority to develop policies, programs, and regulations that pertain to coastal areas." Strafach v. Durfee, 635 A.2d 277, 279 (R.I. 1993) (citing § 46-23-6). The CRMC thus has the authority to "approve, modify, set conditions for, or reject the design, location, construction, alteration, and operation of specified activities or land uses when these are related to a water area under the agency's jurisdiction[.]" Sec. 46-23-6(B). Moreover, any person proposing development within the State's tidal waters "shall be required to demonstrate that its proposal would not (i) conflict with any resources management plan or program; (ii) make any area unsuitable for any uses or activities to which it is allocated by a resources management plan or program; or (iii) significantly damage the environment of the coastal region." Id.

Based on this statutory authority, the CRMC has enacted statewide rules and regulations that it must follow when granting an applicant the right to alter or perform activities within the CRMC's jurisdiction. See, e.g., Rhode Island Coastal Resources Management Program, R.I. Admin. Code 16-2-1 (hereinafter, the CRMP). Consequently, "the regulations are legislative rules that carry the force and effect of law and enjoy a presumption of validity." Parkway Towers Assocs. v. Godfrey, 688 A.2d 1289, 1293 (R.I. 1997) (citing Lerner v. Gill, 463 A.2d 1352, 1358 (R.I. 1983)). Among other things, the CRMP requires CRMC permission, known as an "Assent," for any alteration or activity proposed for tidal waters, shoreline features, and areas contiguous to shoreline features. R.I. Admin. Code 16-2-1:100.1. In some cases, the CRMC may grant an Assent to "prohibited activities to permit alterations and activities that do not conform with a [CRMC] goal for the areas affected or which would otherwise be prohibited by the requirements of [the CRMP]," but only when the applicant meets the stringent requirements

of section 130 of the CRMP, governing "Special Exceptions." See R.I. Admin. Code 16-2-1:130.

The Rhode Island General Assembly has also required the CRMC to promulgate and adopt special area management plans (SAMPs), "as deemed necessary and desirable 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 in the specific areas designated . . . as requiring such integrated planning and coordination." Sec. 46-23-6(1)(v)(B)(I). The CRMC is required to "administer its programs, regulations, and implementation activities in a manner consistent with [the SAMPs]." Sec. 46-23-6(1)(v)(B)(III). Pursuant to this statutory authority, the CRMC promulgated and adopted the Salt Pond Region SAMP (the Salt Pond SAMP). See R.I. Admin. Code 16-1-12:100. Within the Salt Pond SAMP, there are three land use classifications focused on watershed protection and water quality: (1) Self-Sustaining Lands; (2) Lands of Critical Concern; and (3) Lands Developed Beyond Carrying Capacity. R.I. Admin Code 16-1-12:130(B)(3). Correspondingly, each land use classification is subject to different requirements for density, setbacks, buffer zones, and nitrogen reducing technology, so as to meet the Salt Pond SAMP's goal of protecting water quality in the Salt Pond Region. See R.I. Admin. Code 16-1-12:920(A)(1) – (A)(4).

II

Facts and Travel

The Appellant owns three contiguous lots identified as Lots 155, 156, and 157 on the Charlestown Tax Assessor's Map 4. It is undisputed that the Appellant's property as it relates to this appeal is subject to the jurisdiction of the CRMC and that the relevant property is subject to the Salt Pond SAMP. In October 2009, the Appellant filed an application with the CRMC to construct a single-family, six-bedroom home on Lot 157, which is located on Kennedy Lane in

Charlestown, Rhode Island. (CRMC Decision Worksheet, at AR, P6).[1] After an extensive staff-review process, the matter was placed before the CRMC for a Declaratory Ruling to determine whether or not, under CRMC regulations, a Special Exception would be needed to obtain an Assent for building the proposed home. (Hr'g Tr., at AR, P115-P125.) After a hearing on October 25, 2011, the CRMC issued a written decision finding that, because the dimensions of Lot 157 were changed in 2008, a Special Exception would be required to obtain the requisite Assent, and that PZ Realty is not entitled to an exemption from this requirement under § 920.1.B.2(g) of the Salt Pond SAMP. (CRMC Decision, at AR, P2.) In its instant appeal, the Appellant contends that the CRMC erred in making this finding.

It is undisputed that the dimensions of Lot 157 changed significantly in 2008 through an administrative subdivision of the lands in question (the 2008 Administrative Subdivision). See CRMC Staff Sign-off, at AR, P67-P70. Specifically, Lot 157 grew in size so as to include a large stretch of land that had previously been a part of Lot 155. Id. PZ Realty acknowledges that Lot 157 was transformed from an "undersized" lot to a six-acre lot. See Pl.'s Mem. at 8. It is also undisputed that the 2008 Administrative Subdivision, which dramatically altered the dimensions of Lots 155 and 157, was accomplished without informing the CRMC and without seeking CRMC approval. (CRMC Decision, at AR, P3.) Permission was sought only through the Town of Charlestown, and the CRMC was not consulted. Id. The dramatic change in the dimensions of Lot 157 was described by the CRMC in its written decision. The CRMC first made the factual finding that "in its pre-2008 condition, lot 157 was a relatively small lot with

[1] References to the certified Administrative Record will be denoted as "AR" with corresponding page numbers. The AR page number is on the lower left-hand side of the Administrative Record.

frontage on Kennedy Lane." Id. at AR, P4. The CRMC then found that "[t]he merging of a portion of lot 155 with lot 157 created a large lot that crossed land use categories." Id.

On this latter point, PZ Realty does not contest the CRMC's factual finding that, prior to the 2008 Administrative Subdivision, the land comprising Lot 157 was designated as "Lands Developed Beyond Carrying Capacity" under the Salt Pond SAMP. See id. at AR, P4. However, in 1990, the land previously within Lot 155, i.e., the land that was later absorbed into Lot 157 as a result of the 2008 Administrative Subdivision, had been the partial subject of a CRMC Assent (the 1990 Assent). Id. at AR, P2-P4. There appears to be a tacit disagreement between PZ Realty and the CRMC over which land use category under the Salt Pond SAMP applied, prior to the 2008 Administrative Subdivision, to that portion of land that was drawn from Lot 155 into Lot 157 and which had previously been subject to the 1990 Assent. The CRMC maintains that at the time of the 1990 Assent (and thereafter), the land within Lot 155 was designated into the category "Lands of Critical Concern." Id. Thus, the CRMC contends unqualifiedly that the 2008 Administrative Subdivision mixed lands designated by the CRMC as "Lands of Critical Concern" (i.e., pre-2008 Lot 155) on the one hand, and "Lands Developed Beyond Carrying Capacity" (i.e., pre-2008 Lot 157) on the other.[2] Id. at AR, P3. Although PZ Realty does not directly contest the CRMC's assertion in this regard, PZ Realty contends that "a 200-foot buffer zone was never established on Lot 155" even though that is a unique requirement under the Salt Pond SAMP for "Lands of Critical Concern." See R.I. Admin. Code 16-1-12:920(A)(1) – (A)(4). PZ Realty avoids suggesting that the lands absorbed from Lot 155 into Lot 157 in 2008 were designated as one land use category or another. Ultimately, PZ Realty

[2] The CRMC contends that, with reference to PZ Realty's instant application for an Assent, the designation "Lands of Critical Concern" imposes stricter limitations on the use of land subject to the Salt Pond SAMP. (CRMC Decision, at AR, P3.) It is ultimately unclear whether PZ Realty agrees. (PZ Realty Reply Mem. at 3.)

suggests that Lot 155's lands are entitled to the same exemption from the "Special Exception" requirement that is putatively due to Lot 157 under § 920.1.B.2(g) of the Salt Pond SAMP. Thus, the primary question on appeal is whether the CRMC erred in determining that Lot 157, as currently configured, is subject to "Special Exception" requirement under § 920.1.B.2(g) of the Salt Pond SAMP.

III

Standard of Review

When reviewing the decisions of an administrative agency such as the CRMC, this Court "sits as an appellate court with a limited scope of review." Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993); see also Easton's Point Ass'n v. Coastal Res. Mgmt. Council, 559 A.2d 633, 635 (R.I. 1989). Appellate review of agency actions is governed by the Rhode Island Administrative Procedures Act, § 42-35-1, et seq. Iselin v. Ret. Bd. of Emps.' Ret. Sys. of Rhode Island, 943 A.2d 1045, 1048 (R.I. 2008). The applicable standard of review is codified at § 42-35-15(g), which permits this Court to affirm, remand, or modify an agency's decision "if substantial rights of the appellant have been prejudiced" because the agency's decision was:

> "(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 of 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."

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of Rhode Island v. State of Rhode Island Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010). The Court, therefore, "is confined to a determination of whether there is any legally competent evidence to support the agency's

conclusions." Strafach, 635 A.2d at 280. Accordingly, this Court defers to the administrative agency's factual determinations provided that they are supported by legally competent evidence. Arnold v. Rhode Island Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Additionally, 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. and Carriers of the State of Rhode Island, 824 A.2d 1282, 1286 (R.I. 2003) (citations omitted). This standard is permissive; the Court "must affirm the decision of the agency unless its findings are clearly erroneous." Guarino v. Dep't of Social Welfare, 410 A.2d 425, 428 (R.I. 1980).

In analyzing questions of law, however, this Court conducts a de novo review and is not bound by the agency's decision. Narragansett Wire Co. v. Norberg, 118 R.I. 596, 376 A.2d 1, 6 (R.I. 1977). Nevertheless, the agency's interpretation of its own enabling statute or regulations should be accorded "weight and deference as long as that construction is not clearly erroneous or unauthorized." In re Lallo, 768 A.2d 921, 926 (R.I. 2001) (citation omitted). This Court affords deference to an agency's interpretation of statutes that the agency has been charged with administering, "even when other reasonable constructions of the statute are possible." Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 345 (R.I. 2004). "Administrative agencies retain broad enforcement discretion and . . . considerable deference is accorded to such agencies about how to enforce regulations." Arnold v. Lebel, 941 A.2d 813, 820-21 (R.I. 2007).

IV

Analysis

PZ Realty argues that the CRMC's interpretation and application of its own regulation is clearly erroneous. Specifically, PZ Realty contends that the CRMC has misinterpreted § 920.1.B.2(g) of the Salt Pond SAMP by determining that the regulation does not exempt Lot

157, as currently configured, from a 200-foot "buffer zone" setback requirement. PZ Realty's position is that it was erroneous for the CRMC to conclude that the changes to the boundaries of Lot 157 in 2008 counteracted the fact that Lot 157 had been subdivided prior to November 27, 1984. Because Lot 157 had been subdivided prior to that date (albeit in a different configuration, shape, and size), PZ Realty argues that § 920.1.B.2(g) of the Salt Pond SAMP specifically exempts Lot 157 from the 200-foot "buffer zone" requirement. Therefore, PZ Realty argues that a Special Exception is not required to grant its application. In support of this position, PZ Realty contends that the CRMC's definition of the term "subdivision" in this case is impermissibly inconsistent and not supported by the language and intention of § 920.1.B.2(g). In addition, PZ Realty argues that the CRMC erred in finding that a prior CRMC Assent[3] confirmed that portions of the land currently comprising Lot 157 was understood to be subject to the 200-foot "buffer zone" requirement. Finally, PZ Realty contends that the CRMC's decision has impermissibly subjected PZ Realty to disparate treatment.

In response, the CRMC argues that its interpretation of § 920.1.B.2(g) and its definition of the term "subdivision" as it applies in this case is rational, fair, and well considered. Specifically, the CRMC contends that any adjustment of lot lines, including the adjustment to Lot 157 in 2008, constitutes a "new" subdivision for the purposes of § 920.1.B.2(g). The CRMC's position is that, irrespective of the fact that Lot 157 remains nominally the same lot, its new configuration resulting from the 2008 changes to its boundaries takes Lot 157 outside the protection of the § 920.1.B.2(g) exemption for "lands . . . subdivided prior to November 27, 1984[.]" In other words, the CRMC argues that, as a "new" subdivision, Lot 157 is not entitled to be exempt from the "buffer zone" setback requirement because the subdivision was not made

[3] The Assent in question was granted on lands that previously included Lot 157 as it is presently configured.

prior to November 27, 1984, and a Special Exception is therefore required for PZ Realty's proposal to gain CRMC approval. In addition, the CRMC argues that PZ Realty has not shown that it has impermissibly been subjected to disparate treatment.

A

Salt Pond SAMP § 920.1.B.2(g)

There is no dispute that Lot 157, as presently configured, is subject to § 920.1.B.2(g) of the Salt Pond SAMP. PZ Realty's appeal rests primarily on its contention that the CRMC misinterpreted § 920.1.B.2(g), which provides as follows:

> "A 200' buffer zone from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for all development activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 in Lands of Critical Concern. Relief from this regulation requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to November 27, 1984 and cannot accommodate the requirement." (Emphasis added.)

PZ Realty also concedes that the proposed structure, which is the subject of its application for an Assent by the CRMC, is unable to meet the requirements of a Special Exception as defined in section 130 of the RICRMP. Therefore, it is clear that "unless the lands were subdivided prior to November 27, 1984," § 920.1.B.2(g) would not entitle PZ Realty to obtain the Assent it seeks in its application.

PZ Realty contends that Lot 157 was subdivided before November 27, 1984. Specifically, PZ Realty points out that Lot 157 first came into existence on April 8, 1968, by the recording of a subdivision plan in the Charlestown Land Evidence Records, Book 4 at Page 47. The CRMC does not contest this fact, and it does not contest the fact that Lot 157 has existed in one configuration or another, with different boundaries and sizes, all the way through to the present day. PZ Realty therefore argues that because Lot 157 was created by subdivision prior to

November 27, 1984, Lot 157 clearly falls within the "grandfather provision" of § 920.1.B.2(g), such that it is not necessary for PZ Realty to obtain a Special Exception in order to move forward with its proposal.

PZ Realty takes issue especially with findings 21, 24, and 27 of the CRMC Decision. PZ Realty claims that findings 21 and 24 fail to take into account the fact that Lot 157 was, in some capacity, subdivided prior to November 27, 1984. In addition, PZ Realty contends that finding 27 is not supported by the language and intention of § 920.1.B.2(g), and that it depends on a definition of "subdivision" that is inconsistent with other aspects of the regulatory regime. Succinctly, PZ Realty argues that § 920.1.B.2(g) does not contain "any prohibition against future subdivisions once a lot has met the clearly stated standard for exception." The CRMC argues that its decision was rational, fair, and well considered, and that its decision is therefore entitled to deference. In support of its position, the CRMC points specifically to findings 22 through 25, and 27 through 28 of the CRMC Decision. The CRMC essentially contends that the 2008 Administrative Subdivision was a "new" subdivision, and that, as a "new" subdivision, the land comprising Lot 157 as currently configured is subject to the § 920.1.B.2(g) "Special Exception" requirement. The CRMC argues that its determination that a "new" subdivision was created in 2008 for the purposes of § 920.1.B.2(g) is well supported in the CRMC Decision itself, in addition to being well supported by the overall regulatory framework. Findings 21 through 28 of the CRMC Decision, in relevant part, provide as follows:

> "21. The CRMC staff opined while no new lots were created by the 2008 subdivision, the action nevertheless met the definition of subdivision in RICRMP § 325.A.2 as well as other provisions of the RICRMP and the SAMP.
>
> 22. The issue before the CRMC then requires interpretation by the Council of the CRMP and the SAMP sections relating to subdivisions and/or re-subdivisions. Specifically, whether the

grandfather provision of § 920.B.2.(g) (sic) allows re-subdivision or re-configuration of lots previously subdivided and yet still qualify for the grandfather exemption.

23. In looking at this interpretation, the Council notes that the provisions of the SAMP relating to subdivisions must be read in the context of the RICRMP as a whole. Specifically, the SAMP makes reference to CRMP sections relating to subdivisions and the definition thereof.

24. Additionally, the Council notes that when it drafted and adopted the definitions of subdivision and re-subdivision, and their applicability to other sections of the Council's regulations, it was the specific intent of the Council that the definitions of subdivision and/or re-subdivision be consistent with the definitions contained in the Rhode Island Land Development and Subdivision Review Enabling Act of 1992, R.I.G.L. § 45-23-1 et seq. This intention is specifically set forth in CRMP Section § 320, inter alia.

25. As set forth on the record and incorporated herein by reference, R.I.G.L. § 45-23-32(51) defines subdivision as "the division or re-division, of a lot, track or parcel of land into two or more lots, tracks 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." Additionally, the act defines re-subdivision as any change of an approved or recorded subdivision plat that affects the lot lines. Any action relating to those lot lines constitutes a subdivision.

(. . .)

27. Notwithstanding the arguments made by the applicant and it's [sic] Counsel, that among other things, no new lots were created, the Council finds the most reasonable and considered judgment on this regulatory interpretation is that, the 2008 administrative subdivision action meets the definition of a subdivision contained in the CRMP, the SAMP as well as existing statutes. Therefore, the administrative subdivision in 2008 is a new subdivision which occurred after November 27, 1984, and therefore, is not exempt from the buffer zone requirements under the SAMP and requires a Special Exception under the rules.

28. Based on the subdivision history of the parcel as set forth in the record, and the definition provided by the CRMP, SAMP and other statutes a Special Exception is triggered by the 2008

> subdivision of the property as the subdivision does not pre-date November 27, 1984."

Ultimately, PZ Realty's appeal turns on whether the CRMC's interpretation of § 920.1.B.2(g) was permissible. See In re Lallo, 768 A.2d at 926. It is clear from the CRMC's decision that the CRMC considered the applicability of § 920.1.B.2(g) to Lot 157 as currently configured and determined that the "grandfather provision" of that section does not apply because the 2008 Administrative Subdivision effectively created a "new" subdivision from the standpoint of § 920.1.B.2(g). Because Lot 157 was a "new" subdivision while still remaining nominally the same lot, the CRMC determined that Lot 157 did not constitute "lands [. . .] subdivided prior to November 27, 1984[.]" Therefore, PZ Realty must satisfy the standard for a Special Exception under § 130 of the CRMP in order to move forward with its proposal.

This Court will generally defer to an agency's interpretation of a statute that the agency is charged with administering and enforcing. Town of Richmond v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 151, 157 (R.I. 2008) (quotation omitted). If a statute is ambiguous and subject to more than one reasonable interpretation, this Court will uphold an agency's construction so long as it is not clearly erroneous or unauthorized. Gallison v. Bristol Sch. Comm., 493 A.2d 164, 166 (R.I. 1985). The same "presumption of validity" applies to the CRMC's construction of its own regulations because "the regulations are legislative rules that carry the force and effect of law[.]" Parkway Towers Assocs., 688 A.2d at 1293 (citing Lerner, 463 A.2d at 1358). "Administrative agencies retain broad enforcement discretion and . . . considerable deference is accorded to such agencies about how to enforce regulations." Arnold v. Lebel, 941 A.2d at 820-21 (R.I. 2007).

PZ Realty challenges the CRMC's interpretation of § 920.1.B.2(g) by contending that its own interpretation of the regulation is the only acceptable interpretation. PZ Realty simply argues that because Lot 157 was subdivided in some fashion prior to November 27, 1984, Lot

157 unambiguously falls within the categories of lands that are exempted from the § 920.1.B.2(g) "Special Exception" requirement, notwithstanding the dramatic change to Lot 157's shape and size following the 2008 Administrative Subdivision.

While PZ Realty's interpretation of the regulation is not irrational, the Court finds that § 920.1.B.2(g) is sufficiently ambiguous so as to permit other interpretations. See Gallison, 493 A.2d at 166. Importantly, in designating which areas within the Salt Pond SAMP qualify for exemption from the Special Exception requirement, § 920.1.B.2(g) does not contemplate "lots," but instead speaks of "lands." See § 920.1.B.2(g) (stating that "[r]elief from this regulation requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to November 27, 1984 and cannot accommodate the requirement." (Emphasis added)). In this case, the lot lines enclosing Lot 157 were changed without seeking any input from the CRMC. The change resulted in a dramatic increase in the size of Lot 157, and the lot also changed dramatically in shape. In situations such as this, where the boundaries of a lot change dramatically in an area subject to the Salt Pond SAMP, without any participation by the CRMC, it would be reasonable for the CRMC to find that, after the 2008 Administrative Subdivision, Lot 157 no longer constituted the same subdivided "lands," irrespective of whether it remained nominally the same lot.[4] Under this view, because new subdivided "lands" were created well after November 27, 1984 via the 2008 Administrative Subdivision, the new subdivided "lands," a fortiori, could not have been subdivided prior to November 27, 1984.

In fact, the CRMC's interpretation of § 920.1.B.2(g), as set out in finding 27 of the CRMC Decision, is entirely consistent with this alternative. In finding 27, the CRMC stated that

[4] Alternatively, if PZ Realty's position were taken to its extreme, the CRMC would effectively be compelled to cede its statewide authority over "preservation and restoration of ecological systems" to the Town of Charlestown. See Milardo, 434 A.2d at 271.

"the administrative subdivision in 2008 [was] a new subdivision which occurred after November 27, 1984." (Emphasis added.) Implicit throughout the CRMC Decision is the understanding that it would be impossible for "new" subdivisions created after November 27, 1984 to have been subdivided before that date. For example, the CRMC expressly found that because the 2008 Administrative Subdivision amounted to a "new" subdivision, Lot 157 "is not exempt from the buffer zone requirements under the SAMP and requires a Special Exception under the rules." Therefore, PZ Realty's contention that "there is . . . no prohibition in the regulation against future lot line changes" is inapposite because the CRMC determined that after 2008, Lot 157 became a "new" subdivision from the perspective of § 920.1.B.2(g). Moreover, the CRMC's determination that changes in the dimensions or boundaries of a lot in fact constitute a "subdivision" within the meaning of § 920.1.B.2(g) is clearly well-supported as the CRMC decision cites to numerous aspects of the regulatory framework that support that interpretation.[5]

PZ Realty also argues that Lot 157 should not lose the benefit of the § 920.1.B.2(g) exception on account of the 2008 Administrative Subdivision because "[t]he purpose of the lot line change was solely to increase the lot area consistent with CRMC's policies in the zones in question." In addition, PZ Realty contends that finding 27 "creates what is tantamount to a regulatory taking of the property." The question presently before the Court relates only to the permissibility of the CRMC's interpretation of § 920.1.B.2(g). This Court must "uphold an agency's construction so long as it is not clearly erroneous or unauthorized." Gallison, 493 A.2d at 166. PZ Realty's intentions in securing a lot line change for Lot 157 from the Town of Charlestown, without informing the CRMC, clearly have no bearing on whether or not the CRMC's construction of § 920.1.B.2(g) was clearly erroneous or unauthorized and are,

[5] See, e,g,, findings 21 and 24 of the CRMC Decision.

therefore, immaterial to PZ Realty's instant appeal. Moreover, although PZ Realty raises the specter of a "regulatory takings" issue, it has made no substantive arguments in that regard. Our Supreme Court has endorsed several general principles relevant to making out a claim for a regulatory taking. See Woodland Manor III Assocs. v. Keeney, 713 A.2d 806, 811 (R.I. 1998) (citing relevant factors such as "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action."). Because PZ Realty has failed to substantively address any potential claim of regulatory taking, the Court rejects PZ Realty's contention that the CRMC's interpretation of § 920.1.B.2(g) is "tantamount to a regulatory taking of the property."

In addition, PZ Realty contests finding 7 of the CRMC Decision, which states the following:

> "7. The subject parcel of land is at least partially located within a CRMC approved six-lot subdivision subject to [the 1990 Assent]. The CRMC approved the six-lot subdivision after determining it met the requirements of [the Salt Pond SAMP]. Stipulation "F" of the subject assent confirmed the two hundred foot (200') buffer zone required by the Salt Pond SAMP for "Lands of Critical Concern" was met by the subdivision."

PZ Realty contends that the 1990 Assent in fact places no constraints whatsoever on the land that was later absorbed from Lot 155 into Lot 157 via the 2008 Administrative Subdivision. Although PZ Realty contends that such factual determinations are not "relevant to the limited determination to be made by [this] Court in this Appeal," (Pl.'s Reply at 1-2), PZ Realty also suggests that the CRMC Decision is premised on unsupported facts.

This Court defers to the administrative agency's factual determinations provided that they are supported by legally competent evidence. Arnold v. Rhode Island Dep't of Labor and

Training Bd. of Review, 822 A.2d at 167. "Legally competent evidence is defined as 'such 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.'" Foster-Glocester Regional Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1012 (R.I. 2004) (quoting Rhode Island Temps, Inc. v. Dep't of Labor and Training, Bd. of Review, 749 A.2d 1121, 1125 (R.I. 2000)). 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., 824 A.2d at 1286. The Court finds that finding 7 of the CRMC's decision is supported by legally competent evidence. In particular, the CRMC relied on the CRMC biologist's report for the determination that the land that was subject to the 1990 Assent was categorized as "Lands of Critical Concern" within the Salt Pond SAMP. See CRMC Staff Sign-Off, at AR, P7-P8. The Court is satisfied that this report constitutes legally competent evidence as to the nature of the land subject to the 1990 Assent. Moreover, PZ Realty appears to concede that the CRMC's purported error in finding 7 would not be a deciding factor in its instant appeal, as PZ Realty avoids suggesting that the lands absorbed from Lot 155 into Lot 157 were designated as one land use category or another prior to 2008.[6]

This Court is mindful that an agency's interpretation of its own regulations should be accorded "weight and deference as long as that construction is not clearly erroneous or unauthorized." In re Lallo, 768 A.2d at 926. Moreover, this principle of administrative review holds true "even when other reasonable constructions [. . .] are possible." Labor Ready Northeast, Inc., 849 A.2d at 345. The CRMC's interpretation of § 920.1.B.2(g) is not "clearly

[6] PZ Realty appears to suggest that Lot 155's former lands would be entitled to the same exemption from the "Special Exception" requirement that is putatively due to Lot 157 under § 920.1.B.2(g) of the Salt Pond SAMP.

erroneous or unauthorized." However reasonable PZ Realty's interpretation of the regulation may be, it was also reasonable for the CRMC to interpret § 920.1.B.2(g) to require PZ Realty to obtain a Special Exception in this case. "Administrative agencies retain broad enforcement discretion and . . . considerable deference is accorded to such agencies about how to enforce regulations." Arnold v. Lebel, 941 A.2d at 820-21.

B

Disparate Treatment

As discussed above, the CRMC's interpretation of its own regulation is generally entitled to deference and a "presumption of validity." See Parkway Towers Assocs., 688 A.2d at 1293; Arnold v. Lebel, 941 A.2d at 820-21. In addition, an agency must be given latitude to adapt to changing circumstances and is free to change its position if it believes its previous position was based on a mistaken interpretation. See 2B Sutherland Statutory Construction §49:4 (7th ed. 2012) (citing Santa Fe Pacific R. Co. v. U.S., 294 F.3d 1336 (Fed. Cir. 2002)). Nevertheless, "[c]ourts value an agency's consistency." Id. Therefore, an agency interpretation that departs from prior interpretations is "entitled to considerably less deference" than a consistently held position. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (quotation omitted). An agency's departure from a prior interpretation or precedent without providing a reasoned analysis may require the reviewing court to vacate the agency's action as arbitrary and capricious. Harrington v. Chao, 280 F.3d 50, 58-59 (1st Cir. 2002) (citations omitted); 73A C.J.S. Public Administrative Law and Procedure § 419 (2012). Rhode Island law appears to recognize claims for disparate treatment at the hands of an administrative agency, but the standards for such a claim are not clear. See Mill Realty Assocs. v. Crowe, 841 A.2d 668, 674-75 (R.I. 2004). The standard appears to be that a claim for disparate treatment will succeed if it can be shown that the

agency's decision was "arbitrary and capricious because there was no rational basis in the record for [. . .] disparate treatment of [the] application." Id. at 675.

In its instant appeal, PZ Realty contends that it suffered disparate treatment at the hands of the CRMC because, at the October 25, 2011 hearing, PZ Realty presented evidence that the CRMC had previously granted an Assent to newly subdivided lots subject to the Salt Pond SAMP without requiring the prior applicant to meet the stringent requirements of a Special Exception, as required by § 920.1.B.2(g). The CRMC acknowledges that the prior Assent was inconsistent with the Declaratory Ruling that is the basis of PZ Realty's appeal because the two situations are "similar." (Def.'s Mem. at 14.) However, the CRMC maintains that the prior Assent was granted on the basis of a material misrepresentation made by the applicant in that case; specifically, that the prior applicant had stated in its application that the lots in question were created prior to 1984, and the CRMC staff saw no reason to doubt that assertion. In contrast, the CRMC claims that staff members working on PZ Realty's instant application had personal knowledge that Lot 157 had been reconfigured as a result of the 2008 Administrative Subdivision, and therefore sought out more definitive information as to whether the lot qualified for "grandfather" status under § 920.1.B.2(g). These factual assertions are supported by competent evidence, namely, the testimony of the CRMC Wildlife Biologist at the October 25, 2011 hearing. See Hr'g Tr., at AR, P116, P121. Moreover, the CRMC has represented to this Court that it is currently taking enforcement actions against the prior applicant to ensure equal treatment and uniform application of its regulations.

Given the CRMC's factual findings, PZ Realty fails to show that the CRMC has changed its previous position or departed from a prior interpretation or precedent. See Cardoza-Fonseca, 480 U.S. at 446 n.30. In addition, the CRMC has provided a reasoned analysis that explains

discrepancies between the prior Assent and PZ Realty's instant application, and the CRMC is working to investigate potential material misrepresentations that affected the outcome of the prior case. The Court finds, therefore, that PZ Realty does not present adequate grounds to successfully challenge the CRMC's Declaratory Ruling for being "arbitrary and capricious." See Harrington , 280 F.3d at 58-59. Moreover, the Court finds that there was clearly a rational basis in the record for any purported disparate treatment of PZ Realty's application because the CRMC staff was not aware of material misrepresentations in the application for the prior assent, whereas the CRMC staff had personal knowledge of Lot 157's lot line changes resulting from the 2008 Administrative Subdivision. See Mill Realty Assocs., 841 A.2d at 674-75. For the reasons outlined in this section, PZ Realty's disparate treatment claim must fail.

V

Conclusion

For all the foregoing reasons, the Court affirms the decision of the CRMC, which determined that PZ Realty's application for an Assent required a Special Exception as a result of an administrative subdivision of the Appellant's property approved by the Town of Charlestown in 2008. The CRMC's decision was not affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or arbitrary or capricious. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**PZ Realty, LLC v. The Coastal Resources Management Council of the State of Rhode Island**
CASE NO:	**C.A. No. WC 2012-0057**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**August 15, 2013**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Donald J. Packer, Esq.**
For Defendant:	**Brian A. Goldman, Esq.**