

## **INTRODUCTION**

This Court is referred to the “Introduction” contained at pages one through four of the Brief of Respondent Champlin’s Realty Associates in Opposition to the Petition for Certiorari Review of the Town of New Shoreham, the Committee for the Great Salt Pond, the Block Island Land Trust and the Block Island Conservancy.

## **STATEMENT OF CASE**

This Court is referred to the “Statement of Case” contained at pages four through seven of the Brief of Respondent Champlin’s Realty Associates in Opposition to the Petition for Certiorari Review of the Town of New Shoreham, the Committee for the Great Salt Pond, the Block Island Land Trust and the Block Island Conservancy.

## **SUPERIOR COURT DECISION**

This Court is referred to the section entitled “Superior Court Decision” at pages seven through sixteen of the Brief of Respondent Champlin’s Realty Associates in Opposition to the Petition for Certiorari Review Filed on Behalf of the Town of New Shoreham, the Committee for the Great Salt Pond, the Block Island Land Trust and the Block Island Conservancy.

**QUESTIONS PRESENTED**

A. IS THE CONSERVATION LAW FOUNDATION AN AGGRIEVED PARTY FOR PURPOSES OF RIGL § 42-35-16?

B. HAS THE CONSERVATION LAW FOUNDATION BEEN DENIED ITS CONSTITUTIONAL DUE PROCESS RIGHTS BY VIRTUE OF THE DECLINATION OF THE SUPERIOR COURT TO ORDER A REMAND?

C. DID THE SUPERIOR COURT ABUSE HER DISCRETION IN NOT REMANDING THE CHAMPLIN'S APPLICATION FOR FURTHER HEARINGS BEFORE THE CRMC?

### **STANDARD OF REVIEW**

The brief of the Conservation Law Foundation (“CLF”) raises only questions of law. Pursuant to RIGL § 42-35-16 and case law construing it, such questions are reviewed by this Court de novo. See Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1202 (RI 1999).

## ARGUMENTS

### **I. THE CONSERVATION LAW FOUNDATION IS NOT AN AGGRIEVED PARTY FOR PURPOSES OF RIGL § 42-35-16.**

Reference is made to the arguments contesting the aggrievement status of the intervenors at pages 19 through 21 of the Brief of Champlin's Realty Associates in Opposition to Petition for Certiorari Review of Town of New Shoreham, the Committee for the Great Salt Pond, the Block Island Land Trust, and the Block Island Conservancy. This Petitioner has never made any attempt to establish aggrievement status in the Champlin's matter at any forum.

In addition, Champlin's will add that CLF's Superior Court appeal contesting the issuance of a Water Quality Certificate to Champlin's was dismissed by the Providence County Superior Court on the grounds that CLF did not have standing to press its Complaint. See Conservation Law Foundation vs. Frederick J. Vincent, In His Official Capacity As Interim Director Of The Rhode Island Department Of Environmental Management, And Champlin's Realty Associates, Inc. C.A. No: P04-6044.

**II. CONSERVATION LAW FOUNDATION HAS NOT BEEN DENIED ITS CONSTITUTIONAL DUE PROCESS RIGHTS BY VIRTUE OF THE DECLINATION OF THE SUPERIOR COURT TO ORDER A REMAND.**

Even if this Court's aggrievement requirements could be satisfied by CLF, there has been no denial to this Petitioner, or indeed to any of the intervenor Petitioners, of their constitutional due process rights. The essence of CLF's claim of constitutional deprivation, as Champlin's understands it, is that because the Superior Court chose to affirm the Findings of Fact of the CRMC Members in Support of the Sub-committee Recommendation (Proponents' Decision), CLF has been denied its right to appeal that Recommendation as an appellant pursuant to R.I.G.L. § 42-35-15. CLF cites no on point case law in support of this claim of alleged constitutional deprivation.

CLF glosses over the fact that it and its fellow opponents have had full opportunity to be heard with regard to the substantive findings and holdings of the Sub-committee Recommendation. CLF counsel participated fully before the Sub-committee. CLF was permitted to challenge the Sub-committee Recommendation before the entire CRMC at the February 28, 2006 hearing, together with the other intervenors. CLF was a co-equal participant at the evidentiary hearings below. By statute (RIGL § 42-35-15(g)) Justice Vogel could have affirmed, reversed or modified either decision of the CRMC. She chose to affirm the Proponents' Decision, in essence the Sub-committee Recommendation, both because of her express finding that it was supported by the record presented to the Sub-committee and also because it emanated from the CRMC body that had received the testimony, seen and heard the witnesses and arrived at a decision providing Champlin's with amended relief accordingly. She did this after receiving briefs from all of the intervenors, including CLF.

All of the Petitioners have had their many days in court. CLF appears to be under the misguided belief that its status as an intervenor before the CRMC and as a party defendant below did not satisfy its constitutional rights to be heard. A party's due process right to be heard calls for such procedural protections as the particular situation demands. See Morrissey v. Brewer, 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). This Court held in Leone v. Town of New Shoreham, 534 A.2d 871, 874 (1987) that "the foundation of due process rests on an opportunity to be heard in a meaningful manner at a meaningful time." Certainly CLF's due process rights - - if any it has - - were more than amply satisfied by its full appearance before the Sub-committee, the full CRMC Council and the court below. Champlin's would note that CLF did not take the opportunity - - as the other intervenors did - - in briefing before the Superior Court to discuss the substantive issues which were before the CRMC, e.g., water quality, navigation, alternatives. CLF apparently does not understand that the language of RIGL § 42-35-15(g) enabled the Defendants below to deal with these issues.

The irrationality of CLF's arguments can be found in one proposed alternative remedy that it suggests. CLF argues that: "The Superior Court could have remanded with instructions that the CRMC approve the Sub-committee Recommendation and issue a permit for an expansion." (CLF Brief p 14) Then, CLF argues, it could have itself initiated a 42-35-15 appeal of the permit. (In fact CLF and other objectors have filed a separate action in Providence County Superior Court asserting their entitlement to just such relief. See **Appendix A** attached hereto.) CLF does not address the interesting res judicata issues that such an appeal would raise.

CLF makes the interesting argument (CLF Brief p 20) that remand is called for because "Champlin's application to CRMC involved multiple and complicated technical issues including, among many others, questions of water quality certification, impingement on a Town mooring

field, mitigation of impact on shellfish resources, navigational impact and other sophisticated issues requiring technical expertise.” CLF goes on to say that these issues must be addressed “in any possible, probative permit that might be issued.” CLF took full part in the hearings before the CRMC Sub-committee at which these issues were addressed in great detail. They were further addressed by at least some of the intervenors before Justice Vogel, though not by CLF. In making this argument CLF appears to be parting company with its Co-petitioners in appearing to argue for a **full** remand de novo as opposed to a limited remand - - in which the alleged ex parte communications only would added to the existing record. This argument would give credence to Champlin’s arguments against remand, since it appears that at least one of the parties wants to re-open all of the issues previously heard by the Sub-committee and full Council.

In fact in Rhode Island, Superior Court judges can and do reverse the decisions of administrative agencies whose decisions are appealed to them under the APA. Parties who can establish aggrievement protect their right to be heard by intervening in such appeals. They are not given another “bite of the apple” if an agency denial is reversed. See Hometown Properties v. Rhode Island Department of Environmental Management, 592 A.2d 841 (RI 1991) In Hometown Properties the Superior Court reversed a final decision and order of DEM denying the application of Hometown Properties, et al for a license to expand the operation of its sanitary waste landfill in North Kingstown Rhode Island. North Kingstown had intervened in the administrative hearings below. The Superior Court ultimately rendered a decision reversing DEM’s decision and directing that Hometown’s application be granted. DEM sought certiorari review from this Court. Although this Court initially issued its writ, DEM’s Petition for certiorari was ultimately denied and the judgment of the trial court affirmed. Neither DEM nor the Town of North Kingstown took the position in that case that the Superior Court reversal of

the agency decision, directing a grant to Hometown of a license entitled them to take their own 42-35-15 appeal, or otherwise denied them due process.

**III. THE SUPERIOR COURT DID NOT ABUSE HER DISCRETION PURSUANT TO RIGL § 42-35-15(g) IN DECLINING TO REMAND THE CHAMPLIN'S MATTER BACK TO THE CRMC FOR HEARING.**

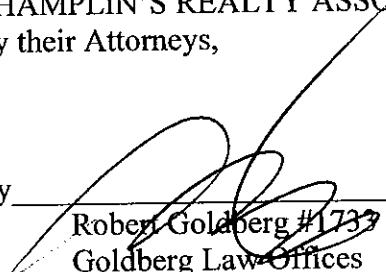
This Court is referred to the arguments in opposition to remand and in support of the trial court's decision not to remand which can be found in the Brief of Respondent Champlin's Realty Associates in Opposition to the Petition for Certiorari Review of Coastal Resources Management Council and Michael Tikoian.

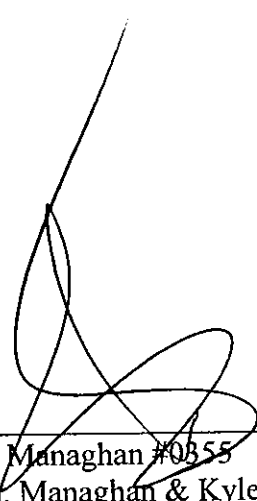
**CONCLUSION**

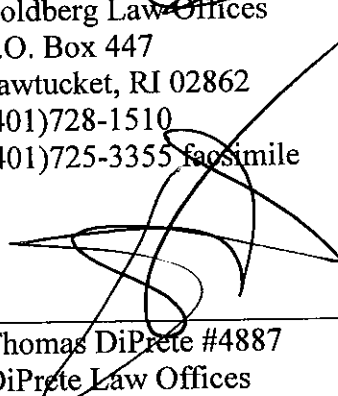
Respondent Champlin's Realty Associates respectfully prays that the Petition for Issuance of Writ of Certiorari of the Conservation Law Foundation should be denied and the Superior Court Judgment below be affirmed. CLF and the other intervening Petitioners can pursue their Superior Court Complaint if they wish. Certainly the filing of that Complaint proves, as much as anything that has already transpired, that these Petitioners have no other interest in this case but to drag the Champlin's matter out for as long as they possibly can, prevailing, not on the merits, but by attrition.

Respectfully submitted,

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I hereby certify that a true copy of the within Brief was sent via regular mail postage pre-paid to the following on this 31st day of August, A.D., 2009.

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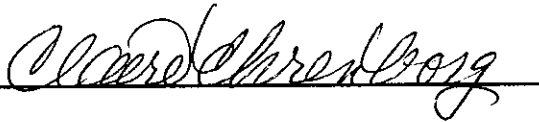
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A handwritten signature in cursive script, reading "Edward J. Brennan", is written over a horizontal line.

**INDEX TO APPENDIX**

- A. Superior Court Complaint of Conservation Law Foundation, et als  
C.A. no: PC 09-2223



STATE OF RHODE ISLAND  
PROVIDENCE COUNTY

SUPERIOR COURT

TOWN OF NEW SHOREHAM,  
CONSERVATION LAW FOUNDATION,  
COMMITTEE FOR THE GREAT SALT POND,  
BLOCK ISLAND LAND TRUST, AND  
BLOCK ISLAND CONSERVANCY

Plaintiffs

v.

C.A. No. PC 09-2223

COASTAL RESOURCES MANAGEMENT  
COUNCIL, and CHAMPLIN'S REALTY  
ASSOCIATES

Defendants

COMPLAINT

1. Conservation Law Foundation (CLF) New England's leading environmental organization. It is a member-supported, non-profit corporation. It maintains an office in Rhode Island and participates in regulatory proceedings in which environmental issues within its concern are at issue.
2. The Town of New Shoreham is a municipal corporation of the State of Rhode Island.
3. The Committee for the Great Salt Pond is a non-profit corporation whose mission is to educate the public regarding the environmental fragility of the Great Salt Pond, encourage appropriate, non-destructive recreational uses of the Great Salt Pond, and to engage in proceedings to resist inappropriate development in and around the Great Salt Pond.

SUPERIOR COURT  
FILED  
HENRY S. KING JR., CLERK

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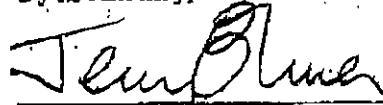
4. The Block Island Land Trust Block Island Land Trust was established in 1986 by state legislation to acquire and preserve open space on Block Island for conservation, recreation, aquifer protection and agricultural uses. It is funded by a three percent fee on the transfer of real property on Block Island.
5. The Block Island Conservancy is a non-profit corporation founded in 1972 to protect Block Island's natural heritage, rural character and public access to its resources. It is funded through contributions from members and supporters. The Conservation Law Foundation, the Town, the Committee for the Great Salt Pond, the Block Island Conservancy, and the Block Island Land Trust will sometimes be referred to collectively as "Plaintiffs."
6. The Coastal Resources Management Council(CRMC) is a Rhode Island administrative agency created by Chapter 23 of Title 46 of the General Laws.
7. Champlin's Realty Associates (Champlin's) is a business corporation which operates a marina in the Great Salt Pond of Block Island, Rhode Island. Champlin's is joined as a party pursuant to the provisions of Superior Court Rule of Civil Procedure 19(a)(2)(i) because Champlin's claims an interest relating to the subject of this action and is so situated that the disposition of this action in Champlin's absence may, as a practical matter, impair Champlin's ability to protect that interest.
8. In May 2003, Champlin's applied to the CRMC for a permit to expand its marina 240 feet into Block Island's Great Salt Pond.
9. Plaintiffs intervened in the proceedings before the CRMC to consider the Champlin's application.

10. The CRMC, in accordance with its rules and regulations, appointed a subcommittee to receive evidence on the Champlin's application, and to formulate a recommendation for decision to be considered by the CRMC when it made its determination on the Champlin's application.
11. The CRMC subcommittee conducted hearings and received evidence on the Champlin's application between January, 2004 and September, 2005. The subcommittee engaged in irregular and unlawful procedure during the conduct of its hearings.
12. On October 24, 2005, the subcommittee voted to recommend approval of almost all of the Champlin's request for marina expansion. The subcommittee recommendation was devoid of evidentiary support, and arbitrary and capricious.
13. On February 28, 2006, the CRMC on a tie vote rejected the subcommittee recommendation and denied the Champlin's application.
14. On March 23, 2006, Champlin's timely filed its statutory APA appeal in the Superior Court pursuant to R. I. Gen. Laws § 42-35-15.
15. On February 24, 2009, the Superior Court issued a written decision on the Champlin's appeal. An order and judgment were entered on the decision March 30, 2009.
16. In its final judgment on the Champlin's appeal, the Superior Court decreed the CRMC subcommittee recommendation to be the final decision on the Champlin's application, and judicially granted the Champlin's application consistent with that recommendation.

17. The Superior Court judgment of March 30, 2009 is the exact legal equivalent of a final order by an administrative agency in a contested case.
18. The final decision with regard to the Champlin's application is in violation of statutory provisions, contrary to the authority of the CRMC, made upon unlawful procedure, affected by other errors of law, clearly erroneous, and arbitrary or capricious.
19. The Plaintiffs are aggrieved by the final decision with respect to the Champlin's application.
20. Plaintiffs are entitled under R. I. Gen. Laws § 42-35-15 to obtain judicial review of a final order of an administrative agency in a contested case.
21. The plaintiffs' right to judicial review of the final agency action is guaranteed by the Due Process clauses of the United States and Rhode Island Constitutions.
22. Plaintiffs will be deprived of their due process rights if they are not afforded a right to judicial review of the final order with respect to the Champlin's application.
23. The Plaintiffs have filed petitions for writ of certiorari pursuant to R. I. Gen. Laws § 42-35-16 seeking review of the Superior Court judgment entered March 30, 2009. However, review pursuant to § 42-35-16 is discretionary, and potentially more limited than the judicial review of a final agency action that is provided by § 42-35-15 and required by the Due Process clauses of the United States and Rhode Island constitutions.

WHEREFORE, Plaintiffs demand that judgment be entered in their favor and against Champlin's Realty Associates, Inc., reversing the decision granting Champlin's a permit to expand its marina into the Great Salt Pond.

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TOWN OF NEW SHOREHAM,  
CONSERVATION LAW FOUNDATION,  
COMMITTEE FOR THE GREAT SALT  
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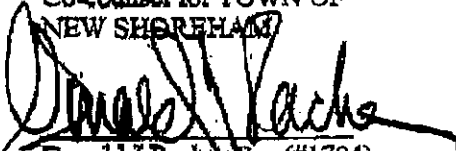
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