

STATE OF RHODE ISLAND
SUPREME COURT

CHAMPLIN'S REALTY ASSOCIATES

v.

MICHAEL TIKOIAN, Individually, and
in his capacity as Chairman of Coastal
Resources Management Council, et al.

No. SU 09-0113
No. SU 09-0114
No. SU 09-0115
(Consolidated)

REPLY BRIEF
OF PETITIONER CONSERVATION LAW FOUNDATION

(On Writ of Certiorari to the Superior Court
Superior Court Case Number PC 06-1659)

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I. INTRODUCTION

The ultimate question that must be answered in these consolidated cases is one of remedy, *i.e.*, whether the Superior Court applied the proper remedy in this case when it issued the disputed Champlin's permit itself instead of remanding the application to CRMC with instructions.

This is a question of first impression for this Court.

CLF argues here that the Superior Court -- by issuing the permit itself -- impermissibly denied the Objectors' Constitutional and Administrative Procedures Act (APA) rights to an appeal -- which appeal must be as of right (rather than discretionary), and must be as to questions of both law and fact (rather than just of law).

II. THE COURT'S REMEDY FOR IMPROPER AGENCY PROCEDURE MUST BE CONSTITUTIONAL AND MUST COMPORT WITH THE APA

All parties agree that members of the CRMC engaged in improper *ex parte* discussions during the pendency of Champlin's application. CRMC told the Superior Court this fact.

The task for the reviewing court(s) is to fashion an appropriate remedy. It goes without saying that the remedy fashioned must be Constitutional and must comport with the requirements of the APA.

This case presents a more complicated fact pattern than some APA cases in which there are no parties other than the agency and an applicant. In this case, there are multiple intervenors that were full parties before the agency and full parties in the

Superior Court proceeding.¹ In an APA case in which there are no other parties but the agency and an applicant, a Superior Court judge reviewing an agency permit denial can, and sometimes does, simply reverse the denial herself and issue the disputed permit rather than remanding to the agency. The instant case is different, however, because there are multiple Intervenors that possess substantial rights.

That is, there are multiple parties before this Court in these three consolidated cases. Champlin's is an applicant for a permit to use public trust resources. CRMC is the state agency authorized by statute to consider and rule on the permit application. The Town of New Shoreham represents all the people of Block Island. CLF, like the Committee for the Great Salt Pond (CGSP), is a nonprofit environmental organization that has intervened, and is a full party seeking to protect a significant natural resource. See Giannitti v. Stamford, 593 A.2d 140, 143 (Conn.App. 1991) ("The "overarching consideration" for the Court is to "be fair to all parties").

A. An Opportunity To Be Heard

Champlin's makes much of the length of the Superior Court proceedings. See, e.g., Champlin's August 31, 2009 Brief in Opposition to Petitioner CLF, at 8 line 1 ("All of the Petitioners have had their many days in court."). However, it is not the length of the proceedings but the opportunity to be heard that is of Constitutional importance. The entire Superior Court proceedings were devoted solely to considering Champlin's

¹ CLF addresses below Champlin's belated and incorrect claim that CLF and the other intervenors lack standing. See infra, at 6-7.

arguments as to why a CRMC permit should be issued. CLF's and the other Objectors' many arguments as to why a CRMC permit should not be issued were never heard in the Superior Court. In the circumstances of the case, this was entirely proper: Champlin's was appealing an adverse agency ruling. Objectors had prevailed in the agency below, and had nothing to appeal. But should that situation be reversed -- should the Intervenor-Objectors become the losing side -- then Objectors cannot constitutionally be denied their due process right of appeal.

Champlin's relies on a familiar trilogy of cases in support of the Superior Court's issuance of the permit: Ratcliffe v. CRMC, 584 A.2d 1107 (R.I. 1991); Easton's Point Assoc. v. CRMC, 559 A.2d 633, (R.I. 1989); Sakonnet Rogers, Inc. v. CRMC, 536 A.2d 893 (R.I. 1988). See Champlin's August 31, 2009 Brief in Opposition to Petitioners CRMC and Tikoian, at 36-37. This line of cases, however, is distinguishable from the instant case because in none of those prior cases did any intervenor-party raise the Constitutional or APA issues which CLF is presenting here. Champlin's also refers to Hometown Properties v. DEM, 592 A.2d 841 (R.I. 1991), for the same proposition. See Champlin's August 31, 2009 Brief in Opposition to Petitioner CLF, at 9-10. Champlin's says that "North Kingstown had intervened in the administrative hearings below," id., at 9, but, when unsuccessful in the Superior Court, the Intervenor Town did not claim a due process violation. Id., at 10. This supports CLF's position that the Constitutional argument which CLF is presenting in this case is an issue of first impression for this Court. CLF's counsel reviewed the briefs in all four of the cases cited in this paragraph.

In none of those cases was the Constitutional issue briefed or presented to this Court; and this Court did not rule on that issue.

The short of it is that Champlin's has had its day in the Superior Court. The Intervenor-Objectors, including CLF, have never presented their arguments in the Superior Court. The Objectors will have their day in Superior Court if -- but only if -- this Court reverses the Superior Court's decision to issue a CRMC permit itself and orders the case remanded to the CRMC for further proceedings.

B. Appeal As of Right

In order to withstand due-process scrutiny, the court appeal to be had by Objectors must be one as of right; a discretionary appeal by means of certiorari is not sufficient. CLF Principal Brief, at 10-11. CLF cited cases from several jurisdictions that support this proposition. Allison v. Ind. Claim Appeals Office, 884 P.2d 1113, 1119 (Colo. 1994) (“[P]arties are constitutionally entitled to judicial review of an administrative agency’s decisions [citations omitted]”); Reading Sch. Dist. v. Dep’t of Educ., 875 A.2d 1218, 1221 (Pa. 2005) (“the “constitution guarantees the right of appeal from an administrative agency decision”).

Champlin’s did not challenge CLF’s argument. Champlin’s did not discuss or address the case support provided by CLF. Champlin’s did not provide case support for any contrary argument or proposition.

The discretionary appeal by means of certiorari that was left to Objectors after the Superior Court itself issued the CRMC permit was not sufficient to pass Constitutional muster.

C. Both Questions of Law and Of Fact Must Be Appealable

In order for due process requirements to be satisfied, both questions of law and of fact must be reviewable on appeal. CLF's Principal Memorandum, at 12-13. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289, 40 S.Ct. 527, 528, 64 L.Ed. 908 (1920) (“[T]he state must provide a fair opportunity for submitting [the] issue to a judicial tribunal for determination . . . as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.”). When the Superior Court granted the disputed permit itself, CLF (and the other Objectors) were impermissibly relegated to an appeal by certiorari which is strictly limited to questions of law.

No party here disputes that certiorari is limited to questions of law. Indeed, Champlin's itself acknowledges that in this appeal, “CLF has raised only questions of law.” Champlin's August 31, 2009 Brief in Opposition to Petitioner CLF, at 5.

There is apparently no argument either about the cases which CLF previously cited for the proposition that both questions of law and questions of fact must be appealable. In its Principal Brief, Champlin's does not dispute the gravamen of the cases for this proposition cited by CLF nor offer any contrary case authority from this or any other jurisdiction.

D. The Remedy Must Comport with the APA

In its Principal Brief, CLF explained that Rhode Island's enactment of the APA requires that "[a]ny person . . . who is aggrieved by a final order in a contested case is entitled to judicial review." R. I. Gen. Laws § 42-35-15(a) (emphasis supplied). CLF's Principal Brief, at 14-15. CLF further argued that, in the wake of the Superior Court decision, CLF and the other Objectors are persons aggrieved; but, because of the remedy chosen by the Superior Court, CLF and the other Objectors were denied their statutory right of appeal of the adverse agency decision. Id.

Champlin's belatedly argues in this Court that CLF lacks standing. Champlin's August 31, 2009 Brief in Opposition to Petitioner CLF, at 6. Nevertheless, Champlin's concedes, as it must, that CLF is a membership organization whose members live on or near the Great Salt Pond and would be affected by any Champlin's expansion. Champlin's August 31, 2009 Brief in Opposition to Petitioners CGSP and Others, at 21. This is exactly the type of injury that must be alleged for standing pursuant to this Court's controlling case, East Greenwich Yacht Club v. CRMC, 118 R.I. 559, 376 A.2d 682 (1977) (finding standing for Save the Bay based harms alleged to its members).

Even Champlin's has conceded that the Intervenor-Objectors properly have standing; in the Superior Court Complaint which Champlin's filed, Champlin's named CLF, CGSP, and the Town of New Shoreham as named Defendants. Like all plaintiffs, Champlin's was the master of its own Complaint. Lincoln Property Co. v. Roch, 546 U.S. 81, 91, 126 S. Ct. 606, 614, 163 L. Ed.2d 415 (2005) ("Plaintiff is master of the

Complaint,” citing 16 J. Moore, Moore’s Federal Practice § 107.14[2][c], p. 107 (3d ed. 2005)). By carefully and deliberately choosing to name CLF and the other Intervenor-Objectors as parties to its APA appeal, Champlin’s itself acknowledged that the Intervenor-Objectors were proper parties.

E. Remand to CRMC Is Possible

Champlin’s argues that the CRMC should not be heard to argue for a remand because it was CRMC’s mistakes that caused the problems. Champlin’s August 31, 2009 Brief in Opposition to Petitioners CRMC and Tikoian, at 38, lines 1-2 (problem caused by CRMC’s “own derelictions and prejudicial ex parte communications . . .”).

Champlin’s argument fails to address the rights of the Intervenor-Objectors.

The Superior Court Justice ruled that remand to the CRMC is not possible because the CRMC does not exist in the wake of this Court’s ruling in In Re Request for Advisory Opinion (CRMC), 961 A.2d 930 (R.I. 2008). CLF argues that the Superior Court’s ruling was wrong both as a matter of law and as a matter of fact. CLF’s July 20, 2009 Principal Brief, at 15-19.

Nowhere in its multiple submissions does Champlin’s attempt to defend the Superior Court’s incorrect assertion that CRMC does not exist. Nowhere in this Court’s decision in In Re Request for Advisory Opinion (CRMC) does it say that CRMC has ceased to exist. The Court set forth in In Re Request for Advisory Opinion (CRMC) the correct way that CRMC members must henceforth be selected. 961 A.2d at 942 (“[T]he Governor has . . . been explicitly granted the power of appointment, subject to the advice

and consent of the Senate”). This Court did not pronounce the CRMC out of existence; quite the contrary: the Court expressly held that Rhode Island’s Separation of Powers Amendment is self-executing. 961 A.2d at 933, 936-937.

Champlin’s argues in this Court, just as it did in the Superior Court, that remand is unjust because the CRMC consists of some members nominated by Governor Carcieri (and, of course, confirmed by the Senate). Champlin’s August 31, 2009 Brief in Opposition to Petitioners CRMC and Tikoian, at 41. Champlin’s argues that this would be inappropriate because Governor Carcieri issued a press release opposing Champlin’s expansion. Id. (See also, Champlin’s Appendix, Tab C, for the full six-paragraph text of the Governor’s press release.) Champlin’s argues that CRMC members nominated by a Governor who has expressed a public opinion on an issue are barred from voting on that issue. Champlin’s cites no case or other authority in support of this proposition. The fact that Governor Carcieri issued a press release about Champlin’s does not make his CRMC nominees --now duly confirmed by the Senate -- somehow ineligible to vote on Champlin’s.

Champlin’s mistakenly asserts that CLF supports a remand to the CRMC to begin the subcommittee hearing process again de novo. Champlin’s August 31, 2009 Brief in Opposition to Petitioner CLF, at 9. CLF’s position is that remand to the CRMC is required for Constitutional and APA reasons -- in order that there be a CRMC decision which the Intervenor-Objectors can appeal pursuant to the APA if they become the losing side. But CLF does not (and never has), as Champlin’s incorrectly asserts, insist that the

subcommittee process begin again de novo. CLF recognizes that there is a range of possible reasonable ways in which the Superior Court could properly remand the matter to the CRMC. As CLF stated in its Principal Brief:

Instead of granting Champlin's permit application itself, the Superior Court should have remanded the case to the CRMC with appropriate instructions to fix or undo the procedural irregularities found by the Superior Court. East Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 376 A.2d 682 (1977). For example, the Superior Court could have remanded to the CRMC with instructions that a new vote be taken on the subcommittee recommendation, this time without the three newly-recused members. Or, the Superior Court could have remanded to the CRMC with instructions to make all of the previous (improper) ex parte communications part of the record and to permit counsel for all parties to cross-examine. Or, the Superior Court could have remanded with instructions that the CRMC approve the subcommittee recommendation and issue a permit for an expansion. In any of these circumstances, there would have been a CRMC decision appealable as of right to the Superior Court pursuant to R. I. Gen. Laws § 42-35-15.

CLF's July 20, 2009 Principal Brief, at 13-14.

Nor is it "irrational," as Champlin's claims, for CLF to acknowledge that "the Superior Court could have remanded with instructions that the CRMC approve the subcommittee recommendation and issue a permit." Champlin's August 31, 2009 Brief in Opposition to Petitioner CLF, at 8. This goes to the very heart of CLF's argument. The principal issue before the Superior Court was what remedy to apply in the face of CRMC members' ex parte communications. The Superior Court had a range of permissible remedies -- but the remedy chosen must involve remand to the agency to fix the prior improper procedure so that the Constitutional due-process right to an appeal of

the multiple Intervenor-Objectors (including, inter alia, CLF, CGSP, and the Town) would be protected if the Intervenor-Objectors were to become the losing side.

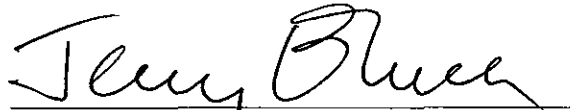
Champlin's also discusses the separate Superior Court action that CLF and the other Intervenor-Objectors have brought, Champlin's August 31, 2009 Brief in Opposition to Petitioner CLF, at 8, and Champlin's provides this Court with a copy of the Complaint in that case as an appendix to its August 31 Brief. What Champlin's does not tell this Court is that, in the Superior Court, Champlin's argues that CLF is not entitled to relief because CLF's Complaint fails to state a claim; while in this Court Champlin's skates close to arguing that this Court should deny CLF relief because of the pendency of the Superior Court case. In contrast, CLF was careful to advise this Honorable Court of the existence of the Superior Court action. See CLF's April 17, 2009 Petition for Certiorari, at 1, 11 ("CLF is sensitive to the potential difficulties presented by the pendency of two separate appeals") CLF was also careful to advise the Superior Court of the pendency of this action. See Superior Court Complaint, ¶ 23.

Despite Champlin's arguments, the central issue remains the same: the remedy to be applied to correct improper agency conduct in a case where there are more parties than just the applicant and the agency. CLF asserts an unremarkable proposition: the remedy must be both constitutional and must comport with the APA. All parties to the Superior Court proceeding must have an appeal as of right, as to questions of both law and fact, if/when they are the aggrieved party(ies).

III. CONCLUSION

CLF respectfully prays that this Honorable Court order that the appropriate remedy for the admitted improprieties committed in this case by the CRMC is remand to the agency -- with whatever instructions the Superior Court believes are necessary to address and correct the improprieties.

CONSERVATION LAW FOUNDATION
By its Attorney,

A handwritten signature in cursive script that reads "Jerry Elmer". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the within Reply Brief of Petitioner Conservation Law Foundation was mailed via first class mail, postage prepaid, on the 10th day of September, 2009, to each of the following:

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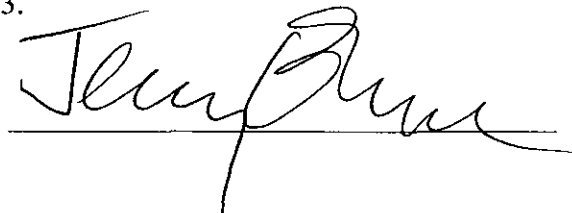
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In addition, because an as-applied Constitutional issue (not a facial Constitutional challenge) is presented by this case, CLF has served a copy of this Memorandum separately upon the Attorney General of Rhode Island, the Honorable Patrick C. Lynch, 150 South Main Street, Providence, RI 02903.



A handwritten signature in black ink, appearing to read "Michael Rubin", is written over a horizontal line.