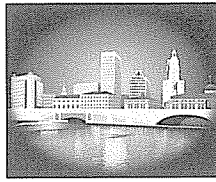


THE PROVIDENCE FOUNDATION

30 Exchange Terrace ■ Providence, Rhode Island 02903 ■ 401. 521. 3248 fax 401. 751. 2434

E-mail: dbaudouin@provfoundation.com



January 12, 2007

James Boyd
Coastal Policy Analyst
Coastal Resources Management Council
4808 Tower Hill Road
Wakefield, RI 02879

RE: Section 230, Urban Coastal Greenways Policy

Dear Jim:

As you know, I could not attend the initial meeting nor could the Foundation's Chair.

We appreciate your review of this matter because we were quite surprised to see the change to 50%. Wasn't the figure 20% throughout the extensive drafting and review process? Also, we have not seen any quantifiable justification for the change.

At this point we believe the compensation percentage should be reduced to the original 20% from 50%. Many of the sites will require variances for which compensation is payable because these urban sites are difficult sites for development and site specific conditions require variances from the urban Coastal Greenways regulations. In other words, the regulations in many instances will impose requirements that hinder appropriate development. The level of compensation should recognize this and not impose a significant monetary cost on a development because the regulations themselves imposed unworkable requirements given site specific conditions.

Additionally, many of these sites will be Brownfields sites which will already be burdened with substantial remediation costs. The level of compensation required could effectively make some of these Brownfields sites undevelopable in an economically viable manner. The net result would be undeveloped, contaminated sites rather than developed sites contributing to tax revenues and economic activity.

Finally, as development costs continue to escalate, additional fees combined with the other UCG requirements will make redevelopment less feasible in many instances.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel A. Baudouin", with a long horizontal flourish extending to the right.

Daniel A. Baudouin
Executive Director

DAB/lp

cc: John M. Boehnert, Foundation Committee Chair

January 15, 2007

Via Electronic Mail

Mr. James Boyd
Coastal Policy Analyst
Coastal Resources Management Council
Stedman Government Center – Suite 116
Wakefield, RI 02879

Re: Section 230 of the Urban Coastal Greenways Policy

Dear Mr. Boyd:

Thank you for the opportunity to present comments on the compensation scheme set forth in Section 230 of the Coastal Resources Management Council's ("CRMC") Urban Coastal Greenways Policy ("UCG Policy"). On behalf of O'Neill Properties Group ("O'Neill"), I am writing to commend CRMC for its efforts to introduce an element of flexibility into development within the Metro Bay Region, while continuing to carry out its legislative mandate to "preserve, protect, develop, and where possible, restore Rhode Island's coastal resources."¹ At the same time, O'Neill is extremely concerned about CRMC's decision to raise the multiplier in Section 230 from 20 percent to 50 percent and the deleterious effects on the future of development in the UCG Zone that will flow from that decision. As more fully detailed below, the absence of any meaningful factual or evidentiary support for the 50 percent multiplier raises serious questions about the validity of the regulation. However, even if the 50 percent multiplier would survive a judicial challenge, it will have significant adverse impacts on the nature and extent of development in the UCG Zone. Therefore, it should be removed from the UCG Policy and replaced with the original 20 percent multiplier proposed by the Rhode Island Economic Development Corporation ("RIEDC").

I. CRMC's Election to Increase the Multiplier Rate in Section 230 to 50 Percent is Unsupported By Any Evidence in the Record

Prior to the October 10, 2006 hearing on the UCG Policy, Section 230 of the UCG Policy proposed a 20 percent compensation rate. As is clear from the transcript of the hearing, this initial rate was based on the expert recommendations of RIEDC.² In contrast, the vote to increase the multiplier to 50 percent was based on no more than pure speculation and opinion testimony from members of the public with no demonstrated expertise in development, let alone any economic analysis.

¹ See UCG Policy Executive Summary and Section 130.1(e).

² Transcript of October 16, 2006 CRMC Semi-Monthly Hearing ("Transcript") at p. 10.



January 15, 2007
Page 2

It is well-settled in Rhode Island that an administrative agency may not act in a manner that is arbitrary or capricious or clearly erroneous in light of the reliable, probative and substantive evidence on record.³ A decision is neither arbitrary nor capricious when an agency can offer a reasoned explanation, based on evidence, facts and circumstances on record, for its particular actions.⁴ In the same vein, there must be some rough proportionality between the 50 percent multiplier selected and the anticipated impacts of the resulting development in the UCG.⁵

As set forth above, the administrative record is bereft of any factual or evidentiary support for the increased rate. Because CRMC's decision was not based on any reliable or substantive evidence and CRMC did not set forth any reasoned explanation for the changed compensation rate, its decision to adopt the 50 percent multiplier in Section 230 is vulnerable to a judicial challenge. Similarly, there is no apparent nexus between the amount of the compensation paid under the 50 percent multiplier and the resulting encroachment.⁶

II. CRMC's Decision to Increase the Multiplier Rate to 50 Percent Will Have Significant Adverse Implications for Development in the Metro Bay Area

Regardless of whether the 50 percent rate would survive a judicial challenge, CRMC should withdraw the rule and lower the rate in Section 230 to 20 percent to avoid the adverse impacts to development that are certain to flow from it. The rule appears to be premised on the fundamentally erroneous assumption that the compensation to be paid under Section 230 is insufficient to deter property owners and developers from seeking a reduced UCG width or a variance. On the contrary, property owners and developers are typically extremely price sensitive, particularly where financing is involved. Moreover, the impact of any fees under Section 230 cannot be viewed in isolation. The Section 230 compensation fees are in addition to the many other costs of meeting the UCG Policy, including the costs of complying with the stormwater and vegetation requirements. In addition, there are real and significant costs associated with meeting the architectural, landscaping and aesthetic demands in the UCG policy, as well as costs to comply with local zoning and other local regulation.

The practical result of imposing too great a financial burden on landowners and developers of property in the UCG Zone is that development will be thwarted or, at a minimum, beneficial elements of it will be sacrificed. For individuals and smaller developers, particularly those with Brownfields properties, it is

³ See Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004).

⁴ See Goncalves v. NMU Pension Trust, 818 A.2d 678, 683 (R.I. 2003).

⁵ See Dolan v. City of Tigard, 512 U.S. 374, 390 (1994) (striking down requirement that a landowner dedicate a portion of her property as a public greenway as a condition of obtaining permission to increase the size of her store where the city failed to provide any support demonstrating the required dedication was roughly proportional to the proposed encroachment).

⁶ It is further questionable as to whether CRMC complied with R.I. Gen. Laws §42-35-3(a)(3), which requires an agency to demonstrate that there is "no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome to affected private persons as another regulation."

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foreseeable that otherwise desirable projects that might bring thoughtful economic development to the area will be abandoned or relocated to other areas outside of the UCG Zone. The increased costs associated with Section 230 are particularly daunting for Brownfields sites, which are estimated to constitute 70 percent of the applications under the UCG Policy.⁷ These sites entail a host of investigatory and remediation costs that increase the hardship. Of course, development of Brownfields sites is critical to the future of the Metro Bay Region. As GrowSmart Rhode Island has recognized, “[i]f [Brownfields are left to] remain contaminated and idle, they will continue to blight surrounding neighborhoods, bring down the value of nearby properties and present a potential health threat to people who live and work nearby.”⁸ In contrast, if the Brownfields are developed, numerous jobs for the local community will be created and millions of dollars in state income tax revenue will be generated annually.⁹ Therefore, Brownfields sites are not only the most important sites potentially impacted by the UCG Policy, but those most likely to be the hardest hit by increased fees.

Alternatively, the increased costs might reasonably cause property owners and developers to seek project cost reductions through undesirable design modifications such as sacrificing the scenic and visual elements of a building that the UCG Policy deems to be a “public priority.”¹⁰ To offset the increased costs under Section 230, a developer might be compelled to reduce the size or square footage of a building, thereby impacting the expected tax revenues. On the other hand, that same developer might increase the height or number of units in a structure as a means of generating revenue to offset the increased cost of construction, resulting in a more densely developed area – a result inconsistent with the objectives of the UCG Policy.

III. Conclusion

For the reasons set forth above, CRMC should reduce the 50 percent multiplier in Section 230 of the UCG to 20 percent as recommended by RIEDC. Alternatively, there should be more consultation and analysis of the potential impacts associated with the 50 percent multiplier because of the significant adverse effects on development. In this case, CRMC should consider forming a stakeholder group. Indeed, it is imperative that CRMC adopt a final version of the UCG Policy that considers the interests of

⁷ Transcript at p. 19.

⁸ *A Strategy for Saving Rhode Island From Sprawl and Urban Decay, Grow Smart Rhode Island's Candidates' Briefing Book*. GrowSmart Rhode Island. (October 2004). “However, if the properties are cleaned up and redeveloped, they can provide new opportunities for revitalization of our urban centers, sites to house new jobs for Rhode Islanders, increased property tax revenues for municipalities and reduced pressure for development of greenfields.” *Id.*

⁹ “According to a recent Rhode Island Department of Environmental Management (RIDEM) analysis, the 97 Brownfields properties redeveloped to date have produced over 1100 jobs. It is estimated that those jobs generate \$3.9 million annually in state income tax revenue.” *Id.* One George Washington University study that evaluated Brownfields generally found that for every 1 acre of Brownfields used, 4.5 acres of open space is saved. George Washington University, “Public Policies and Private Decisions Affecting the Redevelopment of Brownfields: An Analysis of Critical Factors, Relative Weights and Areal Differentials.” September 2001.

¹⁰ UCG Policy at Section 130.5.

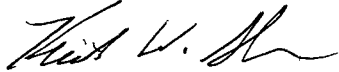
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175 Federal Street
Boston, MA 02110-2890
Telephone 617-482-0600
Fax 617-482-0604

www.apslaw.com

those individuals or organizations that will own and develop the real estate in this region and thereby help CRMC fulfill its legislative mandates. I look forward to your response.

Respectfully submitted,



KRISTEN W. SHERMAN

404914_1

January 17, 2007

Via Electronic Mail

Mr. James Boyd
Coastal Policy Analyst
Coastal Resources Management Council
Stedman Government Center – Suite 116
Wakefield, RI 02879

Re: **Section 230 of the Urban Coastal Greenways Policy**

Dear Mr. Boyd:

Thank you for the opportunity to present comments on the compensation scheme set forth in Section 230 of the Coastal Resources Management Council's ("CRMC") Urban Coastal Greenways Policy ("UCG Policy"). On behalf of Essex River Ventures, Inc. ("Essex"), I am writing to commend CRMC for its efforts to introduce an element of flexibility into development within the Metro Bay Region, while continuing to carry out its legislative mandate to "preserve, protect, develop, and where possible, restore Rhode Island's coastal resources."¹ At the same time, Essex is extremely concerned about CRMC's decision to raise the multiplier in Section 230 from 20 percent to 50 percent and the deleterious effects on the future of development in the UCG Zone that will flow from that decision. As more fully detailed below, the absence of any meaningful factual or evidentiary support for the 50 percent multiplier raises serious questions about the validity of the regulation. However, even if the 50 percent multiplier would survive a judicial challenge, it will have significant adverse impacts on the nature and extent of development in the UCG Zone. Therefore, it should be removed from the UCG Policy and replaced with the original 20 percent multiplier proposed by the Rhode Island Economic Development Corporation ("RIEDC").

I. **CRMC's Election to Increase the Multiplier Rate in Section 230 to 50 Percent is Unsupported By Any Evidence in the Record**

Prior to the October 10, 2006 hearing on the UCG Policy, Section 230 of the UCG Policy proposed a 20 percent compensation rate. As is clear from the transcript of the hearing, this initial rate was based on the expert recommendations of RIEDC.² In contrast, the vote to increase the multiplier to

¹ See UCG Policy Executive Summary and Section 130.1(e).

² Transcript of October 16, 2006 CRMC Semi-Monthly Hearing ("Transcript") at p. 10.



Mr. James Boyd
January 17, 2007
Page 2

50 percent was based on no more than pure speculation and opinion testimony from members of the public with no demonstrated expertise in development, let alone any economic analysis.

It is well-settled in Rhode Island that an administrative agency may not act in a manner that is arbitrary or capricious or clearly erroneous in light of the reliable, probative and substantive evidence on record.³ A decision is neither arbitrary nor capricious when an agency can offer a reasoned explanation, based on evidence, facts and circumstances on record, for its particular actions.⁴ In the same vein, there must be some rough proportionality between the 50 percent multiplier selected and the anticipated impacts of the resulting development in the UCG.⁵

As set forth above, the administrative record is bereft of any factual or evidentiary support for the increased rate. Because CRMC's decision was not based on any reliable or substantive evidence and CRMC did not set forth any reasoned explanation for the changed compensation rate, its decision to adopt the 50 percent multiplier in Section 230 is vulnerable to a judicial challenge. Similarly, there is no apparent nexus between the amount of the compensation paid under the 50 percent multiplier and the resulting encroachment.⁶

II. CRMC's Decision to Increase the Multiplier Rate to 50 Percent Will Have Significant Adverse Implications for Development in the Metro Bay Area

Regardless of whether the 50 percent rate would survive a judicial challenge, CRMC should withdraw the rule and lower the rate in Section 230 to 20 percent to avoid the adverse impacts to development that are certain to flow from it. The rule appears to be premised on the fundamentally erroneous assumption that the compensation to be paid under Section 230 is insufficient to deter property owners and developers from seeking a reduced UCG width or a variance. On the contrary, property owners and developers are typically extremely price sensitive, particularly where financing is involved. Moreover, the impact of any fees under Section 230 cannot be viewed in isolation. The Section 230 compensation fees are in addition to the many other costs of meeting the UCG Policy, including the costs of complying with the stormwater and vegetation requirements. In addition, there are real and significant costs associated with meeting the architectural, landscaping and

³ See Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004).

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⁵ See Dolan v. City of Tigard, 512 U.S. 374, 390 (1994) (striking down requirement that a landowner dedicate a portion of her property as a public greenway as a condition of obtaining permission to increase the size of her store where the city failed to provide any support demonstrating the required dedication was roughly proportional to the proposed encroachment).

⁶ It is further questionable as to whether CRMC complied with R.I. Gen. Laws §42-35-3(a)(3), which requires an agency to demonstrate that there is "no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome to affected private persons as another regulation."

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January 17, 2007
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aesthetic demands in the UCG policy, as well as costs to comply with local zoning and other local regulation.

The practical result of imposing too great a financial burden on landowners and developers of property in the UCG Zone is that development will be thwarted or, at a minimum, beneficial elements of it will be sacrificed. For individuals and smaller developers, particularly those with Brownfields properties, it is foreseeable that otherwise desirable projects that might bring thoughtful economic development to the area will be abandoned or relocated to other areas outside of the UCG Zone. The increased costs associated with Section 230 are particularly daunting for Brownfields sites, which are estimated to constitute 70 percent of the applications under the UCG Policy.⁷ These sites entail a host of investigatory and remediation costs that increase the hardship. Of course, development of Brownfields sites is critical to the future of the Metro Bay Region. As GrowSmart Rhode Island has recognized, “[i]f [Brownfields are left to] remain contaminated and idle, they will continue to blight surrounding neighborhoods, bring down the value of nearby properties and present a potential health threat to people who live and work nearby.”⁸ In contrast, if the Brownfields are developed, numerous jobs for the local community will be created and millions of dollars in state income tax revenue will be generated annually.⁹ Therefore, Brownfields sites are not only the most important sites potentially impacted by the UCG Policy, but those most likely to be the hardest hit by increased fees.

Alternatively, the increased costs might reasonably cause property owners and developers to seek project cost reductions through undesirable design modifications such as sacrificing the scenic and visual elements of a building that the UCG Policy deems to be a “public priority.”¹⁰ To offset the increased costs under Section 230, a developer might be compelled to reduce the size or square footage of a building, thereby impacting the expected tax revenues. On the other hand, that same developer might increase the height or number of units in a structure as a means of generating revenue to offset the increased cost of construction, resulting in a more densely developed area – a result inconsistent with the objectives of the UCG Policy.

⁷ Transcript at p. 19.

⁸ *A Strategy for Saving Rhode Island From Sprawl and Urban Decay, Grow Smart Rhode Island's Candidates' Briefing Book*. GrowSmart Rhode Island. (October 2004). “However, if the properties are cleaned up and redeveloped, they can provide new opportunities for revitalization of our urban centers, sites to house new jobs for Rhode Islanders, increased property tax revenues for municipalities and reduced pressure for development of greenfields.” *Id.*

⁹ “According to a recent Rhode Island Department of Environmental Management (RIDEM) analysis, the 97 Brownfields properties redeveloped to date have produced over 1100 jobs. It is estimated that those jobs generate \$3.9 million annually in state income tax revenue.” *Id.* One George Washington University study that evaluated Brownfields generally found that for every 1 acre of Brownfields used, 4.5 acres of open space is saved. George Washington University, “Public Policies and Private Decisions Affecting the Redevelopment of Brownfields: An Analysis of Critical Factors, Relative Weights and Areal Differentials.” September 2001.

¹⁰ UCG Policy at Section 130.5.

Mr. James Boyd
January 17, 2007
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III. Conclusion

For the reasons set forth above, CRMC should reduce the 50 percent multiplier in Section 230 of the UCG to 20 percent as recommended by RIEDC. Alternatively, there should be more consultation and analysis of the potential impacts associated with the 50 percent multiplier because of the significant adverse effects on development. In this case, CRMC should consider forming a stakeholder group. Indeed, it is imperative that CRMC adopt a final version of the UCG Policy that considers the interests of

those individuals or organizations that will own and develop the real estate in this region and thereby help CRMC fulfill its legislative mandates. I look forward to your response.

Respectfully submitted,



KRISTEN W. SHERMAN

January 31, 2007

Mr. Jim Boyd
RI Coastal Resources Management Council
Oliver Stedman Government Center
Suite 3
4808 Tower Hill Road
Wakefield, Rhode Island 02879

Re: Urban Coastal Greenways Compensation Percentage

Dear Jim:

In response to CRMC's invitation for comments regarding the UCG Compensation figure, Save The Bay reiterates support for the current 50% multiplier found in section 230.1 of the UCG. As we stated in our testimony before the Council a multiplier in the range of 50% to 75% of the value of the property is more appropriate, in order to prevent under valuating the resource. A higher/substantial multiplier is closer to values paid to obtain easements and would be more protective of the resources. The compensation provision provides the property owner with the flexibility to adapt his plans but at the expense of the natural buffer. The level of compensation has two impacts. First, it serves to insure that a property owner has sufficient incentive to abide by the basic UCG parameters. Second, it provides CRMC through the Urban Coastal Greenways Trust with the resources to protect natural buffers and valuable habitat in other areas covered by the MetroSAMP. If the CRMC is to be able to protect a comparable area with the resources available, then the compensation must come closer to the underlying value of land or the cost of an easement. As we noted in our testimony, the amount originally proposed in the UCG for a representative parcel would have equated the value of a square foot of reduced buffer with the cost of a square foot of inexpensive carpeting. This is not a compensation level which is likely to encourage a property owner to comply with the requirements of the basic UCG policy or provide funds which would allow the Urban Coastal Greenway Trust to acquire ownership or easements over land of comparable habitat or public value.

The need for flexibility in addressing properties that are being developed as brownfields or for water dependent uses is adequately addressed in other areas of the UCG policy.

In a related matter we question whether basing the calculation on a single representative waterfront value per municipality is adequate. A further breakdown and sampling of parcels by zone would be likely to capture some potentially important differences in values.

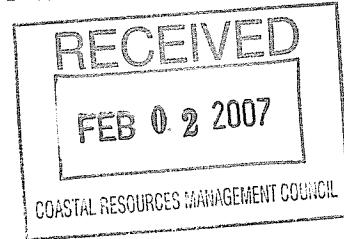
Thank you again for the opportunity to submit comments and for your consideration thereof. We want to acknowledge the importance of the outlined goals and the tremendous amount of work that has gone into its creation. A continuous Urban Coastal Greenway does not occur by happenstance; access to the shoreline is not a given and in many cases, views are not appreciated until they are gone. Individual cities and towns may not naturally orient their planning to the northern parts of Narragansett Bay, even though the benefits to the whole of considering this aspect are undeniable. This policy and the development of the *MetroBay Special Area Management Plan* are very important tools for protecting Narragansett Bay and for creating a common planning framework for Upper Bay communities at a time when waterfront development and use of the waters of the Bay are intensifying.

Sincerely,

Jane Kenney Austin
Director of Policy and Advocacy



CONSERVATION LAW FOUNDATION



January 31, 2007

Grover Fugate, Executive Director
Coastal Resources Management Council
Stedman Government Center - Suite 3
4808 Tower Hill Road
Wakefield, RI 02879-1900

Re: Urban Coastal Greenways for the Metro Bay Region

Dear Mr. Fugate:

I have recently heard that the Council is revisiting the Urban Coastal Greenways compensation rate that was already adopted by the Council. Conservation Law Foundation believes that the 50% compensation rate adopted by the Council is the minimum that should be approved, and that if the Council decides to reopen this proceeding the rate should be increased.

In support of this submission I attach the letter CLF previously submitted, and also reference the testimony I gave at the Council hearing on October 10, 2006. CRMC has the transcript of that proceeding, which includes my testimony and references to studies in support.

Thank you for the opportunity to submit comments. I request that I be notified of any further meetings or proceedings on this matter.

Sincerely,

Cynthia Giles
Director, Rhode Island Advocacy Center

55 Dorrance Street, Providence, Rhode Island 02903-2221 • Phone 401-351-1102 • Fax 401-351-1130 • www.clf.org

MAINE: 120 Tillson Avenue, Rockland, Maine 04841-3416 • Phone 207-594-8107 • Fax 207-596-7706
MASSACHUSETTS: 62 Summer Street, Boston, Massachusetts 02110-1016 • Phone 617-350-0990 • Fax 617-350-4030
NEW HAMPSHIRE: 27 North Main Street, Concord, New Hampshire 03301-4930 • Phone 603-225-3060 • Fax 603-225-3059
VERMONT: 15 East State Street, Suite 4, Montpelier, Vermont 05602-3010 • Phone 802-223-5992 • Fax 802-223-0060



Conservation Law Foundation

May 20, 2006

Grover Fugate, Executive Director
Coastal Resources Management Council
Stedman Government Center - Suite 3
4808 Tower Hill Road
Wakefield, RI 02879-1900

Re: Urban Coastal Greenways for the Metro Bay Region

Dear Mr. Fugate:

The Conservation Law Foundation submits these comments on the proposed urban coastal greenway program.

Our principal concern is the “pay for a variance” program that this proposal suggests. We agree that the resources addressed in the UCG plan are of great public value and importance. We further agree that choices for development and protection of these areas will have huge impact on the health of the bay and surrounding habitat resources. The health of these public resources is a significant part of what gives value to the properties subject to the rules. These legitimate public interests – for environmental health, public health and safety and public access – need to be protected. The proposal as now written creates an incentive for private interests to pay money in exchange for relaxed protection.

There certainly are circumstances where the general rules cannot be made to work and variances are appropriate. That is why CRMC has a variance program. And CLF agrees that when a variance is appropriate and the public’s legitimate interests reduced as a result of attempts to accommodate site specific concerns it is appropriate for an applicant to contribute to addressing the public’s interests in another way. However, the mechanism proposed in this plan for such contribution makes it far too easy for a property owner to opt out of the rules and instead pay a modest fee to avoid what would otherwise be its obligations.

There are two significant problems with such a plan:

- 1) So long as the opt out fee is much smaller than the economic value to the property owner of avoiding the rules, the opt out fee will be paid instead of complying with the rules. No explanation is given for the very modest assessment of 20% of value as the cost of relaxed regulation. At this level, the fee is less of a compensation for unavoidable problems than it is a minor cost of doing business. The fee should be set at a level that will make it

55 Dorrance Street, Providence, Rhode Island 02903-1726 • Phone 401-351-1102 • Fax: 401-351-1130 • www.clf.org

MASSACHUSETTS: 62 Summer Street, Boston, Massachusetts 02110-1016 • 617-350-0990 • Fax: 617-350-4030

MAINE: 14 Maine Street, Brunswick, Maine 04011-2026 • 207-729-7733 • Fax: 207-729-7373

NEW HAMPSHIRE: 27 North Main Street, Concord, New Hampshire 03301-4930 • 603-225-3060 • Fax: 603-225-3059

VERMONT: 15 East State Street, Suite 4, Montpelier, Vermont 05602-3010 • 802-223-5992 • Fax: 802-223-0060

economically unattractive except when a variance is unavoidable, which is the standard that should be applied for a variance.

2) Programs that require compensation either through in lieu fee or restoration/mitigation have been notoriously unsuccessful. Study after study has confirmed that these programs do not work. See e.g., Compensating for Wetland Losses Under the Clean Water Act (2001), National Research Council, National Academy Press, Washington, D.C. While paying a fee into a fund has not guaranteed that projects to compensate for lost ecological values are actually completed, allowing private entities to do the mitigation themselves has an even worse track record. Many studies show that the compensation measures on pages 47-48 are unlikely ever to produce real results. Creation of wetlands is a challenging task, to say the least. Restoration has a somewhat better record of success for compensation, although still poor, in part because the economic incentive for follow through and long term management is lost once the project for which compensation is sought is complete.

These problems can be solved if the standard for variance is high and awarded only when the variance is unavoidable, and the compensation that is required for obtaining a variance equals or exceeds the economic benefit to the applicant of avoiding the rules. Furthermore, when compensation is required, private efforts to create or restore wetlands should not be allowed as offsetting compensation unless the applicant is required to post a performance bond and to create the compensatory wetland before the principal project proceeds.

On a related point, it would be helpful to clarify the statement on page 3: "The freshwater wetlands program administered by the CRMC will not be subject to the UGC program, however." While we certainly agree that wetlands should be governed by the rules CRMC now applies, this one sentence statement could be clarified to specify that all applications proposing to alter wetlands will be governed under the rules in CRMC's current regulations.

Thank you for the opportunity to submit comments.

Sincerely,

Cynthia Giles