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Conservation of Submerged Lands in Rhode Island

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Conservation of Submerged Lands in Rhode Island

1. Introduction

This report further assesses proprietary options for private organizations to carry out conservation activities in Rhode Island tidal lands. This paper is a supplemental paper to URI IGERT Fellow Ronan Roche's paper entitled "Assessment of Law, Policy, and Practice Related to Private Conservation of Tidal lands in Rhode Island."

2. Comparison between Rhode Island and Connecticut

There appears to be one major difference between submerged lands in Rhode Island and Connecticut that has subsequently affected how they are treated. Historically, in Connecticut, it appears that the fishing industry as well as kings grants to private owners has led to an acceptance of private ownership of submerged lands despite the public trust doctrine. Rhode Island is much different in that it is recognized that the state is the property owner of submerged lands, and has delegated its powers to regulate these areas to the Coastal Resources Management Council. This is because Rhode Island received title to its lands initially as a charter from King Charles II. Roger Williams secured from Charles a charter for the land in Rhode Island and this land grant included title to tidal lands. According to English Common law, the title in "lands flowed by the tide were in the king for the benefit of the nation." *Shively v. Bowlby*, 152 U.S. 352 (1894).

While the courts and the general laws do explicitly state that the generally assembly has the right to grant these lands to private owners, there is an equally strong notion that this power is limited by the public trust doctrine. Therefore, whereas title searches and the possibility of

Conservation of Submerged Lands in Rhode Island

buying out private owners is a viable option for conservation agencies in Connecticut, it does not seem as if that same opportunity can be found in Rhode Island.¹

3. Mechanisms

In order to conduct my research I used a combination of legal research, town level and state level research. On the state level, I contacted the Coastal Resources Management Council to garner information. On the town level, I traveled to four towns in Rhode Island: North Kingstown, Charlestown, Bristol and Barrington. I used these four towns as model towns. In these towns, I spoke with such officials as the tax assessor and the town planner. These four towns were chosen, because they are on different parts of the state and were used to determine if visits to more towns in the state were necessary. I also garnered information about an analogous non-governmental organization, namely Save the Bay, primarily through a case study done on their work with eelgrass restoration.

4. Proprietary Mechanisms that can be utilized by Conservation organizations

There are many proprietary mechanisms that can be utilized by conservation organizations to gain some kind of interest in submerged lands. Many of these mechanisms have already been thoroughly explained in a paper entitled “Assessment of Law, Policy, and Practice Related to Private Conservation of Tidal lands in Rhode Island” written by Ronan Roche. In this paper, he discusses such mechanisms as leases (specifically aquaculture), Education and Research permits, and Riparian/Littoral Ownership.

¹ “Exploring a New Strategy for Marine Protection: Assessment of Law, Policy, Practice, and Spatial Data Related to Private Conservation of Submerged Land in Central Connecticut.” The Nature Conservancy, Middletown, Connecticut. June 2008.

Conservation of Submerged Lands in Rhode Island

Roche also discusses the fact that for the only viable means for a private entity to acquire title to tidal lands in Rhode Island would be by express legislative grant from the General Assembly. This avenue will be examined further below when case law is discussed, specifically in *State ex rel. Town of Westerly v. Bradley* (877 A.2d 601)(2005).

Roche also briefly discusses restoration permits, the example of which is the permit which allows Save the Bay to carry out its eelgrass planting. For certain activities, such as restoration, a lease of tidal lands from CRMC would not be necessary to carry out the activity. Instead this general permit to carry out the activity is all that is necessary. An example of this would be the type of permit that Save the Bay uses in order to carry out its eelgrass planting. To conduct this work, Save the Bay acquires a yearly authorization from CRMC for the purpose of restoration. This type of permit is annual because under the Rhode Island General Law §46-23-16, CRMC can grant the permit for any term of years that they choose or in perpetuity plus there is no implied guarantee of renewal. Save the Bay applies for a construction authorization permit but modifies the application to include an explanation of the intent to use the permit for restoration. This permit gives Save the Bay the ability to choose any site that they want to work on, the most successful being those where there is little conflicting use such as places that are not utilized for mooring fields. When conflicts arise that may endanger the restoration efforts, Save the Bay can submit recommendations on how the construction can proceed but in a way which will mitigate the impacts that it will have.²

To get approval for this permit, the applicant should garner support from the coastal towns near the restoration sites. In order to garner this support, information about the restoration sites, what the plan is for this site, and if possible results from the previous restoration efforts should be submitted. The request should be sent to the town manager, and if needed to the town's

² "License: Rhode Island Eelgrass and Marsh Restoration." http://www.leaseown.org/Case_Studies/License_RI.html

Conservation of Submerged Lands in Rhode Island

conservation commission and harbormaster. Save the Bay also sends letters to its partner organizations to give an overview of progress and future plans.³

However, with this kind of permitting arrangement, there is not a high level of protection offered to the conservation agency and there is less control than under a leasing arrangement.⁴

5. Jurisdiction

Even if it does not seem necessary to consult these town bodies, in some cases, as mentioned above in the restoration permits section, it does seem prudent to have the town's support when applying for permits.

- a. Harbormasters have the authority to enforce bylaws, ordinances, and fees/compensation as the city or town council has deemed appropriate to be in accordance with Rhode Island General Law §46-4-2. This provision also explains for certain city specific authorities of harbormasters.
- b. Town Planner (Westerly) – In general, Westerly's Planning Department oversees land use planning, review of major and minor development projects, and subdivisions, community development activities, administration of federal and state grant programs, and other related activities. It provides staff support to a number of local boards and commissions including the Planning Board. When the Assistant Town planner was asked if their office has any jurisdiction over restoration projects in the submerged tide lands, the Planner stated that their office would need more specifics about a project being planned to assess if they had jurisdiction. In general their jurisdiction does not extend over submerged lands; however, if parking, storage, or some other need that

³ Id.

⁴ Roche, Ronan. "Assessment of Law, Policy, and Practice Related to Private Conservation of Tidal lands in Rhode Island." May 2007.

Conservation of Submerged Lands in Rhode Island

would utilize town land was needed, then their jurisdiction would come into play.

Lastly, it was advised that if any projects were being planned in their area, they should be contacted because they are always willing to support any restoration projects.⁵

- c. Coastal Ponds Management Commission (Charlestown) is the local regulatory body authorized to regulate the coastal ponds of the Town through the implementation of the Harbor Management Plan and subsequent regulations.⁶

In all four towns that I visited (Bristol, Barrington, North Kingston, and Charlestown), after talking to the tax assessor I determined that there was no non-state owned submerged tidelands in these areas.

6. Case Law

Ronan Roche covered a great deal of case law in his paper in regards to the strength of the public trust doctrine in Rhode Island. The case law listed below was not used in Roche's paper. The first is a case from 1886, *Gerhard v. Seekonk River Bridge Commissioners* (5A. 199)(1886), which established that tide flowed land in Rhode Island belong to the state. This is an old case which simply established the fact that the state owns any tide flowed lands in the state.

The second case speaks to the General Assembly's power over submerged lands and its balance with the Public Trust Doctrine is articulated in the 2005 case *State ex rel. Town of Westerly v. Bradley* (877 A.2d 601)(2005). It echoes the decision of the court in *Town of Warren v. Thorton-Whitehouse* (740 A.2d 1255)(1999). The court states that "[u]nder the public trust

⁵ Westerly, Rhode Island Town Website:

http://westerly.govoffice.com/index.asp?Type=B_BASIC&SEC=%7BFF750D53-FCDF-4BEC-AB44-D23FD0BE261E%7D and spoke with Westerly, RI Assistant Town Planner – Blanche Higgins – for additional information.

⁶ Town of Charlestown, Rhode Island website:

http://charlestownri.org/index.asp?Type=B_BASIC&SEC=%7BD36D5371-76F9-4E0F-AD67-E1C9C87B8718%7D

Conservation of Submerged Lands in Rhode Island

doctrine, the General Assembly is vested with the authority and responsibility for regulating and preserving tidal lands and may determine appropriate uses for tidal land, grant tidal land to another, or delegate the authority to regulate that land on the state's behalf." (*Bradley*, 606-607) Furthermore, the state's plenary authority over tidal lands is restricted by the state constitutional article which preserves rights of fishery and the privileges of the shore to the state's inhabitants, more commonly known as the Public Trust Doctrine (*Bradley*, 607).

7. Rolling Easements from Global Warming

In the face of global warming and sea-level rise states, such as Rhode Island, have implemented Rolling easements as a way of coping. Rolling easements allow property owners to build near or on the beach with the caveat that any structures built will be taken away should the shoreline advance and these structures are endangered.⁷ A proactive mechanism for obtaining and protecting submerged lands is to acquire them from land owners before they are submerged.

The Coastal Resources Management Council is the agency in Rhode Island for overseeing these easements according to both Rhode Island General Law and their Coastal Zone Management Plan. According to general law § 46-23-1(2):

“it shall be the policy of this state to preserve, protect, develop, and, where possible, restore the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long range planning and management designed to produce the maximum benefit for society from these coastal resources; and that preservation and restoration of ecological systems shall

⁷ Higgins, Megan. *Legal Policy Impacts of Sea Level Rise to Beaches and Coastal Property*, in press, referring to James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. Rev. 1279 (1998).

Conservation of Submerged Lands in Rhode Island

be the primary guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated.”

Lastly, according to the Rhode Island Coastal Zone Management Plan Section 145, CRMC states that its policy in regards to climate change is to “proactively plan for and adapt to climate change and sea level rise.” It is supposed to strive to make the coastal areas more “resilient.” It also has a policy meant to “insure proactive stewardship” of these changing coastal ecosystems.

With these policies in place, it is possible that an organization like the Nature Conservancy could work to study and develop methods that will help these ecosystems to adapt to the changes being brought on by climate change. The work done in North Carolina’s Albemarle Peninsula is a good example of these efforts. In this area more than 400,000 acres of land have been conserved using state, federal and private funding. This money has been invested in both land acquisition and other conservation activities.⁸

North Carolina is preparing for changes on the peninsula in three ways: via hydrologic restoration, wetland restoration, and oyster reef restoration. Hydrologic restoration includes learning about the flow of water and then later changing the area or using water control structures to reduce the impacts of salt intrusion and soil disintegration. Wetland restoration is meant to help prevent the further degradation of this habitat and includes a plan to prepare these areas to be submerged in both the long and short term (an example would be planting species that are both tolerant of the changes and can hold together the system). Oyster Reef Restoration will help to both reduce wave energy and erosion while creating new habitat whose viability will increase over time.⁹

⁸ DeBlieu, Jeff. *North Carolina’s Albemarle Peninsula*. The Nature Conservancy: Global Climate Change Impacts and Adaptation.

⁹ Id.

Conservation of Submerged Lands in Rhode Island

One of the key to success with this program is the fact that a conservation organization was working with the state and federal government from the start, thus allowing it to have some control over the project. This would seem to encourage the idea that if the Nature Conservancy in Rhode Island wanted to pursue such a conservation endeavor in this state that their first course of action would be to work with a government agency from the beginning. This seemingly would allow for more effective work and co-management from the start.

8. Recommendations

a. Aquaculture Lease

As fully detailed in Roche's paper, Aquaculture Leases are the most favorable option for a conservation organization. It gives the organization the most control over an area that it can have short of title to the area; it would also meet the restoration objectives if the aquaculture was conducted in a sustainable way – either farmed and sustainably harvested or just farmed and then subsequently protected. (Rhode Island does not require harvesting, merely active farming. Farming could be possibly be construed as shellfish restoration – either by transplanting or seeding.) However this solution would only work for shellfish.

b. Restoration Permit

The restoration permit is another viable option. This permit would allow The Nature Conservancy to conduct any activity that is permitted for the area – which would include restoration efforts. The downside to this option is that unlike aquaculture, the permit does not give the permittee control over the area, just the ability to carry out the desired activity. Also this permit must be reapplied for, but as mentioned above, the duration of the permit is unspecified and is determined at the time of permitting by CRMC (ex. Save the Bay's permit duration is one year); therefore it does not ensure a long term ability to continue the restoration work. CRMC

Conservation of Submerged Lands in Rhode Island

could deny a reapplication for the permitted restoration activity which may lead to degradation of the area after substantial investment has been made to improve it. Therefore, while a viable option, the aquaculture lease would be the more suitable route.

c. Rolling Easements

The acquisition of lands that will be subject to rolling easements seems like a new and proactive mechanism to protect these areas before they become submerged in order to prepare them to be healthy submerged land. The drawbacks seem to be that this method is highly untested and has the possible drawback of losing all right to the land post-submersion after a hefty investment in their maintenance. However, it seems to be the option that would create the most viable ecosystem over time. As mentioned before a key to the success of this plan would be a coalition between a conservation organization, state government, and federal government right from the start.

d. Grant from the Legislation

The last viable option, and perhaps the hardest to utilize would be the grant of title of submerged lands from the general assembly for public trust purposes. (Rhode Island General Law § 46-5-1.2) It is also possible to acquire these lands from an organization which the General Assembly has delegated its authority to, in a matter such as this, it would be the Coastal Resources Management Council. Finally, if there are two proposed competing uses for the submerged land; it is the generally assembly's job to balance both use and preservation of the submerged lands.

9. Conclusion

In order to acquire some power over submerged tidelands the most reasonable methods would be the aquaculture lease and the restoration permit. Both these mechanisms fall under the

Conservation of Submerged Lands in Rhode Island

purview of CRMC and it seems prudent to develop a working relationship with CRMC. This would make any restoration efforts more efficient. These would be the more prudent courses of action because fee title to state lands resides with the state and the only way to acquire title is through legislative grant, but this mechanism appears to be the least realistic.

On another front, if the Nature Conservancy wished to proactively act to restore submerged tidelands via a rolling easement, it once again would be in the organization's best interest to have some sort of working relationship with CRMC from the start. Work on this front could go a long way to ensure that Rhode Island's coastal resources will be protected in the future.

Conservation of Submerged Lands in Rhode Island

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