Case Number: SU-2020-0168-MP
Filed in Supreme Court
Submitted: 2/1/2022 8:34 AM
Envelope: 3463907
Reviewer: Justin Coutu

STATE OF RHODE ISLAND **SUPREME COURT**

CHAMPLIN'S REALTY ASSOCIATES v. COASTAL RESOURCES MANAGEMENT COUNCIL, et al.	No. SU-2020-0168 MP No. SU-2020-0169 MP On writ of certiorari from the Superior Court, WC-2011-0615, WC-2011-0616 (Lanphear, J., Rogers, J.)

BRIEF OF AMICI CURIAE SAVE THE BAY , ET AL. IN SUPPORT OF INTERVENOR-RESPONDENTS

Kendra L. Beaver # 3013
Staff Attorney, Save The Bay
100 Save The Bay Drive
Providence, Rhode Island 02905
Telephone (401) 272-3540
kbeaver@savebay.org

Lynette Labinger # 1645
128 Dorrance St, Box 710
Providence, Rhode Island 02903
Telephone (401) 465-9565
ll@labingerlaw.com
Cooperating Counsel,
American Civil Liberties Union Foundation of Rhode Island

TABLE OF CONTENTS

Table of Authorities

Cases

Constitutional Provisions

Statutes of the United States

Regulations of the United States

Statutes of the State of Rhode Island

Regulations of the State of Rhode Island

Other Authorities

Case Number: SU-2020-0168-MP
Filed in Supreme Court
Submitted: 2/1/2022 8:34 AM
Envelope: 3463907
Reviewer: Justin Coutu

STATEMENT OF INTEREST TO APPEAR AS AMICUS CURIAE

Save the Bay

Save The Bay is an independent, member-supported, nonprofit organization. For over fifty years we have worked as a grassroots organization for a fully swimmable, fishable, healthy Narragansett Bay, accessible to all. Today we carry out our mission through three areas of work: advocacy, education, and habitat restoration and adaptation. A major focus of our advocacy work is ensuring that decisions made by state and federal agencies are made in accordance with laws and regulations promulgated to ensure transparency and protect our public trust resources.

Save The Bay watches over the government and citizenry for proposals or activities that may degrade the environmental quality of the Bay by encroaching on, destroying or denying access to public trust resources. We review Category B applications before the Coastal Resources Management Council (CRMC) and routinely comment on and object to those applications and activities that do not comport with the process established by law and may cause impacts to the Bay. We intervene in cases that may significantly impact our public trust resources. propose and support changes to law and regulations that promote and maintain fairness, transparency and strong protections for our coastal resources. Save The Bay relies on an open and public process to understand resource impacts and the basis for

Council decisions that inform our legislative and regulatory advocacy positions.

Rhode Island Saltwater Anglers Association and Foundation

Rhode Island Saltwater Anglers Association and the Rhode Island Saltwater Anglers Foundation are duly authorized corporations chartered through the Rhode Island Secretary of State whose principal function is to serve the interests of recreational fishermen located throughout Rhode Island and adjoining areas of southern Massachusetts. Rhode Island Saltwater Anglers Association and the Rhode Island Saltwater Anglers Foundation rely on a public process to prevent possible harm to the coastal waters and the ecological environment of the State of Rhode Island.

American Civil Liberties Union of Rhode Island

The American Civil Liberties Union of Rhode Island (ACLU-RI), with over 5,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. ACLU-RI, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution and state and federal law, including those designed to ensure fundamental procedural fairness and transparency in the administrative and judicial process. In furtherance of this goal, ACLU-RI cooperating attorneys have participated, either directly or as amicus curiae, in various cases challenging governmental policies and practices that, as is

alleged in this case, limit transparency, accountability or public participation in governmental proceedings that affect the public. *See, e.g., Arnold v. Lebel,* 941 A.2d 813 (R.I. 2007) (challenging the reliance by state hearing officers on *ex parte* evidence obtained outside the hearing process); *Jefferson v. Moran*, 479 A.2d 734 (R.I. 1984) (addressing application of the public rule-making provisions of the Administrative Procedures Act to the R.I. Department of Corrections). ACLU-RI previously filed an amicus curiae brief in an earlier aspect of this litigation in Superior Court, there addressing CRMC's assertion of a "deliberative process" privilege to limit disclosure of information related to alleged governmental misconduct. *Champlin's Realty Associates v. Tikoian*, No. PC06-1659, 2009 WL 3161831, at *14 (R.I.Super. Feb. 24, 2009), *aff'd in part, rev'd in part*, 989 A.2d 427 (R.I. 2010).

Common Cause Rhode Island

Common Cause Rhode Island is a state office of Common Cause, a nonpartisan, nonprofit organization with more than 5000 members and supporters in Rhode Island that works to create open, honest, and accountable government that serves the public interest. Common Cause Rhode Island has substantial experience with the Administrative Procedures Act including, most recently, deep involvement in successful 2016 legislative efforts to amend the law to strengthen transparency provisions applicable to rule making proceedings.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Amici adopt and support the Facts and Travel as set forth by the Attorney General and by the intervenors at all stages of the litigation, the Committee for the Great Salt Pond, the Block Island Land Trust, the Block Island Conservancy, Town of New Shoreham, and the Conservation Law Foundation (collectively the Intervenor Parties). In compliance with the public process set forth in the Administrative Procedures Act and the Coastal Resources Management Program and Management Procedures (CRMC Regulations), the CRMC, in its May 6, 2011 Decision, issued ninety (90) findings of fact and ten conclusions of law that resulted in the denial of Champlin's application.[1] The denial was upheld by the Superior Court (K. Rodgers, J.) on February 11, 2020.[2]

SUMMARY OF ARGUMENT

In recognition of the strong public interest in matters that impact our coastal resources, our state legislature and the federal government have gone to great lengths to ensure that applications for development that may degrade our irreplaceable coastal resources, such as the Great Salt Pond, are open and subject to public review and participation. The Great Salt Pond is a public trust treasure; "a water body of

[1] CRMC Decision, *Champlin's Realty Associates consolidated with the Town of New Shoreham Harbor Management Plan* (May 6, 2011) ("CRMC Decision"), reproduced in Appendix of Champlin's Realty (hereinafter "Pet.App.") at 161-172.
[2] *Champlin's Realty Assoc. v. Lemont* (R.I. Super. 2020), reproduced in Pet.App. at 84-138.

particular significance and value. It is relatively shallow, has only limited connection to the open sea, and relatively low rates of tidal flushing. It is also subject to intense recreational use during the summertime, making it a relatively fragile ecosystem."[3]

This Court should overturn the September 9, 2021 Superior Court Decision (Lanphear, J.)[4] holding that mediation was proper and conclusive. In addition to the arguments made in the briefs submitted by the Attorney General and Intervenor Parties, Amici ask that this Court conclude that the September 9, 2021 Superior Court decision holding that the mediation was conclusive and proper cannot withstand important and controlling federal regulatory considerations.

If the Memorandum of Understanding ("MOU") agreed upon between Champlin's and CRMC serves as a draft or final agency decision, Amici and other interested parties will not be informed of the impacts on shellfish and finfish, wildlife, water quality, public use and enjoyment of public trust resources in this case, or in future cases. For future CRMC cases and conclusions of law, it will gut the Administrative Procedures Act and the CRMC Management Procedures and Management Program ("CRMP"). There are no findings of fact in the MOU to support a finding that the proposed marina expansion will conform to the regulations established in the CRMP to protect our coastal resources or to overturn the prior

[3] CRMC Decision, Findings 6 and 7, reproduced in Pet. App. at 161-162.
[4] *Champlin's Realty Assoc. v. CRMC* (R.I. Super 2021), reproduced in Pet. App. at 14-78.

denial on critical issues raised by CRMC in its earlier decisions (upheld in court).

If the 2021 Superior Court decision is upheld, it will eviscerate the public process mandated by state and federal law to ensure transparency and accountability for both the regulated parties and the government body charged with the responsibility of protecting our public trust resources for the citizens of the state. Affirming the decision will create a court-approved path that will allow applicants to sidestep the public's rights to a fair and open government and impact the ongoing interests of more than just the immediate parties and organizations.

ARGUMENT

State and federal law, implemented through the CRMC regulations, mandate a transparent public process for applications that may degrade our coastal resources. This process details fair and consistent standards and affords the public meaningful participation in the review and approval of projects that will impact public trust resources. If left standing, the 2021 Superior Court Decision will deny the public their right to review and be heard on substantive changes made to development proposals during mediated settlement negotiations. This means that even after public participants get involved by investing substantial time and resources into opposing a development proposal and prevail at the administrative level by obtaining a decision denying the application supported by findings of fact and conclusions of law, their efforts may be circumvented by a savvy developer. The denied project

can be revised and approved through a confidential settlement without a public opportunity to vet the revisions and discern whether those changes address the deficiencies outlined in the findings and conclusions that lead to the denial. In addition, it will relieve the applicant of its burden of proving its proposal will not degrade coastal resources by demonstrating compliance with regulatory requirements and instead put the burden on interested parties to demonstrate noncompliance.

The Superior Court's approval of the MOU precludes the public from understanding critical facts such as the revised project's impacts on state and federally protected shellfish and finfish, wildlife, water quality, and public use and enjoyment of public trust resources. Further, it allows the MOU to become an agency decision devoid of findings of fact and conclusions of law.

Amici acknowledge what appears to be an undue passage of time before a decision was issued by the Superior Court But the lengthy delay cannot be a justification for altering the legal standards applicable to resolution of this matter, particularly where the public interest is involved and none of the delay was the fault of the objectors. While the delay is unfortunate, neither the CRMC nor Champlin's appear to have taken any steps to prevent or reduce it, such as presenting a formal application to the Superior Court or seeking intervention on an extraordinary writ by this Court. Even if they had, the delay should not be weighed in favor of Champlin's

at the expense of protecting public trust resources. "Although it is unfortunate that this litigation has been stewing for nearly seven years, both parties have contributed to its longevity. Given the serious environmental impact on the Great Salt Pond that the expansion of the marina may engender, a decision on Champlin's application cannot be made lightly." *Champlin's Realty Assocs. v. Tikoian*, 989 A.2d 427, 442–43 (R.I. 2010).

Here, as well, the passage of time without fault or demonstration of prejudice should not affect the appropriate analysis of the issues before the Court.

I. Coastal Zone Management Law Mandates a Public and Transparent Process for Application to Alter Coastal Resources.

The Attorney General and the Intervenor Parties have detailed the relevant and controlling requirements of the Administrative Procedures Act (APA) and CRMC Regulations. The state and Intervenor Parties have clearly described the pervasive regulatory framework set forth in the APA and CRMC Regulations that mandates a public process requiring an applicant to demonstrate that the proposed use of public trust resources will meet certain standards. Even if the Intervenor Parties agreed to the settlement, a secretive process directly conflicts with the established legal framework. Under this state and federal regulatory backdrop, it was a clear error of law for the Superior Court to uphold a confidential, mediated settlement that circumvents the public process.

A. State Coastal Zone Management Law should be understood and is informed by federal mandates.

The process set forth in the APA and CRMC Regulations clearly prohibits a settlement between an applicant and regulatory agency behind closed doors that results in substantive alterations to the proposed project. The legal framework to evaluate an application that may degrade our resources in navigable waters is further constrained by the federal Coastal Zone Management Act and Rhode Island law which recognizes the special duty imposed on regulators to protect our public trust resources.

State mandates for coastal zone management are best understood in the context of the interaction and historical development of federal mandates.

In the early 1970s, both our state and the federal government recognized that dangerous levels of development pressure were imperiling the critically important balance of the coastal environment and that the rampant development of the country's coastal areas could not continue, unchecked, without a plan to manage its many competing uses. In response to this challenge, the State of Rhode Island created the CRMC in 1971 to fulfill the state's obligation under Article 1, § 17 of the Rhode Island Constitution to protect and preserve Rhode Island's coastal resources.[5]

[5] *See*, R.I Gen. Laws § 46-23-1 (a)-(c).

Shortly thereafter, in recognition of the ecological, aesthetic, recreational and economic importance of the coastal zone and its resources, such as the Great Salt Pond, Congress followed suit, enacting the federal Coastal Zone Management Act of 1972 ("CZMA").[6] Congress passed the CZMA to protect our fragile coastal resources from destruction through alterations that irreparably destroy its values.[7]

Rather than exercise and implement a one-size-fits-all national regulatory program over the nation's varied coasts, the CZMA offered states financial incentives in the form of matching grants to devise and implement coastal management programs that satisfied certain base-line criteria.[8] In order to insure that states took their management responsibilities seriously, these matching grants only became available after the U.S. Secretary of Commerce determined that a management program met the minimum requirements of the CZMA and the applicable rules and regulations developed by the National Oceanographic & Atmospheric Administration ("NOAA").

Rhode Island's Coastal program, set forth in the CRMC Regulations, served to implement and fulfill these federal standards. Rhode Island's Coastal program received federal approval from NOAA in 1978 as the State's official Coastal Resources Management Program under the CZMA. As a result, the Coastal Program

[6] *See* 16 U.S.C § 1451 et seq.
[7] *See* 16 U.S.C § 1451.
[8] *See* 16 U.S.C § 1455 (a)-(d).

administered by CRMC now fulfills a dual role--requiring that it be faithfully administered in accordance with both state and federal law.

Under the CZMA, the state and federal governments each play a role in protecting the coastal environment from the growing demands associated with residential, recreational, commercial, and industrial uses. The CZMA's declaration of national policies requires that all state Coastal Zone Management Programs include a public process.[9] One of the statutory findings the Secretary of Commerce must make before approving a state management program is that "[t]he management program provides for public participation in permitting processes, consistency determinations, and other similar decisions."[10]

The national policies state the Act should "encourage and assist the states…in coastal management through the development and implementation of management programs… which…*should at least provide for*…the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decision-making." (emphasis added).[11]

---

[9] *See* 16 U.S.C § 1452 (2)(I), (4).
[10] *See* 16 U.S.C § 1455 (d) (1) and (14); 15 C.F.R. § 923.1 (c)(7).
[11] *See* 16 U.S.C. §1452(2)(I). Policies listed in 1452 (2) (A)-(K) make up the "coastal management needs" which are used by the Secretary in evaluating the performance of the CZMPs. NOAA's most recent Final Evaluation Findings for Rhode Island's CZMP found the state is "successfully…addressing coastal management needs identified in…the CZMA" "pertaining to aspects of the public participation requirement in 1452(2)(I). NOAA, Final Evaluation Findings: Rhode Island Coastal Management Program; March 2010 to June 2019 (2020).

Other portions of the CZMA require a state to establish public processes for state management plans to achieve specific goals of the Act. Section 1455b(b)(5) (protecting coastal waters) requires "opportunities for public participation *in all aspects of the program*." (emphasis added).[12]

Public notice of executive sessions does not provide an opportunity for the public to participate. CZMA's federal consistency mandates (16 USC § 1456 (c)) require that any state with an approved Coastal Program "establish procedures for public notice… and…procedures for public hearings" for applicants with activities necessitating a federal license or permit.[13] CRMC outlines its procedures for public notice and hearings in the CRMC Regulations which are part of NOAA's approved Rhode Island Coastal Program.

In furtherance of the national goals to protect vulnerable coastal resources, and in establishing a state regulatory process to manage Rhode Island's own valuable coastal public trust resources, the Rhode Island legislature affirmed the critical importance of preserving the natural, commercial, industrial, recreational, and aesthetic coastal resources. The legislature recognized that destruction had already

[12] 16 U.S.C. § 1455 b (b)(5) (requiring state management programs to specifically use public notices, opportunities for comment, nomination procedures, public hearings, and other means to provide for public participation in coastal management).

[13] 16 U.S.C. § 1456(c)(3)(A) (stating an applicant for a federal license or permit must provide in their application that the activity will comply with a state's enforceable policies and be consistent with the program.

occurred and noted the increasing demands on our coastal resources. It sets forth Rhode Island's policy of preserving and protecting our resources from poorly planned development, noting that "preservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated." R. I. Gen. Laws § 46-23-1 (a) (2).

A public process was mandated for Champlin's application by Rhode Island's federally approved Coastal Program.[14] One issue NOAA considers when evaluating program changes is whether the change would impact the CZMA's national interest objectives, including the requirement that an approved Coastal Program minimally provide for public and local government participation in coastal management decision-making.[15] CRMC Regulations outline its public processes and those regulations are part of the NOAA-approved Rhode Island Coastal Program.[16] NOAA has specifically stated in its Final Evaluation Findings for the Rhode Island Coastal Program that the state is in compliance with CZMA national interest objectives.[17] Champlin's proposed project also required a permit from the U.S.

[14] 650 R.I. Code R. § 10-00-1.5; 650 R.I. Code R. § 20-00-1.5
[15] *Id*. at § 1452(2)(I); Coastal Zone Management Act Program Changes, NOAA, https://coast.noaa.gov/czmprogramchange/#/public/home (click "Learn About Program Changes").
[16] 650 R.I. Code R. § 10-00-1.
[17] NOAA, Final Evaluation Findings: Rhode Island Coastal Management Program: March 2010 to June 2019 (2020).

Army Corps of Engineers ("Army Corps'") under the regulatory authority outlined in Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403), for all work seaward of the mean high-water line in the navigable waters of the United States.[18]

Public participation is required by the Coastal Program because that process was a mandatory prerequisite to the program's approval under the CZMA. "Approval" of Champlin's revised project through mediation, precluding public participation, fails to meet those standards.[19] When CRMC settled Champlin's contested application through mediation, it deviated from the federal and state statutory scheme and NOAA-approved regulations which require public participation as set forth in Rhode Island's approved Coastal Program. Mediating and approving a project in state coastal waters created an unauthorized process that excluded public participation and constituted a programmatic change requiring NOAA approval.

---

[18] *See*, 33 CFR § 322.1 and 320.4. The Army Corps' regulatory program seeks to ensure that unobstructed access to harbor channels is maintained, and that harbors that have been dredged or maintained with federal funds by the Army Corps' (federal navigation projects) are after considering the public interest.

[19] 16 U.S.C. § 1455(e)(3)(A). Deviations from public processes in a NOAA-authorized state Coastal Program may amount to a programmatic change necessitating NOAA approval. Under the CZMA, a coastal state "may not implement any amendment, modification, or other change as part of its approved [Coastal Program] unless the amendment, modification, or other change is approved by [NOAA]."

B. Shifting the Burden of Proof Conflicts with Established Law.

As with any application to federal, state or local government for permission to build a structure or engage in a regulated activity, the burden of proof is squarely on the applicant to demonstrate that its proposal complies with the applicable regulations. As the applicant seeking to develop in state coastal waters, Champlin's had the burden to prove that its proposal complied with various criteria specified in the Coastal Program, including that the alteration will not: (1) result in significant impacts on the abundance and diversity of plant and animal life; (2) unreasonably interfere with or impair existing public access to, or use of, tidal waters and/or the shore; (3) significantly deteriorate water quality in the immediate vicinity; and (4) significantly conflict with water-dependent uses and activities such as recreational boating, fishing and navigation.[20]

The behind-doors mediated settlement relieves the applicant of its burden to demonstrate compliance as it is a compromise between the applicant and the Council as adjudicator. The public "fairness" hearing suggested by the Superior Court [21] would reallocate that burden from Champlin's to the Intervenor Parties. Affording the Intervenor Parties the opportunity "to present evidence and have their objections

[20] 650 R. I. Code R. § 20- 00-1.3. In accordance with section 1.1.3 of the CRMP, an applicant must demonstrate that its proposal will not adversely impact our coastal resources by showing compliance with specific criteria set forth in the CRMP to protect our public resources.

[21] *Champlin's Realty Assoc. v. CRMC* (R.I. Super 2021), Pet. App. at 74-78.

heard" reverses the normal burden of proof: It requires that the Intervenor Parties prove the settlement violates the Coastal Program rather than requiring Champlin's--the applicant--to prove (in a public forum) that the proposed resolution satisfies the requirements of the Coastal Program, as required by law.

A settlement could properly be reached with all parties[22] provided the settlement included findings of fact and conclusions of law as required by the Administrative Procedures Act and public notice of the settlement was given as set forth in the Coastal Program.[23] This did not occur.

CONCLUSION

The government has a specific affirmative duty to protect our public trust resources for the public's benefit and an obligation to follow established law and process – it cannot abdicate that responsibility. If CRMC is permitted to disregard its own repeated denial of an application through a settlement reached behind closed doors, it will provide a roadmap for unscrupulous developers: An applicant with a development proposal that fails to meet regulatory requirements can go through the public process, have its application denied, and later cut the public and aggrieved

[22] This Court has already determined that the Intervenor Parties are aggrieved parties. *Champlin's Realty Assoc. v. Tikoian*, *supra,* 989 A.2d. at 437-438. "Even before the 2010 decision, since the application brought by Champlin's in 2003, the intervenors have been involved in this case at every turn." Order of March 26, 2021 in these consolidated cases, reproduced in Pet. App. at 8.

[23] 650 R.I. Code R. § 10-00-1.5; 650 R.I. Code R. § 20-00-1.1.3 E.1.

parties out of the process through a confidential appellate mediation. The burden will shift to the interested public to prove, without findings of fact and conclusions of law, that the settlement does not meet regulatory standards.

The mediation in the present case could very well have been accomplished in a transparent public process with findings of fact and conclusions of law that upheld coastal protections set forth in the Coastal Program pursuant to both federal and state law. However, without transparency guaranteed by the federal and state framework, how will the public know if its interests in public trust coastal resources were protected unless it can see what happened? For this reason, the whole idea of a mediated settlement that circumvents the public process is a clear violation of the CZMA, APA and the Coastal Program and an anathema to open government, especially where the subject matter is a critical irreplaceable public resource located in the fixed and confined area of a harbor on an island. In this instance, public participation through the Intervenor Parties was discarded through a mediation process that should never have proceeded without them.

In summary, Amici join in supporting the briefs of the Attorney General and the Intervenor Parties and submit that a multitude of errors were made in the 2021 Superior Court Decision. Amici respectfully submit that the 2020 Superior Court Decision, Pet. App. at 84, should be upheld and the 2021 Superior Court Decision, Pet. App. at 14, reversed. This Court should find that the opaque and closed door

"negotiation" impacting the public's rights to a fair and transparent administration of CRMC's obligations to safeguard the state's public trust resources is a violation of CRMC's state and federal authority.

Respectfully submitted,

/s/ Kendra L. Beaver
Kendra L. Beaver # 3013
Staff Attorney, Save The Bay
100 Save The Bay Drive
Providence, Rhode Island 02905
Telephone (401) 272-3540
kbeaver@savebay.org

/s/Lynette Labinger
Lynette Labinger # 1645
128 Dorrance St, Box 710
Providence, Rhode Island 02903
Telephone (401) 465-9565
ll@labingerlaw.com
Cooperating Counsel,
American Civil Liberties Union
Foundation of Rhode Island

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B)

1. This brief contains 3988 words, excluding the parts exempted from the word count by Rule 18(b).

2. This brief complies with the font, spacing, and type size requirements stated in Rule 18(b).

/s/Lynette Labinger
Signature of Filing Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on February 1, 2022:

☑ I electronically filed and served this document through the electronic filing system on the following:

Anthony DeSisto, Esq. (tony@adlawllc.net)
Alison B. Hoffman, Esq. (ahoffman@riag.ri.gov)
Tricia Jedele, Esq. (tjedele@riag.ri.gov)
Robert D. Goldberg, Esq. (rgoldberg@goldberglawoffices.com)
Katherine Merolla, Esq. (kamlaw2344@aol.com)
James Crowley, Esq. (jcrowley@clf.org)
R. Daniel Prentiss, Esq. (dan@prentisslaw.com)

☑ The document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/Lynette Labinger
Lynette Labinger # 1645