

Shoreline Issues –
Where The Zone Meets The Coastal Zone

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A. LIMITS OF MUNICIPAL ZONING AUTHORITY

1. ZONING BACKGROUND

Zoning is a tool used in land use planning. Its validity is predicated on the government's power to regulate for the protection of the health, safety and general welfare of the public – the police power. Early challenges to zoning ordinances were based on theories of substantive due process, equal protection and taking doctrines.

Zoning is no longer a highly debated concept – the first comprehensive zoning ordinance having been introduced in New York City in 1916. The United States Supreme Court first upheld the principle of comprehensive zoning in *Euclid v. Ambler Realty Co.* in 1926, which analogized zoning theory to nuisance law and upheld the basic validity of zoning ordinances under the police power. 272 U.S. 365, 47 S.Ct. 114 (1926).

Zoning was introduced in Rhode Island in about 1921. An early, constitutional challenge to a General Law authorizing zoning ordinances was the case of *City of Providence v. Stephens*, 133 A. 614 (R.I. 1926). In *Stephens*, the Rhode Island Supreme Court upheld the legislation under both the federal and state Constitutions as legitimate exercises of the state police power.

2. MUNICIPAL ZONING AUTHORITY (THE COASTAL LIMITATION)

Municipalities have been empowered with broad regulatory powers to address current and future land use concerns relative to the public's health, safety, and general

welfare.¹ The concept of proper land use is not limited to the *terra firma*, in fact the term “proper land use” encompasses the management of other resources such as the air and water as well. As stated in the legislative findings and intent section of the Zoning Enabling Act of 1991:

The zoning enabling authority contained in this chapter empower each city and town with the capability to establish and enforce standards and procedures for the *proper management and protection of land, air, and water as natural resources*, and to employ contemporary concepts, methods, and criteria in regulating the type, intensity, and arrangement of land uses, and provides authority to employ new concepts as they may become available and feasible.²

The idea that municipal zoning should encompass more than just purely “land use” is also evident in the “general purposes” section of the Enabling Act. This section specifically highlights that individual towns and cities need to provide for “orderly growth and development which recognizes the values and dynamic nature of coastal and freshwater ponds, the shoreline, and freshwater and coastal wetlands.”³ It would be a rather myopic view of the Act’s stated purpose to assume that a municipality should be limited to regulating only the land, even though the spectrum of concerns relevant to proper municipal zoning spans much further. A clear example of this rationale is the fact that coastal municipalities are empowered to assert police powers over the harbors lying within the confines of their town or city.⁴ This police power involves the regulation of such things as

¹ See R.I. GEN. LAWS § 45-24-29.

² *Id.*

³ R.I. GEN. LAWS. § 45-24-30 (3)(iii).

⁴ R.I. GEN. LAWS § 46-4-2.

the permitting and operation of vessels, the speed of vessels, and various other guidelines.⁵

But regulation of coastal lands is also probably one of the most clouded and unsettled areas of municipal law. The reason being is that while the state wishes to delegate regulatory authority of land use to the various municipalities, the exact scope of such delegations remains unclear and has been the basis for recent adjudication, specifically as it relates to the coastal zone. The center of discussion involves the scope of municipal zoning authority in the shadow of the Coastal Resources Management Council (CRMC). The Council is a state regulatory body specifically charged with the duties of caring for the state's coastal resources. The debate occurs when a municipality and the CRMC have conflicting views about certain proposed projects or when a resident claims a municipality is regulating the coast in a manner reserved for the CRMC.

The Supreme Court's current approach to statutory interpretation does not allow for a reading which provides for two regulatory authorities over the land below the mean high water mark. Instead, the Court has held that municipalities can merely decide appropriate zoning districts for the coastal uplands and regulate all upland activities.⁶ The municipality cannot regulate tidal land activities and projects at all unless it pertains to prohibiting commercial activities in a residentially zoned waterfront district.⁷ Even though the CRMC authority can reach into the uplands, there is no reciprocal grant of explicit authority allowing a municipality to regulate into the tidal lands, or is there?

⁵ See R.I. GEN. LAWS § 46-4-2; R.I. Gen. L. § 46-4-3; R.I. GEN. LAWS § 46-4-14.

⁶ See *Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999).

⁷ *Id.* In dicta the court mentioned that even though the municipality could not prevent the construction of a residential dock, it could regulate the use to which the dock would be put. See *infra.*, Section D.

While the Rhode Island Supreme Court may have been unwilling to find that municipalities have regulatory authority over tidal lands, the same cannot be said of the Rhode Island General Assembly. The construction of a residential boat dock and commercial ferry operations may be beyond municipal control, but things such as setting boating speed limits, permitting, and patrolling harbors are not. At least at this point, such explicit grants of authority are not broad enough for the Rhode Island Supreme Court to allow municipalities to regulate such activities as commercial ferry operations or the construction of residential boat docks. But where the line in the sand is drawn is not quite clear. For now the debate will have to continue.

B. COASTAL RESOURCES MANAGEMENT COUNCIL

The Council is a sixteen member regulatory body comprised of representatives from state and local government, the general public and coastal communities.⁸ Founded in 1971,⁹ the CRMC is in many ways the administrative by-product of the state's constitutional duty to preserve the public trust doctrine¹⁰ and conserve the numerous natural resources of the state, specifically those relating to the coastal environment.¹¹

⁸ R.I. GEN. LAWS § 46-23-2(a)(1)-(3). Two (2) councilpersons shall be members of the house of representatives. At least one (1) of the council members shall represent a coastal municipality and be appointed by the speaker of the house. Two (2) councilpersons shall be members of the senate, each of whom shall represent a coastal municipality and appointed by the president of the senate. Two (2) councilpersons shall be from the general public appointed by the speaker of the house for a term of two years. Two (2) councilpersons shall be from a coastal municipality appointed by the speaker of the house for a term of three years. In addition, four (4) councilpersons shall be appointed or elected officials of local government appointed by the governor. Lastly, three (3) members shall be appointed by the governor from the public, with advice and consent of the senate and shall represent a coastal community.

⁹ Coastal Resources Management Act, R.I. GEN. L. § 46-23-1 *et seq.*

¹⁰ The public trust doctrine dictates that the state holds title to all land below the high water mark in a proprietary capacity for the benefit of all the public.

¹¹ R.I. CONST. art. I, § 17.

1. JURISDICTION

Under the Coastal Resources Management Act,¹² the CRMC is charged, in very broad terms, with the duty of managing the resources of the state's coastal region.¹³ The council has jurisdiction over alterations and development located within this region, including land areas within two hundred feet of coastal features.¹⁴ Further upland from the coastal zone, the CRMC's regulatory authority is limited to situations in which there is a reasonable probability of conflict with a plan or program for resources management or damage to the coastal environment.¹⁵ In relation to tidal lands,¹⁶ the General Assembly has specifically provided that, below the mean high-water mark, the council is given exclusive jurisdiction over "development, operations, and dredging."¹⁷ This is known as the CRMC's exclusivity provision.

The Rhode Supreme Court has just recently interpreted this exclusivity provision rather broadly.¹⁸ The court stated that the specific terms of the provision are to be read independent of one another. This means that the terms "development" and "operations" are not tethered exclusively to the physical act of "dredging."¹⁹ The terms are not interconnected. Therefore, there are no clear limitations placed on the scope of CRMC's authority as it relates to development, operations and dredging in the tidal lands. This

¹² R.I. GEN. LAWS § 46-23-1 *et seq.*

¹³ R.I. GEN. LAWS § 46-23-6.

¹⁴ R.I. GEN. LAWS § 46-23-6(2)(iii). The council's authority over these land uses and activities shall be limited to situations in which there is a reasonable probability of conflict with a plan or program for resources management or damage to the coastal environment.

¹⁵ This "extra-coastal" zone regulatory authority is in no way limited by the upland location of the potentially hazardous activity. R.I. GEN. LAWS § 46-23-6(2)(iii). E.g., an inland power plant, chemical processing or storage facility, mineral extraction facility. See R.I. GEN. LAWS § 43-23-6(2)(iii)(A)-(E).

¹⁶ Tidal lands are those lands below the mean high water mark. R.I. Gen. L. § 46-23-1(f)(3)(ii).

¹⁷ R.I. GEN. LAWS § 46-23-6(2)(ii)(A).

¹⁸ *Champlin's Realty v. Tillson*, 823 A.2d 1162, 1169 (R.I. 2003)

¹⁹ *Id.* at 1169-70.

was evidenced by the court's willingness to find that the term "operations" was broad enough to encompass commercial ferry activities.²⁰

2. PERMITTING PROCEDURES

The CRMC's strategic plan for regulation of the state's coastal resources is contained in the Coastal Resources Management Plan (CRMP), also known as the "Red Book." The Red Book's regulatory requirements are based on six water types and/or the type of adjacent shoreline.²¹ The purpose behind these classifications is to aid in proper management of commercial development, preservation of shoreline features and the placement of any in-water structures.

The CRMC requires that certain activities or projects occurring within or affecting the coastal zone and in consideration of the applicable water type classification, must first receive an "Assent" (a permit) from the CRMC before commencing. Section 100 of the CRMP specifies which types of activities require an "Assent" from the Council. Section 100 also sets forth certain activities that are "prohibited" within Rhode Island's coastal areas. If an activity is found to be "prohibited" in accordance with Section 100, that is not necessarily a fatal classification. An applicant may simply apply for a "special exception" from the Council and present their case in a hearing before the full Council.²² The Council will review the application for special exception in relation to the stated goals and purposes contained within the CRMP. The Council will specifically look for three things: (1) If the proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private

²⁰ *Id.* at 1170.

²¹ The six water types are: (1) Type 1 Conservation Areas; (2) Type 2 Low Intensity Use; (3) Type 3 High Intensity Boating; (4) Type 4 Multipurpose Waters; (5) Type 5 Commercial and Recreational Harbors; (6) Type 6 Industrial Waterfronts and Commercial Navigation Channels.

²² *See* CRMP §130.

interests;²³ (2) All reasonable steps shall be taken to minimize environmental impacts and/or use conflict; and (3) There is no reasonable alternative means of, or location for, serving the compelling public purpose cited.²⁴

CRMC Assents can be obtained through a purely administrative process or after a much more formal notice and hearing procedure. “Category A” Assents are accomplished administratively.²⁵ Section 110.1 requires the proponent of the project or activity to demonstrate, in their filing, that the project meets the goals and policies of the CRMP and complies with all appropriate state and local regulations. If those requirements are met and barring any substantive objections²⁶ from Council members, a “Category A” Assent will be issued.

Certain activities requiring a “Category B” (as indicated in Section 110 of the CRMP) application and “Category A” applications, which failed the requirements of Section 110.1 or received substantive objections, are all subject to formal notice and

²³ The activity must be one or more of the following activities in order to be considered “compelling”: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public. *Id.*

²⁴ *Id.*

²⁵ While “Category A” Assents may be approved administratively, they are never denied without review before the Council.

²⁶ Section 110.3 of the CRMP defines substantive objections as one or more the following:

1. Threat of direct loss of property of the objector(s) at the site in question;
2. Direct evidence that the proposed alteration or activity does not meet all of the policies, prerequisites, and standards contained in applicable sections of this document;
3. Evidence is presented which demonstrates that the proposed activity or alteration has a potential for significant adverse impacts on one or more of the following descriptors of the coastal environment: (a) circulation and/or flushing patterns; (b) sediment deposition and erosion; (c) biological communities, including vegetation, shellfish and finfish resources, and wildlife habitat; (d) areas of historic and archaeological significance; (e) scenic and/or recreation values; (f) water quality; (g) public access to and along the shore; (h) shoreline erosion and flood hazards; or
4. Evidence that the proposed activity or alteration does not conform to state or duly adopted municipal development plans, ordinances, or regulations

hearing requirements.²⁷ Also, for those applications receiving substantive objections or if at least four council members request it, a public hearing will be held and the application subjected to a full Council review. The standard of review for the application will be whether the proposed activity or project, “conforms with the goals, policies and prerequisites, informational requirements and standards of [the CRMP].” If a proposed activity is not explicitly prohibited, but the applicant cannot meet the specific policies and standards outlined by the CRMC to obtain an Assent, the applicant must obtain a variance in accordance with the burdens of proof outlined in the CRMP, Section 120.

As stated previously, applications for “Category B” Assents and “Category A” Assents that have received substantive objections from Councilpersons require formal notice and hearing procedures. When such an application is received, the Council will issue public notice of the pendency of said application and a brief description of the proposed activity. This initiates a thirty day public comment period whereby comments concerning the application shall be received by the Council. In the event that during this thirty (30) day period, formal written objection and/or request for hearing is received by the Coastal Resources Management Council from an interested party, and the formal written objection and/or request for hearing is substantiated by genuine and material reason as outlined in Section 110.3 of the CRMP, the matter shall then become a contested case under the rules and regulations of the Council. Then, a public hearing may be scheduled at a time immediately following the thirty (30) day objection period before a duly authorized and appointed Subcommittee on the matter. The subcommittee usually renders a recommendation within thirty (30) days of the final hearing unless the Chairman of the Council extends the period.

²⁷ See CRMP §110.2.

Upon the expiration of the thirty (30) day comment period (in an uncontested case) or upon the issuance of a Subcommittee recommendation (in a contested case), the Council shall consider the application including staff reports and recommendations thereon and also comments, reports and recommendations from other state and local agencies. The Council will then further investigate and review the site of the proposed activity through one or more of its own members. Thereafter, at a meeting of the Council, the application shall be considered and acted upon.

C. UNITED STATES ARMY CORPS OF ENGINEERS

1. JURISDICTION

Pursuant to the Rivers and Harbors Act of 1899²⁸ and the Clean Water Act²⁹ the Army Corps of Engineers has jurisdiction over works and structures that are located in or affect the “waters” or “navigable waters” of the United States. The statutory regulations for the Army Corps contains both the terms "navigable waters of the United States" and "waters of the United States.” There is definitional significance to each. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once

²⁸ See 33 U.S.C. §403. Prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army.

²⁹ See 33 U.S.C. §1344. Authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. See 33 CFR §323.

made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.³⁰

Waters of the United States are all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; all interstate waters including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.³¹ The limit of jurisdiction in the territorial seas for the Army Corps is measured from the baseline in a seaward direction a distance of three nautical miles.³²

The Corps has been involved with regulating activities in navigable waterways, through the granting of permits, since the passage of the Rivers & Harbors Act of 1899. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts of specified activities or projects occurring within the waters or navigable waters of the United States. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

The Army Corps regulatory authority covers all of the nation's deep draft harbors mainly used in commerce, as well as hundreds of smaller harbors that serve a variety of

³⁰ 33 CFR §329.

³¹ 33 CFR §328.

³² 33 CFR §329.12.

recreational and commercial purposes. The Army Corps regulates and issues permits for the following activities or projects occurring in the “waters” and “navigable water” of the United States: (1) Dams or dikes in navigable waters of the United States; (2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States; (3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States; (4) Construction of artificial islands, installations, and other devices on the outer continental shelf; (5) Discharges of dredged or fill material into waters of the United States; (6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters.³³

2. PERMITTING PROCEDURES: THE PUBLIC INTEREST REVIEW

The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers.³⁴ The standard of review by which the engineers will review a permit is called the “public interest review.” The public interest review is essentially a balancing test, weighing the reasonably expected benefits from the proposed projects against the potential detriments it may have on certain recognized areas of concern. The Army Corps regulations explain this standard as follows:

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the

³³ See 33 CFR §§ 321-324.

³⁴ The District Office for Rhode Island is:
U.S. Army Corps of Engineers, New England District
Attention: CENAE-R-PT
696 Virginia Road
Concord, MA 01742-2751
Phone: 978-318-8338
FAX: 978-318-8303

probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. 33 C.F.R. §320.4(a)(1).

a. INDIVIDUAL PERMITS

The procedural requirements for obtaining a Department of the Army (DA) permit vary in relation to the proposed activity or project.³⁵ But there are some general requirements that are standard throughout. Applicants for all individual DA permits must use the standard application form (ENG Form 4345, OMB Approval No. OMB 49-R0420).³⁶ Local variations of the application form for purposes of facilitating coordination with federal, state and local agencies may be used when available. The application must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (detailed engineering plans and specifications are not required); the location, purpose and need for the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and

³⁵ For further information concerning each type of project please reference 33 C.F.R. §§320-324.

³⁶ Certain activities have been authorized by general permits and do not require submission of an application form but may require a separate notification. Please reference 33 C.F.R. §330 for a list of activities that need only a general permit and not an activity specific permit.

dimensions of adjacent structures; and a list of authorizations required by other federal, interstate, state, or local agencies for the work, including all approvals received or denials already made.³⁷ Once the application is received, general public notice and an opportunity for comment will be given by the Army Corps.

Complex projects normally require a public hearing in excess of the public notice and comment period. Traditionally, less complex projects may be handled administratively, but that does not foreclose the opportunity for a public hearing in those situations. Any person may request, in writing, within the comment period, that a public hearing be held to consider the material matters at issue in the permit application. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, the engineer shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in Section 327.11 of the Army Corps regulations.³⁸ Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefore to all requesting parties.

b. GENERAL PERMITS

Besides issuing individual permits to applicants, the Army Corps of Engineers from time to time will issue general permits to allow certain activities

³⁷ 33 C.F.R. §325.1(d).

³⁸ 33 CFR §327.11

to commence with little or no Army Corps involvement. Traditionally these are only issued for minor activities which have little or no environmental impact. The purpose of these general permits is to reduce costs and delays for both the applicant and the agency as well allow the agency to devote time and resources to more complex and significant project proposals. General permits can be issued on the nationwide level, regional level, and state level in conjunction with the state's coastal regulatory body.³⁹

3. APPEALS PROCESS

A district engineer's denial of a permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 CFR §331. Such an administrative appeal must meet the criteria in 33 CFR §331.5. Most importantly, the appellant must submit a completed Request for Appeal (RFA) (as defined at Sec. 331.2) to the appropriate division office within 60 days of denial; otherwise, no administrative appeal of that decision is allowed. There shall be no administrative appeal of any issued individual permit that an applicant has accepted, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR §325.7 (see 33 CFR §331.5(b)(1)). An affected party must exhaust any administrative appeal available

³⁹ Rhode Island's state general permits are listed at: <http://www.nae.usace.army.mil/reg/index.htm> (last visited Feb. 6, 2004). E.g., The New England District of the U.S. Army Corps of Engineers is issuing a programmatic general permit (PGP) that expedites review of minimal impact work as defined by the Corps in coastal and inland waters and wetlands within the State of Rhode Island & Lands Located Within the Exterior Boundaries of an Indian Reservation.

pursuant to 33 CFR §331 and receive a final Corps decision on the appealed action prior to filing a lawsuit in the federal courts (see 33 CFR §331.12).

4. CRMC AND ARMY CORPS

Processing of an application for a DA permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications.⁴⁰ If an applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the CRMC guidelines. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to CRMC and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Rhode Island's coastal management program Act or is necessary in the interest of national security.

In accordance with Federal Coastal Zone Management Act,⁴¹ the Army Corps operates with a heightened sense of cooperation with the state coastal regulatory authority. Barring any intervention by the Secretary of Commerce, a permit will not be issued without the consent of CRMC. If the CRMC denies a proposal, the Army Corps can deny the proposal as contrary to the public interest or deny it without prejudice,

⁴⁰ All questions regarding applications and other procedural requirements can be directed to the Army Corps.

⁴¹ See 16 U.S.C. §1456(c). Requires federal agencies conducting activities, including development projects, directly affecting a state's coastal zone, to comply to the maximum extent practicable with an approved state coastal zone management program.

indicating that except for the CRMC denial the Army Corps permit could, under appropriate conditions, be issued. A denial without prejudice allows the applicant to reinstate their application once CRMC is satisfied that all of their requirements have been met. Alternatively, if the CRMC fails to respond to the Army Corps' request for verification of the applicant's certification statement within six months, their concurrence with the proposed project will be conclusively presumed.⁴²

D. RHODE ISLAND SUPREME COURT – WHAT'S NEXT?

While an overlap of municipal zoning authority and the CRMC's regulatory authority over the state's coastal region may seem intuitive, the reality within the Rhode Island Supreme Court is very much counterintuitive. The Court determined that any overlap of regulatory authority seems to end at the point where the land meets the water's edge. It is generally recognized that the CRMC and the municipal zoning authority shall concurrently regulate activities occurring on terra firma within 200 feet of a coastal feature or any activity likely to be injurious to the coastal region regardless of its origin. But, regulation of the tidal lands, as determined by the Rhode Island Supreme Court, is not regulated through a similar collective effort.

The Rhode Island Supreme Court, on at least two separate occasions, has decided that the CRMC maintains exclusive, not concurrent jurisdiction over activities and projects occurring in tidal lands. This is the area of the coastal region falling below the mean high water mark. Specifically, the Court decided: (1) cities and towns have no authority to regulate the construction of residential boat docks or wharves because that authority resides exclusively in CRMC; and (2) CRMC is the exclusive regulatory body

⁴² 33 CFR §325(b)(2)(ii).

for commercial ferry operations. The following is a brief synopsis and analysis of the Court's two holdings.

1. TOWN OF WARREN V. THORNTON-WHITEHOUSE

An owner of waterfront property, without going before the local zoning board, obtained CRMC approval to construct a 102-foot dock. The Town subsequently filed suit to block the dock's construction on the basis that the R-40 zoning district required a special use permit to be obtained prior to any construction of a residential dock. The Superior Court held that CRMC possessed exclusive jurisdiction over the construction of recreational boating facilities. The Rhode Island Supreme Court affirmed.

In affirming the lower court's decision, the Supreme Court relied upon "two ancient and still vital doctrines" – the public trust doctrine and the common law right of riparian property owners to "wharf out." First, under the public trust doctrine, the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public. The state can transfer such authority over to municipalities through an explicit delegation, but the Zoning Enabling Act of 1991 and the Comprehensive Planning and Land Use Act did not contain such language. Rather, such language could be found in the CRMC enabling act.⁴³

Secondly, the right to wharf out gives riparian land owners the right to construct whatever wharf or dock is necessary to gain access to navigable waters, as long as such construction does not interfere with navigation or the rights of other riparian land owners. This common law right is subject to limitation though. The Rhode Island Legislature required landowners to seek CRMC approval prior to constructing a dock. But the court determined that no similar language existed in the Zoning Enabling Act or the

⁴³ R.I. GEN. LAWS § 46-23-6(2).

Comprehensive Planning and Land Use Act and therefore those two Acts could not be the basis for requiring further procedural restrictions on landowners.

The most important portions of this decision were perhaps contained in dicta. The court hypothesized about future challenges to the holding. In doing so the court stated that the decision in no way restricted the zoning power of the municipalities and also that the decision only concerned the construction of residential boating docks. Therefore, municipalities could still regulate the use to which land is put. While the municipality could not dictate whether a dock was going to be built, it could determine whether the dock be used for commercial purposes. But as will be discussed in the next case, once a harbor is zoned for specific commercial uses, the municipality cannot then regulate further as to what commercial uses would be inappropriate. That authority rests with the CRMC alone.

2. CHAMPLIN'S REALTY ASSOC. V. TILLSON

When two Block Island Ferry services proposed to use docks in the Great Salt Pond, the Town of Block Island issued cease and desist orders to prevent such activities. The town claimed that its zoning ordinance did not allow for ferry terminals to be operated within the Pond. The ferry owners sought and received declaratory relief from the Superior Court to continue their ferry services. On appeal, the Supreme Court upheld the Superior Court's issuance of declaratory relief.

The Court determined that the CRMC possessed exclusive jurisdiction over the docks because they were located below the mean high water mark. The court refuted the town's claims of exclusive jurisdiction and in the alternative concurrent jurisdiction over the pond because the state had granted the town ownership of Great Salt Pond back in 1887.

The court stated that a grant of land to the town only transfers title to the property and does not operate as a complete divestment of regulatory authority over the property. This is especially true in consideration of the public trust doctrine, which requires the state to hold property in a proprietary capacity for the people of the state. The state could divest itself of this obligation, but only through an explicit transfer to the municipality, which the court asserted was not the case here.

Such a holding is justified in recognition of two ancient land use concepts tied closely to the public trust doctrine: *jus privatum* and *jus publicum*. The *jus privatum* is the state's title interest in land, while the *jus publicum* represents the state's rights and responsibility to protect the public trust. The state maintained both over the Great Salt Pond until it transferred ownership over to the Town of Block Island. In doing so, the state transferred only title over to the town, but did not divest itself of its constitutional duty to hold the tidal lands in trust for the public. The divestment of the *jus publicum* must be done explicitly and the court held that the land transfer did not operate as such a divestment. Rather, the court cited language from the CRMC enabling acts as evidence of an explicit divestment of the *jus publicum*.

Relying on its decision in *Thornton-Whitehouse* and the language of the CRMC enabling act, the court further refuted the possibility that the town and CRMC held concurrent jurisdiction over the pond. Essentially, the court pointed to language in the *Thornton-Whitehouse* decision that indicated, in dicta, that a town could only regulate the upland region appurtenant to the docks and the operations taking place on the docks, such as commercial ferry service, were beyond its regulatory authority. The court also pointed to the fact that the state explicitly granted the CRMC exclusive regulatory authority over

“operations” taking place below the mean high water mark. The court interpreted the term “operations” broad enough to include commercial ferry service. Interestingly, the court ignored the statement of CRMC’s attorney, made in response to a direct question by the Chief Justice who recalled him to the podium at the end of oral argument, that CRMC would “not” review or regulate the ferry operations if no physical change were being made to the dock, which is the case.

3. CONCLUSION

Thornton-Whitehouse and *Champlin’s* have indeed given the legal community a firm indicator as to how the courts will deal with future cases involving the intersection of municipal zoning authority and the CRMC regulatory authority. While both decisions may have greatly reined in the power of municipalities to regulate uses of tidal lands under zoning, some authority may still exist. Issues more repugnant to the societal interest, such as the placement of gas pumps or mass expansion of docking facilities, may again require the Rhode Island Supreme Court to re-evaluate its interpretation of a municipality’s proper zoning authority.