STATE OF RHODE ISLAND PROVIDENCE, sc.		SUPERIOR COURT
LANCE SHEFFIELD and HOLLY SLATER SHEFFIELD *Plaintiffs/Appellants*, v. COASTAL RESOURCES MANAGEMENT COUNCIL, *Defendant/Appellee*.	: : : : : : : : : : : : :	C.A. No. PC-2023-01199

REPLY BRIEF OF PLAINTIFFS LANCE SHEFFIELD AND HOLLY SLATER SHEFFIELD IN FURTHER SUPPORT OF THEIR ADMINISTRATIVE APPEAL

Appellants Lance Sheffield and Holly Slater Sheffield submit this reply memorandum of law in further support of their administrative appeal.

INTRODUCTION

CRMC's Reply concedes the key facts showing that the 1982 Assent's (Assent) public access requirement is unenforceable as a matter of law: (1) the Kilmarxes—not the Sheffields—obtained the Assent in relation to 56 Elm Lane; (2) the Assent was never recorded in the Barrington land evidence records; (3) the Sheffields had no actual knowledge of the Assent or the 2011 Maintenance Certification when they purchased 85 Nayatt Road (Property); and (4) neither the Kilmarxes nor their successors in interest posted any placard, sign, or other observable indicator stating that the public was entitled to access the seawall on 85 Nayatt Road. The Assent was buried in CRMC's files, inaccessible to the public absent a specific request directed to the agency inquiring about 56 Elm Lane.

Every first-year law student learns that a bona fide purchaser of real property without notice of a condition takes title free of prior encumbrances. CRMC does not cite a single statute or ruling carving out conditions contained in its assents from this bedrock rule. Nor does it explain how such encumbrances are exempt from Rhode Island's recording statute or the General Assembly's clear directive that CRMC permits "*shall be recorded* . . . in the land evidence records of the city or town where the property subject to permit is located." R.I. Gen. Laws § 46-23-21 (emphasis added).

Without a recorded assent, CRMC must provide other evidence showing "facts that are *so suggestive* of the existence of [a right of public access] that a reasonably prudent person would be moved to investigate" CRMC's files for a property they did not purchase. *Hardy v. Zoning Bd. of Rev. of Town of Coventry*, 321 A.2d 289, 293 (R.I. 1974) (emphasis added). There are none. The Sheffields' due diligence included a land survey and a title search of both 85 Nayatt Road and 56 Elm Lane—neither of which uncovered any facts suggesting the public had a right to enter their Property. *See* L. Sheffield Aff. ¶ 5–9; H. Sheffield Aff. ¶ 5–9. No reasonable title attorney would separately canvass the files of every state and federal agency that *might* have an interest in the Property. *See* Montalbano Aff. ¶¶ 11-14. Similarly, neither sheer proximity to Narragansett Bay, the presence of a seawall, nor CRMC assents on other properties trigger a special duty to investigate CRMC's files because they do not, in and of themselves, suggest a public access easement exists on *this* Property.

CRMC's reach far exceeds its grasp. The Sheffields cannot be bound by a four-decade old, unrecorded seawall-repair permit that purportedly created a broad public entitlement to access[1] across their

[1] The 1982 Assent could be construed to convey a right of access in more than one form. The phrases "public easement," "public entitlement," "right of public access," and "restrictive covenant" are thus used interchangeably throughout this memorandum. Regardless, the substantive effect is the same: the assent purports to prohibit the Property's owner from exercising their right to exclude the public from the seawall, which is private property.

otherwise private property. For the same reason, the Court should also vacate CRMC's September 21, 2021 and May 27, 2022 cease-and-desist orders. *See* Exhibit I; Exhibit J.

ARGUMENT

I. CRMC cannot dodge fundamental common law and statutory protections for bona fide purchasers by characterizing its assents as "government permits."

CRMC argues that because its 1982 Assent was, in substance, a government permit, the agency may circumvent hundreds of years of common law, Rhode Island's recording statute, and its own enabling legislation. But that's wrong. To be sure, the Rhode Island General Assembly gave CRMC authority to "grant permits, licenses, and easements for any term of years or in perpetuity." R.I. Gen. Laws § 46-23-16. However, the General Assembly also directed that those permits, licenses, and easements must be recorded to bind subsequent property owners:

> A notice of permit . . . *shall be recorded* at the expense of the applicant in the land evidence records of the city or town where the property subject to permit is located, and any subsequent transferee of the property shall be responsible for complying with the terms and conditions of the permit. The clerk of the various cities and towns shall record any orders, findings, or decisions of the council at no expense to the council.

R.I. Gen. Laws § 46-23-21 (emphasis added). Similarly, violations of CRMC's coastal management program, regulations, or decisions "*shall be recorded* in the land evidence records in the city/town wherein the property subject to the order is located, and any subsequent transferee of the property shall be responsible for complying with the requirements of the order and notice." R.I. Gen. Laws § 46-23-7 (emphasis added). The word "shall" admits of no ambiguity here. *See Castelli v. Carcieri*, 961 A.2d 277, 284 (R.I. 2008) ("We have held that the use of the word 'shall' contemplates something mandatory or the 'imposition of a duty.'" (quoting *Conrad v. State of Rhode Island—Medical Center—General Hospital*, 592 A.2d 858, 860 (R.I. 1991))); *Tedeschi v. Driscoll*, No. 98-0076, 1998 WL 596764, at *2 (R.I. Super. Ct. Aug. 18, 1998) ("Where the word 'shall' appears in a statutory directive, '[the Legislature] could not have

chosen stronger words to express its intent that [the specified action] be mandatory.'" (quoting *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 (6th Cir.1993)) (cleaned up).

The provisions of Chapter 23 dovetail with the Rhode Island recording statutes, which declare that "every conveyance of lands . . . shall be void unless made in writing duly signed . . . and recorded in the records of land evidence in the town or city where the lands . . . are situated." R.I. Gen. Laws 34-11-1; *see also* R.I. Gen. Laws § 34-13-1(1) (describing instruments eligible for recording as "[a]ll instruments . . . affecting, or purporting to affect, the title to land or any interest therein"); § 34-13-2 ("A recording or filing under § 34-13-1 shall be constructive notice to all persons of the contents of instruments and other matters so recorded."). Hence, recording the Assent is essential for ensuring legal notice to subsequent purchasers who cannot otherwise be bound. *See Shappy v. Downcity Cap. Partners, Ltd.*, 973 A.2d 40, 44 (R.I. 2009) ("The purpose of recording statutes is to provide protection to those diligent enough to conduct a search of the title records."); 1 Patton and Palomar on Land Titles § 4 (3d ed.) (stating purposes of recording acts include "protecting subsequent purchasers against unknown conveyances and agreements regarding the land" and "preserving an accessible history of each title, so that anyone needing the information may reliably ascertain in whom the title is vested and any encumbrances against it").

Despite the dearth of caselaw in Rhode Island, the Supreme Court of New Jersey addressed a closely analogous dispute in *Island Venture Associates v. New Jersey Department of Environmental Protection*, 846 A.2d 1228 (N.J. 2004) ("*Island Venture*"). The Court described the issue presented by *Island Venture* as "whether the property owner in this case is bound to a restriction on its land that was imposed by the Department of Environmental Protection (DEP) as part of a coastal permit issued to the owner's predecessor in title." In that case, DEP issued a construction permit to the appellant's predecessor that was conditioned on development restrictions under the state's Coastal Area Facility Review Act

(CAFRA). *Id.* at 1229. The permit was recorded in the land evidence records, but was not in the apparent chain of title associated with the properties purchased by the appellant. *Id.* at 1229–30. The lack of actual notice was undisputed. Under these circumstances, the Court prohibited DEP from enforcing the development against the appellant, reasoning that "the policies underlying the Recording Act outweigh those reflected in CAFRA," and that "[b]ecause the restriction could not be found by a diligent search of record title . . . the property owner is not bound by the restriction." *Id.* at 1229, 1233. The facts here are even stronger than in *Island Venture.* It is undisputed that the 1982 Assent was never recorded at all. And unlike the New Jersey statute, Chapter 23 requires that assents be recorded to be enforceable against subsequent purchasers. *See* R.I. Gen. Laws § 46-23-21.

CRMC's reliance on *CFD Realty, LLC v. State of Rhode Island*, No. PC-2012-6591, 2017 WL 934758 (R.I. Super. Ct. Mar. 03, 2017), is misplaced. *CFD Realty* has nothing to do with enforcing conditions in an unrecorded permit against a bona fide purchaser. The bases for RIDEM's enforcement in *CFD Realty* were "distinctly new violations" of environmental regulations—not the unrecorded 1980 notice of violation of prior infractions committed by a predecessor—whereas CRMC's enforcement claims rests exclusively[2] on the unrecorded Assent. *See CFD Realty, LLC*, 2017 WL 934758, at *6, 9.[3] Furthermore, there was evidence accepted by the RIDEM hearing officer and the Court that the appellants in *CFD Realty* had actual knowledge about the 1980 notice of violation. *Id.* at *9. Thus, unlike the Sheffields, the appellants in that case were not bona fide purchasers.

[2] As discussed below, CRMC's claimed violations based on regulations related to fencing and permanent signage are moot.

[3] The appellant stipulated that they had affirmatively violated RIDEM regulations *after* purchasing the property. *Id.* at *2. The fact that the old violations that were the subject of the unrecorded 1980 notice of violation would be remediated by enforcement actions related to the new violations is irrelevant. The unrecorded notice of violation was not the basis for RIDEM's enforcement action against the subsequent purchaser.

As the Supreme Court of New Jersey held in *Island Venture*, this Court should hold that the Sheffields' status as bona fide purchasers forecloses CRMC's ability to enforce the unrecorded 1982 Assent, whether or not it constitutes a "government permit." *See Shappy*, 973 A.2d at 44.

II. Common law due diligence does not require a title attorney to examine the records of every state and federal agency that *might* have an interest in property, and the mere existence of a seawall is insufficient to provide constructive notice of a right of public access.

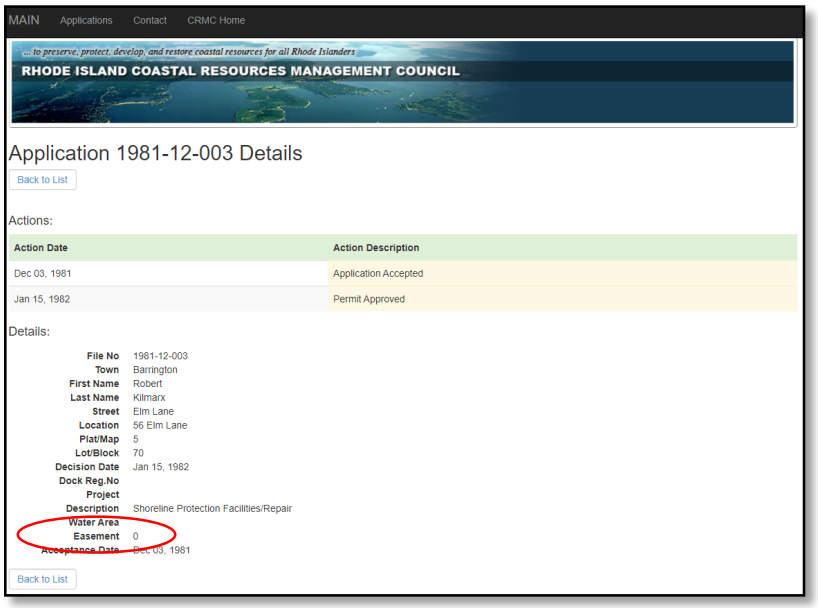
CRMC claims that—even if it cannot enforce an unrecorded permit—the Sheffields had constructive notice of the Assent's public access requirement. This argument caricatures the standard for reasonable due diligence and rests on unsupported inferences that no reasonable person would draw.

The clear majority of courts require the party claiming notice to prove it. *See, e.g.*, *Devine v. Town of Nantucket*, 870 N.E.2d 591, 601 (Mass. 2007) ("The party claiming a purchaser had notice of a prior party's interest has the burden to prove such notice."); *Amason v. Woodman*, 498 S.W.2d 142, 143–44 (Tex. 1973) ("The general rule in Texas . . . is that the one who relies upon an equitable title to land as against a subsequent owner of the legal title assumes the burden of showing that the latter is not an innocent purchaser for value without notice."); *Carter v. Thorp*, 76 S.E. 950, 952 (Va. 1913) ("It is a well-settled rule of law . . . that the burden to prove notice is on him who alleges it."). While Rhode Island courts do not appear to have weighed in on this issue, consistent with the majority rule, CRMC has the burden of proving constructive notice. It has fallen far short of the mark.

CRMC claims that the Sheffields or their title attorney should have conducted an independent search of its online database and that such a search falls within the ambit of required due diligence when purchasing waterfront property in Rhode Island. This argument would open a pandoras box of obligations, requiring every purchaser to make separate inquiries with a host of agencies—CRMC, RIDEM, the United States Coast Guard, the local harbormaster, and the Federal Aviation Administration, just to name a few. And what does CRMC cite to support its sweeping contention? *Nothing*. Common law principles

of caveat emptor and due diligence do not require a prospective home buyer to scour the records of every state and federal agency that might have an interest in the property. Such obligations would be antithetical to the purpose of Rhode Island's recording statute. *Shappy*, 973 A.2d at 44 ("The purpose of recording statutes is to provide protection to those diligent enough to conduct a search of the title records.").

CRMC exclaims that it is "baffling" that the Sheffields' title attorney did not review its database to discover the 1982 Assent, but no reasonable title attorney would undertake a fishing expedition for unrecorded land interests in CRMC's database merely because the property abuts Narragansett Bay. *See* Montalbano Aff. ¶¶ 11-14 . This is especially true when no one disputes that the seawall itself predates the creation of CRMC. *See* Exhibit E at 1 (stating that the seawall existed when Mr. Kilmarx purchased the property in 1961); R.I. Gen. Laws § 46-23-2 (establishing CRMC in 1971). Even if a title attorney were so inclined to peruse the CRMC database after finding no evidence of an easement or right of public access in the land evidence records, they would have found that the "application details" of the 1982 Assent indicate that "0" easements were associated with the Assent:



Procaccini Aff. Exhibit 1. In addition, the Assent itself is not available for download through the database's interface.

Neither case CRMC cites supports its assertion that adequate due diligence would have uncovered the Assent. The plaintiffs in *Lizotte v. Mitchell*, 771 A.2d 884, 888 (R.I. 2001), failed to conduct a standard land survey that would have disclosed that they could not build on the property under applicable town ordinances. The plaintiff in *Hotel Associates., LLC v. HMS Associates Limited Partnership*, No. CIV.A. 96-6273, 2004 WL 422812, at *23–24 (R.I. Super. Ct. Feb. 20, 2004), failed to conduct a standard environmental audit that would have uncovered conditions requiring removal under generally applicable environmental regulations before a factory building could be razed. In both cases, the controlling factors are generally applicable ordinances or regulations that made the property unsuitable for their intended use or caused further expense. CRMC's 1982 Assent is not an ordinance, regulation, or statute generally applicable to property in the state or municipality—it is a *permit* to conduct shoreline repairs appended with a condition burdening a *specific* parcel of land with a public right of access.

The other facts CRMC points to as triggers for further investigation are without merit. The presence of a seawall or rip rap on the Property is immaterial, as shown by the sole case CRMC cites in support of its assertion: "[T]he doctrine [of constructive notice] should be applied cautiously and only where one has acquired knowledge of facts that are *so suggestive* of the existence of an ultimate fact that a reasonably prudent person would be moved to investigate and ascertain the ultimate fact." *Sousa v. Town of Coventry*, 774 A.2d 812, 815 (R.I. 2001) (quoting *Hardy*, 321 A.2d at 293). Here, the "ultimate fact" that the circumstances must suggest is a right of public access, not the right to build a seawall. The existence of a seawall is not "so suggestive" of a right of public access that a "reasonably prudent person" would be moved to investigate further. *See Sousa*, 774 A.2d at 815 (quoting *Hardy*, 321 A.2d at 293). This is a particularly strong conclusion here because—as noted above—it is undisputed that the seawall predates CRMC's existence. The same is true regarding the adjacent right of way on Elm Lane and assents recorded on other properties in the neighborhood. Absent other evidence, a reasonable person would not

infer that their property is open to public access merely because a right of public access exists on other nearby properties.

The Sheffield's due diligence included a land survey and a title search—neither of which uncovered any alleged right of public access or easement across the seawall. *See* L. Sheffield Aff. ¶ 5–9; H. Sheffield Aff. ¶ 5–9. In the words of the New Jersey Supreme Court, the Sheffields "did all that was required of [them] legally or reasonably to determine the existence of the now-disputed restriction." *Island Venture Assocs.*, 846 A.2d at 1233. There is no colorable argument that the property's location or its seawall provided the Sheffields constructive notice of a right of public access across a portion of their property.

III. This Court Should vacate the September 21, 2021 and May 27, 2022 cease-and-desist orders because each was premised on the unrecorded, unenforceable 1982 Assent, and each order is moot.

CRMC now recasts its September 21, 2021 and May 27, 2022 cease-and-desist letters as orders enforcing 650-RICR-20-00-1.1.4(A),[4] but each letter plainly states that the basis for its enforcement is the unrecorded, unenforceable 1982 Assent. *See* Exhibit I; Exhibit J. Neither letter claims to proceed under the regulation first proffered in CRMC's opposition to this appeal. *See id.* Instead, each states the Sheffields' conduct was in "nonconformance with CRMC assent 1981-12-003." *Id.* Because the 1982 Assent is unenforceable against the Sheffields for the reasons elucidated above, this Court should vacate the September 21, 2021 and May 27, 2022 cease-and-desist orders. Regardless, the Sheffields removed the offending fence and signs complained of in each cease-and-desist letter from their property. Thus, to the extent the cease-and-desist letters are not otherwise unenforceable—they are moot.

[4] In its brief in opposition, CRMC cites 600-RICR-20-00-1.1.4(A) as the basis for the cease-and-desist letters. However, 650-RICR-20-00-1.1.4(A) is the active rule.

CONCLUSION

For the foregoing reasons, this Court should issue a declaratory ruling that (1) CRMC has violated R.I. Gen. Laws § 42-35-8(c); (2) the 1982 Assent is unenforceable with respect to the 85 Nayatt Road and the Petitioners; and (3) the September 21, 2021 and May 27, 2022 cease-and-desist orders shall be vacated.

Respectfully submitted,

LANCE SHEFFIELD
HOLLY SLATER SHEFFIELD

By their attorneys,

/s/ Daniel J. Procaccini
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Facsimile: (401) 751-0604

Date: September 11, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2023, I electronically filed and served this document via the Rhode Island Judiciary's Electronic Filing System with notice to all parties in the system. The document is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System

/s/ Daniel J. Procaccini

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STATE OF RHODE ISLAND
PROVIDENCE, sc.

SUPERIOR COURT

LANCE SHEFFIELD and
HOLLY SLATER SHEFFIELD
Plaintiffs/Appellants,

v.

COASTAL RESOURCES
MANAGEMENT COUNCIL,

Defendant/Appellee.

C.A. No. PC-2023-01199

AFFIDAVIT OF DANIEL PROCACCINI, ESQ.

I, Daniel J. Procaccini, being duly sworn, depose and say as follows:

1. I am an attorney with the law firm Adler Pollock & Sheehan P.C., and counsel for Lance Sheffield and Holly Slater Sheffield, in the above-captioned matter.

2. I make this affidavit in support of the Plaintiffs' administrative appeal in the above-captioned action. This affidavit is made upon my personal knowledge unless otherwise noted.

3. I accessed the Rhode Island Coastal Resources Management Council Permit Database on September 11, 2023, to inspect the application details of the 1982 Assent (Application 1981-12-003) for 56 Elm Lane, Barrington, Rhode Island (Assessor's Plat 5, Lot 70).

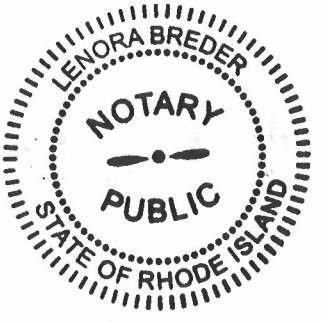
4. Attached hereto as Exhibit 1 is a true and accurate screen capture of the information shown on the database, including the "0" entry in the "Easement" field.

Signed under the pains and penalties of perjury on September 11, 2023.

Daniel J. Procaccini

State of Rhode Island
County of Providence

On this 11th day of September, 2023, before me, the undersigned notary public, personally appeared Daniel J. Procaccini, personally known to the notary to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to the notary that the contents of the document are truthful and accurate to the best of his knowledge and belief.



Lenora Breder
Notary Public
My Commission Expires: 10/30/2026
Notary Number: 31306

EXHIBIT 1

Application 1981-12-003 Details

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Actions:

Action Date	Action Description
Dec 03, 1981	Application Accepted
Jan 15, 1982	Permit Approved

Details:

File No	1981-12-003
Town	Barrington
First Name	Robert
Last Name	Kilmarx
Street	Elm Lane
Location	56 Elm Lane
Plat/Map	5
Lot/Block	70
Decision Date	Jan 15, 1982
Dock Reg.No	
Project Description	Shoreline Protection Facilities/Repair
Water Area	
Easement	0
Acceptance Date	Dec 03, 1981

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STATE OF RHODE ISLAND
PROVIDENCE, sc.

SUPERIOR COURT

LANCE SHEFFIELD and
HOLLY SLATER SHEFFIELD
Plaintiffs/Appellants,

v.

COASTAL RESOURCES
MANAGEMENT COUNCIL,

Defendant/Appellee.

C.A. No. PC-2023-01199

AFFIDAVIT OF CHRISTOPHER MONTALBANO, ESQ.

I, Christopher Montalbano, Esq., being duly sworn, depose and say as follows:

1. I make this affidavit in support of the administrative appeal of Plaintiffs Lance Sheffield and Holly Slater Sheffield in the above-captioned action. This affidavit is made upon my personal knowledge, training, education and experience unless otherwise noted.

2. The Plaintiffs have retained me in this matter as an expert in the field of real property title examination and related issues.

3. I have worked as a land title examiner since 1986. My educational background includes the degree of Juris Doctor from Suffolk University School of Law. I have been a Principal of Pilgrim Title in Providence, Rhode Island since December 2008, and have been a Partner of Montalbano, Belliveau & St. Sauveur, LLP since January 2009.

4. I am a former president of the Rhode Island Conveyancers Association and a former member of the North Kingstown Zoning Board.

5. A true and accurate copy of my curriculum vitae is attached as Exhibit 1.

6. In the course of my work, I have reviewed thousands of recorded filings in land evidence records and offered hundreds of opinions regarding the status of title to real property, including waterfront property. I have been admitted to testify as an expert witness on real property title issues in several cases.

7. All opinions and conclusions that I have set forth in this Affidavit are made to a reasonable degree of professional certainty in my field of title examination and related opinions about title matters.

8. I understand that there is a dispute between the Plaintiffs and Defendant Coastal Resources Management Council (CRMC) concerning the enforceability of a right of public access over rip rap and/or a seawall that is part of the Plaintiffs' property at 85 Nayatt Road in Barrington, Rhode Island (Property).

9. I understand the CRMC has argued that the right of public access is enforceable as a condition of an unrecorded CRMC assent issued in 1982 to Robert and Mary Kilmarx, the prior owners of 56 Elm Lane (1982 Assent).

10. I also understand that, in opposition to the Plaintiffs' administrative appeal, CRMC has argued that the Sheffields' or their title attorney should have made an independent inquiry of CRMC based on the Property's shoreline frontage, the presence of a seawall and riprap revetment, and that an unidentified neighboring property has a recorded assent referring to a condition of public access. The CRMC does not appear to dispute that the 1982 Assent was not recorded and would not be found by an examination of the Barrington land evidence records.

11. It is my opinion that, under the circumstances of this dispute, no reasonable title examiner or title attorney would have made an independent inquiry of the CRMC—whether

through its online database or a separate public records request—to determine whether an assent had been issued creating a right of public access to the Property.

12. State law requires that instruments affecting title to real estate be recorded in the land evidence records of the town or city which is the situs of the property in question. Accordingly, a person undertaking due diligence in the form of a title examination should not be reasonably expected to make independent inquiries of other repositories, including an independent inquiry of CRMC.

13. Based on my training, education, and experience, it is my opinion that neither shoreline frontage nor a seawall and riprap revetment, in and of themselves, would cause a reasonable title examiner to make an independent inquiry of CRMC to determine whether there was any unrecorded administrative decision or order establishing any easement, limitation, or other condition affecting title to real estate.

14. Similarly, based on my training, education, and experience, it is my opinion that a reasonable title examiner would not analyze the land evidence records concerning neighboring properties that are not related to the subject property or otherwise within its chain of title.

Signed under the pains and penalties of perjury on September 11, 2023.

Christopher Montalbano, Esq.

State of Rhode Island
County of Providence

On this 11th day of September, 2022, before me, the undersigned notary public, personally appeared Christopher J. Montalbano , personally known to the notary to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to the notary that the contents of the document are truthful and accurate to the best of his knowledge and belief.

Notary Public
My Commission Expires:_____
Notary Number:_____

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JAMIE L. PEARSON
Notary Public, State of Rhode Island
My Commission Expires NOV. 28, 2026