

In accordance with notice to members of the Rhode Island Coastal Resources Management Council, a meeting was held on Tuesday, July 31, 2012 at 6:00 p.m. in Council Chambers, Narragansett Town Hall, 25 Fifth Avenue, Narragansett, RI.

Members Present

Anne Maxwell Livingston, Chair
Paul Lemont, Vice Chair
Raymond Coia
Robert Ballou, RIDEM
David Abedon
Tony Affigne
Jerry Sahagian
Donald T. Gomez
Guillaume deRamel

Staff Present

Jeffrey M. Willis, Deputy Director
Kenneth Anderson, Supervising Engineer
William Mosunic, Administrative Officer

Brian Goldman, Esq.

Members Excused

Mike Hudner

1. CALL TO ORDER

Chair Livingston called the meeting to order at 6:00 p.m.

2. APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Chair Livingston asked that the attendance record be corrected to reflect the absence of Don Gomez and the attendance of David Abedon. Vice Chair Lemont motioned, seconded by Mr. Coia, approval of the minutes from the July 24, 2012 Semimonthly meeting as corrected. Motion carried on unanimous voice vote.

3. SUBCOMMITTEE REPORTS

There were no subcommittee reports.

4. STAFF REPORTS

There were none.

5. APPLICATION BEFORE THE FULL COUNCIL IN ACCORDANCE WITH REMAND ORDER FROM THE RHODE ISLAND SUPERIOR COURT:

2003-05-155 CHAMPLIN'S REALTY ASSOCIATION -- Expansion of existing marina facility consisting of an additional 2,990 linear feet of fixed pier, and 755 linear feet of floating docks, with corresponding expansion of existing marina perimeter limit (area) by approximately 4 acres, however, it should be noted that the requested marina perimeter limit ("MPL") seeks approximately 13 acres. The stated increase in marina capacity is 140 boats. Additionally, this matter was consolidated with the Town of New Shoreham's request for CRMC approval of its Harbor Management Plan. The Harbor Management Plan issues were limited to the location and size of Mooring Field E. Project to be located at plat 19; lots 5 and 6; West Shore Road, New Shoreham, RI.

Chair Livingston introduced the case and asked all attorneys to identify themselves. Robert Goldberg, Esq. was present for the applicant, as well as Thomas DiPrete, Esq. and Kathleen Managhan, Esq. Dan

Prentiss, Esq. was present for the Committee for the Great Salt Pond and the Block Island Land Trust. Don Packer, Esq. was present for the Town of New Shoreham. Jerry Elmer was present for the Conservation Law Foundation. Chair Livingston asked Mr. Goldman to explain the matter before the Council for the beginning of a Council discussion. Mr. Goldman stated that Judge Rogers had issued a Remand Order to allow Champlin's to present evidence of disparate treatment on their application as compared to the Payne's Dock application (CRMC File No. 2005-08-004) which was heard and approved by the full Council on June 28, 2011. Mr. Goldman stated that Champlin's had the burden of proof to demonstrate any such treatment and that neither application will be reopened for review at this hearing. Mr. Goldman clarified that the purpose of the meeting was limited to the issue of presentation of evidence related to disparate treatment. Mr. Goldman stated that Judge Roger's order made the issue subject to CRMC Council normal rules and regulations and procedures.

Mr. Goldman informed the Council that a preliminary ruling was sought by the Committee for the Great Salt Pond, the Block Island Land Trust, and the Town of New Shoreham to further define the scope of the remand hearing and to limit the evidence that can come in during this hearing. Mr. Goldman also reviewed the hearing package documentation with the parties involved as it comprised the start of the Administrative Record for this meeting, also explaining what and Administrative Record should include. Mr. Goldman also made clarifications regarding comments made by him that were taken out of context regarding the scope of the hearing explaining that evidence presented would be subject to objection on new evidentiary ground; the purpose being that the disclosure would allow parties to prepare themselves to object to or not object to.

Mr. Goldman explained the Motion in Limine to the Council which was filed by Mr. Prentiss (and joined by Mr. Packer) on behalf of the Committee of the Great Salt Pond and Block Island Land Trust. Mr. Goldman stated that it would be best for the Council to rule on the motion before hearing too much testimony as the motion did not set parameters of what evidence the Council may or may not proceed with in this matter. Mr. Goldman suggested that the Council deal with the part of the court order that required each Council member who had not sat on the Council while hearing either case would need to give public certification that they had read the administrative record. Mr. Goldman stated that the Council's past practice and normal process is that prior to any vote, at the close of evidence, the Council members will certify that they read the entire record.

Chair Livingston invited Mr. Prentiss to explain his Motion. Mr. Prentiss briefly summarized the most recent history of the CRMC/Champlin's case explaining that in its appeal to Superior Court for the denial of their pending CRMC application, Champlin's argued that the application for the expansion of the marina – Payne's Dock – was treated differently than the Champlin's marina expansion request and that Champlin's marina received disparate treatment from the Council. Mr. Prentiss stated that the remand order did not prejudice to the Council was evidence it should hear or admit and that the acceptance or denial of evidence was at the discretion of the Council. Mr. Prentiss explained that his motion was to get a ruling on the limits of evidence that can be admitted by Champlin's to prove that the two difference applications were treated differently with no rational explanation for the difference. Mr. Prentiss expressed his opinion that there was no room to try to remake the record in either the Champlin's Case or the Payne's Dock case and that the determination of whether the Council treated the two applicants differently must be based on what is already in the record. Mr. Packer added to Mr. Prentiss' explanation by saying that Champlin's could have introduced information at the Payne's Dock Council public meeting which was noticed and advertised but that they chose not to attend. Mr. Packer reiterated that both records were closed and could not be added to. Mr. Packer also stated that he requested several times during the course of the court hearing, asking what information would be allowed into the record before the Council to which Mr. Goldman responded at the time of the court hearing that the Champlin's lawyers should file some type of pre-hearing memo on what they are trying to produce and then the objecting side can respond – giving a reference point to what the Council will be hearing. Mr. Packer reiterated that the records

should be compared to but not added to in any way. Mr. Affigne questioned Mr. Prentiss on the explanation of disparate treatment and whether or not he saw evidence of that regarding the two cases. Mr. Prentiss stated that he did not but that Champlin's had also brought into question the content of the Legal Decision being a procedural irregularity.

Ms. Managhan stated that the judicial order stated that a remand of the issue back to the Council, as a result of the Payne's decision, for presentation of additional evidence relating to the approval of the Payne's Dock expansion. Ms. Managhan agreed that the burden of proof was on Mr. Goldberg but that there was no mention of limiting what the Council could hear to the administrative record of Payne's. Ms. Managhan stated that at the pre-hearing conference it was made clear that witnesses would be presented and that there would be additional testimonial evidence in regards to the Payne's record. Ms. Managhan stated the Mr. Goldman agreed in court that rebuttal witnesses that were not on the original witness list could be heard. Ms. Managhan stated that it is for the Superior Court to determine whatever conditions or limitations are to be imposed upon this hearing and a request of Judge Rogers was never made to determine such conditions. Ms. Managhan stated that the Payne's application process was much briefer and less thorough than the Champlin's application process; particularly in regards to biological and navigational issues. Ms. Managhan spoke to Champlin's position on attending the hearing for Payne's Dock by stating that they did not attend as they had no standing to make any kind of representation at the hearing and they could not anticipate the Council's decision. Ms. Managhan asked that the Motion in Limine be denied and that Champlin's be allowed to present testimonial evidence. Mr. Affigne countered that even though Judge Rogers did not ascribe limitations to support the assertion of disparate treatment but neither did Judge Rogers bar the Council from setting limitations on what they would consider relevant to the question of disparate treatment. Ms. Managhan expressed concern that the objecting attorneys were attempting to delimit Champlins from providing any testimony and that the Motion in Limine should have been decided by Superior Court not on the Council level. Mr. Packer stated that a Motion in Limine was not filed before Judge Rodgers because the Judge made it clear she did not want to micromanage the case.

Chair Livingston asked for a motion from Council to grant or deny the Motion in Limine. Mr. Coia, seconded my Vice Chair Lemont, motioned to deny the Motion in Limine and explained that the language in the court order would suggest that the parties be allowed to present additional evidence relating to the approval of Payne's dock but also that the Council can limit the scope of where it goes. Mr. Affigne stated that he supported the motion but amended that the Council be able to declare that the sorts of evidence should be limited to evidence of bias, ill will, absence of evidence or simple logic without reopening testimony as the Council does not want to reargue both cases. Mr. Coia agreed. Discussion over the motion with clarification from Mr. Goldman saying the motion is being denied so as to not limit any evidence that comes to certify the administrative record in the Payne's case and granting the motion in part that you are setting the parameter of information input to bias, ill will and absence of evidence; limiting the scope of the hearing and setting the parameter of what evidence the Council is going to consider relevant. Vice Chair Lemont agreed that denying the Motion in Limine but limiting information heard to what which pertains to the wording of Justice Rodgers. Mr. Goldman clarified Mr. Coia's motion with Mr. Coia's agreement. Chair Livingston expressed support for the motion as amended. Motion carried on unanimous voice vote.

Mr. Goldberg opening statement began with a brief explanation of their intended process and then called Mr. Grillo for witness. Mr. Goldberg stated that the entire process for the Motion in Limine took longer than the entire Payne's case setting the path for inequities. Mr. Goldberg asked for confirmation that the Payne's administrative record was made part of the Champlin's record. Mr. Goldman confirmed. In Mr. Goldberg's opening statement they agreed that the body of water is the same for both cases and they are both in close proximity to one another; and then read pieces of Champlin's record quoting Council member's statements about the uniqueness of the Great Salt Pond, the expansion being unnecessary, the close proximity to the mooring field/shape of the mooring field, impacts to water quality, public access

plan and fairways/safe navigation. Mr. Goldberg reminded the Council that the Payne's case was objected to, gave a list of the objectors, and stated that a few of the objectors to the Payne's case had requested a subcommittee hearing. Mr. Goldberg compared the timeframe of each case stating that the Champlin's case took 23 subcommittees and several years to get through to a decision of denial, but the Payne's case was completed in one full Council hearing with a decision of approval. Mr. Goldberg compared both cases in terms of witnesses, expert testimony, studies completed due to water depth, and reasons for expansion, and he concluded that, although the reasons for expansion were similar, the cases were treated very differently. Mr. Goldberg also brought up that in the Champlin's case, a hearing was held on the island but not in the Payne's case, there was only one meeting before the Council held in Narragansett. Mr. Goldberg remarked on the difference of the discussion of Public Trust lands payment during the Champlin's case but not in the Payne's case.

Mr. Affigne reiterated for the record that he abstained from the vote in the Payne's case. Mr. Affigne also wanted clarified for the record that Mr. Payne was sworn in during the Payne's Council hearing. Mr. Goldberg corrected himself saying that Mr. Payne was sworn in but did not follow the Rules of Evidence. Mr. Affigne also stated for the record that much of the information that Mr. Goldberg mentioned was missing in the Payne's case was actually in the Council Agenda and staff documentation that became part of the record and was read and considered by the Full Council.

Chair Livingston called a brief recess at 7:31 p.m. and the meeting resumed at 7:41 p.m.

Mr. Goldberg clarified that Mr. Payne did make an unsworn statement at his hearing before the Full Council which is part of the record.

Mr. Goldberg called Mr. Grillo as his first witness. Mr. Grillo was sworn and identified himself for the record. Under direct examination: Mr. Grillo testified that he was the principal of Champlin's Marina and has been throughout the Champlin's hearing proceedings; that there is approximately ¼ of a mile of distance between Champlin's marina and Payne's marina; and that he was familiar with the services offered by Payne's marina. This last statement was objected to by Mr. Packer and Mr. Prentiss; objection sustained by Chair Livingston. Mr. Goldberg offered to have the witness make an offer of proof that services are identical at each marina. This was objected to by Mr. Prentiss. Mr. Goldberg offered to do the Offer of Proof himself through Mr. Grillo. Mr. Prentiss and Mr. Packer both objected based on the reasoning that neither case could be supplemented to. Mr. Packer stated that Mr. Goldberg could have briefed his opening argument and addressed it in an exhibit. Mr. Goldberg argued that he could not compare the two records if he could not compare the services of each marina. Argument on what information Mr. Goldberg can introduce based on what is in the record and the motion made in the beginning of the meeting to keep testimony to proof of disparate treatment/illogical results. Mr. Goldberg makes offer of proof that Payne's marina is often a transient marina such as Champlin's but they do not have a dinghy dock nor do they have a public access plan. Mr. Goldberg submits new photos for the record and asks that they be marked. Mr. Goldman marked the photos 7-31-1 through 6. Mr. Goldberg asks Mr. Grillo to identify the photos and the dates they were taken. A discussion ensued regarding the process for submitting photographs for record purposes. Mr. Packer objected to Mr. Goldberg's line of questioning regarding the content of the photos. Objection sustained. Mr. Goldberg gave offer of proof that the photographs depicted Payne's marina during its application time, application pending timeframe, assent approval and present. Mr. Grillo testified to the dates the pictures were taken. Mr. Prentiss objected to the question to Mr. Grillo regarding the size of the boats at the Payne's Marina stating that the information should already be in the record and it was established that there would be no expansion of the closed records. Chair Livingston sustained the objection. Mr. Goldberg makes an offer of proof as to the size of the boats in the pictures to which is objected to by Mr. Packer and asked that it be stricken from the record. Chair Livingston asked for explanation of relevance for line of questioning. Mr. Goldberg stated that the boat size and its ability to navigate in the channel were reasons for denial decision in Champlin's

case; but that larger boats are tied up at Payne's marina with less of navigational fairway. Chair Livingston accepted offer of proof. Mr. Goldberg asked that the photographs be marked as full exhibits. Mr. Prentiss and Mr. Packer objected. Chair Livingston sustained objection and the photos were marked for identification only. Mr. Goldberg and Mr. Grillo discuss the content of Champlin's Exhibit T full which is a plan depicting three marinas in the Great Salt Pond which Mr. Grillo identified. Objections were made to Mr. Goldberg's questions to Mr. Grillo of what a fairway is. The objection was based on administrative record and Mr. Grillo's qualifications to define fairway. Chair Livingston sustained the objection. Mr. Goldberg expresses concern regarding not being able to ask from administrative record and not being able to add to the administrative record. Chair Livingston stated that if it is in the record and pertains to the questions at hand, it can be used. Mr. Goldman clarifies that Mr. Goldberg should point to things in the record, without supplementing the record, that show disparate treatment which may mean legal argument and not testimony. Mr. Goldberg stated that he felt he was being constrained from offering any evidence and suggested that the actions and the rulings were in contempt of the order and he would file a motion. Mr. Affigne expressed concern regarding Mr. Goldberg's statements. Mr. Goldman stated that with the addition of the Payne's administrative record into the Champlin's record, additional information has been introduced into the Champlin's record. Mr. Affigne questions why the hearing is continuing if Mr. Goldberg plans on appealing any decision made. Chair Livingston states the hearing is continuing to see if Mr. Goldberg has any evidence of disparate treatment. Mr. Goldman stated that the Court would not micromanage the case and would not take the case up again until CRMC makes a decision. Mr. Goldberg continued to try to question Mr. Grillo about the CRMC requirement for a public hearing on the island, questions regarding the CRMC staff member recommendation and whether Mr. Grillo thought he was treated disparately from the Payne's application. All questions were objected to. Chair Livingston allowed Mr. Grillo to state why he felt he was treated disparately. Mr. Grillo stated that he was required to perform an in-depth water quality, a shellfish study, he was required to hire an engineer, a captain was needed to discuss navigational issues, they were required to have a meeting on the island and they were subject to subcommittee holding 23 different meetings. Mr. Grillo stated that we was not against the Payne decision but was against the difference in the way the applications were dealt with. Mr. Grillo testified that the Payne's Marina and Champlin's marina were competitors – offering similar services and competing for same customers. Mr. Prentiss stated that the Council cannot be condemned for making a decision on the Payne's Dock application based on evidence that was not before the Council when the application was heard; therefore, it is inappropriate to hear evidence that was not there before. Mr. Goldberg asked about the staff recommendation and made an offer of proof that the staff recommendation for the Champlin's case was not accepted but in the decision for the Payne's application they followed the staff recommendation. Mr. Goldman stated that the information on the staff recommendations and the decisions was in both records. Discussion on the scope of the remand which was limited to evidence of disparate treatment. Chair Livingston suggested that as the burden is on Champlin's to find evidence of disparate treatment and no questions could be asked, then the hearing will be terminated and legal briefs would be accepted from the attorneys. Mr. Affigne asked for clarification on what the council should be looking at as it was determined that disparate outcomes was not in and of itself evidence of disparate treatment. Mr. Goldman answered that they were letting Mr. Goldberg sustain his burden of proof as directed by the Court subject to the Rules of Evidence so that a record can be built and the Council can rule. After several more attempts at questioning Mr. Grillo and having objections sustained Mr. Goldberg made an offer of proof that he was not allowed a meaningful hearing, he was not allowed to ask any questions that allow for an answer showing disparate treatment, he was not allowed to get into arbitrary and capricious conduct as he was limited to disparate. Mr. Goldberg stated that based on on the rules of the evening he did not have any further witnesses and what he wanted to introduce to the record was not allowed. Mr. Elmer asked to make a brief statement prior to the closing of the meeting regarding the legal proceedings in Superior court having to do with a technical legal reason of not bringing up equal protection in their complaint and if not in their complaint it should not be brought up in court and the substantive reason was that the equal protection issue was already argued in federal court proceeding and had lost and had it dismissed. Mr. Elmer stated that it should not have been allowed to bring up the

same claim again. Mr. Goldberg asked to strike Mr. Elmer's statement. Mr. Elmer continued to give his interpretation on the remand criteria explaining to the Council that Justice Rodgers would like to see that the Council looked at both cases and was able to determine whether or not they were treated differently because of the actual case or because of one applicant was treated unfairly. Mr. Goldberg asked that Mr. Elmer's statement be stricken from the record as the Superior Court speaks through its Order.

Chair Livingston stated that the Council would be making a decision but not until after briefs were received. A briefing schedule was set. Mr. Goldberg would have his brief ready in 45 days and then the counter briefs would be in within 30 days of that and then Mr. Goldberg's response to the counter brief would be within 10 days. Mr. Goldberg stated that as soon as the transcript was ready he intended to file a motion in Superior Court.

Mr. Ballou asked to offer comments. Mr. Goldman stated that after the briefs were received Council members would have the opportunity to comment. Mr. Goldman clarified for Council was information was accepted to the record.

6. ADJOURN

Mr. Coia motioned, seconded by Mr. deRamel, to adjourn. Motion carried on unanimous voice vote. Meeting adjourned at 8:53 p.m.

Respectfully submitted,
Lisa A. Turner, Recording Secretary