

In accordance with notice to members of the Rhode Island Coastal Resources Management Council, a meeting was held on Tuesday, October 23, 2012 at 6:00 p.m. in Conference Room A, Administration Building, One Capitol Hill, Providence, RI.

Members Present

Anne Maxwell Livingston, Chair
Paul Lemont, Vice Chair
David Abedon
Ronald Gagnon
Raymond Coia
Donald Gomez
Michael Hudner
Jerry Sahagian
Tony Affigne
Guillaume deRamel

Staff Present

Grover J. Fugate, Executive Director
Jeffrey M. Willis, Deputy Director
Laura Miguel, Enforcement
Brian Harrington, Enforcement
James Boyd, Coastal Policy Analyst

Brian A. Goldman, Esq.

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

Vice Chair Lemont motioned, seconded by Mr. Coia, approval of the minutes from the October 9, 2012 Semimonthly meeting. Motion carried on unanimous voice vote.

3. SUBCOMMITTEE REPORTS

None

4. STAFF REPORTS

Mr. Fugate reported out on several items:

Peter Lord seminar was held for journalists to be educated on scientific issues. Last week was a seminar on climate change and the response to climate change. Mr. Fugate and Ms. Freedman participated with a panel of experts for that group of journalists. There were articles generated on the seminar and are in the press packages handed out to Council members. A clarification was made in regards to a misquote a remark Mr. Fugate made in regards to North Carolina's legislature trying to outlaw sea level rise regulatory changes.

Ports meeting has been organized by a congressional delegation and the State to try to stimulate the RI Port sector. Chair Livingston, Mr. Fugate and Mr. Goulet have been asked to participate. The meeting will be held on October 29th from 1 p.m. to 3:30 p.m. at CCRI.

Invitations were sent out for CRMC's 40th anniversary celebration to be held on November 8th. Governor Chafee and Senator Whitehouse will be present at the celebration. The celebration to be held at the South Kingstown Land Trust facility known as the Barn.

CRMC is in the process of commenting on new FEMA maps for flood insurance rating known as FIRMs which determine rates and base flood elevations for building in the coastal areas. Mr. Fugate stated that the maps are not a very good resemblance to the Rhode Island coast and that CRMC is requesting that FEMA conduct further studies.

5. Coastal Education Series: Jared Rhodes, Statewide Planning

Mr. Rhodes spoke to members, staff and attendees regarding Statewide Planning programs and their interaction with CRMC to advance RI's missions.

6. Applications which have been out to 30 day notice and are before the Full Council for Decision:

2012-03-069 RONALD FATULLI – Construct and maintain a commercial float array, approximately 170 linear feet total, (approx. 940 sq. ft. total), to support commercial fishing business, Newport Water Shuttle, taxi service, and “touch and go” recreational boat activity. Establish “Structural Perimeter Limit” for in-water facility. Located at plat 24, lots 246 and 351; Bowen’s Wharf, Newport, RI.

Jay Lynch, Esq of Moore Virgadamo & Lynch, present on behalf of Mr. Fatulli. Mr. Anderson gave a brief overview of the application to the Council stating that the applicant was requesting to add 170 linear of float at a commercial facility in Newport Harbor. Mr. Anderson stated that the expanded use on the new floats is for continued storage of fishing vessels and expanded short duration touch-and-go recreational boats. Mr. Anderson stated that staff offered some suggestions to attempt to minimize navigational conflict with the facility and the adjacent permitted marina. Mr. Anderson stated that an objection was received from the abutting property owner Bowen's Wharf, who is represented by Joseph DeAngelis but a tentative agreement was reached between both parties and staff does not have any objection to the imposition of conditions set forth in the agreement. Mr. Lynch explained to Council that the agreement between the owner and Bowen's Wharf contained four conditions which merge together with staff recommendations. Mr. Lynch stated that the SPL line will be reconfigured to conform to the exterior of the new float line that's going to be installed; place a maximum vessel beam width of 25' on vessels that will be using the new dockage area; limited use of the easterly 88' area for personal vessel of marina owner; during special events they will be able to tie up boats beyond the 25' beam limit for that limited purpose. Mr. DeAngelis stated that he represented Bowen's Wharf and provided a copy of the agreement to the Council for the record. Mr. DeAngelis stated that the a littoral rights agreement would need to be signed between the two parties and asked that the assent not be issued until the littoral rights agreement has been executed. Mr. DeAngelis stated that both parties would like the agreement to be a free-standing agreement and not incorporated into the assent. Mr. Goldman stated that CRMC would like to reference the agreement in the assent and have the assent and agreement recorded as well. Mr. Sahagian moved for approval of the application with the agreement between Bowen's Wharf and Ronald Fatulli. Vice Chair Lemont seconded the motion. Motion carried on unanimous voice vote.

2010-04-119 STONEBRIDGE MARINA – Establish a Marina Perimeter Limit at existing marina. Located at plat 21, lot 104; 17 Point Road, Portsmouth, RI.

Alessio Iafrate, owner of the marina, was present. Mr. Anderson gave a brief overview of the application to the Council stating that the applicant wished to establish a marina perimeter limit around the existing legal marina in Portsmouth. Mr. Anderson stated that staff recommended approval. Vice Chair Lemont motioned, seconded by Mr. Hudner and Mr. Coia, for the approval of the application. Motion carried on unanimous voice vote.

2012-07-057 DEPARTMENT OF ENVIRONMENTAL MANAGEMENT – The applicant proposes to: 1) rebuild and relocate a float and piles to the eastern side of the pier; 2) construct a 66 ft. T-shaped extension of the fixed pier; and 3) to remove, dispose and replace the existing decking at railings. This project requires the issuance of a Special Exception to the prohibition to the siting of recreational structures in Type 2 waters contained in Section 100 of the RICRMP. This project is located in Colt State Park, plat 184, lot 23; Bristol, RI

Council member Ronald Gagnon recused himself as he is an employee of RIDEM. Mr. Anderson gave a brief overview of the application to the Council stating that the application was to extend and existing fishing pier in Colt State Park in Bristol, the construction of a T-shaped extension 66 feet long to the existing outboard terminus. Mr. Anderson stated that the project was in Type 2 waters which makes it prohibited in this area requiring a special exception. Mr. Anderson stated that staff concluded that the project is consistent with the special exception criteria and recommends approval. Chair Livingston opened the public hearing on the special exception. Mr. Coia motioned to close the public hearing, seconded by Mr. deRamel. Motion carried on unanimous voice vote. Mr. Goldman conducted a roll call vote on Mr. Sahagian’s motion, seconded by Mr. Coia, to approve the Special Exception.

Mr. deRamel	Yes
Mr. Affigne	Yes
Mr. Abedon	Yes
Mr. Gagnon	Yes
Mr. Hudner	Yes
Mr. Sahagian	Yes
Mr. Coia	Yes
VC Lemont	Yes
Chair Livingston	Yes

Special Exception approved. Mr. Coia motioned, seconded by Mr. deRamel, for the approval of the application. Motion carried on a unanimous voice vote.

7. Applications Which Have Had a Public Hearing and are Before the Full Council for Final Decision:

1989-02-032 DOWNING SALT POND PARTNERS, LP – Extension of assent and compliance with previously issued CRMC approval. Located at plat W, Lots 82, 85, 86A, 87, 88, 173-174, 175; Karen Ann Drive, Narragansett, RI.

Mr. Goldman gave a procedural briefing to the Council stating that the application had been out to public hearing and that the Subcommittee had made a recommendation to the Council. Mr. Goldman stated that after the Subcommittee level when an application goes before the Full Council only new evidence is allowed to be introduced. Mr. Goldman stated that no memos were submitted requesting the introduction of new evidence but that both parties had filed memos for and against the adoption of the subcommittee recommendation. Mr. Goldman stated that brief oral statements could be made prior to the Council deliberating on whether to approve, modify or reject the subcommittee recommendation.

Gregory Schultz, Special Assistant Attorney General, was present for the Environmental Advocate and Historic Preservation and Historic Commission. William Landry, Esq was present representing Downing/Salt Pond Partners. Jack Killooy, Esq. was present to represent the Narragansett Indian Tribe Historic Preservation Office. Ted Sanderson, Executive Director of the RI Historic Preservation & Heritage Commission (RIHPHC).

Mr. Landry addressed the Council stating that the case pertained to the determination of the legal rights of distinct parties under the Administrative Procedures Act and through the Subcommittee meetings three distinct issues were deliberated on – 1) whether the assent for this project, issued in 1991, is still a live and valid assent; 2) whether Downing/Salt Pond Partners violated their assent justifying a revocation or substantial modification of such; 3) question on the CRMC Cease and Desist Order issued in 2009. Mr. Goldman added a fourth issue which was to grant the assent extension. Mr. Landry stated that the assent was covered by the tolling legislation which extended live assents. Mr. Landry stated that all parties involved agreed that the parcel was of significant interest to people interested in archaeology and that Phase I and II archaeological digs had already been conducted and reported on. Mr. Landry stated that the Assent issued in 1991 provided for certain data recovery requirements trying to balance between the property owner's right to develop the property and the archaeological interest in the site which required a Phase III data recovery dig. Mr. Landry stated that the very specific data recovery component was established in 1993 in a letter from the Executive Director to the applicant stating that the data recovery would take place on a 2.4 acre area using a map to avoid confusion. Mr. Landry stated that millions of dollars were invested by the developer up to 2007 in which 26 of the houses were built, road and sewer infrastructure were installed, and sewer impact fees were paid to the Town of Narragansett. Mr. Landry stated that throughout the life of the project over \$4 million was invested by the developer of the property. Mr. Landry stated that in 2007, the RIHPHC asked for the revocation of the permits for the project because of the historic value of the site to the Narragansett Tribe and that the piece of land should be preserved as a public archaeological park with no further development to which Mr. Landry explained the CRMC Management procedures does not provide for in this case. Mr. Landry stated that the abeyance of the process was used by RIHPHC to find funding to purchase the site which they were not able to raise but still continue to request revocation of the Assent. Mr. Landry stated that through deliberation of all materials and information, the Subcommittee determined that the Assent is live and valid and that there was no basis for revocation or modification of the current Assent. Mr. Landry stated that the proper avenue for the RIHPHC and parties involved would be to purchase the property or take it by eminent domain. Mr. Landry explained to the Council that although a letter was written to the Council from NOAA that NOAA stated in the letter they had no jurisdiction over the matter, but asked the Council to look at the facts carefully. Mr. Landry stated that RIHPHC has recently changed their stance from revocation of the assent to an archaeological dig requirement of each parcel to be developed prior to development. Mr. Landry stated that this change in stance still involves the modification of the live valid Assent. Mr. Landry closed by thanking the Subcommittee members for their diligence and the Council for reading the record and asked that the Subcommittee recommendation be adopted.

Mr. Schultz addressed the Council as a representative of two parties, RI Historical Preservation and Heritage Commission and the Environmental Advocate for Rhode Island. Mr. Schultz stated that he respectfully strongly disagreed with Mr. Landry's characterization of certain facts and the omitting of certain facts that are extremely important with regards to the decision making process of the evening. Mr. Schultz explained that the potential purchase of the property between State entities and Downing Salt Pond Partners was irrelevant to the facts of the matter pending and improperly put forth. Mr. Schultz agreed that Downing/Salt Pond Partners clearly had vested rights with regard to the permit and regulations in place at the time of issuance and with the conditions of the Assent. Mr. Schultz stated that it was very clear in the Assent that there was a requirement of additional archaeological surveying required on site prior to development. Mr. Schultz stated that significant artifacts were found as a result of the four separately approved digs and that it is uncontested at this point that this is one of the most important Native American archaeological sites on the east coast. Mr. Schultz informed the Council that in the PAL report (contracted by Downing) it stated that 22 dwelling sites were found, individual burial sites were found and likely more to be found which are entitled to the same respect as other burial sites found today. Mr. Schultz also stated that it is unclear where the cemetery boundaries are at this point in time. Mr. Schultz stated that the PAL report suggested further study be done on lot due to its historical significance, recommending a systematic lot-by-lot procedure. Mr. Schultz stated in regards to the findings that they would request a modification

dealing with the scope of the required data recovery or archaeological review and explained the “Dig” procedures. Mr. Schultz talked about the NOAA/OCRM letter in which it states that heavy equipment may not be consistent with archaeological practices. Going over aspects of the Subcommittee recommendation, Mr. Schultz stated that paragraph #35 is simply not feasible and unsupported by other paragraphs; also, paragraph 25 would require a Phase III data recovery dig. Mr. Schultz talked about paragraph 27, and the specific conditions required prior to the issuance of the Assent and how it is inconsistent with paragraph 35 as was Section 220 of CRMC regulations. Mr. Schultz briefly explained the RI Cemeteries Act which he feels is not being complied with but is very relevant to RIHPHC and EA’s opinion. Mr. Schultz also feels that the ACOE permit has not been complied with. Mr. Schultz stated that in his brief he suggested three additional recommended findings of fact and a request to modify paragraph 35.

Brief recess.

Mr. Killoy addressed the Council regarding the significance of the historic Native American Narragansett Village, burials and sacred sites which is eligible to be listed in the National Register of Historic Places. Mr. Killoy stated that the responsibility of the Council was to protect and preserve those sites that are important within the coastal zone. Mr. Killoy stated that he felt modifications should be made to the original Assent pursuant to CRMC regulations and testimony and evidence taken. Mr. Killoy acknowledged that the archaeological process is expensive but stated that the site is irreplaceable and unlike any other present at this time. Mr. Killoy stated that due to changed conditions on the site, the Assent should be changed to reflect the conditions of the site. Mr. Killoy objected to the characterization of the archaeological dig as an “Egyptian” dig. Mr. Killoy explained that even though the developer feels he has vested rights to build, the developer does not have the right to destroy, desecrate sites or burials. Mr. Killoy stated that the letter from NOAA to the Council was precipitated by the Narragansett Tribe to remind the commission of its responsibility to be consistent in its treatment of these types of projects under its mandates. Mr. Killoy stated that the Narragansett Tribe asks that conditions be placed that protect and require any archaeological or mitigation efforts on that undisturbed areas, perhaps a lot-by-lot basis with monitoring. Mr. Killoy expressed concern that a normal excavation operation would not recognize from the height of a 20 foot high machine what might be a significant artifact; and a solution to that concern would be to have someone on the ground during construction with the knowledge and understanding of the historical issues.

Chair Livingston asked for clarification of the size and location of the property in question. Mr. Landry stated that there were 37 acres left to be developed; 26 houses have been built so there would be 53 houses left to be built with road infrastructure and substantial drainage infrastructure to be completed. Mr. Landry confirmed that the 2.5 acres would not have anything built on it as it was agreed upon for data recovery area. Mr. Landry confirmed that at least one burial remain had been found and that they were following the Historic Cemeteries Act which was enforced by the Town of Narragansett and that the CRMC does not have any jurisdiction over the Historic Cemeteries Act. Mr. Killoy quoted from the 2006 archaeological report which stated that it was anticipated that undiscovered human burials are located throughout the planned development, and that there have been sacred and funerary sites on this project location. Mr. Schultz stated that in the RI Cemeteries Act there is a requirement that boundaries need to be determined for the found cemetery and that this requirement has not been fulfilled. Mr. Schultz stated that he understood that CRMC could require a full determination as to whether or not human remains are located on the property prior to any development which could be done on a lot-by-lot basis.

Mr. Affigne asked what information or evidence had been submitted to the Subcommittee to cause a reassessment of two key points – Cease and Desist Order and scope of analysis. Mr. Goldman stated that procedurally a motion for reconsideration was submitted and the subcommittee reconvened and made subsequent findings. Mr. Affigne asked what new evidence was submitted regarding burial sites or

whether or not the Cease and Desist Order was valid. Mr. Coia stated that he was originally troubled with the Cease and Desist Order being left in place after the first subcommittee recommendation so he re-reviewed all of the evidence, listened to new evidence and felt that he was more comfortable in his opinion that there was a proper balancing of all of the rights of the individuals, and that proper protections were in place so that he felt comfortable putting forth the amended subcommittee report. Vice Chair Lemont concurred with Mr. Coia in that the subcommittee recommendation was in the best balanced interest of all parties. Mr. Affigne asked for clarification of the extent of the discussion on the position of clerk of the works monitoring the site for artifact content during excavation; and whether it would be a less expensive alternative to a lot by lot analysis. Mr. Landry stated that the suggestion of a site monitoring person is not out of the question and that the subcommittee left it to the Executive Director to try to work out the protocol. Mr. Landry expressed concern at the suggestion that the development of the property would need to be under such strict excavation terms. Mr. Affigne stated that vested rights of the property owner are not unrestrained and that there is a global problem of significance in the prehistoric archaeological recovery but not in the understanding of importance of those sites except for in the US and that if this is in fact the most significant pre-Columbian archaeological location on the east coast it should be treated as such. Mr. Affigne suggested that it was in the best interest of the developer to do a comprehensive archaeological analysis before any more money is invested so it is known what is being dealt with. Discussion on the perception of the significance of the site. Mr. Fugate clarified that when the matter was originally heard, the Council was not aware of the full extent of the significance of the site and may not have issued the assent for the entire portion of the area at that time. Mr. Landry disagreed and stated that a Phase I and Phase II dig concluded beyond a doubt that this was a significant Native American Village and that was before the assent was issued. Mr. Fugate stated emphatically that there was very little discussion on the significance of the site and that the Council was not aware of it that night. Mr. Sanderson stated that no other village of such significance has been identified in the Northeast and that why people did not know what they were looking at back in 1989 and 1990. Mr. Sanderson stated that the Council imposes conditions on developments routinely. Mr. Landry stated that the State cannot make a private developer be financially responsible for such a major Phase III archaeological dig.

Mr. Coia stated that the arguments being made are not new arguments and are all in the record which was considered at great length by the Subcommittee and that if something arises on the site, they need to stop, work with the parties involved and CRMC to remedy; and if it cannot be remedied, then it comes back before the Council as it relates to that particular area. Mr. Coia expressed again the amount of information that was reviewed and the thought process that went into the decision made trying to respect the interests of all parties. Mr. Coia reiterated that if something was found on site all parties would try to resolve the issue.

John Brown, Narragansett Tribe Historic Preservation Office, gave new argument for the record stating that he had concern about bringing the weight of the tribal preservation office and its federal rights to a State board as they would strike a difference balance. Mr. Brown stated that the knowledge of this site has always been known to his people; a continued place of their history and culture. Mr. Brown expressed deep concern regarding the idea of striking a balance within the material world by removing everything that is left there of the Narragansett Tribe. Mr. Brown stated that the NOAA letter was a reminder that in the converse and concourse of CRMC business, Federal consistency must be met and that the standard for review in the National Historic Preservation Act and the RI State Historic Preservation Act. Mr. Brown expressed concern that there was not involvement by the ACOE.

Mr. Landry stated again that having someone on the site was not off the table but that having to stop every time an artifact is found is not an acceptable place for a permitting issue. Mr. Affigne expressed concern that Subcommittee Recommendation #37 would not be adhered to on site and who would determine a significant find.

Mr. Hudner stated his concern that no matter what decision is made it will be subject to appeal and wondered why the application is not already in Federal Court.

Mr. Sanderson suggested that the Council require the applicant to work with his archaeological consultant to put together a plan of action and the conduction of an archaeological clearance process to be put in place; so that all parties can review and reach an agreement on the process.

Vice Chair Lemont suggested that the decision be postponed for a month so that the Executive Director, Mr. Landry and Mr. Sanderson, and what ever other party is involved can sit down and see if they can come up with a clear vision of what 37 means and how it's going to be enacted and then bring it back to the Council with a resolve that all can agree to; sort of an amended subcommittee recommendation for #37.

Chair Livingston continued the application to the Tuesday, December 11th meeting.

7. CATEGORY "A" LIST/ ENFORCEMENT REPORT

None were held.

8. ADJOURN

Mr. Affigne motioned, seconded by Mr. Hudner for the meeting to be adjourned at 8:45 p.m.

Respectfully submitted,
Lisa A. Turner, Recording Secretary