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VIA E-MAIL: tony@adlawllc.net

Anthony DeSisto, Esq.
Coastal Resources Management Council
Oliver Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

Re: CRMC File # 2017-12-086 – Letter in Response to Elizabeth Noonan’s Letter of June 8, 2018 in Support of Remote Virtual Hearing Procedure

Dear Anthony:

I am writing on behalf of Mr. Kevin Hunt, Ms. Alicia Cooney, Mr. Stephen Quigley, and Mr. David Latham in response to the above-referenced letter regarding the application (the “Application”) of Mr. Perry Raso (the “Applicant”) for a Coastal Resource Management Council (“CRMC”) permit to operate an aquaculture facility in Segar Cove.

I note several points briefly.

The Izzo v. Victor Realty case cited in Applicant’s letter addressed only the question of whether a petitioner who had actual notice could claim a due process violation for lack of notice. It did not address the fundamental due process question facing the CRMC in determining whether to allow a remote virtual hearing procedure for the Application, namely, what does it mean to afford interested parties an opportunity to present their objections. Or as noted in the McKenna case, what does it mean to have a meaningful opportunity to be heard in a quasi-judicial hearing. (The effort to distinguish the McKenna case because it involved “a property interest sufficient to invoke due process protections” (i.e. the right to practice law) is unavailing, as our Supreme Court, as cited in my letter of May 19th, has determined that participants in a quasi-judicial proceeding, as before the CRMC, are entitled to due process protections.)

The two Massachusetts cases cited in Applicant’s letter involved a hearing before a hearing examiner to classify the level of a sex offender. Massachusetts has long allowed video hearings for such proceedings, which are narrow, limited proceedings. In the 2011 case cited, no witnesses appeared and in the 2020 case one expert witness appeared and it is unclear whether any other witnesses testified.

Applicant's reliance on these cases, and on the Sixth Circuit case (again involving a narrow proceeding, a parole revocation hearing) is misplaced. The issue here is not whether it is possible for CRMC to hold a hearing by virtual remote proceedings without violating due process requirements. Rather, the question is whether, on the facts and circumstances of the Application, such a remote proceeding could be held without violating due process rights. For the reasons stated in my May 19th letter, including multiple expert and lay witnesses to testify over four days for an estimated 17 hours, while hamstringing attorneys from communicating with their clients during the proceeding, including direct and cross examinations, and severely limiting public participation on a matter which has generated significant public interest, we believe that a virtual remote hearing procedure on the facts of the Application would impermissibly infringe on due process rights.

The Applicant's letter is dismissive of the burdens placed on the public who have indicated a strong interest in participating but may be significantly restricted by technology limitations, travel restrictions arising from the pandemic, social distancing restrictions, and personal health concerns arising from the continuing pandemic.

This insensitivity to the limitations on public participation inherent in such virtual remote hearing procedures ignores the CRMC's own insistence on broad public outreach and the right to public participation in aquaculture hearings, and it ignores concern expressed in the Open Meetings Act for insuring that hearings by electronic proceedings do not undermine the purposes of the Act.

Applications for aquaculture projects are one of only two types of applications for which CRMC mandates seeking input from community advisory bodies, and CRMC is solicitous of public participating in such hearings. To allow a virtual remote hearing procedure on an aquaculture application which has generated such widespread public interest, and opposition, and in which two advisory bodies have either opposed the Application or deadlocked in considering it, would be a reversal of the deference which CRMC has granted to public input and participation in such applications.

Additionally, while the Open Meeting Act itself allows meetings through the limited "use of electronic communication, including telephonic communication and telephone conferencing", no such procedures "shall be used to circumvent the spirit or requirements of this chapter". R.I. Gen. Laws § 42-46-5(b). Governor Raimondo's Executive Order allowing virtual remote hearing procedures did not repeal this provision, and it did not require CRMC to use such virtual remote hearing procedures in all cases. The reason is obvious. The Governor's Executive Order was not intended to undermine or contravene the protections of the Open Meeting Act and it was not intended to foster due process violations.

Accordingly, the CRMC must decide if it can conduct a complicated quasi-judicial hearing over four days and as much as 17 hours with multiple witnesses (lay and expert), significant direct testimony and cross-examination, documentary evidence, and a significant number of members of the public who want to attend the proceeding and have the opportunity to

participate, without impermissibly infringing on protected due process rights and protected public interests. We believe the answer is no.

Given there is no statutory or regulatory deadline to hear the Application, that pandemic-imposed restrictions are not permanent and are in the process of being relaxed, and given that on the specific facts and circumstances of this Application, a virtual remote hearing proceeding would limit and restrict public participation in a manner contrary to established CRMC procedures on hearing aquaculture application, would undermine the public participation purposes of the Open Meeting Act, and would materially and adversely impact due process rights, we respectfully request CRMC schedule this matter for an in-person public hearing when circumstances pertaining to the pandemic allow.

Regards,

A handwritten signature in blue ink, appearing to read 'C. Capizzo', is written over a faint, light blue circular stamp.

Christian F. Capizzo, Esq.

CFC:dad

cc: Elizabeth Noonan, Esq., AP&S - enoonan@apslaw.com
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