STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 3, 2016)

MICHAEL AND LEIGH EDDY	:	
	:	
V.	:	**C.A. No. PC-2013-1213**
	:	
COASTAL RESOURCES MANAGEMENT COUNCIL (CRMC) by and through its members Anne Maxwell Livingston, Chair, Paul E. Lemont, Vice Chair, David Abedon, Tony Affigne, Raymond C. Coia, Janet Coit, DEM Director, Guillaume de Ramel, Donald Gomez, Michael Hudner and Jerry Sahagian and JEFFREY M. WILLIS in his official capacity as the Deputy Director of CRMC.	:	

DECISION

MCGUIRL, J. Michael and Leigh Eddy (the Eddys or Appellants) appeal from a decision of the State of Rhode Island Coastal Resources Management Council (the Council or CRMC) issued on February 14, 2013. The Council found that the Eddys had altered the "buffer zone"[1] on their property in violation of previous assents and consent agreements, and that Appellants' dock was not in compliance with CRMC Assent A2003-07-010. The Eddys were given thirty days to bring the dock into compliance and restore the buffer zone. They now contend that the information underlying the decision was illegally obtained, insufficient to warrant the Council's findings, and clearly erroneous. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

[1] "A Coastal Buffer Zone is 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." R.I. Code R. 16-2-1:150.

I

Facts & Travel

This dispute concerns improvements to property owned by Appellants located at 47 Carousel Drive, East Providence, Rhode Island (the Property). The Property is part of a forty-six unit subdivision authorized in 1997 by CRMC Assent B97-6-25 (1997 Assent) issued to Kelly & Picerne, Inc., the developer. (Tr. at 17:3–5.) As part of the 1997 Assent, there was a deeded Conservation Easement Agreement (the Easement) granted by Kelly & Picerne, Inc. in favor of CRMC and the City of East Providence. Id. at 17:5–10. The Easement coincides with the buffer zone,[2] which is an average of 100 feet in width but varies throughout the subdivision. Id. at 23:10–12. As part of the Easement, CRMC was granted the right to enter upon the buffer zone included in the Property "in order to prevent the existence of any condition which is in violation of th[e] easement. . . ." (R. at 21.)

The Eddys purchased the Property on or about May 25, 2001. Since that time, there have been two other violations at the Property; both involving the buffer zone. (Tr. at 23:16–17.) In 2003, the Eddys entered into a consent agreement with CRMC. (R. at 26–27.) The Eddys consented and agreed "that, except as specifically authorized under CRMC assent A02-07-38, and A01-06-52, there shall be no further alteration (mowing, pruning, thinning, etc.) of the required 100' buffer zone on site." Id.

[2] The buffer zone was established "to conserve and protect the special plant and animal populations within in perpetuity, and to prevent any uses or development activity within the area that would impair or interfere with the conservation values, or be contrary to its current scenic and natural condition." (R. at 24, CRMC Letter to Carousel Drive Property Owners, dated April 29, 2002.)

On August 16, 2011, CRMC received a complaint about clearing in the Eddys' buffer zone. (Tr. at 23:22–24.) Pursuant to this anonymous tip[3], CRMC conducted a compliance inspection. Id. at 23:24-24:1. Laura Miguel (Ms. Miguel) and Brian Harrington (Mr. Harrington), members of CRMC's compliance staff, conducted the inspection after accessing areas of the buffer zone on the Eddys' Property by way of neighboring properties also covered by assents. Id. at 24:3–5. Ms. Miguel and Mr. Harrington conducted their inspection from the buffer and easement area at all times, never entering onto other areas of the Property. Id. at 24:5–8. Following this inspection, Ms. Miguel sent the Eddys a cease and desist order regarding alterations[4] made to their buffer zone, which were done "without benefit of a CRMC assent and in violation of a signed Consent Agreement dated March 4, 2003." (R. at 28, Cease and Desist Order 11-0100, dated September 23, 2011.) The Eddys were fined $2500, and they were given ten days to cease all activity in the buffer zone and contact CRMC. Id.

In November of 2011, Ms. Miguel and Mr. Harrington performed a follow-up inspection, which was routine practice after a buffer zone violation. (Tr. at 24:14–17.) During this inspection, they discovered that there was a dock on the Property. The Eddys applied to build such a dock in 2003, but only obtained an assent to build a timber walkway, terminating in a four-by-four viewing platform.[5] Id. at 24:19–20; 25:9–11. Ms. Miguel and Mr. Harrington observed a forty-and-one-half foot fixed pier, a sixteen-and-one-half foot ramp, and a twenty-foot float. Id. at 25:11-13. These new observations resulted in a second cease and desist order[6] being issued to the Eddys along with a second $2500 fine. Id. at 25:13–14.

[3] Laura Miguel, CRMC compliance staff, represents that "all of the complaints are anonymous." (Tr. at 34:23.)
[4] The buffer zone had been mowed and was "substantially lawn." (R. at 10, File Summary.)
[5] See R. at 31, Assent, dated July 26, 2005.
[6] Cease & Desist Order 11-0117 was not included as part of the record.

On August 23, 2012, the Eddys sought to challenge the fine before an appointed hearing officer, but the Eddys refused to participate in the administrative fine appeal hearing[7] after learning that CRMC had entered onto "their property . . . without [the Eddys'] consent or knowledge. . . ." (R. at 44.) Thereafter, the hearing officer referred the matter to the full Council for an order to remove the dock and restore the buffer zone. Tr. at 25:17–19; R. at 11.

On September 11, 2012, CRMC held a full hearing on this matter. At the hearing, Ms. Miguel testified about how the violations at the Property were discovered as well as about a series of photos of the buffer zone and allegedly noncompliant structure taken by her and Mr. Harrington at the Property. Tr. at 26:19-28:8. The first photos were taken during the original visit in August of 2011 after CRMC had received a complaint about the Eddys' buffer zone. (R. at 12, Photo 1, dated August 16, 2011; R. at 13, Photo 2, dated August 16, 2011.) Photos three and four were taken in August of 2012, prior to the Administrative Fine Appeal hearing. Id. at 14, Photo 3, dated August 21, 2012; 15, Photo 4, dated August 21, 2012. Ms. Miguel testified that even in the photos from August 2012, she "would not consider that to be a fully vegetated buffer." (Tr. at 43:1–3.) She also explained how, following the two prior violations, she spent "a considerable amount of time" educating the Eddys "about what was allowed and what wasn't allowed on this property." Id. at 33:13–16.

As to the dock, Ms. Miguel testified about several photos showing the structure. First, as to photo number five, which was taken on August 16, 2011, she and Mr. Harrington were unaware that it was a violation at that time. Id. at 27:16–20; R. at 16, Photo 5, dated August 16,

[7] CRMC is authorized by its enabling legislation to assess an administrative penalty of not more than $2500 to "[a]ny person who violates, or refuses or fails to obey, any notice or order issued pursuant to § 46-23-7(a); or any assent, order, or decision of the council . . . ." See G.L. 1956 § 46-23-7.1. A party receiving notice of the assessment of a fine may request a hearing before an officer designated by the executive director under § 46-23-7.1(1).

2011. They knew there was an assent, but they did not know that "the assent was for a walkway that terminated significantly inland of where the dock is." Tr. at 27:20–23. It was only upon their return in November of 2011 that Ms. Miguel and Mr. Harrington discovered that the dimensions of the dock on the Property differed dramatically from the dimensions of the walkway and viewing platform in the assent. Id. at 25:7–13. Ms. Miguel presented a picture of the dock which shows CRMC staff biologist, Sean Feeley, standing "where the viewing platform would have terminated" based on the 2007 Assent. (R. at 17, Photo 6, dated August 21, 2011; Tr. at 28:4–6; R. at 31, Assent, dated July 26, 2005.) Ms. Miguel further offered two Google Earth pictures showing that the dock had been in existence since at least 2007. (R. at 18, Photo 7, dated July 28, 2007; R. at 19, Photo 8, dated April 2, 2012; Tr. at 28:7–11.)

Ms. Miguel also offered testimony regarding the Conservation Easement and Restrictions—an agreement between the developer of the forty-six unit subdivision, CRMC, and the City of East Providence—in order to establish its existence and to clarify "that there was a conservation easement on the property . . . ." (R. at 9; Tr. at 33:1–2.) She also testified regarding the 2003 Consent Agreement between CRMC and the Eddys, which was entered into following the two earlier buffer zone violations. (R. at 26–27; Tr. at 33:3–10.)

Finally, Ms. Miguel informed CRMC that the compliance staff's recommendations were as follows: "the dock should be removed in its entirety, nobody else in this subdivision has a dock, nobody else has been allowed to have a dock, as far as I know. We also recommend that the buffer be restored in accordance with the Council's guidelines . . . ." (Tr. at 33:16–22.) The compliance staff further recommended that "the Council make an order to that effect, that the dock be removed and the site be restored by October 15th [2012], . . . that the ability to assess a penalty of $500 a day, up to an aggregate of $10,000, be implemented." Id. at 33:22–34:3.

The Eddys' attorney, Ms. Mannis, then examined Ms. Miguel to elicit that her initial investigation was in regard to an alleged violation of a Consent Agreement dated March 4, 2003. (Tr. at 37:7–9.) Ms. Mannis argues that the Consent Agreement did not contain permissive language inviting CRMC to enter onto the property for investigative purposes and should not be viewed as a basis for entry. Moreover, she contends that this entry violated the Eddys' "constitutionally guaranteed rights." (R. at 43.) Ms. Mannis sent a letter to Mr. Goldman, counsel for CRMC, asserting the Eddys' Fourth Amendment right. Mr. Goldman responded to this letter with the Council's current position and evidence of the assents and easements governing CRMC entry onto the Property. The correspondence between Ms. Mannis and Mr. Goldman is set forth in the record at 36 and 43.

On January 22, 2013, CRMC issued a lengthy, five-page decision which includes detailed findings of fact and conclusions of law (the Decision). (R. at 2.) The Council found, inter alia, that the dock at the property constitutes "an illegal structure" and found it "clear the conditions of the buffer zone Assent have been violated. . . ." (R. at 5, ¶ 18.) However, instead of ordering the removal of the dock, as is well within the authority of CRMC, the Council accepted "the representations of the Eddy's (sic) counsel that the dock will be removed and the walkover structure brought into compliance, as well as the buffer zone being restored."[8] Id. The Eddys were given thirty days to comply. They now bring this appeal seeking to suppress evidence of the violations and challenging the sufficiency of the Decision.

[8] Despite very frank language from members of the Council at the formal hearing, Ms. Mannis would not agree that the structure, such as it is, violates any assent or consent agreement. Instead, she agreed that, if the structure is not currently compliant, the Eddys would bring it into compliance with the assents in the record. (Tr. at 57–58.)

II

Standard of Review

This Court "sits as an appellate court with a limited scope of review" when reviewing the decisions of an administrative agency such as CRMC. Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). Appellate review of agency actions is governed by the Rhode Island Administrative Procedures Act (APA), codified at chapter 35 of title 42 of the Rhode Island General Laws. Section 42-35-15(g) provides the Court may:

> "affirm the decision of the agency or remand the case for further proceedings, or . . . 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." 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. When standing in its appellate role, the 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). If this Court finds that substantial evidence exists in the record, it '"is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I.

Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994)) (internal quotation marks omitted). This Court reviews questions of law de novo. See Arnold, 822 A.2d at 167.

III

Analysis

A

Exclusionary Rule

As a threshold matter, Appellants contend that CRMC exceeded its constitutional and statutory authority when its agents entered the Property to conduct an inspection without first obtaining a warrant. Specifically, the Eddys argue that evidence, pictures, and mental impressions acquired from the investigation should have been excluded from the Council's consideration at hearing as fruit of the poisonous tree. (R. at 47.) In response, CRMC argues that the exclusionary rule is not activated in the administrative context and, if it is, evidence of the disputed improvements should fall outside the purview of the rule because Appellants explicitly consented to CRMC oversight prior to the investigation and the improvements are located in "plain view." (Tr. at 57:9–24; Tr. at 16–17; Tr. at 19:11.)

The Fourth Amendment of the United States Constitution extends to all citizens the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." Rhode Island residents are afforded coextensive[9] protection under article I, section 6 of the Rhode Island Constitution, which states:

> "The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in

[9] See Brousseau By & Through Brousseau v. Town of Westerly By & Through Perri, 11 F. Supp. 2d 177, 183 (D.R.I. 1998).

> writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized." R.I. Const. art. I, § 6.

These constitutional protections are enforced primarily through the exclusionary rule, which provides a vehicle for courts and quasi-judicial bodies to exclude improper evidence from the consideration of the fact finder. "The exclusionary rule . . . was first promulgated by the United States Supreme Court in Weeks v. United States, 232 U.S. 383 . . . (1914), and was later extended in application to state criminal proceedings by the decision in Mapp v. Ohio, 367 U.S. 643 . . . (1961)."[10] Prior to Mapp, Rhode Island's exclusionary rule was codified in G.L. 1956 (1985 Reenactment) § 9-19-25 and continues to govern this issue. It states:

> "In the trial of any action in any court of this state, no evidence shall be admissible where the evidence shall have been procured by, through, or in consequence of any illegal search and seizure as prohibited in section 6 of article 1 of the constitution of the state of Rhode Island." Sec. 9-19-25.

Rhode Island has never developed an independent jurisprudence addressing the applicability of the rule in the civil context, but our courts have "with very few exceptions, followed the opinions of the United States Supreme Court whether premised on the Fourth Amendment to the United States Constitution or on our own statutory exclusionary rule." State v. Mattatall, 603 A.2d 1098, 1113 (R.I. 1992). The United States Supreme Court has noted "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." United States v. Janis, 428 U.S. 433, 447 (1976); see also I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that credible evidence obtained by immigration officers did not need to be excluded because a deportation proceeding is a civil proceeding). Critically, administrative searches are civil in nature and "'differ from traditional criminal searches' because the 'Fourth Amendment only applies where the object of the search is

[10] See Bd. of License Comm'rs of Tiverton v. Pastore, 463 A.2d 161, 162 (R.I. 1983).

to penalize, which is not the case with an administrative search.'" M.D. v. State, 65 So. 3d 563, 567 (Fla. Dist. Ct. App. 2011); see also State v. Carter, 733 N.W.2d 333, 337 (Iowa 2007) (holding "administrative searches are treated differently, for Fourth Amendment purposes, because generally the intrusion on privacy is reduced").

In Pastore, 463 A.2d at 164, our Supreme Court looked to federal courts[11] for guidance on the application of the exclusionary rule in the administrative context. In that case, our Supreme Court applied the exclusionary rule to "administrative proceedings when the police [] searched premises known to be licensed for the sale of liquor and [] turned over the fruits of the search to the administrative agency empowered to revoke the license." In its reasoning, the Pastore Court considered the tangible impact that certain types of administrative proceedings may have on the violator and noted that experts have found, in the liquor licensing context, "a forfeiture proceeding could result in punishment greater than the criminal prosecution for the underlying conduct." Pastore, 463 A.2d at 163. "Although technically a civil proceeding, a license revocation based on an illegal search and seizure to uncover stolen goods is in substance and effect a quasi-criminal proceeding since its object is to penalize for the commission of an offense against the law, thereby invoking the application of the exclusionary rule." Id. at 165.

The instant matter is readily distinguishable from Pastore. In Pastore, the Court sought to penalize a violation of the law. By contrast, here the Council seeks to ensure administrative compliance. Although administrative fines have been levied as an enforcement mechanism, the Eddys do not face the burden and stigma of criminal punishment because the matter before this Court is civil in nature. Additionally, unlike the search in Pastore, this search was conducted by the administrative agency's own compliance officers pursuant to narrowly tailored authority

[11] See One 1958 Plymouth Sedan v. Commonwealth of Pa., 380 U.S. 693 (1965).

within its public mission to regulate coastal lands, not police providing evidence obtained at a private business in a collateral civil matter. The Court is satisfied that the instant search, conducted in the administrative context, does not implicate the exclusionary rule.

Moreover, the Court notes that there is no warrant requirement found in CRMC's statute. Section 46-23-7(a)(3) of the Rhode Island General Laws states that CRMC "shall have authority to apply to a court of competent jurisdiction for a warrant to enter on private land to investigate possible violations of this chapter; provided that they have reasonable grounds to believe that a violation has been committed, is being committed, or is about to be committed." Sec. 46-23-7(a)(3) (emphasis added). Importantly, the statute's plain language is permissive and not mandatory; the "authority to apply" for a warrant is not equivalent to a warrant requirement. See 1A Sutherland Statutory Construction § 25:1 (7th ed.) ("Enabling legislation under which persons may claim special powers or privileges is overtly permissive."); see also Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006) ("'When the language of a statute is clear and unambiguous, [the Court] must enforce the statute as written by giving the words of the statute their plain and ordinary meaning.'") (quoting Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 811 (R.I. 2005)). Indeed, our Supreme Court has never found such a warrant requirement in this context, and this Court will not fashion one from whole cloth.[12] See In re Request for Advisory Op. from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 941 (R.I. 2008) (describing § 46-23-7(a)(3) as empowering CRMC to apply for a warrant, with no mention of a warrant requirement). Furthermore, § 46-23-7(a)(3) is not implicated here as CRMC did not have "to enter on private land." The August 2011 compliance inspection was

[12] Mr. Goldman, CRMC counsel, argued that § 46-23-7(a)(3) only applies in criminal contexts and the Council agreed with this position when it refused to exclude evidence of the violations. (Tr. at 16:12) However, Mr. Goldman presents no authority to support this position, and the Court has not located binding authority addressing this point.

conducted only from the buffer zone and easement area and CRMC compliance staff could see the violations from a vantage point on the Eddys' neighbor's property. Tr. at 24:5–8; R. at 12, 13, 16. Accordingly, CRMC's decision to consider the evidence was not in violation of constitutional or statutory provisions.

1

Assent

Even assuming, arguendo, that a warrant requirement exists in this context in Rhode Island, the weight of the evidence supports the Council's finding that Ms. Miguel and Mr. Harrington entered onto the Property under the clear and unambiguous consent of the Eddys. CRMC has been actively engaged in the regulation of the Property since it was acquired by the Eddys on or about May 25, 2001. Between acquisition and the instant matter, the Property was cited for two additional violations concerning buffer zone restrictions,[13] and Appellants were granted three permits for improvements affecting the buffer zone. (R. at 3, ¶ 6.) The Council represents that every applicant for assent agrees to permit periodic and continuing access to the relevant property for the purpose of inspection in both the application and the subsequent assent. Id. at ¶ 7. The instant matter is no exception. See e.g., R. at 40.

On July 15, 2003, Michael Eddy signed and submitted a standard Application for State Assent to improve upon the Property by constructing a ninety foot "residential pier" with a fifteen foot ramp and a "floating dock." (R. at 40.) The application clearly states that "as a condition to the granting of this assent, members of the CRMC or its staff shall have access to the applicants (sic) property to make on-site inspections to insure compliance with the assent."

[13] In each case, the unauthorized alterations were resolved through Consent Agreements.

Id. This condition is further clarified in the subsequent Assent issued July 18, 2005.[14] Therein, CRMC reserves the right to "inspect said project at all times including, but not limited to, the construction, completion, and all times thereafter." (Assent No. A2003-07-010, Page 2) (emphasis added). These documents grant unequivocal access for legitimate agency purposes.[15]

2

Easement Agreement

The Property is also subject to a Conservation Easement Agreement executed between Kelly & Picerne, Inc., and CRMC on December 15, 1998. The parties do not dispute that the Agreement governs in perpetuity, runs with the land, was incorporated in the sale of the land, and affords CRMC certain rights including the remedy of reentry. It states in pertinent part:

> "[i]f Grantees determine that Grantor or its successors or assigns is in violation of the terms of this Conservation Easement and Restrictions, then the Grantees have the right and easement to enter upon the Conservation Easement Area in order to prevent the existence of any condition which is in violation of this easement or which would reasonably tend to detract from or diminish the aesthetic appearance of said land." R. at 21 (emphasis added).

[14] Appellants did not appeal the Council's decision to approve a smaller, modified structure.

[15] The Eddys contend that any Assents governing the Property expired by their own language prior to the investigation. The pertinent language set forth in all Assents states as follows:

> "All work being permitted must be completed on or before **July 18, 2008** after which date this assent is null and void, (unless written application requesting an extension is received by CRMC sixty (60) days prior to expiration date)" (R. at 31.)

Counsel to CRMC argues that this language simply sets a date for the revocation of the state's permission to build at the site. The language does not waive or otherwise impair any right of the state to enforce the plain language of the agreement, because to do so would undermine the document's very purpose, including language permitting inspection "all times thereafter." Moreover, the fact remains that a structure was built and remains on the Property. Either the Assent persists, and CRMC has the right to enter the Property, or the Assent expired and any structure on the Property, of which there is ample evidence, sits in violation of the governing statute. In either case, the Council's finding as to this procedural issue is neither clearly erroneous nor in violation of its statutory authority.

CRMC and the City of East Providence received this deeded right from Appellants' direct predecessor in title as a condition to the issuance of an Assent permitting development of the Property. Under the Agreement, no modification of the "open, natural, undisturbed" buffer zone may be affected without CRMC approval. Id. The Easement was recorded in 1999, and Appellants purchased the property in 2001 subject to the terms and conditions of Assent B97-6-25 and the Easement. Together, these documents demonstrate clear and unambiguous consent. See Kmiec v. Liquor Control Hearing Bd., 87 R.I. 257, 262, 140 A.2d 133, 135 (1958) (where there is no "evidence [in the record] to show that petitioners' consent was obtained by force, misrepresentation or trickery . . . there has been no violation of petitioners' constitutional rights of freedom from unreasonable search and seizure and . . . it was not error to admit such evidence").

3

Plain View

Additionally, the record indicates that the disputed improvements were in plain view from public waters and areas governed by valid assents. "[T]he 'plain view' exception to the warrant requirement 'permits law enforcement to seize objects if (1) the officer is lawfully present in the location where the observation is made[;] (2) the officer has lawful access to the item[;] and (3) the object's incriminating nature is immediately apparent.'" Sheffield v. United States, 111 A.3d 611, 620 (D.C. 2015) (quoting United States v. Davis, 657 F. Supp. 2d 630, 637 (D. Md. 2009) aff'd, 690 F.3d 226 (4th Cir. 2012)). The Council found that compliance staff lawfully entered onto the Eddys' neighbor's property. It is uncontested that the Eddys' neighbor's property is governed by valid assents and situated adjacent to the Property. From that vantage, Ms. Miguel testified that she could look over onto the Eddys' Property and see

substantial clearing had taken place in the buffer zone and a structure was present in the buffer zone. See R. at 12, 13, 16. There is no evidence that compliance staff ever entered onto portions of the Property not controlled by a valid assent. Even if they had, the initial observations of clearing and noncompliant improvements in plain view would have permitted admittance. "Where the initial intrusion that brings the [compliance officer] within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, [such as consent], the seizure is also legitimate." Coolidge v. N.H., 403 U.S. 443, 465 (1971).

The record demonstrates that the disputed evidence was in "plain view." As such, this Court finds that CRMC did not obtain evidence in violation of the Eddys' constitutional and statutory rights or in excess of CRMC's authority, and that the Decision was not made upon unlawful procedure.

B

Sufficiency of the Evidence

In its Decision, CRMC found two distinct but related violations. First, the Council found that the Eddys are responsible for significant clearing in the "buffer zone," and, second, that a noncompliant structure is located in that zone. Instead of compelling the Eddys to remove the structure, which was well within its authority, the Council accepted the "alternative of merely bringing the structure back into compliance with CRMC Assent 2003-07-010" and restoring the buffer zone in keeping with previous consent agreements. (R. at 5, ¶ 17.) Now, the Eddys contend that CRMC's violation findings are clearly erroneous given the dearth of reliable, probative, and substantial evidence in the record.

In their memorandum, Appellants claim that "[t]he evidence as a whole does not support a finding of violation in this case." Specifically, Appellants contend CRMC heard "[n]o evidence supporting" a buffer zone infraction, only "vague references to altering a buffer zone." However, the Council's findings and conclusions are supported by substantial evidence in the record. For example, the record includes photographs dated August 16, 2011, which show substantial clearing of the buffer zone. See R. at 12, 13. The record also includes photographs of a partially revegetated buffer zone dated August 21, 2011. See R. at 14, 15. The clearing's significance and the insufficiency of the revegetation effort were both remarked upon in the testimony of Ms. Miguel and accepted by the Council as credible. Moreover, this Court defers to the agency when it utilizes specialized knowledge. See Robert E. Derecktor of R.I., Inc. v. United States, 762 F. Supp. 1019, 1022 (D.R.I. 1991) ("[w]here an agency's decision is highly technical, and specialized knowledge is required, judicial deference is necessary"). The agency relied on such specialized knowledge to determine whether the buffer zone in the pictures reflects the appropriate level of vegetation. Therefore, the Court finds competent evidence in the record to support CRMC's findings of a buffer zone infraction.

In addition to the buffer zone violation, the Council also found that "the credible evidence is clear a dock has been constructed [in that zone], which was never permitted." (R. at 5, ¶ 15.) However, Appellants argue that critical deficiencies in the record as to the precise nature of the dock render the finding insufficient: "[n]o measurements were offered", "[n]o showing was made as to what specific regulation(s) the Eddys allegedly violated and how." Appellants' Mem. at 8.

CRMC derives its statutory authority to regulate coastal waters and resources from §§ 46-23-1, et seq.[16] As part of this mission, the General Assembly has empowered CRMC to monitor all development within 200 feet of the shoreline as set forth in R.I. Code R. 16-2-1.[17] Consequently, any structure permanently situated within that zone must necessarily be governed by a valid assent. Id.

The Court finds substantial probative evidence in the record to support CRMC's findings regarding the presence and dimensions of the structure. The Council viewed a copy of Assent 2003-07-010 at the hearing and heard testimony from Ms. Miguel as to what the Assent was intended to permit. By its terms, the Assent permits "a timber walkway terminating in a four-by-four viewing platform." (Tr. at 25:9–10.) Ms. Miguel also testified as to the precise dimensions of the improvement that she and Mr. Harrington witnessed at the site during the second inspection. They found a "40-and-[one]-half foot fixed pier, 16-and-[one]-half foot ramp and a 20 foot float at the site." (Tr. at 25:11–13.) The improvement in Ms. Miguel's description is clearly inconsistent with the plain language of Assent 2003-07-010, which includes a diagram of an approved structure terminating in a four-by-four platform. See R. at 33. The Council's findings as to the dock are also supported by photographs in the record that show a clearing of

[16] "The primary responsibility of the council . . . [is] the continuing planning for and management of the resources of the state's coastal region." Sec. 46-23-6.

[17] CRMC regulations governing development explicitly provides:

> "[a]ll developments or operations within, above or beneath the tidal waters below the mean high water mark extending out to the extent of the state's jurisdiction in the territorial sea, and those occurring on coastal features or within all directly associated contiguous areas which are necessary to preserve the integrity of coastal resources, or any portion of which extends onto the most inland shoreline feature or its 200 foot contiguous area, or as otherwise set out in the Coastal Resources Management Program, require a Council Assent." (R.I. Code R. 16-2-1.)

the buffer zone[18] and a substantial structure consistent with Ms. Miguel's testimony. See R. at 16 (photograph dated 8/16/2011 showing structure present in the buffer zone); R. at 17 (photograph dated 8/21/2012 showing structure as it was in 2012). The Council found this evidence of a noncompliant improvement "uncontradicted and . . . credible," and this Court must give deference to those that sit closest to the evidence. See R. at 3, ¶ 8; Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993) (stating the Court defers to the agency's credibility determinations due to its proximity to the evidence).

Viewing the record as a whole, the Court finds that sufficient legally competent evidence exists in the record to support the Council's finding of violations of the Property's buffer zone and assents. See Mine Safety, 620 A.2d at 1259. This Court also finds sufficient legally competent evidence to support the Council's decision to allow the walkover structure to be brought into compliance and the buffer zone to be restored. Further, this Court finds that the Council set forth sufficient findings of fact and conclusions of law under the governing statute. Therefore, the Decision was not affected by error of law, clearly erroneous in view of reliable, probative and substantial evidence on the record as a whole, arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The CRMC's Decision was not in excess of its statutory authority.

IV

Conclusion

After careful review, this Court finds that CRMC's Decision contains substantial evidence sufficient to support its findings and that evidence relied upon was not illegally or otherwise obtained in violation of constitutional or statutory provisions. The Decision is not

[18] See R. at 12, 13 (photographs dated 8/16/2011(showing substantial clearing of the buffer zone)); R. at 14, 15 (photographs dated 8/21/2012 showing partially revegetated buffer zone)

affected by error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary and capricious, or characterized by abuse of discretion. The substantial rights of the Appellants have not been prejudiced. The Court also notes that the Council's action in providing an opportunity for the Eddys to bring the offending structure into compliance was exceedingly reasonable and generous. Accordingly, the Decision of the CRMC is affirmed. Counsel shall submit an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Michael and Leigh Eddy v. Coastal Resources Management Council, et al.**
CASE NO:	**PC-2013-1213**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 3, 2016**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**Carolyn A. Mannis, Esq.**
For Defendant:	**Anthony DeSisto, Esq.**