

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: January 22, 2025)

THE DUMPLINGS ASSOCIATION, INC. :

Appellant, :

v. :

C.A. No. PC-2021-00296

COASTAL RESOURCES MANAGEMENT :

COUNCIL and SHM JAMESTOWN :

BOATYARD, LLC :

Appellees. :

DECISION

LANPHEAR, J. Before the Court is the appeal of The Dumplings Association, Inc. from the decision of Coastal Resources Management Council (CRMC), which approved an application by SHM Jamestown Boatyard, LLC (SHM) to extend three piers and dredge the seafloor in Dumplings Cove in Jamestown. Jurisdiction is pursuant to G.L. 1956 § 42-35-15, the Administrative Procedures Act (APA).

I

Facts and Travel

SHM operates a boat yard, is a boat yard providing marine services at 60 Dumpling Drive in Jamestown, Rhode Island. SHM owns four lots along Dumpling Drive. SHM’s northeastern lot is bounded to the southwest by property that is owned by The Dumplings Association, Inc. (Dumplings). Dumplings is a nonprofit neighborhood association.

On June 6, 2019, SHM applied to CRMC seeking permission to extend its marina and perform dredging. On June 23, 2019, Dumplings sent a letter to CRMC requesting a hearing on

the matter and raising several objections to the application. This letter took issue with the potential negative impacts on the surrounding properties and the environment and noted the neighbors have utilized the waters for generations. On November 5, 2019, SHM amended its application to modify the dredging footprint and reduce the marina expansion so that it would remain within the marina perimeter limit. On February 26, 2020, SHM further reduced the size of its proposed project. On April 2, 2020, CRMC staff engineer, Mr. Danni Goulet, recommended approval of the application subject to standard stipulations. On October 7, 2020, Dumplings sent CRMC a summary of its objections. Dumplings took issue with the SHM's failure to consider how the development would affect other low intensity uses of the water and how the dredging would negatively impact the environment.

CRMC held hearings on SHM's application on October 20, 2020 and October 27, 2020 via Zoom. During the October 20, 2020 hearing, the parties were informed that the case was not a contested case, and therefore, they did not have the ability to cross-examine.¹ Only six of ten CRMC members were present at the meeting. Additionally, none of the objectors were informed that the present members were acting as anything other than a subcommittee.

Following the hearings, CRMC discussed the matter and held a vote. CRMC voted 4-2, approving the project.² The written decision issued on December 31, 2020. In its decision, CRMC

¹ In the October 20, 2020 transcript, counsel to the CRMC states: "We are not – it was not the Council's intent to allow cross-examination of witnesses because this is not a full-blown contested case. . . . It's a disputed case, but it's not a contested case. So if you had questions, usually you could direct them through the Chair, but just please don't abuse that opportunity to cross-examine." The transcript is located in the second notebook of the certified record, after the meeting minutes in the October 20, 2020 tab. (Hr'g Tr. 58:8-17, Oct. 20, 2020.)

² It is challenging to locate documents in the record, which apparently consists of three large notebooks, without an index and without pages numbered or collated documents. The CRMC decision is about twelve pages, all of which are unnumbered. Hence, it is difficult to cite the documents. However, Exhibit A to the Complaint herein is a copy of the decision. The votes are on unnumbered page 11 of the decision.

included various findings of fact and conclusions of law, approving 2,000 cubic yards of dredging and expansions to the marina.

On January 14, 2021, Dumplings appealed CRMC’s decision to this Court. Briefing was completed in 2024.

II

Standard of Review

The Superior Court’s review of an appeal from an administrative agency decision is governed by the APA, § 42-35-15, which provides in pertinent part:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Section 42-35-15(g).

The Court defers to the administrative agency’s factual determinations if they are supported by legally competent evidence. *See Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003).

III

Analysis

Although Dumplings attacks CRMC’s decision on multiple substantive grounds, the Court declines to address them because the Court finds persuasive a procedural argument raised by SHM—namely, that CRMC erred in not assigning the matter to subcommittee.

A

Raise or Waive

SHM contends that the raise-or-waive doctrine precludes the Court from addressing Dumplings' argument that the matter should have been sent to subcommittee, because Dumplings did not raise this issue before CRMC.

The Rhode Island Supreme Court is reluctant to consider an issue that was not raised before the trial court. *Harvey Realty v. Killingly Manor Condominium Association*, 787 A.2d 465, 467 (R.I. 2001). Whether the raise-or-waive doctrine applies to the Superior Court's review of administrative proceedings is an open question. *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1153 (R.I. 2006). Further, the raise-or-waive rule does not apply when a jurisdictional issue is raised. *See State v. Sivo*, 925 A.2d 901, 916 (R.I. 2007).

The purpose of the raise-or-waive rule is to serve interests of judicial economy and to promote fairer and more efficient judicial proceedings. *State v. Burke*, 522 A.2d 725, 731 (R.I. 1987). The raise-or-waive rule provides "the opportunity to grapple in the first instance with particular arguments . . . in the vital context of the then-ongoing" hearing. *State v. Diefenderfer*, 970 A.2d 12, 30 n.33 (R.I. 2009). Here, the record demonstrates that Dumplings did not have reason to present the argument as the hearings were ongoing, and the meeting appeared to be before the CRMC, not a subcommittee. Specifically, it was not made clear to the attorneys or the parties whether they were before a subcommittee in a contested case or the full council. The parties were informed that the case was disputed but not a contested case and that they did not have the ability to cross-examine. (Hr'g Tr. 58:13-17, Oct. 20, 2020.) One of the attorneys even remarked that he thought he had the ability to cross-examine. *Id.* at 58:18-20. Hence, objectors' counsel did not

have the ability to meaningfully raise the argument at that point in the proceedings. Because the raise-or-waive doctrine does not apply to jurisdictional issues, and Dumplings could not have appropriately responded if it did apply, it is unfair to preclude Dumplings from raising such issues on appeal.

B

Contested Case

In the December 31, 2020 notice of a final decision, CRMC refers to the matter as “a contested case.” The notices of the October 20, 2020 meeting refer to the meeting as “the next meeting of the Coastal Resources Management Council,” that is, not a subcommittee. The notices also say, “Interested parties may attend and present evidence for or against, or for informational purposes in accordance with CRMC rules.” First notebook of certified record, unnumbered pages 65-76.

CRMC’s failure to comply with its own procedure by failing to declare the matter a contested case, as set forth in greater detail below, stripped the full council of its jurisdiction to render a decision without a formal hearing before a subcommittee. CRMC was without sufficient jurisdiction to hear the matter because, by its own rules, the full council did not have authority to pass on the matter until after the subcommittee had considered it. 650 RICR 10-00-1.1(B).

The Rhode Island Code of Regulations (RICR) provides the following:

“B. ‘Contested case’ means a proceeding in which the legal rights, duties or privileges of a specific party are required to be determined by the Council after an opportunity for hearing. A proceeding before the Council shall be considered contested when a substantive formal written objection and/or request for hearing is received by the Council from any interested party. Further, a proceeding shall be considered contested upon request for hearing by any four (4) members of the Council.” 650 RICR 10-00-1.1(B).

Section 1.1.6(G) of the RICR delineates what constitutes a substantive objection:

“1. Substantive objections are defined by one or more of the following:

“a. Threat of direct loss of property of the objector(s) at the site in question;

“b. Direct evidence that the proposed alteration or activity does not meet all of the policies, prerequisites, and standards contained in applicable sections of this document;

“c. Evidence is presented which demonstrates that the proposed activity or alteration has a potential for significant adverse impacts on one or more of the following descriptors of the coastal environment: (1) Circulation and/or flushing patterns; (2) Sediment deposition and erosion; (3) Biological communities, including vegetation, shellfish and finfish resources, and wildlife habitat; (4) Areas of historic and archaeological significance; (5) Scenic and/or recreation values; (6) Water quality; (7) Public access to and along the shore; (8) Shoreline erosion and flood hazards; or

“d. Evidence that the proposed activity or alteration does not conform to state or duly adopted municipal development plans, ordinances, or regulations.” 650 RICR 20-00-1.1.6(G).

Dumplings contends its July 23, 2019 objection elevated the matter to contested case status.³ Specifically, it argues that it presented the potential for significant adverse impacts on sediment dispersed and erosion, biological communities and wildlife habitats, and recreational values. Additionally, Dumplings argues that its request for a hearing rendered the matter a contested case. In opposition, SHM argues this is not a contested case because none of the concerns argued by Dumplings rises to the level of substantive objections as defined by 650 RICR 20-00-1.1.6(G). SHM suggests that Dumplings failed to present any evidence supporting substantive objection status. CRMC also contends that Dumplings failed to present sufficient evidence to constitute a substantive objection and that the July 23, 2019 objection fails to qualify as substantive objections.

³ While the Court prefers to cite to the certified record in which this document is contained, the certified record consists of several large notebooks with unnumbered pages. This document is attached as Exhibit 8 to Plaintiff’s Memorandum in Support of Appeal, January 16, 2024.

In the July 23, 2019 writing, Dumplings raised several substantive objections before CRMC. Dumplings claimed that the sediment could have negative effects on the eelgrass. Dumplings asserted that the project would interfere with other recreational uses of the property, and Dumplings noted the historic nature of the area and how the expansion would impact the area. Dumplings raised the possibility of toxic exposure to humans. The claims raised by Dumplings are not mere arguments. Under the regulations, Dumplings does not need to *prove* that harm will occur - it merely needs to demonstrate the *potential* for significant adverse impact. 650 RICR 20-00-1.1.6(G)(1)(c). Dumplings met that burden by raising several substantive objections in its pre-hearing correspondence. These objections were supplemented by significant supporting documents.

CRMC suggests there is no direct evidence to support the arguments of Dumplings. Of course, there is no direct evidence until introduced at hearing.⁴ CRMC's decision not to classify the matter as contested was improper because Dumplings had advanced sufficient evidence to render their claims as substantive objections under the regulations. *See* 650 RICR 20-00-1.1.6(G)(1). This Court concludes that the matter constitutes a contested case. First, the July 23, 2019 objection contains within it a request for a hearing. Notice of Protest and Request for Hearing at 11. Under the RICR, this alone is sufficient to elevate the matter to a contested case. 650 RICR 10-00-1.1(B). Either a substantive objection or a request for a formal hearing on the matter was sufficient to make this a contested case and trigger a formal hearing.⁵

⁴ The suggestion that Dumplings needs to produce absolute proof prior to the hearing defies logic. Not only do the regulations not require such a showing, but the opportunity to make proof, with other guarantees of cross-examination and confronting witnesses, would be at a hearing – not before a hearing.

⁵ It is, of course, very unfortunate that no hearing was held for some seventeen months after the objection.

C

The Failure to Treat the Dispute as Contested

Resulted in a Failed Procedure

Section 1.5.2 provides for the following procedure in a contested case:

“A. In the event an application or matter pending before this Council becomes a contested case as defined herein, the Council shall then schedule a public hearing before a duly authorized and appointed Subcommittee on the matter. The Subcommittee shall render a recommendation within thirty (30) days of the final hearing unless the Chairman of the Council extends such period.

“B. Notice of this public hearing shall be in conformity with R.I Gen. Laws Chapter 42-35 to ensure all parties be afforded an opportunity to be heard.” 650 RICR 10-00-1.5.2.

Section 1.5.3 provides additional guidance:

“A. Hearings required or permitted shall be conducted in accordance with appropriate Rules of Law and these Rules and Regulations. Hearings may be before a duly appointed Subcommittee before the Council as a whole, as designated by the Chairman in his/her sole discretion. A Subcommittee hearing shall be required when a substantive objection is received from any party or when requested by members (a vote of four (4) or more) of the Coastal Resources Management Council.

“B. In the case of hearings before a duly-appointed Subcommittee, the full hearing shall be before such Subcommittee. A record shall be kept as provided herein. The Subcommittee shall then report its recommendations to the full Council. The record shall be available to the full Council and all parties of record. After the Subcommittee recommendation is formally submitted to the full Council, parties may present new evidence before the full Council at the full Council hearing.” 650 RICR 10-00-1.5.3

CRMC was required to send the matter to subcommittee for a full hearing and vote on the matter. No subcommittee was appointed, no subcommittee was referred the matter, and no subcommittee heard the matter. As counsel for SHM pointed out when asking CRMC to approve the application, the RICR is CRMC’s “Bible” and must be followed. (Hr’g Tr. at 77:15-21, Oct.

27, 2020.)⁶ In failing to strictly adhere to the regulations, CRMC committed procedural error which warrants remand so that the proper procedure can be followed.

CRMC argues that, even if it were a contested case, it had authority to hear the matter. This argument is based on a code section which was quoted out of context. That section provides the following:

“Additionally, the Chairman in his/her discretion may appoint standing Special Area Management Plan (SAMP) Subcommittees to hear contested cases resulting from the implementation of the Council’s Special Area Management Plans. However, in appropriate circumstances, contested cases may be heard by the full CRMC, or *ad hoc* Subcommittees, as determined by the Chairman. The Chairman and Vice Chairman shall sit *ex officio* on all Subcommittees.” 650 RICR 10-00-1.3(B).

This section provides that utilizing alternative forums for hearing contested cases can occur only in “appropriate circumstances.” The CRMC did not acknowledge or specify any “appropriate circumstances” on the record or specify such circumstances to this Court. Accordingly, the full CRMC was without sufficient authority to hear the matter prior to it being referred to the appropriate subcommittee.

Rather, while the parties waited for seventeen months for any response, and additional months for a substantive subcommittee hearing, they were then apprised of a hearing by CRMC. Of course they complied by appearing before the full council. Awkwardly, they then learned they would be unable to cross-examine, present evidence, or appeal to the full council.

⁶ This transcript is contained in the midst of other documents in the unnumbered pages which follow the October 27, 2020 tab in the first unnumbered volume of the record. For convenience, a copy appears as Exhibit 2 attached to the Plaintiff’s Memorandum in Support of Appeal, January 16, 2024.

IV

Conclusion

For the foregoing reasons, the Court vacates the CRMC decision of December 31, 2020. The Court remands the matter to the CRMC with instructions to have the matter heard by an appropriate subcommittee forthwith.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **The Dumplings Association, Inc. v. Coastal Resources Management Council and SHM Jamestown Boatyard, LLC**

CASE NO: **PC-2021-00296**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **January 22, 2025**

JUSTICE/MAGISTRATE: **Lanphear, J.**

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