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January 23, 2023

VIA EMAIL TO: tony@adlawllc.net

Anthony DeSisto, Esq.
Anthony DeSisto Law Associates, LLC
450 Veterans Memorial Parkway, Suite 103
East Providence, RI 02914

Re: CRMC File # 2017-12-086
Letter in Objection to Applicant's Request to Offer New Evidence

Dear Anthony:

I am writing on behalf of Mr. Kevin Hunt, Ms. Alicia Cooney, Mr. Stephen Quigley, and Mr. David Latham (the "Intervenors") in response to a letter from Elizabeth Noonan, Esq. regarding the application (the "Application") of Mr. Perry Raso (the "Applicant") for a Coastal Resources Management Council (CRMC) permit to operate an aquaculture facility in Segar Cove (the "Facility" or "proposed facility"), in specific reference to the Applicant's request, by letter to you dated January 16, 2023, from Ms. Noonan, that he be allowed to present "new evidence" in furtherance of the Application.

The Applicant wishes to present "new evidence" for hearing before the CRMC at its January 24th hearing, being a "Proposed Reduced Layout" for the Facility, essentially a new layout and elimination of floating gear as shown on a "supplemental exhibit" attached to her letter.

The Intervenors object to Applicant's request to present "new evidence". This is clearly not new evidence because it utterly fails to meet the requisite standard for "new evidence". Furthermore, Applicant's proposed revision is so substantial that it must be filed as a new application.

First, this is clearly not new evidence. The Applicant and his counsel knew full well three (3) years prior to the hearing and during the course of extensive hearings that the size and location of the proposed facility was always at issue for the Intervenors, the South Kingstown Waterfront Advisory Commission, the South Kingstown Conservation Commission and members

of the public. At no time since submitting the Application to CRMC in 2017 has the Applicant agreed to reduce or modify the size and location of his proposed facility as evidenced herein.

The stringent limitation on the introduction of new evidence to the Council after these extensive subcommittee hearings, as well as review and action taken by several local and state entities in preparation for said hearing, is designed to prevent endless hearings and endless delays. It is not designed to allow an Applicant to circumvent and make a mockery out of the process, by simply introducing "new evidence" in an attempt at another bite at the apple because the decision rendered was not favorable to the Applicant.

The Applicant's request follows approximately 33 hours of hearings before the Subcommittee over eight days, with the introduction of 39 exhibits, including the opportunity of Applicant's counsel not only to present his case in chief but also to present rebuttal testimony. The Applicant testified and presented expert witnesses and documentary evidence in his main case, as well as testimony and documentary evidence in his rebuttal. After hearing all of that evidence, as well as the testimony and evidence of the Intervenors represented by this firm, the intervenor represented by Mr. Wagner, and dozens of members of the public, the Subcommittee deliberated for three hours and unanimously voted 5-0 to deny the Application.

In addition prior to the hearing, certain state and local agencies and entities invested time, resources and energy reviewing the Application in preparation for said hearing including but not limited to: the Rhode Island Department of Environmental Management (DEM), the Rhode Island Marine Fisheries Council (RIFMC) including its Shellfish Advisory Panel, the Rhode Island Historical Preservation and Heritage Commission (RIHPHC), the South Kingstown Waterfront Advisory Commission and the South Kingstown Conservation Commission.

Despite these extensive hearings and investment of the aforementioned resources, the Applicant now contends he has "new evidence" which he is entitled to present to the full Council.

While the CRMC Regulations allow new evidence to be presented, the opportunity to do so is extremely limited.

Section 1.5.3 B provides in relevant part as follows:

> "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 R.I. Code R.20-00-1.5.3(B)

Section 1.1 K defines what constitutes new evidence.

> "New evidence" is that which is of a material and controlling nature and was not by the exercise of ordinary diligence discoverable in time to be presented at the evidentiary hearing". 650 R.I. Code R.20-00-1.1(K)

Accordingly, the Applicant must meet a substantial burden in order to introduce new evidence to the full Council, which is as it should be after having been given the opportunity for a full, fair and extensive hearing plus rebuttal testimony, which rebuttal testimony could not be cross-examined.

First, the new evidence must be material. The "new evidence" presented by the Applicant is clearly not material. The proposed relocation of the Facility involves a substantial portion of the Facility being in an area which has not been subject to any review, study, testimony, or expert scrutiny by CRMC staff, other state agencies, and local advisory entities, let alone the public most familiar with Segar Cove. Accordingly, it is incapable of being "material evidence".

Second, the Applicant's request to introduce such "new evidence" to the full Council after the conclusion of the Subcommittee hearings must meet an even higher bar. It must be demonstrated that such new evidence is not merely material, but that such evidence is also of a "controlling nature", meaning it would be decisive to the determination of whether the Applicant met its burden of proof. The "new evidence" proposed by the Applicant is clearly not of a "controlling nature" for the simple reason that it is not even "material", and therefore cannot be evidence of a controlling nature.

Finally, and perhaps most importantly, it must be evidence that was not discoverable by ordinary diligence in time to be presented at the evidentiary hearing. This term, "ordinary diligence" must be understood in the context of this case. In this case, such ordinary diligence does not involve the diligence of an applicant presenting evidence to a subcommittee on his or her own, without the benefit of legal representation. Rather, it involves an applicant represented by highly experienced legal counsel skilled in presenting matters to administrative bodies in contested cases involving complex evidentiary issues. It is against that background that the standard of "ordinary diligence" must be measured.

To introduce the "new evidence" pertaining to a change in the layout of the Facility, the Applicant must also bear the burden of demonstrating that the Applicant could not have introduced it during the hearing, through the exercise of ordinary diligence. The Applicant was well aware of these issues before the hearing as well as during the hearings and could have addressed them in his main case.

The record is clear that the Applicant knew full well the objections to the size and location of the proposed facility by: (1) the South Kingston Conservation Commission finding that the leased area was excessive and could be reduced to minimize impact[1]; (2) The South Kingstown Waterfront Advisory Commission finding the proposed facility would pose a "significant negative impact on public recreational activity in that area"[2]; (3) The 147 objections against the proposed facility filed with CRMC; (4) Intervenor's objection and technical memo

[1] See November 12, 2020, transcript p. 116 line 24, p.117 line 1-24, p. 118 line 1-20.
[2] See also Intervenor Exhibit 10 South Kingstown Waterfront Advisory Commission Letter date 2/15/18 and Exhibits 11 and 12 meeting minutes from the South Kingstown Waterfront Advisory Commission.

submitted prior to the hearing[3]; and (5) the extensive public comment objecting to the proposed facility over three hearing dates.[4]

Moreover, even before those hearings commenced, the Applicant and Intervenors, represented by this firm, conducted a conference call on or about May 8, 2020, to discuss a possible resolution of this matter. During the call, the issue of modifying the location of the Facility was raised by the undersigned. As a result of that call, the Applicant declined to pursue any other proposed modification of the Facility location. And this was despite the fact that prior to the commencement of the hearings, the Applicant was well aware that the location and size of the Facility was the critical issue in raising conflicts with water-dependent uses.

Clearly, since the 2017 filing of the Application with CRMC, the Applicant had more than ample opportunities to address and put forward a new and/or modified layout for the Facility. The Applicant never did so. In fact, the record of the Subcommittee hearings confirms this.

First, at the outset of the hearings on November 12, 2020, Applicant's Counsel introduced the Application to Subcommittee as follow:

> "Ms. Noonan: Thank you. Good Afternoon. We are before you today for an aquaculture application submitted by Mr. Raso in 2017 to approve a three (3) acre aquaculture farm in Potter Pond. His application spells out his plan, how it meets CRMC requirements, and how it will operate. This has not changed in over the three years he has submitted that application."
>
> See Nov. 12. 2020 Transcript, p. 38, line 22-24, p. 39, line 1-4.

On the same date, the Applicant testified before the Subcommittee as follows in response to questions from Intervenor's counsel:

> Mr. Wagner: You never made any proposal to reduce the size from the maximum 3 acres right?
>
> Mr. Raso: No I did not?
>
> Mr. Wagner: You heard of 147 objections to it and you didn't want to try to reduce the size of it to meet those objections?
>
> Mr. Raso: "….I understand the objectors' point of view in many cases.

[3] See Intervenor's Exhibit 1, ESS Segar Cove, Technical Memo dated 4/10/20.
[4] See Transcript of CRMC Subcommittee Hearings re: public comment from December 16, 2020, December 30, 2020, January 29, 2021.

> Mr. Wagner: But you still haven't agreed to reduce the size of the farm, right?
>
> Mr. Raso: I have not.
>
> See Nov. 12, 2020 Transcript, p. 117, line 24, p. 118, line l1-20.

Finally, at the December 4, 2020, hearing, CRMC's own staff, Mr. Beutel, admitted that Mr. Raso never offered to reduce the size of the lease area in response to the following question from Intervenor's counsel:

> Mr. Wagner: Mr. Raso has never offered to reduce the size of the lease area has he?
>
> Mr. Beutel: No he has not.
>
> See Dec. 4, 2020 Transcript, p. 674, line 10-12.

To understand when new evidence may be introduced in the context of this proceeding, it is instructive to look at long and clearly established case law on the related issue of when a party may introduce rebuttal evidence.

Because the Applicant bears the burden of proof, the Applicant "cannot hold back his evidence but must give all of his evidence supporting the affirmative of the issue when presenting his case". Labree v. Major, 306 A. 2d 808, 819 (R.I. 1973). That being said, a party need not anticipate a defense, and if a new matter is introduced by the defense, the moving party is entitled to introduce competent rebuttal evidence. Id. However, rebuttal evidence is limited to **only** evidence which addresses the new matter introduced. Souza v. United Electric Railways Co., 143 A. 780 (1928)

There is no reason the "new evidence" could not have been introduced before the Subcommittee with the exercise of ordinary diligence by highly experienced and skilled legal counsel. Not only did the Applicant have numerous opportunities to do so, but he even refused when invited to do so. Accordingly, the Applicant's request must be denied.

Furthermore, Applicant's request should be in the form of a new application submittal to CRMC as he is requesting to reconfigure the Facility to significantly occupy a new location which was never subject to pre-hearing review by the CRMC, DEM, RIMFC, RIHPHC, South Kingstown Waterfront Commission and South Kingstown Conservation Commission, nor the subject of a CRMC staff report, study, analysis, public testimony, or expert witness testimony.

Just by way of example, the expert witness called by this firm testified that the original layout was in close proximity to opening of Segar Cove between Ram Point and Gardner Island and raised safety issues. The proposed layout is now submerged and substantially closer to Ram Point and the opening of Segar Cove, and presumably raises even more user conflict and

serious safety issues, which issues have not been the subject of study or analysis. Consequently, the Applicant's request must be denied.

Not only may the "new evidence" not be heard by the Council because it utterly fails to meet the requisite standard for "new evidence", but the proposed revision should be filed as a new application. Under the guise of presenting "new evidence", the Applicant is effectively asking the full Council to approve a new project rather than having it filed as a new application, going through the full application and review process at the state and local level, including CRMC staff review. Staff review on a new application may be particularly important here, as the Subcommittee overrode the staff's recommendation on the Application, which no doubt will give staff a new perspective to consider.

For the foregoing reasons, we respectfully request that the "new evidence" the Applicant seeks to introduce be denied and the full Council consider, and affirm, the unanimous decision of the Subcommittee rejecting the Application.

Thank you for your consideration.

Sincerely,

Christian F. Capizzo

cc: Elizabeth McDonough Noonan, Esq. (via email to enoonan@apslaw.com)
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