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**RE: CRMC File # 2017-12-086 - Opposition Letter to Remote Virtual Hearing Procedure**

Anthony,

Please allow this letter to serve as notice of opposition submitted on behalf of Mr. Kevin Hunt, Ms. Alicia Cooney, Mr. Stephen Quigley, and Mr. David Latham (collectively, the “Abutters”), individuals with ownership interests in properties located on Segar Cove, a portion of Potter Pond in South Kingstown. It is submitted in opposition to a proposed remote-virtual hearing procedure on the pending application (the “Application”) of Mr. Perry Raso for a Coastal Resources Management Council (“CRMC”) permit for a lease of three (3) acres in Segar Cove to operate an oyster and scallop aquaculture facility (the “Proposed Facility”).

**I. Introduction.**

On April 15, 2020, Governor Gina Raimondo issued Executive Order 20-25<sup>1</sup> in response to the COVID-19 pandemic, which superseded a similar prior Executive Order, 20-05, and which allows public bodies to conduct public meetings by use of telephonic or electronic communications despite the prohibitions of such meeting under the Open Meetings Act, R. I. Gen. Laws 42-46-5(b).

In reliance on this Executive Order, CRMC is planning on scheduling a virtual hearing on the Application where the parties and the public will be required to participate remotely. The Abutters object to a contested hearing being held by remote hearing procedures because it

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<sup>1</sup> Extended in RI Executive Order 20-34, May 15, 2020

materially and impermissibly erodes the due process rights of the Abutters and it significantly and adversely impacts the rights of the public to participate in the hearing process.

## **II. Due Process and Public Participation Rights.**

The Applicant and the Abutters have been advised that a hearing on the Application (the “Hearing”) will be scheduled before a subcommittee of the CRMC (the “Subcommittee”) consisting of members of the CRMC and an appointed individual representing South Kingstown, the locus of the proposed facility. The Subcommittee will conduct the Hearing and make a recommendation to CRMC. Accordingly, only a small portion of the 16-Member CRMC will participate in the Hearing and the decision of the CRMC will be made by the full Council on the basis of an administrative record, with most members of the CRMC not having seen the presentation of witnesses and evidence. This fact alone places increased importance on the conduct of the Hearing.

The Abutters intend to testify as witnesses, they intend to present expert witnesses, and they likely will present documentary evidence. It is anticipated that the Applicant would testify and that other witnesses, perhaps lay witnesses and expert witnesses, will also present testimony. The Hearing will therefore necessarily involve the direct and cross-examination of both lay and expert witnesses.

Additionally, it is our understanding that over 100 letters and correspondence have been filed with the CRMC taking a position on the Application. To our understanding, most of the communications have been in opposition to the Application. Dozens of individuals have been in contact with the Abutters and have expressed interest in attending the Hearing and participating in the public portion of the Hearing. Virtually all of this contact has been with members of the public who are opposed to the Application.

Accordingly, the Hearing will be a contested proceeding in which there is substantial public interest. It is unquestioned that a contested permit proceeding before the CRMC is a quasi-judicial proceeding. Champlin’s Realty Associates v. Tikoian, 989 A. 2d. 427 (R.I. 2010). Moreover, it is unquestioned that parties to a quasi-judicial proceeding are accorded due process rights. State v. Berard, 401 A. 2d. 450 (R.I. 1979). These due process rights at a quasi-judicial hearing require

a meaningful opportunity to be heard. In the Matter of Kevin A. McKenna, 110 A.3d. 1126 (R.I. 2015). Our Supreme Court has found that such rights are met in the circumstance where an individual has had the opportunity to appear before the tribunal, present witnesses, present exhibits, present and argue motions, and submit post-hearings memoranda. *Id.* at 1143.

Our concern is that a remote virtual hearing in a contested proceeding sets up significant obstacles to the fairness and meaningfulness of that hearing by preventing or constraining the ability to conduct a hearing in several respects:

- The ability to effectively conduct direct and cross examination of both lay and expert witnesses and the presentation and submission of evidence is inherently limited by the format;
- The ability to communicate with clients and experts in “real time” during the hearing, particularly in regard to the presentation of evidence and the examination and cross-examination of witnesses, is largely not possible.

In a contested hearing context, it is necessary to communicate directly with clients and/or expert witnesses as the hearing is proceeding. This is likely to be extraordinarily difficult, if not impossible, when clients and experts are in several different locations, communicating remotely with the Subcommittee. This is further complicated by the requirements for social distancing, including the limitation on the number of persons who may gather in one location. It is further complicated by the fact that at least one of the Abutters is under travel restrictions from a physician given the pandemic, and others are at the age where they are required to stay home and avoid all non-essential travel.

Moreover, the infirmities of such virtual remote hearing procedures takes on added significance with respect to the Application given that the CRMC anticipates four separate hearing dates will be necessary, allotting for as much as 17 hours of hearings. While public participation is not required at hearings, it is encouraged when the hearing involves a matter of substantial public interest that may impact the public’s right to recreate on a public body of water, Segar Cove.

In this case, dozens of members of the public have advised the Abutters of their interest in the Application and their strong desire to attend the hearing and participate in the public comment portion of the hearing in order to make their views known. Most of these members of the public

are in opposition to the Application. Some have expressed interest in providing evidence of water-based activities in Segar Cove. The virtual remote hearing procedures limit the ability of public participation, as it requires a device such as a computer, laptop, tablet or other device with a webcam, microphone and speakers, with secure, fast, reliable WIFI connection and the ability to properly use the device to access and participate in the hearing. The virtual remote hearing procedures do not allow for the introduction of evidence by members of the public, or if that is possible, it may be beyond the available technology, knowledge and expertise of some members of the public who wish to do so.

The Abutters concerns regarding proceeding with a virtual contested hearing were highlighted at CRMC's semi-monthly virtual Zoom meeting on April 28, 2020 where the participants and attendees participated remotely. CRMC held a hearing on an application for a fairly straightforward variance request for a residential dock (2018-10-016) to which objection was made. Although the lone objector was able to enter the virtual meeting and could see and hear the participants, she encountered audio issues during the entire hearing which limited her ability to communicate and participate in the hearing despite the efforts of the CRMC Chair, CRMC staff and legal counsel.<sup>2</sup> In addition, although Council members had copies of the application and supporting materials referenced in the testimony of the Applicant, Applicant's engineer and CRMC staff, the lone objector did not have copies of the same nor the opportunity to review this material prior to the hearing or in "real time" during the hearing<sup>3</sup>. This application was a fairly simple application with only one objector.

This stands in stark contrast to a contested hearing on an Application that will encompass multiple witnesses with lay and technical testimony and multiple exhibits that will need to be accessed, manipulated, referenced and available for viewing by all throughout the hearing. In addition, with over 100 letters and correspondence filed with the CRMC, both in support of and in opposition to the Application, as well as submissions from the Rhode Marine Fisheries Council,

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<sup>2</sup> CRMC Staff also encountered audio issues during the hearing and was unable to communicate for a period of time during the hearing until it was resolved.

<sup>3</sup> CRMC Staff/Moderator did indicate during the hearing that she was able to "share" portions of the application with the participants via the Zoom app. In addition, the Chair requested that CRMC Staff send the materials to the Objector after the hearing and after CRMC voted to approve the Application.

the South Kingstown Waterfront Advisory Commission and the South Kingstown Conservation Commission, there is substantial public interest in this Application. In order for the public to attend and participate in the Hearing they must be able to access and view the information and materials being presented and the ability to communicate with participants at the appropriate time. A virtual remote hearing presents issues for those members of the public who do not have the ability or the available technology to participate and communicate during the hearing (e.g. an interested member of the public may not have a device with audio/video capability to access information and materials presented to the Subcommittee).

In short, understanding we all need to adjust how we operate during this COVID-19 pandemic, conducting a contested virtual hearing by remote proceedings imposes significant due process limitations on the hearing, poses obstacles and constraints on public participation on a matter of substantial public interest and in our judgment prevents a meaningful hearing, certainly as to the facts of this Application and the circumstances of this Hearing.

Perhaps this is why the Rhode Island Supreme Court and the Rhode Island Superior Court, by orders addressing the COVID-19 pandemic and the conduct of remote hearings, have significantly limited such hearings to only designated procedures. Initially by Supreme Court Executive Order No. 2020-09, only emergency matters and essential matters, with limited exceptions, shall be heard, some of which may occur in a courtroom and/or by remote procedures where available and publicly accessible. Then superseded by Supreme Court Executive Order 2020-12, where all criminal jury trials scheduled between March 16, 2020 and August 1, 2020 shall be continued to a date no earlier than August 1, 2020. Civil jury trials shall be continued to a date no earlier than August 1, 2020. A judge may schedule a bench trial to be conducted remotely but to do so, it must be accessible to the parties, and more importantly, **the parties must consent to the remote procedure.**

The Hearing on the pendency of the Application clearly would not constitute an emergency matter, nor would proceeding with such Hearing appear to constitute an essential matter.<sup>4</sup> In

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<sup>4</sup> Although the Application was filed with CRMC on December 29, 2017, Applicant has not asserted that CRMC Staff unreasonably delayed review of the Application nor requested CRMC to expedite its review of the Application. In fact, Applicant filed a revised configuration on March 15, 2018 and submitted a collection of photographs on

Executive Order 20-05, dated March 16, 2020, Governor Raimondo authorized remote proceedings under the Open Meetings Act if the public body is meeting for an essential purpose, which it defined as “either that which is necessary for continued government operations or to ensure compliance with statutory or regulatory deadlines.” No such deadlines are at issue here and a decision on the Application clearly is not necessary for continued government operations.

While Executive Order 20-25, dated April 15, 2020, which superseded Executive Order 20-05, does not limit an agency’s use of remote meeting proceedings to “essential matters”, it certainly did not sanction meetings where the very limitations of remote-virtual proceedings may materially and adversely impact due process rights, or where such limitations may make widespread public participation impossible on matters of significant public interest such as this Application.

It is therefore incumbent on CRMC to determine whether the limitations and restrictions on remote virtual proceedings could materially impact due process rights. In this instance, we assert that presentation of witnesses, and particularly the cross-examination of witnesses, would be severely limited by the restrictions imposed by remote hearings, as would the introduction of evidence and challenges to the evidence. It is likely for this reason that we understand Superior Court proceedings, held by remote proceedings in non-emergency and non-essential matters, are largely limited to oral arguments and chambers conferences with the judge and attorneys.

Massachusetts courts have suspended criminal and civil jury trials to a date no earlier than July 1, 2020. All bench trials in both criminal and civil cases are also suspended to a date no earlier than June 1, 2020 unless the bench trial may be conducted virtually **by agreement of the parties and the court**. Importantly, until at least June 1, 2020, Massachusetts will address emergency matters in person “if they cannot be resolved virtually (i.e. by telephone, videoconference, email, or comparable means, or through the electronic filing system) **because it is not practicable or would be inconsistent with the protection of constitutional rights**”. Massachusetts Supreme Judicial Court Order Regarding Court Operations Under the Exigent

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November 18, 2019 with CRMC. According to CRMC Staff, offshore wind projects were taking precedence over aquaculture projects.

Circumstances Created by the COVID-19 (Coronavirus) Pandemic, adopted April 27, 2020, effective May 4, 2020 (emphasis supplied.)

Accordingly, both Rhode Island and Massachusetts are providing strict limits on judicial hearings which are clearly intended to protect the rights of parties and the public to the proceeding. It is inevitable that if agencies extend remote virtual hearing procedures to quasi-judicial contested proceedings which they are not designed to accommodate, and cannot accommodate, there will be subsequent litigation in the courts challenging these hearings on the basis of the failure to protect essential due process rights and public participation on a matter of substantial public interest.

### **III. Conclusion**

The instant contested hearing proceeding is one which we strongly believe should be rescheduled until restrictions pertaining to the COVID-19 pandemic would allow an in-person proceeding with public participation. The continuance of this matter does not prejudice the Applicant's rights, ensures all parties their due process rights and the ability of the public to participate and avoids the likely court challenges to the due process deficiencies of a remote virtual hearing for a contested matter of substantial public interest.

Regards,



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