

In accordance with notice to members of the Rhode Island Coastal Resources Management Council, a meeting was held on Tuesday, December 13, 2011 at 6:00 p.m. in Conference Room A of the Administration Building, One Capitol Hill, Providence, RI.

Members Present

Anne Maxwell Livingston, Chair
Paul Lemont, Vice Chair
Dave Abedon
Donald Gomez
Bruce Dawson
Ronald Gagnon, RIDEM
Tony Affigne
Guillaume de Ramel
Raymond Coia

Staff Present

Grover J. Fugate, Executive Director
Jeffrey M. Willis, Deputy Director
Laura K. Miguel, Enforcement
Brian Harrington, Enforcement

Brian A. Goldman, Esq.

Members Excused

Michael Hudner

1. **CALL TO ORDER**

Chair Livingston called the meeting to order at 6:10 p.m. and made opening statement.

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

Chair Livingston called for approval of the minutes from the previous meeting. Vice Chair Lemont motioned, seconded by Mr. Coia, for approval of minutes from November 8, 2011 meeting. Mr. Affigne asked for the minutes to be corrected to reflect the he said he thought the project could be a great project. Vice Chair Lemont changed the motion to approval of minutes as amended. Motion carried on unanimous voice vote.

3. **STAFF REPORTS**

Mr. Goldman reported to the Council that the Downing/Salt Pond Group had filed a Petition for Certiorari with the US Supreme Court seeking review of the First Circuit Court of Appeals' May 20th decision which dismissed their takings claim against CRMC. Mr. Goldman stated that the Supreme Court denied the Petition for Certiorari and the First Court of Appeals dismissing the Downing Complaint stands. Mr. Goldman thanked Mike Rubin of the Attorney General's office for assisting in the matter.

Mr. Goldman also reported to the Council on the Koolen Enforcement matter stating that on November 18th, there was a hearing in front of the Supreme Court and the Court denied Mr. Koolen's request for a stay and ordered that he comply forthwith with the Council's order to remove all floats and structures located in tidal waters forthwith. Mr. Goldman stated that on December 2, 2011, the case went back to court and the Court found that Mr. Koolen was in willful contempt of the previous court order of removal and ordered him to remove the structures forthwith and issued a \$25,000 fine against Mr. Koolen to be deposited in the Registry of the Court for purposes of facilitating the removal of the floats. Mr. Goldman stated that in the interim, Mr. Koolen had filed for bankruptcy and that he will brief the issue of whether or not the Court's order was subject to the automatic stay of the Bankruptcy Code. Mr. Goldman stated that the Attorney

General's office is interested in this case because of the big picture of people filing for bankruptcy to avoid complying with orders of environmental agencies. Mr. Goldman stated that they will be back to Court in January on this issue.

Mr. Fugate informed the Council that appointment notices went out to the HAB and FAB board members. Mr. Fugate stated that Advisory Board meetings were in the process of being set up for the Block Island Project.

Chair Livingston asked about the Budget portion of the meeting. Vice Chair Lemont stated that in past years the Chair, Vice Chair and one other member of the Council got together with CRMC staff to review the budget items prior to being brought before the Full Council for minimize discussion. Vice Chair Lemont asked that the Budget be discussed in an Executive Session if possible and defer it to the next CRMC meeting for posting purposes. Chair Livingston stated that they would go through the Application items and discuss the Budget options at the end of the meeting.

4. SUBCOMMITTEE REPORTS

There were none.

Chair Livingston confirmed applicant attendance and Mr. Fugate made an opening statement.

5. **APPLICATIONS REQUIRING PUBLIC HEARING ON SPECIAL EXCEPTION AND ARE BEFORE THE FULL COUNCIL FOR DECISION:**

2011-03-044 PERRY RASO -- Replace a failing OWTS with a denitrifying OWTS designed to service the existing 80 seat restaurant. The installation of an OWTS, such as this, which has a design flow greater than 2000 gpd, is classified as a "watershed activity" by the Salt Pond Region Special Area Management Plan and requires a public notice. Note that the RIDEM approved OWTS plan shows proposed alterations to the restaurant structure and decks that are not the subject of this application. Located at plat 87-2, lot 189; Succotash Road, South Kingstown, RI.

Applicant Perry Raso was present as well as Donald J. Packer, Esq, and Bill Dowdell, PE. Mr. Fugate introduced Russell Chateauf, from RIDEM ISDS Section, who was present for the Council's benefit. Mr. Fugate gave a brief overview of the application to the Council stating that Mr. Raso had requested a meeting with CRMC staff and RIDEM to discuss the potential of one recommendation – a hybrid system. Mr. Fugate stated that CRMC staff was concerned with peak flow and the ability of the system to handle those peak flows. Mr. Fugate stated that RIDEM is comfortable with the design but staff were concerned and talked about including an extra safety net that would deal with possible overflow during peak months. Mr. Fugate stated that Mr. Raso agreed to submit an amended design which would include an additional storage tank which would double the capacity of the existing storage tank. Mr. Fugate confirmed that CRMC staff no longer recommended denial of the application and that the recommendation based on earlier discussions was for approval. Discussion on application for more outdoor seating. Mr. Packer clarified that the outdoor seating will be the picnic tables already present and that they would only be used during the warm weather season. Mr. Chateauf clarified that DEM sizes a system based on the number of seats in the restaurant. In answer to Mr. Dawson's inquiry regarding the letter from the

objector and their not attending the Council meeting, Mr. Goldman clarified that the objectors had filed an action with superior court against DEM and also named CRMC but that their main concern was with RIDEM issuing the OWTS system permit. Mr. Goldman stated that the matter was dismissed by the Court. Mr. Affigne asked for clarification on CRMC staff's recommendation. Mr. Fugate stated that it was his intention to make the presentation to the Council regarding the earlier meeting and the agreement for the second storage tank. It was also clarified that Mr. Raso would have to provide a revised plan to RIDEM for approval in which Mr. Chateaufeuf stated did not appear to be a problem. Mr. Gagnon stated that a condition is in the DEM permit that requires that flows be monitored on a weekly basis so that there is a good record of how much flow is going into that system to ensure that he stays under 3290 gallons per day. Vice Chair Lemont motioned approval seconded by Mr. Dawson and Mr. Abedon. Mr. Affigne asked about staff stipulations. Mr. Fugate stated that staff asked for the opportunity to place additional stipulations on the project in the event that the Council did not approve the suggested alternatives. Motion carried on a unanimous voice vote.

6. ENFORCEMENT ACTIONS BEFORE THE FULL COUNCIL:

09-0121; 09-0122; 09-0126; 09-0127; 09-0128; 09-0129 – PBH Realty LLC

Vice Chair Lemont clarified his affiliation with Dick MacAdams. Mr. Fugate, Ms. Miguel and Mr. Harrington were sworn in. Mr. Fugate stated that the enforcement matter had been before the Council previously and the Council requested that an on-site meeting be conducted to discuss potential resolutions to the matter. Mr. Fugate stated that a meeting was held on site with CRMC staff, the property owner, and their attorneys. Mr. Fugate stated that at the meeting a potential resolution was discussed which was to cut a V-notch in the existing dike and bring that notch down to a level that was consistent with the previous elevation that was on a plan that was submitted as part of a restoration/design. Mr. Fugate stated that after granting several extensions to the agreed upon time frame for submittal of new restoration plan; the property owner decided that they did not want to go down to the level agreed upon by both parties at the on-site meeting. Mr. Fugate stated that it's being brought back before the Council as it appears there is an impasse. Mr. Fugate stated that Staff was going to ask the Council to issue a restoration order to establish that V-notch down to elevation 20 as agreed upon at the on-site meeting. Mr. Goldman clarified the Administrative Fine procedures and stated that the property owner should have the opportunity to address the elevation issue with the Council and have the Council decide if there is area for compromise. Ms. Miguel addressed the Council stating that anything short of restoring the stream to its original elevation requires a special exception. Mr. Miguel stated that CRMC staff has been trying for two years to work with the property owners to have the stream restored so that other issues can be negotiated, such as revegetation. Ms. Miguel stated that the plan submitted dated July 26th, 2010 shows the impoundment elevation at 20 feet but staff cannot agree to it as it would require a special exception that cannot be granted as it is a prohibited activity. Vice Chair Lemont asked for clarification of the regulation which was in violation. Ms. Miguel clarified that there were six violations of the coastal program and the Freshwater Wetlands in the Vicinity of the Coast regulations. Ms. Miguel stated that the one in discussion regarding the special exception was for RICRMP Section 100.4.F.1 regarding filling removing or grading being prohibited on any tributary or tributary wetland. Mr. Fugate stated that the property owner built up a berm and a substantial wall. Mr. Fugate stated that restoration would mainly include the stream flow restored as the pond would revegetate if left to itself. Mr. Lemont stated that he had been on the site and saw water flowing to Narragansett Bay and that a wetland was created. Mr. Fugate stated that the

hydrodynamics of the stream was altered below the pond and altering stream flow is prohibited. Mr. Fugate stated that agreements were reached between DEM and CRMC when creating freshwater wetland regulations within the vicinity of the coast. Mr. Fugate stated that the Investco case brought about the tightening of these regulations so that alterations could not occur again in the future. Mr. Fugate stated that in order for the project to be allowed, the property owner would have to prove compelling public purpose

Mr. Goldman swears in Mr. Rabideau and Ms. Szeplatowski. Ms. Silman, from Nixon Peabody makes brief presentation for PBH Realty. Ms. Silman submitted letter and a chronology for the record. Ms. Silman stated that client is distressed at the apparent breakdown in communication. Ms. Silman stated that Mr. Rabideau was present to give a more technical presentation to show the Council that the elevation they were proposing is actually the same elevation agreed upon at the on-site meeting. Mr. Rabideau introduced himself to the Council stating that he was brought into the project in August of 2011 to prepare a restoration plan that would be consistent with the pre-existing conditions of the site. Mr. Rabideau showed the 2002 Mark Boyer plan that staff used to require the pre-existing site condition. Mr. Abedon asked Mr. Rabideau to clarify his meaning of reaching the same conclusion as staff. Mr. Rabideau clarified by saying that through a presentation of a series of plans that show the pre-existing elevation, he will show the true elevation of the property which he believes differs from what staff has asked for. Mr. Rabideau showed a Class 3 survey which was a copy of a 1997 John Caito plan was copied and used for submission to CRMC. Mr. Rabideau went to DEM and found the original John Caito plan which has been approved by DEM in 1997 as a preliminary determination application. Mr. Rabideau stated that the location shows an open water marsh. Mr. Rabideau explained to the Council that the Engineer who stamped the plan is certifying the accuracy of elevations, the grades and the elements of the plan. Mr. Rabideau then showed two more plans dated 2001 and 2002. Mr. Rabideau stated that he used the baseline plan that CRMC said was supposed to be the plan of record, saw the elevation was at 40, and he counted the contour lines which are two-foot contour lines. Mr. Rabideau stated that he followed the 20 foot elevation line and it came to the existing condition of the property. Mr. Rabideau stated that his restoration plan was to take two feet of elevation off and making the opening 5-foot wide as requested. Mr. Rabideau stated that the stream will flow right under the existing concrete as it did previously. Mr. Fugate asked for clarification on reference point where the two feet is being measured from. Mr. Rabideau explained using photos of property. Ms. Silman submitted three plans into the record. Mr. Rabideau stated that he had delineated all the wetlands on the property in 1995 giving him institutional memory of the property. Mr. Rabideau stated that the impoundment in the location of the stream is the lowest on the property. Mr. Rabideau stated that in his professional opinion the appropriate elevation is 20 not 16 as staff requested. Mr. Fugate and Mr. Rabideau, using photographs, worked to clarify exactly where the elevation would be taken down. Mr. Rabideau clarified that they would remove the blockage from the channel as it exists on the other side. Ms. Miguel shows PowerPoint photographs of area. Mr. Fugate clarifies CRMC regulations on maintenance of walls in wetlands stating that the regulation regarding alterations to tributary wetlands was amended making it a special exception. Mr. Fugate and Mr. Rabideau discuss the fixing of the wall as maintenance according to regulation in which the water would flow under the impoundment. Mr. Rabideau shows the Council a cross-section. Mr. Fugate and Mr. Rabideau further clarified the restoration of the stream regarding the wall and getting the water to flow underneath the lantil. Ms. Silman stated that the existing pipe will be removed to allow for free flow of water. Mr. Rabideau stated that the area behind the wall will be cleaned out to elevation 18. Mr. Rabideau stated as a matter of resolution, the elevation would be brought down to the lantil on the pond side and on the landward side, bring it down the additional two feet regardless of what the elevation is. Mr. Rabideau stated that it process would be

monitored by environmental professional and if field adjustment needed to be made they could be made. Mr. Affigne and Mr. Rabideau discussed the shape of the pond after restoration. Mr. Rabideau stated that the undisturbed buffer zone is revegetating nicely. Mr. Fugate and Mr. Rabideau discuss the estimated elevation of the stream bed on the seaward side. Chair Livingston asked if Staff was recommending acceptance of the restoration plan. Mr. Fugate stated that they were okay with what had been proposed. Mr. Miguel asked if the stream would remain channelized. Mr. Rabideau stated that they would create four to five feet of natural relief so that water could flow. Mr. Rabideau stated that the stone on the seaward side would remain. Mr. Affigne asked how this would be explained on restoration order. Mr. Fugate stated that staff would inspect site to make land is down to elevation of original streambed and Mr. Goldman added that there is now a record transcript of what has been agreed upon. It was clarified by both Mr. Fugate and Mr. Rabideau that the pipe under the lentil will be removed. Chair Livingston asked if discussion was necessary on any other violation listed on site. Ms. Miguel stated that after the flow is restored, CRMC would wait and see what happens in terms of vegetation regrowth. Mr. Goldman stated that a motion was required for approval of restoration agreement and then the next phase would be resolution of the administrative fine which was contingent on the restoration plan. Mr. Goldman talked about the drafting of a consent order which would embody the restoration points agreed upon. Ms. Silman submits plans and standard for the record. Ms. Miguel requested the Council impose a timeframe for the restoration, asking that it be no later than June 1st. Vice Chair Lemont motioned approval of restoration plan as discussed, seconded by Mr. Coia. Ms. Silman confirmed agreement with motion on behalf of PBH. Motion carried on unanimous voice vote.

7. PUBLIC HEARING ON PROGRAM CHANGES TO THE RI COASTAL RESOURCES MANAGEMENT PROGRAM (REDBOOK):

Section 120–Variances

Section 300.6--Treatment of Sewage and Stormwater

Mr. Boyd gave brief overview of the proposed changes explaining that the language was put out to notice in October with a written comment period that ended on November 25th, 2011. Mr. Boyd stated that no comments were received at all. Vice Chair Lemont motioned approval of both changes, seconded by Mr. Coia. Motion carried on a unanimous voice vote.

8. FY2013 BUDGET

Chair Livingston opened discussion on the budget stating that Council could not go into Executive Session as it was not posted and Executive Session was for discussion of personnel or litigation. Chair Livingston asked for Council comments.

Mr. Gomez expressed concern regarding the limited time given to review the budget prior to the meeting, the organizational chart, and the need for a halftime in-house staff lawyer. Mr. Gomez asked that the organizational chart be made clearer in terms of the relationship of the Council to the staff. Chair Livingston expressed her views on the existing Legal Counsel need and the need for a halftime staff lawyer. Mr. Fugate explained that the five positions requested in the budget proposal are what CRMC has been requesting for a number of budget cycles. Mr. Fugate stated that the budget included one position for enforcement at the request of the Council. Mr. Willis explained that the budget as being presented was asking for funding for current services but also expressing the need for more positions without asking for funding of those positions in this budget proposal. Mr. Fugate explained

the process for budget submittal and approval. Mr. Fugate explained the reasoning behind the request for a half-time attorney stating that it was in response to the Federal 312 review. Chair Livingston explained that Mr. Goldman's CRMC schedule is very full and would be increase in doing more with Right's-of-Way. Vice Chair Lemont suggest that the Chair, Vice Chair and another member of the Council sit with the Executive Director and the Deputy Director to go over the budget and then report back to the Council for vote. Chair agrees and postpones the budget discussion to a future meeting.

9. **ENFORCEMENT REPORT** – October, 2011 and November 2011

None were held.

6. **CATEGORY "A" LIST**

None were held.

7. **ADJOURN**

Vice Chair Lemont motioned, seconded by Mr. Gomez, to adjourn. Motion carried on unanimous voice vote. Meeting adjourned at 8:20 p.m.

Respectfully submitted,

Lisa A. Turner
Recording Secretary