

In accordance with notice to members of the Rhode Island Coastal Resources Management Council, a meeting was held on Tuesday, May 12, 2009 at 6:00 p.m. at the Department of Administration; Conference Room A; One Capitol Hill, Providence, RI.

**MEMBERS**

Michael Tikoian, Chair  
Paul Lemont, Vice Chair  
Ray Coia  
Don Gomez  
David Abedon  
Bruce Dawson  
Michael Sullivan

**MEMBERS ABSENT**

None Absent

**STAFF PRESENT**

Grover J. Fugate, Executive Director  
Ken Anderson, Supervising Engineer  
Brian Goldman, Legal Counsel

1. Chair Tikoian called the meeting to order at 6:00 p.m. and made a brief statement on the Council's permitting process.

2. **APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING:**

Mr. Coia motioned, seconded by Director Sullivan, to approve minutes of previous meeting, April 28, 2009. Motion carried on unanimous voice vote.

3. **SUBCOMMITTEE REPORTS**

Nothing to report

4. **STAFF REPORTS**

Nothing to report.

Chair Tikoian informed members, staff and audience that there would not be a meeting on May 23<sup>rd</sup> and that the first June meeting would be Wednesday June 10, 2009 to accommodate a quorum. Chair Tikoian stated that the location of the June 10<sup>th</sup> meeting was to be determined, but that it would either be DOA conference rooms or DEM conference room.

5. **CHAIR TIKOIAN READ THROUGH THE AGENDA TO SEE WHICH APPLICANTS/ ATTORNEYS WERE PRESENT.**

All applicants and/or their attorneys present. Chair Tikoian stated that three items on the agenda were continued at the applicant's request.

6. **APPLICATIONS WHICH HAVE BEEN OUT TO NOTICE FOR 30 DAYS AND ARE BEFORE THE FULL COUNCIL FOR DECISIONS.**

**2009-01-012 Kevin and Erin Kulak -- Proposed residential development. Located at plat 2, lot 42; Surfside Drive, Charlestown, RI.**

Present representing the applicant is Attorney Elizabeth Noonan, along with Richard Lipsitz, President of Waterman Engineering Co, and Scott P. Rabideau, Principal of Natural Resource Services Inc. Mr. Fugate gave brief overview to the Council stating that the applicant is requesting an appeal to an executive decision on administrative finality. Mr. Fugate stated that the Kulaks are new owners of the property which has been before the Council several times with applications requesting to build a residential dwelling. Mr. Fugate gave history of applications stating that one such application known as the Todd case had been before a CRMC subcommittee and which was denied by the Full Council. Mr. Fugate stated that after the Kulaks purchased the property, they had a series of meetings with CRMC staff with staff being fairly consistent in terms of what they feel is necessary in this area asking for a substantial downsizing of the proposed structure with a possible relocation of the ISDS and structure to maximize setback requirements. Mr. Fugate stated that the last application that the Kulaks submitted still did not meet the necessary 50-foot setback and none of the findings of fact that the Council based its denial on, in terms of the physical features had really changed. Mr. Fugate stated he felt since there had not been a material change in circumstances, the doctrine of administrative finality applied; the appeal of that decision is before you now for review.

Attorney Noonan stated that she and her clients take a different view than Mr. Fugate. Ms. Noonan handed out exhibits to Council. Ms. Noonan stated that she had a there was a fundamental misunderstanding of what administrative finality is. Chair Tikoian asked CRMC Legal Counsel Brian Goldman to brief the Council members on Administrative Finality and how it applies to an agency like CRMC. Mr. Goldman stated that administrative finality prevents a repetitive or duplicate application for the same relief that an agency has reviewed and denied; the court states that there has to be a substantial or material change in circumstances between the two applications. Mr. Goldman stated that he did not think that a material and substantial change such as the change in ownership is enough, but that a change in the circumstances underlying the original decision has changed. Mr. Goldman stated that the Council members should review the previous decision, determine the basis of that denial, and review the evidence that the applicant puts forth and determine if there is a change in circumstances which are not related to the underlying circumstances that form the basis of the denial. Ms. Noonan informed the Council that she disagreed with Mr. Goldman's interpretation of administrative finality stating that if they are not identical (they have different owner) that the doctrine of administrative finality not apply. Ms Noonan stated that based on the Johnston Ambulatory Surgicare Center case which had a different party, administrative finality, res judicata means the application can go forward. Chair Tikoian asks that all three attorneys, Mr. Goldman, Ms. Noonan and Mr. Coffey come to some agreement on the definition of administrative finality. Ms. Noonan states that while the meeting is a public hearing in this particular case there is no application or abutter's list and no notices were sent out on their behalf and the neighbor has no standing to come into the issue at this time. Ms. Noonan states the issue is a legal issue between the Kulaks and the Council and requested that the Council not allow for objectors at this point in time. Mr. Coffey asks to speak on Ms. Noonan's request stating that he represents Richard Campbell, abutter to the Kulak property, and that Mr. Campbell is a beneficiary of the prior decision of the Todd case and would have a substantial income on his rights in that it would allow this applicant to proceed with a repetitive application seeking the same relief. Mr. Coffey stated that he supports Mr. Goldman's position on administrative finality and requests to expand on his position. Mr. Goldman stated that the abutter has standing because one of the reasons the Supreme court used in adopting the concept of administrative finality was so that third parties that could be materially effected by a decision will be able to rely upon that decision and would not have to be faced with the prospect of coming back and relitigating it again. Director Sullivan stated that, from his view, the

Council is still being asked to review a case that is seeking the same forms of relief, thereby making the application very similar. Mr. Lipsitz was sworn in by the Council and his resume (marked for identification as Kulak Exhibit 1) was given to the Council. Ms. Noonan distributes a plan (marked for identification as Kulak Exhibit 2) to Council. Ms. Noonan questions Mr. Lipsitz on his familiarity with the Kulak property. Mr. Lipsitz stated that he was retained by the Kulaks to prepare survey plans (Kulak Exhibit 2) of their property. Mr. Lipsitz signs that plan marked Kulak Exhibit 2. Mr. Lipsitz give a brief description of the property stating that it is a rectangular piece of property that runs north to south from Surfside Drive down to Block Island Sound in Charlestown RI. Mr. Lipsitz discussed the setbacks that applied to this property both from CRMC and town zoning stating that the municipal setbacks are 30 feet in the front and 20 feet on each side and the coastal feature requires 25-foot buffer and 25-foot setback. Mr. Lipsitz stated that Waterman Engineering prepared the plans for the house and the septic system design which received a DEM approval. Mr. Lipsitz stated that he had made alterations to the plans on a few occasions as part of the CRMC application submittal process, one plan of which was an overlay where they superimposed the 1995 plan over the current proposal showing the septic system, house, porches, patios etc so that staff could see the differences. Ms. Noonan questioned Mr. Lipsitz on his knowledge of the previous application (prior to Kulak owning property) and the decision by the Council asking him to point out the differences between the two applications such as size of house, change in type of septic system and difference in setback measurements. Mr. Lipsitz briefed the Council on the Kulak's permitting process with the Town of Charlestown.

Attorney Coffey cross examines Mr. Lipsitz questioning him on the erosion and overwash that the property is subjected to during storm events. Mr. Lipsitz states that he cannot attest to the condition of the property in 1999 as they had visited the site for the first time in 2004. Mr. Lipsitz stated that the property fronts a piece of property that's shorefront; the Kulak's do not own to the water pointing out that the original 1993 survey by Richard Greene Associates was in error.

Vice Chair Lemont questioned Mr. Lipsitz about the elevation of the property which Mr. Lipsitz states it is in substantial conformance with elevation 11 when they did the survey in 2004.

Director Sullivan questioned Mr. Lipsitz on whether the applicant looked into alternative technology for OWTS such as composting or incinerating toilets. Mr. Lipsitz stated that the applicant looked at the use of Advantex with the bottomless sand filter as the downsizing of the septic and for the denitrification in the coastal area. Director Sullivan asked Mr. Lipsitz about the regulatory relief from the setback provisions. Mr. Lipsitz stated that the applicant requests a relief from 25 feet to 15 feet.

Mr. Lipsitz is excused from the meeting.

Ms. Noonan calls Scott Rabideau as next witness and asks that his CV be marked as Kulak Exhibit 3. Mr. Rabideau is sworn in and identifies himself for the record and Council qualifies him as expert witness. Mr. Rabideau briefs the Council on his involvement in the Kulak/CRMC application process stating that he submitted a preliminary determination application for the Kulaks to make sure that the coastal feature identified in the 1995 application was in fact still the same and acknowledged by CRMC staff. Ms. Noonan and Mr. Rabideau go over coastal feature description as identified in the Statement of Limitations. Mr. Rabideau briefs the Council on his participation in the application submittals to the town and CRMC. Ms. Noonan questions Mr. Rabideau on the differences in original 1995 submittal by Todd and the 2007 submittal of the Kulaks. Mr. Rabideau stated that in his application package he outlined the difference between the two submittals; Council reviews letter from Natural Resources Services. Mr. Rabideau, being asked by Ms. Noonan about CRMC's rationale for the reduction in size and changing the layout of the structure, states that CRMC wants to maximize the distance between any structure and any coastal feature to protect the structure during storm events; the further away the better leading into discussion on how setback requirements are determined. Mr. Rabideau

explains, based on his expertise, the biological differences between the original 1995 septic system and the newer Advantex system, stating that the denitrification tank in the currently proposed system reduces the size of the leachfield that's required and provides some treatment of the effluent prior to discharge into the leachfield thereby reducing the nitrogen going into the groundwater. Discussion with Council. Director Sullivan questions Mr. Rabideau on the square footage of the proposed dwelling which is proposed at 672, but since it is two floors, it is really 1344 sf. Mr. Rabideau states that when dealing with CRMC the footprint of the foundation is what is the concern.

Mr. Rabideau is cross examined by Mr. Coffey on the size of the proposed dwelling and the difference between the two submittals 1995 and 2007. Mr. Rabideau confirmed that the house was reduced in size from 36 x 24 with an eight foot covered deck to a 36' x 20' house with two 8' decks as per Finding of fact #24 recommendations for minimization. Mr. Coffey questions Mr. Rabideau regarding the erosion and overwash of the property during storm events. Mr. Rabideau stated that he agreed with the findings of CRMC and that the area is a very dynamic system and portions of the property are part of the beach ramp. Discussion on allowance of line of questioning. Mr. Rabideau discusses the biological impacts of the changes in the application specifically the additional 6 feet of setback.

Mr. Fugate is sworn in and affirms comments he made earlier in the proceeding as the basis of his opinion. Mr. Gomez questions Mr. Fugate regarding CRMC signed letter dated October 5, 2007 and whether he still agrees with staff opinion that a material change would represent conformance with a minimum of a 50-foot setback required by Section 140. Mr. Fugate states that he still agrees with letter based on frequent overwash, scouring, and erosion in this area. Mr. Fugate briefs Council on the adjacent lots which have historic revetments predating the Council stating that the Kulak lot will not be eligible. Mr. Fugate stated it was suggested to the applicant that if the length of the house was reduced then it would allow the applicant to rotate the septic system to the side of the lot and increase the setback from the house, referring to a drawing of 24 x 24 dwelling. Ms. Noonan asked if plan had been given to applicant as she had been given a copy herself and also states that the change was predicated upon a variance from the Town of Charlestown as acknowledged by CRMC staff comments. Mr. Fugate stated that with that increase in setback, the application might have been determined to have substantial changes thereby allowing for CRMC review. Mr. Fugate also stated that the Council has been holding to their requirement of 50-foot setback. Ms. Noonan questions Mr. Fugate on staff recommendations for meeting CRMC requirements and the differences between the original application by Todd and the newer application by Kulak.

Ms. Noonan objected to not receiving copy of the plan with multicolored overlay with their determination of administrative finality. It was determined that although the plan was referenced in text of staff report, the report itself was three pages only. The plan was done for Council's benefit to clarify the issue trying to show setbacks as measured by staff. Mr. Fugate stated that the drawing is part of the file record in the office which can be reviewed by the public.

Mr. Coffey questions Mr. Fugate in regards to the 50-foot setback in Section 140 which became in effect February 10, 2009. Mr. Fugate stated that the 50-foot setback has been in effect since he started working with CRMC 24 years ago. No change has been made. Mr. Fugate explains how the staff would consider the erosion factor and the measurement process they would use.

Chair Tikoian asked Council to make their decision based on the information submitted by the applicant and not the recommendations made by staff as the decision is on the determination of administrative finality not approval of application. Discussion amongst Council members.

Chair Tikoian calls for three minute recess so Ms. Noonan can converse with clients.

Chair Tikoian calls meeting back to order.

Ms. Noonan made closing argument as representing applicant referring to several CRMC past applications, Hruska v CRMC and Palazzolo v CRMC. Ms. Noonan stated that even though there are similarities between the Todd application submittal which the Council denied and the Kulak application which has been determined to be uneligible for submittal due to administrative finality; the applications have differences in owner, house size and septic system design, thereby making the application different.

Mr. Coffey made his closing argument as representing the abutter Mr. Campbell reiterating his involvement since the original Todd case in 1995 through its determination by the Superior Court. Mr. Coffey stated that even though aspects of the application submitted to CRMC by the Kulaks are slightly different, the applicant is still requesting the same relief from CRMC regulations as the previous Todd case. Mr. Coffey request the Council to uphold the Director's determination of administrative finality.

Director Sullivan motions, seconded by Vice Chair Lemont, that the Council make a determination that the administrative finality decision made by the Executive Director as appropriate and that we reinforce that. Chair Tikoian agrees that the Executive Director made the correct call. Motion carried on a unanimous voice vote.

**2008-09-121 STARWOOD TIVERTON, LLC -- Completion of The Village on Mount Hope Bay project. Remaining components include Phases IV and V of the Residential Development and the Commercial Waterfront Development (with the exception of the Boat House Restaurant which is in operation). Starwood is seeking a permit to construct 126 units out of the total 290 units originally permitted in the Residential development and the nine buildings remaining in the Waterfront Commercial Development. Located at plat Map 7-8, Blocks 24 & 51; Map 7-9 Blocks 24 & 51; 995 Main Road, Tiverton, RI.**

Attorney Richard Sherman present to represent Starwood Tiverton. Mr. Anderson gave brief overview of application to the Council stating that the application was to complete construction of the village at Mount Hope Bay which was originally permitted by this Council in 2001. Mr. Anderson stated that it was a very large project containing residential and commercial elements and has exhausted their three year permitting window as well as their three additional one year extensions. Vice Chair Lemont, seconded by Mr. Coia, motioned to approve application. Mr. Fugate clarified for the Council that the applicant is seeking new approval of previously approved project thereby starting the three year construction window and be eligible for all subsequent extension. Vice Chair Lemont keeps his motion. Attorney Sherman requests from the Council that the Assent be granted through December of 2012 as opposed to expiring in May 2012 as the project is scheduled to be finished at the end of 2012. Mr. Coia withdraws second and Vice Chair Lemont restates motion. Vice Chair Lemont, seconded by Mr. Coia, motions approval of application with a new assent that expires December 31, 2012. Mr. Dawson questioned staff on the project's noncompliance issues. Mr. Anderson stated that the noncompliance issues have been substantially corrected or resolved and that through stipulations in the new assent, the noncompliance issues will all be complete and resolved. Mr. Gomez asks for assurance that the noncompliance issues will not continue in the next three years. Mr. Sherman addresses the Council and explains all of the provisions made so as to not have issues of noncompliance in the future. Mr. Gomez asks about public access easement and whether it will be easily recognizable by public through signage and available parking. Mr. Sherman assures that it is and that CRMC staff is satisfied as well. Motion carried on unanimous voice vote.

## 7. Category "A" List

None were held.

There being no further business to discuss. The meeting was adjourned at 8:28 p.m.

Respectfully submitted,  
Grover Fugate, Executive Director

Reported by Lisa A. Mattscheck