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November 26, 2013

NOTICE FOR PUBLIC COMMENT

A Petition for Adoption of Rules (Petition) was filed on October 3, 2013 with the Coastal Resources Management Council (CRMC) pursuant to R.I.G.L. § 42-35-6 and Section 14.8 of the CRMC Management Procedures. The Petition seeks to amend Sections 920.1.B.2(f) and (g) of the CRMC Salt Pond Region Special Area Management Plan (SAMP) as they pertain to parcels of land located within CRMC-designated Lands of Critical Concern of the Salt Pond Region SAMP. Sections 920.1.B.2(f) and (g) require a 225-foot setback and a 200-foot buffer, respectively, for all development activities within Lands of Critical Concern. Relief from the setback and buffer regulations requires a Special Exception as defined in Section 130 of the Coastal Resources Management Program unless the land was subdivided before the SAMP regulations adoption. For Section 920.1.B.2(f) the adoption date is April 12, 1999 and for Section 920.1.B.2(g) the adoption date is November 27, 1984. A similar rule is in effect for the CRMC Narrow River SAMP.

The Petitioners seek to amend the SAMP regulations by exempting parcels from the Special Exemption requirement provided that they were originally platted prior to the respective SAMP rule adoption dates and then were subsequently the subject of an administrative subdivision. The proposed rule change could affect parcels in CRMC-designated Lands of Critical Concern located within the Towns of Westerly, Charlestown, South Kingstown and Narragansett.

The Petition has been assigned file number **2013-10-026** and is available for review, including the applicable plat maps and site plans, in the CRMC office during its business hours. Additionally, the Petition itself is available on the CRMC web pages here:

<http://www.crmc.ri.gov/applicationnotices.html>.

The CRMC Planning & Procedures Subcommittee has the Petition under consideration and is seeking public comment in preparation for developing a recommendation to the full Council as to whether to proceed with rule-making under the Administrative Procedures Act. The Subcommittee invites any interested parties to file written comments regarding the Petition **on or before December 31, 2013**. Written comments should be mailed to the CRMC address above, attention James Boyd, or emailed directly to jboyd@crmc.ri.gov.

Before the RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL

In the Matter of Kevin and Suzanne Delane

Petition No.:



PETITION FOR REGULATION CHANGE

INTRODUCTION

So that its purpose of protecting the salt ponds through a reduction in development density may be achieved in a manner consistent with both Rhode Island law and the United States Constitution, Petitioners Kevin and Suzanne Delane request, pursuant to R.I. Gen. Laws § 42-35-6, that the Coastal Resources Management Commission amend sections 920.1.B.2(f) and (g) of the Salt Pond Special Area Management Plan. The proposed amendment would clarify that relief from the setback and buffer zone requirements imposed by those provisions

requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to [the adoption date] **or were originally platted prior to [the adoption date of the regulation] and were subsequently the subject of an administrative subdivision, as defined by R.I. Gen. Laws § 45-23-32(2), and cannot accommodate the requirement.**

FACTS

1. Petitioners Kevin and Suzanne Delane (the "Delanes" or "Petitioners") are the owners of real property located on the easterly side of West Beach Road in Charlestown, Rhode Island, which is identified by the Town of Charlestown as Map 2, Lot 339 (the "Delane Lot").
2. The Delane Lot, as it currently exists, was created through the consolidation of several smaller lots created when two larger parcels were subdivided prior to 1974.
3. The easterly section of the Delane Lot was platted in February 1926 as lots 203, 204, 205, 206, 207, 208, 209, 210 and 211 of Section D of the Quonocontaug Highlands Section D plat, which is recorded in the Charlestown Land Evidence records at Plat Book 1, Map 76. Lots 203,

204, 205, 206, 207 and 208 “fronted” on a 40’ right of way or “paper street” extension of North Avenue. Lots 209, 210 and 211 “fronted” on the opposite side of the paper street. *See Exhibit 1.*

4. The western section of the Delane Lot originally was part of a large parcel of land that was subdivided by Mildred E. Richardson prior to February 1974. *See Exhibit 2.* One of the resulting lots was a 3.30 acre parcel, originally designated as Lot B but later re-designated as lot 301 by the Charlestown Tax Assessor. *See Exhibit 3.*

5. In 1999, Robert Frost, who owned all of the aforementioned lots, undertook an administrative subdivision which took land from lot 301 and added it to the merged lots 203-208 to create a single 2.10 acre lot. *See Exhibit 4.* This administratively combined lot was designated by the Charlestown Tax Assessor as Map 1, lot 339. *See Exhibit 5.*

6. The 1999 administrative subdivision also resulted in lots 209, 210 and 211 being combined with the remaining part of lot 301 and the 40’ right of way to create lot 339. *See Id.*

7. The administrative subdivision resulted in a decrease, rather than an increase, in the number of building lots, as three potential building lots in the form of lots 209-211, lots 203-208 and lot 301 were consolidated into the two lots now known as lots 301 and 339.

8. In addition, the administrative subdivision resulted in the creation of a far better lot upon which to build than lots 203-208 standing alone, because it permits the house and septic system to be placed on the western side of the enlarged lot 339.

9. Kevin and Suzanne Delane purchased lot 339 in 2001 with an expectation that they could build a single family dwelling on the property.

10. The Rhode Island Department of Environmental Management subsequently issued a permit for the installation of a denitrifying individual sewage disposal system (“ISDS”) on the

Delane Lot.



11. In 2006, the Delanes sought from the Coastal Resources Management Commission (“CRMC”) a Preliminary Determination regarding their plans to construct a single family dwelling serviced by a denitrifying ISDS and a private well on the Delane Lot.

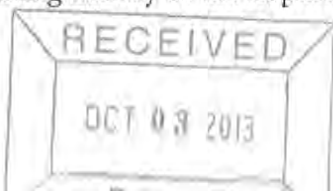
12. The Preliminary Determination issued in April 2007 raised issues about the suitability of the Delanes’ plan based upon an interpretation of the Special Area Management Plan for the Salt Pond Region (the “Salt Pond SAMP”) that requires enhanced minimum setbacks and buffer zones on land subdivided after November 27, 1984 unless a special exception is obtained.

ARGUMENT

I. One purpose of the Salt Pond SAMP is to protect the salt pond watersheds by reducing the density of development within the watersheds.

The Rhode Island legislature has required the CRMC to develop special area management plans “to provide for the integration and coordination of the protection of natural resources, the promotion of reasonable coastal-dependent economic growth, and the improved protection of life and property in the specific areas designated [by the CRMC] as requiring such integrated planning and coordination.” R. I. Gen. Laws § 46-23-6(1)(v)(B). As a result, the CRMC promulgated and adopted the Salt Pond SAMP, which covers properties within the salt ponds watershed in the Towns of Westerly, Charlestown, South Kingstown and Narragansett, Rhode Island. The original Salt Pond SAMP, adopted on November 27, 1984, focused on alleviating water pollution through regulations intended to reduce the density of development within the salt ponds watershed. *See generally*, The Salt Pond Region Special Area Management Plan (Coastal Resources Management Commission August 1984)(“1984 Salt Pond SAMP”) at §§ 140 and 310.1. *See also*, Rhode Island’s Salt Pond Region: A Special Area Management Plan (Coastal Resources Management Commission April 12, 1999) (“Salt Pond SAMP”) at § 130.B.3.

The 1984 Salt Pond SAMP established three specific land-use classifications based upon the then-existing density of development. These classifications were (1) Self-Sustaining Lands, which



were defined as “lands which were undeveloped or developed at a density of not more than 1 residential unit per 2 acres”; (2) Lands of Critical Concern, which were defined as lands with the same development characteristics as Self-Sustaining Lands but which abut sensitive salt pond areas or overlie aquifer recharge areas for existing or potential water supply wells; and (3) Lands Already Developed Beyond Carrying Capacity, which were defined as “lands . . . developed at densities beyond carrying capacity, frequently at one residential or commercial unit per 1/8 to 1/2 acre.” 1984 Salt Pond SAMP at § 320.1.A-C. After the Salt Pond SAMP was adopted, the Town of Charlestown and other communities within the watershed revised their zoning ordinances to adopt the 2 acre minimum housing lot size recommended by the SAMP, thereby dramatically reducing potential building development in the watershed. Salt Pond SAMP at § 130.D.1.

The 1984 Salt Pond SAMP created various management policies and regulations applicable to the various classifications of property located within the salt ponds watershed. Included among the regulations applicable to property classified as Lands of Critical Concern was a requirement that a “200 foot wide natural buffer zone shall be provided in those areas that abut the salt ponds, their tributaries and contiguous wetlands” in which the construction of buildings and sewage disposal systems or leachbeds was to be prohibited. 1984 Salt Pond SAMP at § 320.1.B.2(f).

The CRMC adopted a substantially revised Salt Pond SAMP on April 12, 1999. The revision included additional regulations intended to reduce the cumulative impact of on-going development in the salt ponds watershed. Among these regulations was a requirement for a “minimum 225’ setback from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands . . . for ISDS in Lands of Critical Concern for activities within 200’ of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 .” Salt Pond SAMP at § 920.1.B.2(f).

Of particular relevance to this Petition are the exceptions from the regulations imposing setbacks and buffer zones on Lands of Critical Concern. As originally adopted, there was no



exception to the buffer zone regulation. *See* 1984 Salt Pond SAMP at § 320.1.B.2(f). The SAMP was revised in 1987, however, to specifically provide that the regulation would not apply to properties platted before the adoption of the 1984 Salt Pond SAMP. Section 320.1.B.3 stated,

The definition and regulations pertaining to areas of critical concern apply to those properties platted after the adoption date of this plan. Alterations to coastal features or within 200 feet of a coastal feature on properties platted prior to the adoption of this plan will, where possible, conform to the regulations of this section.

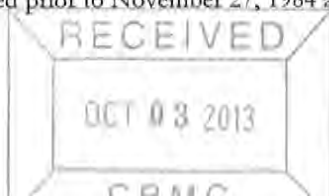
In cases where, due to the size or configuration of a lot that was platted prior to the adoption of this plan it is not possible to provide a 200 foot buffer, then the determination of the boundaries of a buffer zone must balance the property owner's rights to enjoy their property with the Council's responsibility to preserve, and where possible, restore ecological systems. Recommended Buffer Zones shall be established according to the environmental values and sensitivities of the site as assessed by the Council's staff engineer and biologist.

The Salt Pond Region Special Area Management Plan (Coastal Resources Management Commission June 1, 1987) at § 320.1.B.3.

When the Salt Pond SAMP was revised in 1999, this provision was replaced by provisions providing that relief from the buffer zone regulation, as well as the newly added setback requirement, may be obtained only through a Special Exception, unless the lands were "subdivided" prior to April 12, 1999, in the case of the setback requirement,¹ or November 27, 1984, in the case of the buffer zone requirement.² Salt

¹ Section 920.1.B.2(f) of the Salt Pond SAMP provides as follows: "A minimum 225' setback from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for OTWS in Lands of Critical Concern for activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4. Relief from this regulation requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to April 12, 1999 and cannot accommodate the requirement."

² Section 920.1.B.2(g) of the Salt Pond SAMP provides as follows: "A 200' buffer zone from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for all development activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 in Lands of Critical Concern. Relief from this requirement requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to November 27, 1984 and cannot accommodate the requirement."



Pond SAMP at § 920.1.B.2(f) and (g). Thus, property that was subdivided before the regulations were adopted is specifically excluded from having to comply with them.

II. Exclusion of administrative subdivisions from the application of Salt Pond SAMP §§ 920.1.B.2(f) and (g) is consistent with the definitions provided by the Development Review Act.

The exclusions from the setback and the buffer zone requirements do not apply to land that is “subdivided” after the regulations were adopted unless a Special Exception is granted. Salt Pond SAMP at §§ 920.1.B.2(f) and (g).

The word “subdivide” necessarily contemplates a division of land into smaller parcels. The Merriam Webster dictionary defines “subdivide” as a verb meaning “(1) to divide the parts of into more parts; (2) to divide into several smaller parts; *especially*: to divide (a tract of land) into building lots.” “Subdivide.” Merriam-Webster.com. Accessed September 17, 2013. <http://www.merriam-webster.com/dictionary/subdivide>. *See also*, Black's Law Dictionary Free Online Legal Dictionary, 2nd Ed. Accessed September 24, 2013. <http://thelawdictionary.org/subdivide>. (Defining “subdivide” as “To divide a part into smaller parts; to separate into smaller divisions.”). Thus, the plain and ordinary meaning of the word “subdivided” would imply that buffer zones and setbacks are required only on land that was divided into smaller lots after the Salt Pond SAMP regulations were adopted. However, the CRMC disregards both the common and the effective meaning of this word in its regulations as well as in its application of the regulations.

There is no definition of the word “subdivided” in the Salt Pond SAMP. Instead, the sections of the Salt Pond SAMP relating to Lands of Critical Concern rely upon the definition of the word “subdivision” contained in the Rhode Island Coastal Resources Management Program (“RICRMP”), a set of substantive regulations that serve as the CRMC’s management plan for the State’s coastal resources. *See, e.g.*, Salt Pond SAMP § 920.1.B.2(a). The RICRMP defines

“subdivision” as



the *division of a lot, tract, or parcel of land into two (2) or more lots, tracts, parcels or other divisions of land* for sale lease or other conveyance or for development simultaneously or at separate times. It also includes re-subdivision and when appropriate to the context, shall relate to the process of subdividing or to land subdivided.

RICRMP at § 325.A.2 (emphasis added). This definition very clearly acknowledges that a subdivision involves creating additional lots by dividing property into two or more lots. It fails, however, to recognize other types of subdivisions that do not yield an increased number of lots and, in fact, may even result in a decreased number of lots for development. As a result, the Salt Pond SAMP also fails to account for such actions.

Some provisions of the Salt Pond SAMP specifically refer to definitions provided in the Rhode Island Development and Subdivision Review Enabling Act of 1992 (“Development Review Act”), R.I. Gen. Laws § 45-23-25, *et seq.*. See, e.g., Salt Pond SAMP at § 920.1.B.2(c) (applying the Development Review Act definition to the terms “major land development project or . . . major subdivision of land”). Although neither the Salt Pond SAMP nor the RICRMP specifically refer to the definitions provided by the Development Review Act in relation to the term “subdivision”, the CRMC has indicated that it has adopted the provisions of the Development Review Act in order to maintain “consistency with state land development legislation.” See RICRMP § 320.A.3.

The Development Review Act was enacted, *inter alia*, “to require that the regulations and standards for all land development projects and subdivisions be sufficiently definite to provide clear direction for development design and construction and to satisfy the requirements for due process for all applicants for development approval.” R.I. Gen. Laws § 45-23-29(b)(8). The statute includes a set of definitions that the legislature directed “shall be controlling in all local ordinances, regulations, and rules created under this chapter.” *Id.* at § 45-23-32.

The Development Review Act contains a number of definitions relevant to the interpretation of the word “subdivided”. First, it defines “subdivision” as



The division or re-division, of a lot, tract or parcel of land into two or more lots, tracts, or parcels. Any adjustment to existing lot lines of a recorded lot by any means is considered a subdivision. All re-subdivision activity is considered a subdivision. The division of property for purposes of financing constitutes a subdivision.

R.I. Gen. Laws § 45-23-32(51)(emphasis added). It also defines “division of land” as “a subdivision.” *Id.* at § 45-23-32(11). “Resubdivision” is defined as

Any change of an approved or recorded subdivision plat or in a lot recorded in the municipal land evidence records, or that affects the lot lines of any areas reserved for public use, or that affects any map or plan legally recorded prior to the adoption of the local land development and subdivision regulations. For the purposes of this act any action constitutes a subdivision.

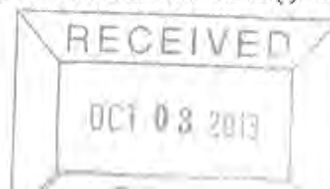
Id. at § 45-23-32(38).

Most importantly, and consistent with the common meaning of “subdivision”, the Development Review Act recognizes that although a re-subdivision results in a differently configured tract of land, such an adjustment of lot lines may not result in additional lots. This action is considered to be an “administrative subdivision”, which is defined as

Re-subdivision of existing lots *which yields no additional lots for development*, and involves no creation or extension of streets. The re-subdivision only involves divisions, mergers, mergers and division, or adjustments of boundaries of existing lots.

Id. at § 45-23-32(2)(emphasis added). Thus, the Development Review Act recognizes a distinction that the RICRMP and the Salt Pond SAMP do not – that, in some cases, property can be “subdivided” without creating any additional lots for development.

Because it has acknowledged that its regulations should be consistent with the Development Review Act, the CRMC should recognize that administrative subdivisions do not result in any additional building lots and amend the Salt Pond SAMP to treat such actions in a manner consistent with the SAMP’s stated purpose of reducing the density of development. Otherwise, property owners undertaking administrative subdivisions are likely to be misled and prejudiced because the undeniably ambiguous language of sections 920.1.B.2(f) and (g) of the



Salt Pond SAMP is not consistent with the definitions provided in the Development Review Act “to provide clear direction for development design and construction and to satisfy the requirements for due process for all applicants for development approval.” R.I. Gen. Laws § 45-23-29(b)(8).

III. The relief requested by Petitioners is consistent with the density reduction policies incorporated in the Salt Pond SAMP.

Petitioners’ request to amend the Salt Pond SAMP to exclude administrative subdivisions from the application of section §§ 920.1.b.2(f) and (g) of the SAMP is entirely consistent with the SAMP’s purpose of alleviating water pollution by reducing the density of development within the salt pond watersheds. *See* Salt Pond SAMP at § 130.B.3. Because administrative subdivisions do not create any additional lots, such subdivisions do not increase the density of development. In some cases, such as the administrative subdivision that created the Delane Lot, the number of building lots actually decreases, effectively reducing the density of potential development. Therefore, administrative subdivisions, such as the one at issue here, should be encouraged rather than penalized.

A nutrient loading study conducted by the University of Rhode Island in the 1980’s indicated that sustainable development in the salt ponds watershed could be accomplished by requiring building lots to be a minimum of 2 acres in size. Unfortunately, pre-existing development in many areas close to the salt ponds had resulted in densities far greater than those recommended by the study. These areas, deemed Lands Developed Beyond Carrying Capacity by the Salt Pond SAMP, frequently have houses crowded together on 10,000 to 20,000 square foot lots. In an effort to mitigate the effects of these more densely developed areas, the Salt Pond SAMP recognizes that land located up-gradient of Lands Developed Beyond Carrying Capacity should be developed at as low a density as possible. Salt Pond SAMP at § 310.3.A.4. As a result, the SAMP recommends reducing

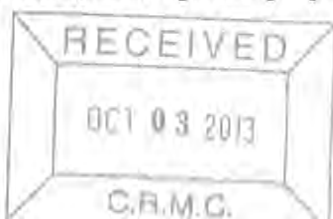


densities in “undeveloped areas previously platted at extremely high densities” through amendments to zoning ordinances and other actions. Salt Pond SAMP at § 920.1.C.3(a).

The Delane Lot is in an area adjacent to, and up-gradient of, Lands Developed Beyond Carrying Capacity. The administrative subdivision that created it and Lot 301 merged several lots which were platted in 1926 at densities far greater than is now permitted by the Salt Pond SAMP to create just two lots, both of which are larger than 80,000 square feet. Merger is an accepted method of combining two or more contiguous substandard lots in order to create a single buildable lot. *R.J.E.P. Associates v. Hellewell*, 560 A.2d 353, 355 (R.I. 1989). The law permits and encourages merger of contiguous lots of common ownership, especially if it will result in reduced residential densities and traffic congestion. *See Brum v. Conley*, 572 A.2d 1332, 1334 (R.I. 1990); *Baker v. Zoning Board of Review of Jamestown*, Superior Court No. NC 07-0416 (May 4, 2009). Thus, the action that CRMC has indicated should preclude development of the Delane Lot is actually one that furthers CRMC’s stated policy of reducing densities in the salt pond watershed generally and in areas adjacent to Lands Developed Beyond Carrying Capacity specifically. As a result, the Salt Pond SAMP should be amended to recognize that administrative subdivisions after the adoption of sections 920.1.B.2(f) and (g) do not disqualify properties from the exceptions to the buffer zone and setback requirements provided in those sections.

IV. The relief requested by Petitioners is necessary to prevent claims that the CRMC’s interpretation of the Salt Pond SAMP constitutes a taking of private property for public use.

The exceptions from the setback and buffer zone requirements provided by sections 920.1.B.2(f) and (g) of the Salt Pond SAMP can also be considered “grandfather clauses.” The general purpose of a “grandfather clause” is to preserve rights and prevent hardship to individuals who have existing uses. *Spaght v. State of Oregon Dept. of Transportation*, 564 P.2d 1092, 686 (Or. App. 1977). The specific purpose of the grandfather clauses at issue clearly was to

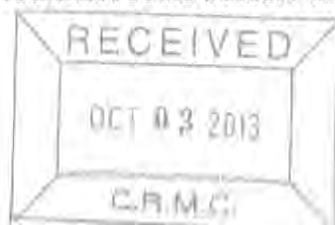


preserve rights to develop land as it existed immediately before the date the regulations were adopted.

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court recognized long ago that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "[T]he Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

To determine whether a regulation effects a taking, a court must consider, among other factors, "the economic impact of the regulation, and, particularly, the extent to which the regulation interferes with distinct, investment-backed expectations." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). A regulation may be found to interfere with a property owner's reasonable investment-backed expectations when a regulation deprives the owner of the ability to develop that property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

The exceptions to the setback and buffer zone requirements imposed by the Salt Pond SAMP do not apply to land that was "subdivided" after the adoption of the regulations imposing those requirements. Salt Pond SAMP §§ 920.1.B.2(f) and (g). The plain and ordinary meaning of the word "subdivided" is an action that results in a parcel of land being divided into two or more smaller parts. See *supra* at 6. Therefore, it is reasonable for an owner of land that had not been divided into smaller parts after the adoption of those regulations to expect that development would be permitted without having to fulfill the setback and buffer zone requirements. A finding that such development could not occur because the property had been the subject of an administrative



subdivision that consolidated smaller lots into fewer, larger lots would undeniably interfere with the property owner's reasonable investment-backed expectations.

Moreover, such a finding is not consistent with the Salt Pond SAMP's established purpose of reducing the density of development within the salt pond watersheds. *See* Salt Pond SAMP at § 130.B.3. Land use regulation for the purpose of protecting legitimate state interests is constitutionally permissible only if the regulation substantially advances the asserted state interest. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). A regulation will be deemed to constitute a taking requiring compensation under the Fifth Amendment if the regulation "utterly fails to further the end advanced as the justification for the [regulatory] prohibition." *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

The CRMC's current interpretation of the Salt Pond SAMP, which treats administrative subdivisions resulting in the same or a fewer number of lots the same as subdivisions that increase density by creating additional lots for development, does not substantially advance the CRMC's interest in reducing development density. As a result, application of the setback and buffer zone regulations to administrative subdivisions occurring after the adoption of those regulations may be considered a compensable taking. Thus, the SAMP should be amended, as requested by Petitioners, to recognize that administrative subdivisions resulting in the same or a fewer number of lots are not the same as subdivisions that create additional lots.

CONCLUSION

Property owners who consolidate multiple lots created through subdivisions platted prior to 1999 in order to create fewer, larger lots that are better suited for development are acting in a manner consistent with the density reduction purposes of the Salt Pond SAMP. The Development Review Act recognizes that such actions are different than subdivisions which result in a larger number of buildable lots. The Salt Pond SAMP should be amended, as requested by the Petitioners,



to recognize that difference in order to achieve a consistency with the Development Review Act and prevent constitutional challenges to the SAMP.

Respectfully submitted,

Kevin and Suzanne Delane

By their attorney,



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October 3, 2013



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COASTAL RESOURCES MANAGEMENT COUNCIL
INTER-OFFICE MEMORANDUM

DATE: March 10, 2014
TO: Grover J. Fugate, CRMC Executive Director
Anne Maxwell Livingston, CRMC Chair; Planning & Procedures Subcommittee
FROM: James Boyd, Coastal Policy Analyst
SUBJECT: Staff Report CRMC File 2013-10-026 – Petition for Regulation Change filed by Attorney Melissa Horne on behalf of Kevin and Suzanne (Frost) Delane

Issue

A Petition for Adoption of Rules was filed with the CRMC on October 3, 2013 pursuant to R.I.G.L. § 42-35-6 and Section 14.8 of the CRMC Management Procedures. **The Petition seeks to amend §§ 920.1.B.2(f) and (g) of the Salt Pond Region Special Area Management Plan (SAMP) by removing the prohibition (and the need for relief through a Special Exception) for development activities on parcels that cannot accommodate the required setback and buffer in CRMC-designated *Lands of Critical Concern*, provided said parcels were originally platted prior to the SAMP regulation adoption date and were [are] subsequently the subject of an administrative subdivision.**

The Salt Pond Region SAMP applies to portions of the Towns of Westerly, Charlestown, South Kingstown and Narragansett. At issue are the unintended consequences of the proposed amendment that would remove the prohibition and potentially exempt hundreds of pre-existing, undeveloped lots located within CRMC-designated *Lands of Critical Concern* within these four towns that are part of the Salt Pond Region SAMP. It should be noted that similar regulations are also in effect for the Narrow River SAMP. Although the current petition does not seek to revise the Narrow River SAMP, the granting of the Petition would have implications in a similar manner for undeveloped parcels zoned for residential use located in *Lands of Critical Concern* within the Narrow River SAMP.

Findings of Fact

1. Robert Frost was the owner of record for lot 301 located at 308 West Beach Road in Charlestown, RI. Lot 301 consisted of 3.30 acres of land located within CRMC-designated *Lands of Critical Concern* as defined in the Salt Pond Region SAMP Section 920.1.B and is shown on Petitioners Exhibit 2. Mr. Frost was also the owner of record for lots 203 - 208 and 209 - 211 located along a paper street extension of North Avenue as

shown on Petitioners Exhibit 1. These lots either abutted or were in close proximity to lot 301 and were also located within CRMC-designated *Lands of Critical Concern*. The Salt Pond Region SAMP was adopted by the Council on November 27, 1984 with significant amendments adopted in April 1999 and August 2009.

2. Robert Frost filed an administrative subdivision site plan dated December 1, 1999 involving all the aforementioned lots. The re-subdivision of land merged lots 203-208 and combined them with a portion of lot 301 to create a single 2.10 acre parcel known as lot 339. This plan was recorded in the land evidence records on December 22, 1999 according to the Town of Charlestown online land evidence records. He subsequently filed a revised plan “Corrective Plat Administrative Subdivision – Frost Redivision” dated July 16, 2000, which was recorded in the land evidence records on August 3, 2000. See Petitioner’s Exhibit 4.
3. On or about June 12, 2000, Robert Frost sold lot 301 to Frank and Laurie Chumley and a residential dwelling was constructed between July 2000 and June 2001.
4. Lot 339 is located within CRMC-designated *Lands of Critical Concern*. The administrative subdivision also merged lots 209-211 (owned by Mr. Frost) with lot 301 to offset the land that was merged with lot 339. Thus, through the re-subdivision lot 301 remained a 3.30 acre parcel. See Petitioner’s Exhibits 3 and 4. Mr. Frost also apparently obtained a right-of-way across Lot 301 to access lot 339 from West Beach Road. The final configuration of lots 301 and 339 are shown in Petitioner’s Exhibit 5.
5. The re-subdivision of lot 339 in August 2000 was the result of merging existing lots and changing lot lines; it did not create more lots than was originally platted at that time. The merging of lots to create lot 339 resulted in a decrease in the number of pre-platted lots. Nevertheless, the act of changing lot lines is defined as a subdivision pursuant to R.I.G.L. § 45-23-32(51) which states in part “[a]ny adjustment to existing lot lines of a recorded lot by any means is considered a subdivision. All re-subdivision activity is considered a subdivision.”
6. On or about June 12, 2001 Robert Frost sold lot 339 to Kevin and Suzanne (Frost) Delane.
7. On February 7, 2002 CRMC Cease & Desist Order 02-3336-3280 was issued to Kevin and Suzanne (Frost) Delane for unauthorized earthwork and vegetative clearing within 200 feet of a coastal feature (coastal wetland) on lot 339.
8. On May 8, 2003 a Preliminary Determination (PD) 2003-05-040 application was filed by Kevin and Suzanne Frost Delane for a proposal to construct a four-bedroom, single family residence, well and ISDS (now referred to as OWTS). The May 13, 2003 PD report indicted that the applicants would first have to resolve a CRMC enforcement action before they could file a formal application to include site plans showing the

flagged wetland edge and coastal features along with a detailed lot history and full-sized DEM ISDS plans.

9. On December 31, 2003 CRMC Notice of Violation 03-3240-3632 was issued to Frank and Laurie Chumley for the unauthorized installation of a driveway and the stockpiling of material within 200 feet of a coastal feature (coastal wetland) on lot 339. Evidently, the Chumley's were cited because the as-built gravel driveway was installed partly on lot 301 at 308 West Beach Road, which was previously owned by Mr. Frost.
10. On March 9, 2004 the Chumley's, through Robert Frost, were issued Assent 2004-03-006 resolving their outstanding violation and authorizing the temporary stockpile area and as-built gravel driveway on lot 301.
11. On March 24, 2004 Assent 2004-03-098 was issued to Kevin Delane resolving the outstanding violation and authorizing a 200 square foot pervious parking area and as-built gravel driveway on lot 339. Access to Lot 339 was gained through lot 301 off West Beach Road. Stipulation I of CRMC Assent 2004-03-098 specifically stated "[t]he site plans are approved for the driveway and 200 square foot parking area only. This Assent in no way authorizes any other proposed or existing work (including lot lines) shown on the plans, unless such work has received prior CRMC authorization."
12. On October 24, 2006 Kevin and Suzanne Frost Delane filed CRMC Preliminary Determination (PD) application 2006-10-072 for a proposal to construct a residential dwelling, onsite wastewater treatment system and a private well. CRMC staff issued a PD report on March 30, 2007 correctly indicating that the proposed project was subject to a Special Exception (CRMP Section 130) because lot 339 was subdivided after April 12, 1999 and the proposed project could not meet the minimum coastal wetland setback requirement of 225 feet as specified in Section 920.1.B.2(f) of the Salt Pond Region SAMP and the 200 foot buffer required pursuant to Section 920.1.B.2(g).

Background

The Petitioners own a 2-acre parcel of land identified as Map 2, Lot 339 located off West Beach Road in the Town of Charlestown that was created by administrative subdivision in August 2000. Petitioners have proposed the construction of a four-bedroom single family dwelling, denitrification onsite wastewater treatment system (OWTS) and an onsite private well. The Petitioners filed a CRMC Preliminary Determination (2006-10-072) application that showed site plans with a dwelling and OWTS approximately 60 feet and 150 feet, respectively, from the coastal wetland. The parcel is located within CRMC-designated *Lands of Critical Concern* of the Salt Pond Region SAMP. Accordingly, § 920.1.B.2(f) requires a 225-foot setback and § 920.1.B.2(g) requires a 200-foot coastal buffer zone for all development activities. Relief from the setback and buffer regulations requires a Special Exception unless the land was subdivided

before the SAMP regulations adoption. For § 920.1.B.2(f) the adoption date is April 12, 1999 and for § 920.1.B.2(g) the adoption date is November 27, 1984.

CRMC staff issued a Preliminary Determination (PD) report 2006-10-072 stating that the proposal for development was prohibited because the project parcel was subdivided in August 2000 and after the SAMP regulation adoption dates noted above. Accordingly, relief from the prohibition requires a Special Exception. The PD is an advisory opinion from CRMC staff as to what regulatory standards of the Coastal Resources Management Plan (CRMP) apply at the time of the PD filing to a development proposal if and when the applicants submit an application for a CRMC permit. The Petitioners are now requesting a CRMC regulation change within the Salt Pond SAMP that would exempt their parcel from the required 225-foot setback and 200-foot coastal buffer zone requirements. Importantly, however, the requested regulation change would also pertain to all similar undeveloped and pre-platted parcels zoned for residential use located within *Lands of Critical Concern* within the SAMP boundary of all four towns.

Following the filing of the Petition, CRMC staff requested information from the Towns of Charlestown and South Kingstown as to the number of presently undeveloped parcels zoned for residential use and located within the CRMC-designated *Lands of Critical Concern* in their respective towns. These two towns were approached because they use Geographic Information System (GIS) mapping software for local land use planning and employ trained staff with appropriate GIS and mapping technical expertise. Both towns provided a GIS map depicting the existing undeveloped parcels zoned for residential use within CRMC-designated *Lands of Critical Concern* and a spreadsheet listing the parcel data. Of the 224 undeveloped parcels identified by the Town of Charlestown, 157 parcels are not prohibited from residential development. That is, these lots do not have a conservation easement, are not dedicated as open space parcels or are not owned by a land trust, municipality, state or federal government. In South Kingstown there were 185 undeveloped parcels of which 169 are not similarly prohibited from residential development. The Town of Westerly and the Town of Narragansett were not contacted because they do not presently have GIS capability to perform the necessary data queries and develop applicable maps. Accordingly, it is unknown how many similar lots exist within those towns that may be affected by the proposed SAMP regulation change.

Discussion

I. Importance of coastal buffer zones to protect coastal wetlands and salt ponds

The Salt Pond Region SAMP was first adopted by the Council on November 24, 1984 for the primary purpose of protecting the coastal salt ponds and improving water quality and ecosystem health. The SAMP clearly details the major water quality problems within the salt ponds resulting from the existing density and distribution of residential development in the surrounding watersheds. Bacterial contamination and nutrient enrichment were and continue to be the

primary threats to water quality, including drinking water supplies, and the health of the salt ponds. The SAMP established land use categories and assigned density requirements to help mitigate for new residential development and to limit the input of pollutants to the salt ponds. See Salt Pond SAMP § 130.B.3. The SAMP also notes the high pressure to develop lots with wetlands. Id. § 130.B.4. The Petitioners parcel is mostly composed of coastal wetland with a relatively small upland area at the western side of their lot. The small upland portion of the lot was appended to the wetland lots by the administrative subdivision. As noted in the CRMC Preliminary Determination report six small existing lots were combined with a portion of lot 301 through administrative subdivision to create lot 339. “These small lots, lots 342-347, consisted entirely of contiguous [coastal] wetland.” See PD 2006-10-072 report at 3. Lots 342-347 were previously designated by the Town of Charlestown as lots 203-208. See Petitioners Exhibits 1 and 3.

Salt Pond SAMP *Lands of Critical Concern*, in which the Petitioners lot is located, abut sensitive salt pond areas and are particularly susceptible to eutrophication and bacterial contamination as a result of dense residential development. Additionally, these lands often contain large coastal wetland complexes and tributary wetlands that provide critical habitat. Because of the critical importance of these lands for wildlife habitat and to protect the health of the salt ponds, the Council adopted a 200-foot wide coastal buffer zone to help reduce ecosystem degradation and water quality impacts by keeping new residential development as far as practicable from the salt ponds and associated coastal features, including coastal wetlands. As part of its April 1999 revision, the Council adopted a 225-foot setback to separate residential development from fragile coastal wetlands and to protect the integrity of coastal buffers by providing an area separating the inland edge of the coastal buffer zone and the development itself.

In looking at future development trends within the salt pond watershed (as of 1984 when the SAMP was first adopted) the CRMC established a wide 200-foot coastal buffer zone requirement for *Lands of Critical Concern* because undisturbed zones along the salt ponds, their tributaries and associated wetlands serve an important role in protecting the coastal ponds. See Salt Pond SAMP § 310.3.D.1. In a 1994 detailed summary review and bibliography of *Vegetated Buffers in the Coastal Zone* prepared by the URI Coastal Resources Center a 200 foot (60 meter) buffer width was shown to be the minimum width to achieve an 80 percent removal rate of total suspended solids and nitrogen in stormwater runoff. The 80% removal rate is the minimum standard as required through the RI’s Coastal Nonpoint Pollution Control Program adopted in 1995 pursuant to 16 U.S.C § 6217. Accordingly, a 200-foot coastal buffer zone was adopted as the minimum necessary to protect the health of coastal wetlands and tributaries within CRMC-designated *Lands of Critical Concern* and to help mitigate water quality impacts to the salt ponds from existing and new residential development.

In the 1999 revision of the Salt Pond SAMP a new Section 800 was included to address the cumulative and secondary impacts to the salt ponds from residential development. It was recognized that most of the desirable buildable lots had already been developed and that there was increasing pressure to develop marginal lots that were especially unsuitable due to the presence of wetlands, high groundwater and small lots sizes. This type of development pressure results in cumulative fragmentation of the landscape within the watershed and increases pollution sources to the salt ponds. See Salt Pond SAMP § 810.4.A.3. In fact, the Petitioners appear to acknowledge the fact that they own such a marginal parcel by stating that the administrative subdivision creating Lot 339 resulted in a far better lot upon which to build. See Petition at 2.

All the smaller lots previously owned by Mr. Frost, lots 203-208 and 209-211, either individually or in combination could not support residential development because of the very high percentage of wetlands present on those lots. And, since the filling or other alterations to coastal wetlands are prohibited within the Salt Pond Region pursuant to Salt Pond SAMP § 940.D.1, it was necessary for Mr. Frost to arrange a land swap with lot 301 to gain some upland area to combine with his wetland lots in an attempt to create a potential area for residential development with access from West Beach Road to avoid altering coastal wetlands. That appears to be the genesis of the administrative subdivision that created lot 339 in August 2000.

II. Importance of reducing residential density of development within the Salt Pond watersheds

As noted above, the density and distribution of residential development within the watersheds of the salt ponds has a direct impact on water quality due to pollutants from onsite septic systems, stormwater runoff and construction activity. See Salt Pond SAMP § 310. The CRMC adopted three land use categories that were based primarily on the existing density of development in the early 1980's. These were (1) *Self-Sustaining Lands*, which were defined as "undeveloped or developed at a density of not more than 1 residential unit per 2 acres"; (2) *Lands of Critical Concern*, which were defined as "undeveloped or developed at a density of not more than 1 residential unit per 2 acres and (a) abut sensitive salt ponds areas that are particularly susceptible to eutrophication and bacterial contamination"; and (3) *Lands Already Developed Beyond Carrying Capacity*, which are defined as "developed at densities above carrying capacity, frequently at one residential or commercial unit per 1/8 to 1/2 acre." See 1984 Salt Pond SAMP § 320.1. After extensive research on cumulative and secondary impacts that resulted in the 1999 revision, the Salt Pond SAMP density requirement for *Lands of Critical Concern* was further decreased from one residential unit per 2 acres to one residential unit per 120,000 square feet (approximately 3 acres) because the 2-acre base density had already been exceeded in many areas and there was continued water quality impacts occurring and projected into the future based on build-out analysis. See 1999 Salt Pond SAMP §§ 310.3 and 920.1.B.

Petitioners argue that the administrative subdivision resulted in a decrease, rather than an increase, in the number of building lots because three potential lots consisting of lots 209-211, lots 203-208 and lot 301 were consolidated into the two lots now represented as lots 301 and 339. See Petition at 2. CRMC staff contends that lots 203-208 and lots 209-211 either individually or in combination could not accommodate residential development as these lots consisted mostly of wetlands. Therefore, only a single lot (lot 301) could support residential development, which was sold by Mr. Frost in June 2000. A residential dwelling was constructed on lot 301 shortly thereafter. It seems that Mr. Frost would have known lots 209-211 and 203-208 could not support residential development due to the extensive presence of wetlands. Moreover, to our knowledge Mr. Frost never sought a DEM OWTS permit for lots 203-208 or 209-211¹. It appears that the land swap with the owners of lot 301 was an attempt to gain some upland area for the new lot 339 with access from West Beach Road, as access would not have been possible from Upland Way due to the extensive wetlands on lots 203-208 and 209-211. Thus, CRMC staff concludes there never were three lots that could accommodate residential development and the Petitioners argument that the administrative subdivision resulted in a decrease of building lots is simply not true. Actually, in this case the administrative subdivision would result in an increase in the number of lots that potentially could support residential development in the area and would result in an increase in residential dwelling density within the Salt Pond SAMP *Lands of Critical Concern*.

III. The act of subdividing land and its significance to CRMC regulations

There are two regulatory issues associated with the creation of lot 339 through an administrative subdivision in 2000. First, any development project on the parcel must meet the Salt Pond SAMP required setback and coastal buffer because the lot was subdivided after April 12, 1999. Second, because the lot was the subject of a subdivision the parcel must meet the Salt Pond SAMP minimum residential unit density requirement of 1 unit per 120,000 square feet.

With respect to the setback and coastal buffer requirements the applicable Salt Pond SAMP regulations are as follows:

§ 920.1.B.2(f)

A minimum 225' setback from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for OWTS in Lands of Critical Concern for activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4. Relief from this regulation requires a Special Exception as defined in

¹ An online search of the DEM OWTS permit database shows that Mr. Frost was the owner/applicant for septic system permits for lots 301, 301-1 and 302. These three lots abut one another and have frontage on West Beach Road. There was no OWTS permit application history for lots 203-208 or 209-211.

Section 130 of the RICRMP, unless the lands were subdivided prior to April 12, 1999 and cannot accommodate the requirement.

§ 920.1.B.2(g)

A 200' buffer zone from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for all development activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 in Lands of Critical Concern. Relief from this regulation requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to November 27, 1984 and cannot accommodate the requirement.

In this case the Petitioner's parcel contains coastal wetland. Therefore, as specified in the CRMC regulations above land development projects that cannot meet the required 225-foot setback and 200-foot coastal buffer requirements are prohibited unless the parcel(s) were subdivided before the CRMC regulations went into effect. Relief from the requirements is only attainable through a Special Exception. The Petitioner's parcel was subdivided after the effective regulation dates and is consequently subject to the requirements.

The Petitioners argue that the administrative subdivision that created lot 339 should be exempt from the above CRMC requirements because the subdivision did not create additional lots. Their lot 339 was created by merging smaller lots with a portion of an abutting larger lot (301). The Rhode Island Land Development and Subdivision Review Enabling Act of 1992 (Act) defines *administrative subdivision* as the "re-subdivision of existing lots which yields no additional lots for development, and involves no creation or extension of streets. The re-subdivision only involves divisions, mergers, mergers and division, or adjustments of boundaries of existing lots." See R.I.G.L. § 45-23-32(2). The Act also defines *subdivision* as the "division or re-division, of a lot, tract or parcel of land into two or more lots, tracts, or parcels. Any adjustment to existing lot lines of a recorded lot by any means is considered a subdivision. All re-subdivision activity is considered a subdivision. The division of property for purposes of financing constitutes a subdivision. (Emphasis added) Id. at § 45-23-32(51).

The CRMP defines the term *subdivision* in part as "the division of a lot, tract, or parcel of land into two (2) or more lots, tracts, parcels or other divisions of land for sale, lease or other conveyance or for development simultaneously or at separate times. It also includes re-subdivision and when appropriate to the context, shall relate to the process of subdividing or to land subdivided." See CRMP §§ 320.A.2 and 325.A.2. It should be noted that when the Council drafted and adopted the definitions of subdivision and re-subdivision, and their applicability to other sections of the CRMC regulations, it was the specific intent of the Council that the definitions of subdivision and re-subdivision be consistent with the definitions contained in the

Act. This intention is specifically set forth in CRMP § 320. In application of the regulations, the CRMP and the Salt Pond SAMP need to be read as a whole, as the SAMP is part of the CRMP. The merging of lots and the adjustment of lot lines to create lot 339 constituted a subdivision as defined in the General Laws and the CRMP. Therefore, the administrative subdivision in 2000 creating lot 339 was a new subdivision of land that occurred after November 27, 1984 and April 12, 1999. Consequently lot 339 is not exempt from meeting the required 225-foot setback and 200-foot coastal buffer as specified in Salt Pond SAMP §§ 920.1.B.2(f) and 920.1.B.2(g), respectively.

It should be noted that the facts in this case are very similar to the PZ Realty case (CRMC File 2009-10-090) in which PZ Realty also undertook a re-subdivision of land located in Charlestown in 2008, which was after the Salt Pond SAMP effective regulation dates of November 27, 1984 and April 12, 1999. The result was the creation of a lot that could not meet the Salt Pond SAMP coastal buffer and setback requirements for a proposed residential dwelling within *Lands of Critical Concern*. The Council ruled in its Decision on this matter that the PZ Realty lot was subdivided, as that term is defined in the General Laws and the CRMP, and after the CRMC effective regulation dates. Accordingly, the Council in its decision dated January 3, 2012 determined that the proposal required a Special Exception. CRMC staff and the Council have consistently interpreted the regulations pertaining to subdivision when applying them to proposals within the Salt Pond SAMP. The PZ Realty case was appealed to the RI Superior Court where a judgment was issued upholding the CRMC decision in the matter. See C.A No. WC 2012-0057.

The second issue relates to the required size of lot 339 to meet the residential unit density requirement. As established above, lot 339 was created by the act of subdivision, as defined by the General Laws and the CRMP §§ 320.A.2 and 325.A.2 Salt Pond SAMP § 920.1.B.2(a) requires that “subdivisions shall not exceed an average density of one residential unit per 120,000 square feet for Lands of Critical Concern.” In addition, for purposes of the SAMP the allowable number of residential units “shall be calculated on the basis of available land suitable for development.” Id. Land suitable for development is essentially the upland portion of a lot remaining after exclusion of areas containing coastal features or freshwater wetlands. Id. As previously established, the Petitioner’s lot is located within *Lands of Critical Concern* and the residential density requirement for said lands is 1 unit per 120,000 square feet (approximately 3 acres). The Petitioner’s lot is only 2.10 acres and therefore does not meet the minimum density requirement. Additionally, 70% or more of lot 339 is contiguous coastal wetland² and thus, the land suitable for development would be substantially less than 2.10 acres. In either case, lot 339 does not meet the residential density requirement of 1 unit per 120,000 square feet in Salt Pond SAMP § 920.1.B.2(a).

² See staff report attachment showing wetland coverage on lot 339 from Town of Charlestown GIS webpage at: http://charlestown.mapxpress.net/ags_map/

IV. The issue of regulatory takings as raised by the Petitioners

The Petitioners disagree with the findings of an earlier CRMC Preliminary Determination (2006-10-072) where staff found that lot 339 was subdivided after the effective date of the CRMC regulations noted therein. Essentially, the construction of a residential dwelling with onsite septic system and well on lot 339 is prohibited because the proposed project could not meet the required 225-foot setback and 200-foot coastal buffer. The Petitioners are requesting that the Salt Pond SAMP be amended, as requested, to prevent a constitutional challenge to the SAMP. See Petition at 13. CRMC staff notes that the administrative subdivision was executed without the advice or consent of the CRMC, which could have offered guidance to Mr. Frost who originally owned the lots that were merged to create lot 339. Further, the CRMC issued an Assent to Kevin Delane in 2004 authorizing the as-built constructed gravel driveway and a 200 square foot pervious parking area. See CRMC Assent 2004-03-098. After discussion with CRMC legal counsel, staff has been advised that a “takings” issue is not ripe in the context of a proposed regulation change, and therefore has not been addressed in this staff report.

Conclusion

The primary issue facing the CRMC is whether there is a rational reason to change the Salt Pond SAMP regulations as requested. The Petitioners assert that the relief they are requesting through their petition for regulation change is consistent with the density reduction policies incorporated in the Salt Pond SAMP and that such administrative subdivisions should be encouraged. CRMC staff contends that the proposed amendment to the SAMP could in fact result in an increase in the density of residential dwellings within *Lands of Critical Concern* not only in Charlestown, but potentially in the three other towns that are included within the Salt Pond SAMP watershed area. It is known through the recent GIS analysis that there are 224 undeveloped parcels zoned for residential use in the Town of Charlestown within CRMC *Lands of Critical Concern*. Of these, 157 parcels are not prohibited from residential development in that they do not have a conservation easement, are not dedicated as open space parcels or are not owned by a land trust or other entity that would maintain these parcels in their current undeveloped state. In South Kingstown there are 185 undeveloped parcels zoned for residential use of which 169 are not prohibited from residential development.

The Petitioner’s proposed amendment would permit the reconfiguration of lot lines through administrative subdivision for any lands that were platted prior to April 12, 1999 and located within *Lands of Critical Concern* and exempt newly merged lots from having to meet the 225-foot setback to coastal wetlands or other coastal features and the 200-foot coastal buffer as required pursuant to Salt Pond SAMP §§ 920.1.B.2(f) and (g). Additionally, such lots would be exempted from meeting the one residential unit per 120,000 square foot density requirement specified in Salt Pond SAMP § 920.1.B.2(a). Under the proposed regulation change any newly merged lots, some of which might not have previously been able to meet the SAMP setback,

coastal buffer and residential density requirements, would now be able to support residential development. Consequently, the exclusion for administrative subdivisions as proposed by the Petitioners most likely will result in an increase in the density of residential development within Salt Pond SAMP *Lands of Critical Concern*.

Should the Petitioners request be granted and the proposed regulation change adopted by the CRMC, there are 326 undeveloped parcels zoned for residential use located within CRMC-designated *Lands of Critical Concern* in just the Towns of Charlestown and South Kingstown that potentially could be combined with other parcels through an administrative subdivision. If such administrative subdivisions result in parcels being exempted from meeting the setback, coastal buffer and density requirements within *Lands of Critical Concern* in the entire SAMP watershed of all four towns, then such actions will result in an increase in residential density and not be meeting the goals of the Salt Pond SAMP. Accordingly, the potential unintended consequences of amending the SAMP, as proposed by the Petitioners, would likely result in an action that could prove disastrous in the effort to reduce secondary and cumulative impacts within the SAMP due to additional residential development occurring that will impact water quality in tributaries and the salt ponds. Therefore, the Petitioners request would not be consistent with residential density reduction policies of the Salt Pond SAMP

It is CRMC staff opinion that Mr. Frost appears to have created his own hardship when he created lot 339 through a new subdivision of lands without the advice or consent of the CRMC. Thus, he created a lot that is non-compliant with the Salt Pond Region SAMP requirements for a 200-foot coastal buffer, 225-foot setback and a lot density no greater than one residential unit per 120,000 square feet. Mr. Frost was familiar with CRMC procedures and regulations as he had filed at least 12 different CRMC applications³ at the time lot 339 was created in August 2000. It appears that he sought upland land area from the owners of lot 301 for access from West Beach to avoid the alteration of coastal wetlands on the remaining eastern portion of lot 339, which is prohibited under CRMP § 210.3.D and Salt Pond SAMP § 940.D.1.

Summary

1. Lot 339 was created by the act of subdivision as defined by RIGL § 45-23-32(51) and CRMP §§ 320.A.2 and 325.A.2.
2. The administrative subdivision creating lot 339 in 2000 was a new subdivision of lands, which occurred after the effective dates of the applicable Salt Pond SAMP regulations. Accordingly, a Special Exception is required for relief from the setback, coastal buffer and residential density regulations.

³ Number of applications determined from review of CRMC permit database for projects in Charlestown, RI filed by Robert Frost on or before August 2000.

3. Lot 339 is not exempt from meeting the required 225-foot setback, 200-foot coastal buffer and residential density requirement of 1 unit per 120,000 square feet as specified in Salt Pond SAMP §§ 920.1.B.2(f), 920.1.B.2(g) and 920.1.B.2(a), respectively.
4. The Petitioner's have already been granted a permit for lot 339 in accordance with CRMC Assent 2004-03-098.

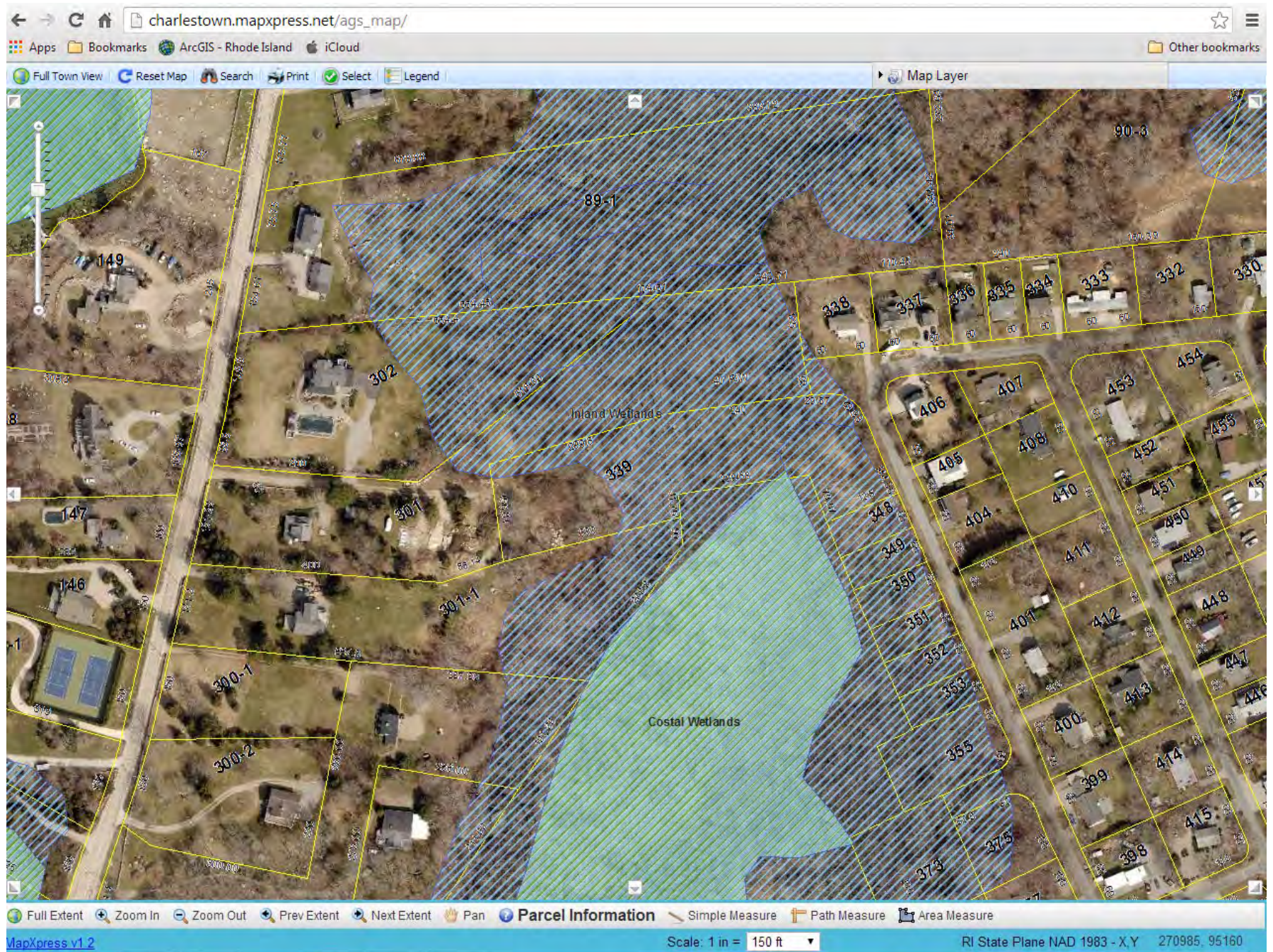
Staff Recommendation

Based on the evidence and facts presented herein it is CRMC staff opinion that the Petition for Regulation Change should be denied to maintain the Salt Pond SAMP goals of protecting coastal wetlands, water quality and wildlife habitat, reducing residential density within the watershed, and minimizing the secondary and cumulative impacts to the salt ponds that are associated with residential development.

CRMC Staff

Date

Attachment 1





State of Rhode Island and Providence Plantations
Coastal Resources Management Council
Oliver H. Stedman Government Center
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(401) 783-3370
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NOTICE OF MEETING

A Petition for Adoption of Rules (Petition) was filed on October 3, 2013 with the Coastal Resources Management Council (CRMC) pursuant to R.I.G.L. § 42-35-6 and Section 14.8 of the CRMC Management Procedures. The Petition seeks to amend Sections 920.1.B.2(f) and (g) of the CRMC Salt Pond Region Special Area Management Plan (SAMP) as they pertain to parcels of land located within CRMC-designated Lands of Critical Concern of the Salt Pond Region SAMP. Sections 920.1.B.2(f) and (g) require a 225-foot setback and a 200-foot buffer, respectively, for all development activities within Lands of Critical Concern. Relief from the setback and buffer regulations requires a Special Exception as defined in Section 130 of the Coastal Resources Management Program unless the land was subdivided before the SAMP regulations adoption. For Section 920.1.B.2(f) the adoption date is April 12, 1999 and for Section 920.1.B.2(g) the adoption date is November 27, 1984. A similar rule is in effect for the CRMC Narrow River SAMP.

The Petitioners seek to amend the SAMP regulations by exempting parcels from the Special Exemption requirement provided that they were originally platted prior to the respective SAMP rule adoption dates and then were subsequently the subject of an administrative subdivision. The proposed rule change could affect parcels in CRMC-designated Lands of Critical Concern located within the Towns of Westerly, Charlestown, South Kingstown and Narragansett.

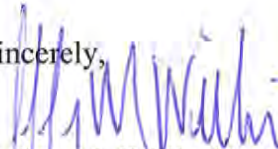
The Petition has been assigned file number **2013-10-026** and is available for review, including the applicable plat maps and site plans, in the CRMC office during its business hours. Additionally, the Petition itself is available on the CRMC web pages here:

<http://www.crmc.ri.gov/applicationnotices.html>.

Parties interested in this matter should refer to Management Procedures 5.3(8) among others for additional information.

The CRMC Planning & Procedures Subcommittee will consider the petition for a recommendation to the full Council at its meeting of Tuesday, March 18, 2014 at 8:30 a.m. in the CRMC Office Conference Room, Oliver Stedman Government Center, 4808 Tower Hill Road, Wakefield, RI.

Sincerely,


Jeffrey M. Willis, Deputy Director

/lat