UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

Rhode Island Association of Coastal Taxpayers, Plaintiff, v. Peter Neronha, et al., Defendants.	Case No. 1:23-cv-00278-WES-LDA

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendant state officials (Officials) have filed a motion to dismiss Plaintiff Rhode Island Association of Coastal Taxpayers' (RIACT's) complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. RIACT's operative complaint, the Second Amended Complaint, *see* ECF No. 21, challenges state legislation (the Act) that extends Rhode Island's publicly accessible beach area inland from the traditional mean high water (MHW) boundary to ten feet inland of the high water line (or seaweed line). *See* R.I. Gen. Laws § 46-23-26. Thus, the Act converts previously private land into a beach open to the public at large. The complaint asserts that the Act grants the public a right to invade land owned by RIACT's members, destroying their private property rights and causing an unconstitutional, per se taking of private property. *See* ECF No. 21 at 3, ¶ 9.

The Officials argue that RIACT lacks standing to press its takings claim and that sovereign immunity principles shield them from suit. These defenses are baseless, largely because they misapprehend the *Ex parte Young* doctrine. *See* 209 U.S. 123, 157 (1908). Under the guise of the concepts of "traceability" and "redressability," the Officials contend that RIACT cannot sue unless the Officials have directly enforced the Act against RIACT members, and unless an injunction will guarantee complete relief from every possible injury they may suffer. ECF No. 22-1 at 1–9. But this is not the law. The *Ex parte Young* doctrine allows citizens to challenge new legislation as a violation of federal law as long as the defendants *have power* to enforce the law allegedly causing injury. *Whole Woman's Health v. Jackson*,

142 S. Ct. 522, 544 (2021) (Roberts, J., concurring in the judgment and dissenting in part) ("As eight Members of the Court agree, petitioners may" sue "under *Ex parte Young* because there exist state executive officials who retain authority to enforce it." (citations omitted)).

Of course, a "concrete injury" is still required. Here, RIACT's members have been injured several times over. ECF No. 21 at 2, ¶ 7 (alleging the Act harms the exclusivity, enjoyment, value, and marketability of RIACT members' property). Moreover, the Officials have authority to enforce the challenged law both under the Act itself and under R.I. Gen. Laws § 46-23-7, which authorizes the Officials to identify and penalize violations of the Act. *See* R.I. Gen. Laws § 46-23-7 (authorizing cease-and-desist orders for violations); *id.* § 46-23-7.1 (administrative penalties); *id.* § 46-23-7.2 (state court actions); *id.* § 46-23-7.3 (criminal penalties). *See* Exhibit (Ex.) 1 (statutes). A declaration and injunction against the Officials will provide RIACT members with relief by preventing the Officials from applying the Act to their land, allowing them to exercise their constitutionally protected property right to exclusive possession free from the risks of violating the Act—risks that include civil penalties and criminal prosecution.

The Officials' sovereign immunity arguments are also meritless. As noted, under *Ex parte Young*, citizens may "seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health*, 142 S. Ct. at 532. This is the point of RIACT's complaint. It properly sues officials that have authority to enforce the Act, and seeks to enjoin the

them from enforcing it because it effects an unconstitutional taking of property. *See Soscia Holdings, LLC v. Rhode Island*, No. 22-cv-266, 2023 WL 4230720, at *8–9 (D.R.I. June 15, 2023) (holding that a takings complaint seeking prospective injunctive relief against the DEM director (and other defendants) was proper under *Ex parte Young*). The case raises classic physical takings issues, not quiet title questions, *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009), and is thus subject to this Court's jurisdiction under *Ex parte Young*. *Id.*

FACTS AND LEGAL BACKGROUND

A. Rhode Island Coastal Property Law

1. Shoreline features and terminology

The Rhode Island coastline is generally defined by the following features: (1) the mean low tide (MLT) line, also called the mean low water mark. The MLT line is calculated as the average of low tides over an approximately 19 year period and is located near open waters; (2) the MHW line (also called the "mean high tide" line), calculated as an average of daily high tides over an approximately 19 year period; (3) the actual or "recognizable" high tide line, which is often marked by a seaweed, debris, shell, oil, or wrack line; and (4) the first line of vegetation that spreads continuously inland. *See* ECF No. 21-3 (Final Report of the Special Legislative Commission To Study And Provide Recommendations On The Issues Relating To Lateral Access Along The Rhode Island Shoreline ("Commission Final Report")).

The Act declares that "the actual water line is significantly landward of the MHW line." ECF No. 21-1 at 4:28–29. Indeed, the special legislative commission that

studied and recommended passage of the Act found that the "MHW line is usually 40–60 feet seaward" of the "seaweed line." *See* ECF No. 21-3 at 7 (Commission Final Report at 6); *see also*, Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine*, 26 Roger Williams U. L. Rev. 671, 679–80 (2021) ("As an average, the mean high water line is further into the water" than the high water line.).

2. Relevant legal background

Article I, Section 17, of the Rhode Island Constitution recognizes the existence of public rights in the "shore," stating:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values[.]

The state constitution does not define the location or extent of the "shore" area to which the public has the right of access declared in Article I, Section 17. However, for more than a century, Rhode Island courts have identified the MHW line (not the high water/seaweed line) as the landward extent of the public's "shore" area. *Jackvony v. Powel*, 21 A.2d 554, 557 (R.I. 1941) (holding that the state-controlled shore is "between the lines of mean high tide and mean low tide"); *Narragansett Real Estate Co. v. Mackenzie*, 82 A. 804, 806–07 (R.I. 1912) (A private landowner "has title in fee only to ordinary high-water mark, and that the fee of the land below ordinary high-water mark is in the state[.]").

In *State v. Ibbison*, 448 A.2d 728 (R.I. 1982), the Rhode Island Supreme Court emphatically confirmed that the MHW line has always demarcated the extreme landward boundary of the pubic beach under state common law. *Ibbison* considered the issue of at "what point does the shore extend on its landward boundary?" *id.* at 729, and noted that "[t]he setting of this boundary will fix the point at which the land held in trust by the state for the enjoyment of all its people ends and private property belonging to littoral owners begins." *Id.* In *Ibbison*, the state argued that the "mean high tide line" is the public/private beach boundary. *Id.* at 730. The defendants, a group of beachgoers charged with trespassing, argued that the public beach extended inland to the high water line, a point marked by the seaweed line. *Id.* The *Ibbison* court held that, under the common law in Rhode Island, "the mean-high-tide line [is] the landward boundary of the shore for the purposes of the privileges guaranteed to the people of this state by our constitution." *Id.* at 732.

The *Ibbison* court understood that the MHW line is "not readily identifiable by the casual observer," but must be ascertained by scientific methods. *Id.* at 732–33. The court found, however, that the MHW line boundary provides greater certainty than one set at the visible highest tide, and that the latter approach "would unfairly take from littoral owners land that is dry for most of the month." *Id.* at 732. The *Ibbison* court further noted that other coastal states had adopted the MHW line as the private/public beach boundary. *Id.* at 733.

In sum, *Ibbison* (1) recognized that the high tide/seaweed line is located landward of the MHW line, and the public would have more beach area if the high

water/seaweed line was the boundary, but it (2) rejected the high water line as the landward public beach boundary, and held instead that the boundary existing since the inception of the state under common law is at the MHW line. *Ibbison* has never been overruled.

B. The Act and Its Effect on Private Property

1. RIACT members' property

Given Rhode Island's background law, it is not surprising that coastal land deeds in Rhode Island state that private titles to beachfront property extend to the MHW line/"mean high tide" line or to the "high water line." *See, e.g.*, *Newport Hospital v. Ritchie*, 161 A. 371, 371–72 (R.I. 1932) (discussing a private title to land adjacent to Sachuest Beach bounded "by the line of mean high tide"); *Taber v. Hall*, 51 A. 432, 434 (R.I. 1902) (discussing a private title that extended the boundaries to the "high-water mark"). Both boundaries (the mean high tide and high water mark) extend private ownership farther toward the sea than a line set at 10 feet inland of the high tide line/seaweed line.

RIACT members' titles are no different. For instance, RIACT member Stilts, LLC (Stilts) owns a small home on beachfront property in the Charlestown area. ECF No. 21 at 4, ¶ 14, The deed to this property states that portions of its land extend to the "mean high tide line." *Id.* There is no recorded or adjudicated public easement on the title, *id.* at 10, ¶ 43, and Stilts has never ceded exclusive right to its property lying landward of the MHW line. *Id.* at 10, ¶ 44.

Similarly, RIACT member Joseph Simonelli owns a beachfront home and lot at 115 Atlantic Avenue in Westerly, Rhode Island. *Id.* at 10, ¶ 42; *id.* 21-4 at 2–3. Title to a portion of his property extends to "the Atlantic ocean." ECF No. 21 at 10, ¶ 42. Accordingly, by operation of state law, Simonelli's title extends to the MHW line. *See Ibbison*, 448 A.2d at 732. Simonelli's title thus includes land lying between the MHW line and ten feet inland of the seaweed line, ECF No. 21 at 10, ¶ 42, an area subject to the Act.

2. The Act

In 2021, a special legislative commission, the Shoreline Commission, was created to study "lateral" shoreline access in the state and make recommendations to the Rhode Island House of Representatives. ECF No. 21-3. The Commission heard copious expert testimony on the nature and status of the MHW line as a shoreline boundary (both on its own terms and in relation to potential alternative boundary lines). The Commission summarized this expert testimony and adopted some of it as findings in a "Final Report." *See* ECF No. 21-3. In 2022, two members of the Shoreline Commission introduced legislation to change and expand the publicly accessible shore area. *Id.*

On June 26, 2023, the Governor of Rhode Island signed a law passed in the 2023 legislative session titled, "An Act Relating to Waters and Navigation—Coastal Resources Management Council." This legislation was enacted as R.I. General Laws § 46-23-26 and codified within Section 46-23, which relates to the powers of the Coastal Resources Management Council (CRMC).

The Act's preamble declares, that "[t]he general assembly finds that the lack of a workable, readily identifiable right of access to the shore by the public has led to confusion, conflict and disputes between those attempting to exercise their rights and privileges to the shoreline and the rights of landowners whose property abuts the shore." ECF No. 21-1 at 2:2–5.

The Act recognizes that *Ibbison* set the public beach boundary at the MHW line but declares that

> use of the MHW for determining shoreline access has restricted the public's rights. Retaining the MHW line rule employed by the court in 1982 results in the public only having meaningful shoreline access at or near the time of low tide, if at all, at some locations. Thus, the constitutional right and privileges of the shore delineated in the 1986 Constitutional Convention amendments have become illusory under such a rule.
>
> . . . Insofar as the existing standard for determining the extent of the public's access to the shore is unclear and not easily discernable, due to the lack of a boundary that can be readily seen by the casual observer on the beach, resulting in confusion, uncertainty and even confrontation, the General Assembly is obligated to provide clarity. This enactment constitutes the necessary clarification in accordance with Article I Section 17 of the R.I. Constitution.

ECF No. 21-1 at 4:34–5:1–9.

The Act ultimately declares that "[n]otwithstanding any provision of the general laws to the contrary, the public's rights and privileges of the shore may be exercised, where shore exists, on wet sand or dry sand or rocky beach, up to ten feet (10') landward of the recognizable high tide line." ECF No. 21-1 at 5:29–31. The Act qualifies this grant of public access only by noting

> the public's rights and privileges of the shore shall not be afforded where no passable shore exists, nor on land above the vegetation line, or on lawns, rocky cliffs, sea walls, or other legally constructed shoreline

> infrastructure. Further, no entitlement is hereby created for the public to use amenities privately owned by other persons or entities, including, but not limited to: cabanas, decks, and beach chairs.

ECF No. 21-1 at 5:31–34–6:1–2.

The Act defines "recognizable high tide line" (which functions as the baseline marker for locating the reach of the publicly accessible beach under the Act) as:

> a line or mark left upon tidal flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface level at the maximum height reached by a rising tide. The recognizable high tide line may be determined by a line of seaweed, oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, or other suitable means that delineate the general height reached by the water's surface level at a rising tide. If there is more than one line of seaweed, oil, scum, fine shell, or debris, then the recognizable high tide line means the most seaward line.

Id. at 5:15–22.

The Act notes that if there is no physical beach residue available to identify the "recognizable high tide line," that line can be identified by the

> wet line on a sandy or rocky beach. The line encompasses the water's surface level at spring high tides and other high tides that occur with periodic frequency, but does not include the water's surface level at storm surges in which there is a departure from the normal or predicted reach of the water's surface level due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storms.

Id. at 5:23–28.

The Act tasks several state agencies with the duty to implement the Act declaring: "The coastal resources management council (CRMC) in collaboration with the department of environmental management (DEM), shall develop and disseminate information to educate the public and property owners about the rights set out in this

section," and that "[t]he CRMC in collaboration with the DEM, and the attorney general, shall determine appropriate language and signage details for use at shoreline locations." ECF No. 21-1 at 6:6–10.

The Act does not include any provision or means to compensate owners of private beachfront lands that are regulated, declared, or treated as a public area under color of the Act.

3. After enactment: The invasion of RIACT members' properties under color of the Act

Following passage of the Act, members of the public entered onto RIACT members' beachfront properties located near South Kingstown and Charlestown, under color of the Act. Members of the public entered and occupied Stilts' property and other RIACT members' properties in the area between June 30–July 4, 2023. ECF No. 21 at 10, ¶ 46; *id.* at 11, ¶ 47. RIACT members fear that they will be held in violation of the Act and subject to penalties under R.I. Gen. Laws Section 46-23 or other laws if they attempt to stop people from accessing their private land lying between the MHW line and ten feet inland of the seaweed line. *See* ECF No. 17-1 at 7, ¶ 33.

C. Procedural Posture

On July 7, 2023, RIACT filed a complaint seeking redress for a violation of their federal constitutional right to be free from an uncompensated taking of private property. ECF No. 1. RIACT filed a Second Amended Complaint (the operative complaint) on August 7, 2023. ECF No. 21. The complaint names the CRMC Executive Director, the Director of the Rhode Island Department of Environmental

Management, and Rhode Island Attorney General as Defendants, in their official capacities. The complaint does not seek damages, but asks for prospective equitable relief from the enforcement of the Act. ECF No. 21 at 14. On July 31, 2023, Defendants filed a motion to dismiss the complaint for lack of jurisdiction under Federal Rule of Civil Procedure Rule 12(b)(1). ECF No. 20. On August 15, 2023, Defendants filed a supplemental memorandum to their motion to dismiss. ECF No. 22.

STANDARD OF REVIEW

Generally speaking, a motion to dismiss for lack of subject matter jurisdiction is afforded review similar to that given to a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). Thus, in weighing a jurisdictional challenge, a "district court must construe the complaint liberally, treating all well-pleaded facts as true and drawing all reasonable inferences in favor of the plaintiffs. *See Royal v. Leading Edge Prods., Inc.*, 833 F.2d 1, 1 (1st Cir. 1987). However, if the jurisdictional challenge is factual in nature, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

SUMMARY OF ARGUMENT

The Officials' primary contention is that RIACT lacks standing to file this suit. The Officials are mistaken. The Act concretely injures RIACT members by

authorizing public use of land they own between the MHW line and ten feet inland of the high water/seaweed line. The Act strips RIACT members of their right to lawfully exclude strangers from the land and harms the value, privacy and enjoyment of their property. ECF No. 21 at 2, ¶ 7.

The Officials acknowledge none of this, focusing instead on the causation (or traceability) and redressability prongs of the standing test, arguing that they are not to blame for the Act's destruction of RIACT members' property rights. But in the *Ex parte Young* context, the causal connection needed for standing simply requires defendants to have "some connection" to enforcement of the law causing the injury. *Ex parte Young*, 209 U.S. at 157; *Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, J., concurring in the judgment and dissenting in part). As one federal court recently put it, "[i]n *Ex parte Young* cases, "for purposes of standing analysis, the redressability prong is met as long as the official[s] in question . . . 'currently assist in giving effect to the law.'" *Pomeroy v. Utah State Bar*, 598 F. Supp. 3d 1250, 1258 (D. Utah 2022) (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1204 (10th Cir. 2014)).[1]

RIACT meets the test. Under R.I. Gen. Laws Sections 46-23-7–7.5, the CRMC Director and Attorney General have power to identify and penalize violations of the Act (which is part of Section 46-23) through administrative penalties and initiation

[1] As federal courts have noted, in an *Ex parte Young* case, the "redressability" issue and the issue of whether the plaintiff has sued the proper state officials, i.e., those with sufficient enforcement authority, often overlap. *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004); *Pomeroy*, 598 F. Supp. 3d at 1257–58 (reviewing subject). Whether one conceptualizes the issue in terms of injury "causation"/"traceability" (as the Officials do) or as a question of the proper defendants, RIACT members need only show that the Officials have power to enforce the Act. *Kitchen*, 755 F.3d at 1201–02.

of state court prosecutions. Under the Act itself, the Officials have authority to enforce the Act by creating and disseminating information to the public about the rights it declares. They have already demonstrated a willingness to use both powers. *See, e.g.*, Ex. 2 & 3 (recent news stories about CRMC staff's efforts to implement the Act). These realities show that the Officials cannot credibly claim that they are too tenuously connected to the Act to be sued.

The Officials' redressability arguments also fail. A declaration that the Act effects an unconstitutional taking of property and an injunction prohibiting its enforcement by the Officials will provide RIACT members with relief by ensuring the Act cannot be applied adversely to them as they exercise their property rights in and over the land they own between the MHW line and ten feet inland of the seaweed line. *See Seneca Nation v. Hochul*, 58 F.4th 664, 672 n.39 (2d Cir. 2023) (noting, in an unlawful easement/*Ex parte Young* case, "[a] declaration that the status quo constitutes an ongoing violation of federal law" both "redresses the . . . asserted injury for purposes of Article III standing and properly constitutes prospective relief under the *Ex parte Young* analysis"); *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1205 (N.D. Fla. 2020) (concluding in a takings case, that "Plaintiffs' [economic] injury would be redressed by a judgment declaring Amendment 13 unconstitutional and enjoining its enforcement"). This is sufficient to find that RIACT members, and RIACT itself, satisfies standing-related jurisdictional predicates for a suit under *Ex parte Young*.

The Officials also claim that sovereign immunity principles shield them from RIACT's takings claim. This too is meritless. Again, under *Ex parte Young*, sovereign immunity does not bar suits that seek prospective relief from an ongoing violation of federal constitutional law occurring under color of state law. 209 U.S. at 157; *Ortiz De Arroyo v. Barceló*, 765 F.2d 275, 280 (1st Cir. 1985) (holding, in a case involving governmental deprivation of property in violation of the Fifth and Fourteenth Amendments, that "[t]he court may not award the value of the diminished property right; it may issue only declaratory or injunctive relief"). Such a suit must target state officials who have "some connection" to enforcement of the challenged law. *Ex Parte Young*, 209 U.S. at 157.

RIACT's suit satisfies the *Ex parte Young* requirements. Its complaint seeks prospective injunctive relief to halt the ongoing violation of their constitutional rights occurring under the Act. ECF No. 21 at 14. The Officials are proper defendants because (1) they have the right and power to enforce the Act by cease-and-desist orders, administrative fines, and criminal prosecutions under R.I. Gen. Laws Section 46-23. *See* R.I. Gen. Laws §§ 46-23-7–7.5, and (2) the Officials have the power to put the Act into effect by creating signs and information that will encourage the public to use private land owned by RIACT members between the MHW line and ten feet inland of the seaweed line. ECF No. 21-1 at 6. This is enough enforcement power to confirm the Officials as proper defendants. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007).

The Officials' final contention is that this is a "quiet title" action beyond the scope of *Ex Parte Young*. Not so. The Act does not claim title to private land; it claims certain public rights (effectively, an easement) in privately owned beach land between the MHW line and ten feet inland of the seaweed line. ECF No. 21-1 at 5. RIACT's challenge is not an attempt to recover title but to halt the Act's imposition of an unconstitutional encumbrance on their titles. *Ex Parte Young* applies to such a case. *See Seneca Nation*, 58 F.4th at 673 (rejecting a *Coeur d'Alene* defense in an easement dispute).

ARGUMENT

I. RIACT Has Associational Standing

Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies." To satisfy this constitutional requirement, a plaintiff must have "standing" to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In general, standing requires a plaintiff to show (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.*

An association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in

the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). RIACT meets this test.

A. RIACT Members Would Have Standing to Sue on Their Own Behalf

1. RIACT members are suffering harm from the Act, which the Officials enforce

The first factor in the associational standing inquiry is whether RIACT's "members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. This inquiry requires consideration of the basic, injury-related standing requirements, *Lujan*, 504 U.S. at 560, in light of the *Ex parte Young* context of this case. RIACT members satisfies this inquiry.

The complaint demonstrates that RIACT members have suffered actual, ongoing, and concrete injuries traceable to the Act, which (as shown more fully below) the Officials have the authority to implement and enforce. *See* R.I. Gen. Laws §§ 46-23-7–7.5. The complaint specifically alleges that RIACT member Stilts holds title to property lying between the MHW line and ten feet inland of the high tide/seaweed line. ECF No. 21 at 9–10, ¶¶ 40–41. RIACT member Joe Simonelli is in a similar position; his title extends to the "Atlantic ocean," and thus, also includes property located between the MHW line and ten feet inland of the high tide/seaweed line. *Id.* at 10, ¶ 42. The complaint asserts that the Act authorizes the public to enter and use the land Stilts and Simonelli own inland of the MHW line. *Id.* ¶ 45. It further alleges that, under authority of the Act, members of the public have invaded Stilts' and other RIACT members' land. *Id.* ¶ 46. The Act has thus injured Stilts, Simonelli, and other members' right to exclusive and peaceable possession of their land and damages its

value, marketability, and privacy, *id.* at 2, ¶ 7, each of which is a sufficient injury for standing. *American Trucking Ass'ns, Inc. v. Alviti*, 630 F. Supp. 3d 357, 374 (D.R.I. 2022) (a "pecuniary loss" caused by a state bridge toll program was injury-in-fact).

The next question is whether there is a sufficient connection between the Officials and the injuries to Stilts and Simonelli and other RIACT members. There is. DEM Director Gray has authority (along with the CRMC) to implement the provisions of R.I. Gen. Laws Section 46-23; *see* § 46-23-6(2)(i), and the Act is now a provision within that Section, being enshrined as R.I. Gen. Laws § 46-23-26. Moreover, CRMC Executive Director Willis and the Attorney General have authority to identify and penalize violations of Section 46-23, which, again, includes the Act. *See* R.I. Gen. Laws §§ 46-23-7–7.5 (authorizing issuance of cease-and-desist orders, administrative fines, and criminal prosecution for violations). The latter two officials also have power to penalize private actions that block a public "right-of-way" to tidal waters, R.I. Gen. Laws § 46-23-7.4, and RIACT has plausibly alleged that the Act creates such a public right-of-way on members' land. ECF No. 21 at 8–9, ¶ 35; *id.* at 10, ¶ 45. The Officials accordingly have the right and authority to penalize RIACT members if they impede public access on their land lying between the MHW line and ten feet inland of the seaweed line, in contravention of the Act. *See* R.I. Gen. Laws § 46-23-7.4. Notably CRMC staff (supervised by Executive Director Willis) have already begun to enforce the Act. *See* Ex. 2 (news stories and related CRMC letter showing that it recently sent a letter to a coastal business (Ballards) telling them

they had to remove beach fencing "to comply with recently enacted legislation, Chapter 46-23-26").

Further, under the Act, the Officials must disseminate public information and create beach signage about the public rights the Act creates (i.e., that the public has access rights up to ten feet inland of the seaweed line). ECF No. 21-1 at 6. Again, the CRMC staff is apparently already hard at work at this task. Ex. 3. On August 17, 2023, a CRMC spokesperson publicly declared that the Act is "not merely a law allowing for passage. People can set down a towel and chair and stay."[2] Ex. 3 at 4. Disseminating this information, particularly by beach signage, will encourage members of the public to invade RIACT members' land between the MHW line and ten feet inland of the seaweed line. At the same time, RIACT members now risk civil or criminal sanctions at the hands of the Officials under Section 46-23 if they try to exclude the public from that same land. RIACT members want to preserve the privacy of their property, but must now refrain from doing so due to the real risk that such action will violate the Act and incur enforcement by the Officials under R.I. Gen. Laws § 46-23-7.

2. The harm to RIACT members arising from the Act is redressable by equitable relief

Turning to redressability, a declaration that the Act is an unconstitutional taking and an injunction against its enforcement by the Officials will provide relief

[2] The CRMC also held a webinar event soon after enactment of the Act, in which the participants acknowledged that property owners aren't putting out signs because they are afraid of contravening CRMC's interpretations, and that the Act prevents erection of a fence/obstruction on land subject to the law. *See* http://www.crmc.ri.gov/news/2023_0616_webinar.html (last visited Aug. 21, 2023).

to Stilts, Simonelli, and other RIACT members by preventing the Officials from applying the Act adversely to their property rights. *Support Working Animals, Inc.*, 457 F. Supp. 3d at 1205. The requested relief will ensure that RIACT members can exercise the right to exclude others from their land without violating the Act and incurring penalties under R.I. Gen. Laws Section 46-23 at the hands of the Officials. *Larson v. Valente*, 456 U.S. 228, 242 (1982) (holding that a declaration that a rule is unconstitutional provides relief because it prevents the government from applying the rule to secure compliance from plaintiffs). The chance that a random person or activist might still trespass on RIACT members' land is irrelevant. A plaintiff need not prove that the requested relief will end every possible threat, only that it will remove "one obstacle to the exercise of one's rights." *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 190 (4th Cir. 2018); *see also*, *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997). A declaration that the Act violates the Constitution, and an injunction against enforcement by the Officials, would prevent them from applying the Act to RIACT members who seek to exercise their right to exclude non-owners from their land and make it difficult, if not impossible, for trespassers to rely on the Act to justify an invasion of private land. That is enough. *Larson*, 456 U.S. at 242; *Support Working Animals, Inc.*, 457 F. Supp. 3d at 1205.

Given the foregoing, RIACT members Stilts and Simonelli satisfy the traditional injury-based standing inquiry. Consequently, they would have standing to bring this suit in their own right and RIACT satisfies the first associational

standing factor. *Housatonic River Initiative v. U.S. EPA*, No. 22-1398, 2023 WL 4730222, at *9 (1st Cir. July 25, 2023) (association members' assertion that the defendants' land use proposal "will negatively impact their use and enjoyment of the area and their property values" satisfied the first prong of associational standing); *Severance*, 566 F.3d at 496 (property owner satisfied standing requirements in alleging that state officials authorized a public beach easement on her previously unencumbered land).[3]

B. Individual Members Are Not Necessary to Adjudicate RIACT's Takings Claims

The third and final prong of the associational standing test requires consideration of whether "the claim asserted []or the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. This factor is a flexible, "prudential" concern, which involves judicial "administrative convenience and efficiency." *United Food & Com. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996). The claim and remedies in this case demonstrate that the participation of RIACT members is unnecessary, and thus, that RIACT meets the final standing factor.

Indeed, in cases seeking injunctive relief rather than damages, individualized proof is generally unnecessary and the relief usually inures to the benefit of all

[3] The second associational standing issue is whether "the interests [RIACT] seeks to protect [through the lawsuit] are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. The Officials do not challenge this element, likely because it is plain that the interests RIACT seeks to protect by challenging the Act as a taking are germane to its purpose. RIACT was formed with the goal of "promoting, advocating for, and defending coastal property rights and beach access rules that balance beach access needs with property rights." ECF No. 21 at 3, ¶ 11. This suit plainly advances RIACT's interest in defending "coastal property rights" in seeking to halt the unconstitutional imposition of a public easement on coastal property.

members injured. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975); *United Food & Com. Workers Union*, 517 U.S. at 546 ("'[I]ndividual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members, but . . . such participation would be required in an action for damages to an association's members . . . ."). Thus, "[u]nder First Circuit precedent, in a case seeking only injunctive relief, like this case, where there is no need to allocate damages to each individual member, the basis for the requirement of individualized proof is missing." *New Hampshire Motor Transport Ass'n v. Rowe*, 324 F. Supp. 2d 231, 236 (D. Me. 2004) (citing *Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 35 (1st Cir. 1990)).

Here, RAICT does not seek damages, but asks only for prospective equitable relief. ECF No. 21 at 14. This strongly supports the conclusion that individual member participation is not needed to adjudicate RIACT's takings claim. *Rowe*, 324 F. Supp. 2d at 236; *Pharmaceutical Research & Mfrs. of Am. v. Williams*, 64 F.4th 932, 948 (8th Cir. 2023) ("[T]his case involves an allegation of a physical, *per se* taking with a request for equitable relief, neither of which 'require[] the participation of individual members in the lawsuit.'" (citations omitted)); *Short Term Rental Owners Ass'n of Georgia, Inc. v. Cooper*, 515 F. Supp. 3d 1331, 1343 (N.D. Ga. 2021) (holding in a takings case that "STROAGA's individual members do not need to be parties to the suit" because they "seek declaratory and injunctive relief that the Ordinance is unconstitutional" and "explicitly disclaim damages").[4] The fact that RIACT's takings

[4] *See also South Lyme Property Owners Ass'n, Inc. v. Town of Old Lyme*, 539 F. Supp. 2d 524, 535 (D. Conn. 2008) (finding associational standing for takings claim).

claim is a facial, per se takings challenge to the Act, rather than a fact-dependent, "as-applied" challenge, further confirms that individual property owners are unnecessary. *Pharmaceutical Research*, 64 F.4th at 947–48 (holding that participation of an association's members was not necessary because the "case involves an allegation of a *physical* taking of insulin, not a *regulatory* taking"). Finally, it serves judicial economy, a prudential concern, to litigate the important constitutional issue in this case as pled, rather than to require a multitude of individual property owners to file "as-applied" takings claims over an indeterminate period, as natural forces shift the high water line and, thus, the location of the public shore area created by the Act.

II. RIACT's Takings Claim Is Not Barred by Sovereign Immunity Because It Is Properly Raised Under *Ex parte Young*

The Officials argue that Eleventh Amendment sovereign immunity principles shield them from this suit. They are incorrect. It is true that sovereign immunity generally bars suits against states in federal court. *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991), However, as we have seen, *Ex parte Young* carved out an important exception, establishing that the Eleventh Amendment "does not prohibit a party from bringing suit against a state officer in federal court for prospective declaratory or injunctive relief under federal law." *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 24 (1st Cir. 2007). The Officials assert, however, that *Ex parte Young* does not apply to this suit. They serve up a potpourri of arguments that boil down to two claims: (1) the Officials are not proper defendants for purposes

of the *Ex parte Young* doctrine, and (2) this case is akin to a "quiet title" action that is exempt from the *Ex parte Young* doctrine. Both contentions fail.

A. The Officials Are Proper Ex Parte Defendants Because They Have "Some Connection" to Enforcement of the Act

1. The requirements for *Ex parte Young* defendants

The Officials assert that this suit is not exempt from sovereign immunity under *Ex parte Young* because it believes the defendant officials do not have sufficient enforcement authority to render them subject to suit. Rhode Island law shows the contrary.

To justify an *Ex parte Young* suit, the defendant state officer must only have "*some connection* with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex parte Young*, 209 U.S. at 157 (emphasis added). Further, it is not necessary that the required connection be found directly in the challenged act.

> The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

Id. A "connection with the enforcement of the act" means the official has "the right and the power to enforce" the challenged act in some way. *Id.* at 157, 161. "[I]t is a question of federal jurisdictional law whether the connection is sufficiently intimate to meet the requirements of *Ex parte Young*." *Shell Oil v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979). Moreover, at the motion to dismiss stage, a plaintiff must only identify a "potentially" proper defendant. *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005).

2. The CRMC Director has a direct connection to enforcement of the Act as part of his duty to police R.I. Gen. Laws Section 46-23, of which the Act is now a part

As previously discussed, the Officials have the requisite connection to enforcement of the Act under R.I. Gen. Laws Section 46-23, and under the Act itself. R.I. Gen. Laws Section 46-23-7 authorizes CRMC officials like Executive Director Willis, as well as the Attorney General, to identify and penalize violations of the provisions in R.I. Gen. Laws Section 46-23, such as the Act, through cease-and-desist orders, administrative fines, and criminal prosecutions. R.I. Gen. Laws §§ 46-23-7–7.5. Thus, the CRMC Executive Director has the "right and the power," *Ex parte Young*, 209 U.S. at 161, to enforce the Act through a multitude of administrative tools.[5] This is enough of an enforcement connection to make the CRMC Director a proper defendant. *See CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 99 (2d Cir. 2002) (holding that the "executive director" of the State Office of Real Property Services is a proper defendant because he can "impose penalties" to enforce the challenged law and order compliance from those subject it); *Cressman v. Thompson*, 719 F.3d at 1145 (officials charged with enforcing the chapter of law that contained the challenged provision were proper defendants); *see also Jones v. Jegley*, 947 F.3d 1100, 1103 n.2 (8th Cir. 2020).

For its part, the Attorney General has the power to institute state court actions to prosecute violations of Section 46-23, which again, includes the Act. R.I. Gen. Laws

[5] Notably the CRMC has already begun to enforce the Act against those it believes are impeding public use of the area the Act sets aside for the public. *See* Ex. 2 ("R.I.s new shore access law washes up at Ballard's").

§ 46-23-7.2. Indeed, he has the "duty" to prosecute criminal (i.e., knowing) violations of R.I. Gen. Laws § 46-23, of which the Act is a part, as well as power to enforce prohibitions against blocking public rights-of-way to the water.[6] *See* R.I. Gen. Laws §§ 46-23-7.3, 46-23-7.5. The Attorney General thus has the power to halt and criminally penalize RIACT members who seek to prevent public use of their land lying between the MHW line and ten feet inland of the seaweed line, in contravention of the Act. Notably, the Rhode Island Attorney General has publicly proclaimed that he has the power to enforce public beach access rights and that he will do so, stating: "Public access to Rhode Island's coastal and waterfront resources is a priority mission of the Attorney General, who is empowered to protect the public's rights and interests in accessing our state's coastal resources." Ex. 4 at 2 (R.I. AG News Release, June 7, 2023). This is a sufficient enforcement connection to the Act to render the Attorney General a proper defendant. *281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (holding that an Attorney General with the authority to enforce the challenged law by initiating prosecutions falls within the *Ex parte Young* exception); *Support Working Animals, Inc.*, 457 F. Supp. 3d at 1212–13 (same).

3. All the Officials are connected to enforcement by their duty to create and disseminate information to the public about the rights set out in the Act

Finally, all three defendant officials have authority to give effect to, and thus "enforce," the Act by disseminating information and creating beach signage that

[6] The Officials claim that the relevant state law provisions only prohibit blocking "vertical," as opposed to "lateral," rights-of-way to the water. But the statutes' text make no such distinction. Moreover, the shore access rights granted by the Act can be used vertically, for public access "down" to the water, as well as lateral access "along" the shore.

inform the public that it has a right to use land between the MHW line and ten feet inland of the seaweed line. ECF No. 21-1 at 6. Provision of this type of official information is a very practical form of enforcement, as it will directly advise and assure the beachgoing public that they can lawfully enter RIACT members' land between the MHW line and ten feet inland of the high water/seaweed line, and encourage them to do so. It will also undermine property owners' ability to seek to prevent people from entering their beach land. In short, the Officials' power to create and disseminate information gives the Act practical effect, and "[t]o give effect" is the definition of "enforce." *Prairie Band*, 476 F.3d at 828 n.15 (citing Webster's Third New International Dictionary 751 (1986)). The Officials are accordingly all proper defendants. *Id.* at 828; *see also South Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir 2008) (finding the Executive Director of the South Carolina Department of Transportation to be a proper defendant due to involvement in implementation of the challenged policy).

B. The Officials' Attempt to Avoid *Ex parte Young* by Recasting this Case as a Quiet Title Dispute Fails

The Officials' final contention is that *Ex parte Young* is unavailable to avoid sovereign immunity because the Association's claim is the functional equivalent of a quiet title action against the state of Rhode Island. ECF No. 20-1 at 18. The Officials rely on the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), which involved a tribe's attempt to sue the state of Idaho under *Ex parte Young* for control over "unique" submerged lands which the state had long claimed as its own. 521 U.S. at 283.

This contention also fails because this case is nothing like *Coeur d'Alene*. The Act at issue does not claim that the state holds title to the lands in dispute (between the MHW line and ten feet inland of the seaweed line), nor does it seek to wrest title from the private owners who do own the land. It declares that, on land between the MHW line and ten feet inland of the seaweed line, the public "may enjoy the rights" set out in Article I, Section 17 of the R.I. Constitution, which include "fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore." ECF No. 21-1 at 3:27–28. Since the Act leaves title to the subject land in private hands, its effect in granting public rights on such land is to authorize a public easement or right-of-way. No court has held that a dispute over the constitutionality of such an encumbrance is akin to a quiet title dispute; instead, they routinely treat it as a textbook physical takings action. *Severance*, 566 F.3d at 495 And *Ex parte Young* applies to these takings cases, including this one. *See Seneca Nation*, 58 F.4th at 673 (rejecting a *Coeur d'Alene* defense in an easement dispute); *Arnett v. Myers*, 281 F.3d 552, 568 (6th Cir. 2002) (rejecting a *Coeur d'Alene* defense in finding that *Ex parte Young* applies where property owners sought "prospective equitable relief to enjoin Tennessee officials from committing continuing violations of federal law, namely violation of their rights under the Fifth and Fourteenth Amendments").

CONCLUSION

The Court should deny the Officials' motion to dismiss for lack of jurisdiction, and set a schedule for briefing and a hearing on RIACT's motion for a preliminary injunction.

DATED: August 22, 2023.

Respectfully submitted,

/s/ J. David Breemer
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Counsel for Plaintiff

Exhibit 1

R.I. Gen. Laws § 46-23-7. Violations.

(a)(1) In any instances wherein there is a violation of the coastal resources management program, or a violation of regulations or decisions of the council, the commissioner of coastal resources management shall have the power to order any person to cease and desist or to remedy any violation of any provisions of this chapter, or any rule, regulation, assent, order, or decision of the council whenever the commissioner of coastal resources management shall have reasonable grounds to believe that such violation has occurred.

(2) Council staff, conservation officers within the department of environmental management, and state and municipal police shall be empowered to issue written cease and desist orders in any instance where activity is being conducted which constitutes a violation of any provisions of this chapter, or any rule, regulation, assent, order, or decision of the council.

(3) Conservation officers within the department of environmental management, council staff, and state and municipal police shall have authority to apply to a court of competent jurisdiction for a warrant to enter on private land to investigate possible violations of this chapter; provided, that they have reasonable grounds to believe that a violation has been committed, is being committed, or is about to be committed.

(b) Any order or notice issued pursuant to subsection (a) shall be eligible for recordation under chapter 13 of title 34, and 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.

(c) The coastal resources management council shall discharge of record any notice filed pursuant to subsection (b) within thirty (30) days after the violation has been remedied.

R.I. Gen. Laws § 46-23-7.1. Administrative penalties.

Any person who violates, or refuses or fails to obey, any notice or order issued pursuant to § 46-23-7(a); or any assent, order, or decision of the council, may be assessed an administrative penalty by the chairperson or executive director in accordance with the following:

(1) The chairperson or executive director is authorized to assess an administrative penalty of not more than ten thousand dollars ($10,000) for each violation of this section, and is authorized to assess additional penalties of not more than one thousand ($1,000) for each day during which this violation continues after receipt of a cease-and-desist order from the council pursuant to § 46-23-7(a), but in no event shall the penalties in aggregate exceed fifty thousand dollars ($50,000). Prior to the assessment of a penalty under this subdivision, the property owner or person committing the violation shall be notified by certified mail or personal service that a penalty is being assessed. The notice shall include a reference to the section of the law, rule, regulation, assent, order, or permit condition violated; a concise statement of the facts alleged to constitute the violation; a statement of the amount of the administrative penalty assessed; and a statement of the party's right to an administrative hearing.

(2) The party shall have twenty-one (21) days from receipt of the notice within which to deliver to the council a written request for a hearing. This request shall specify in detail the statements contested by the party. The executive director shall designate a person to act as hearing officer. If no hearing is requested, then after the expiration of the twenty-one (21) day period, the council shall issue a final order assessing the penalty specified in the notice. The penalty is due when the final order is issued. If the party shall request a hearing, any additional daily penalty shall not commence to accrue until the council issues a final order.

(3) If a violation is found to have occurred, the council may issue a final order assessing not more than the amount of the penalty specified in the notice. The penalty is due when the final order is issued.

(4) The party may within thirty (30) days appeal the final order, of fine assessed by the council to the superior court which shall hear the assessment of the fine de novo.

R.I. Gen. Laws § 46-23-7.2. Proceedings for enforcement.

The superior court shall have jurisdiction to enforce the provisions of this chapter, the coastal resource management program, or any rule, regulation, assent, or order issued pursuant thereto. Proceedings under this section may follow the course of equity, and shall be instituted and prosecuted in the name of and at the direction of the chairperson and council by the attorney general or counsel designated by the council. Proceedings provided in this section shall be in addition to, and may be utilized in lieu of, other administrative or judicial proceedings authorized by this chapter.

R.I. Gen. Laws § 46-23-7.3. Criminal penalties.

Any person who knowingly violates any provision of this chapter, the coastal resources management program, or any rule, regulation, assent, or order shall be guilty of a misdemeanor, and, upon conviction thereof shall be fined not more than one thousand dollars ($1,000) or by imprisonment of not more than three (3) months or both; and each day the violation is continued or repeated shall be deemed a separate offense.

R.I. Gen. Laws § 46-23-7.4. Penalty for blocking or posting of rights-of-way.

Any person who shall post or block any tidal water, public right-of-way, as designated by the council, shall be punished by a fine not exceeding one thousand dollars ($1,000) or by imprisonment for not more than three (3) months or both; and each day the posting or blocking continues or is repeated shall be deemed a separate offense. The chairperson of the council, through council's legal counsel or the attorney general, may apply to any court of competent jurisdiction for an injunction to prevent the unlawful posting or blocking of any tidal water, public right-of-way.

R.I. Gen. Laws § 46-23-7.5. Prosecution of criminal violations.

The chairperson and anyone designated by the chairperson, without being required to enter into any recognizance or to give surety for cost, may institute proceedings in the name of the state. It shall be the duty of the attorney general and/or the solicitor of the city or town in which the alleged violation has occurred to conduct the prosecution of all the proceedings. The chairperson may delegate his or her authority to bring prosecution by complaint and warrant to any law enforcement officials authorized by law to bring complaints for the issuance of search or arrest warrants pursuant to chapters 5 and 6 of title 12.

Exhibit 2

State of Rhode Island
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

(401) 783-3370
Fax (401) 783-3767

July 14, 2023

VIA EMAIL AND USPS MAIL

Dean J. Wagner, Esq.
Savage Law Partners, LLP
564 South Water Street
Providence, RI 02903

RE: Ballard's Inn Realty, LLC
CRMC Enforcement File 23-0101

Dear Mr. Wagner,

I am writing in response to your correspondence to me dated June 28, 2023. CRMC assent A2017-10-092, was issued to Ballard's Inn Realty, LLC to "Redistribute sand on the beach, install snow fence, in order to limit sand transport into harbor". CRMC assent A2017-10-092, Beach Replenishment, Snowfence, and Signs on Beaches, Stipulation I, states that "Snowfence may be installed on the beach in the off season (fall, winter, spring) in order to diminish the volume of sand transported into Old Harbor. Snowfence configuration shall be perpendicular to the prominent direction of wind flow. If the beach erodes and the fence blocks lateral access, the fence must be relocated landward.". The snowfencing installed at Ballard's to the south does not appear to be installed to limit sand transport into the harbor, is unauthorized, and must be removed to comply with recently enacted legislation, Chapter 46-23-26 of the R.I.G.L. (as amended). The snowfencing installed to the north along the jetty does not appear to have been constructed on property owned by Ballard's and is unauthorized.

Regarding the acoustic shell constructed on the stage, the acoustic shell was permitted as a temporary structure and was required to be removed during the offseason by CRMC assent F2006-05-122. It was not removed during this past offseason and therefore is in nonconformance with the assent. If your client wants to maintain the acoustic shell as a permanent structure, it will require the submittal of a new application. Submittal of an application does not confer approval.

Regarding the tiki bars, as Laura Miguel, CRMC Deputy Director explained in her correspondence to you on May 8, 2023, the CRMC does not agree with your conclusion that the tiki bars placed on the beach do not require CRMC approval. Consistent with past practice at Ballard's (see CRMC assents A2004-08-024, A2005-08-024 and M2006-05-122) and as required elsewhere throughout the State, temporary structures located on, or within 200 feet of, a coastal feature require prior CRMC authorization. In addition, on May 8, 2023, Anthony DeSisto, CRMC

Legal Counsel, sent you correspondence via email that said, "The issue is whether the tiki bars and stage are prior non-conforming uses and therefore permitted. One thing that jumps out is the question of intermittent use; the photographic evidence is does not show the required continuous use to establish a prior non-conforming use. your assertion that the structures are "grandfathered" and therefore, do not require CRMC approval. Accordingly, the tiki bars may not be re-installed unless a CRMC assent is obtained. Any utility connections to the tiki bars are also subject to CRMC approval.". You must submit a complete application to maintain the tiki bars as seasonal temporary structures. Submittal of an application does not confer approval.

Regarding the unauthorized pergola, CRMC assent M2010-12-043 was issued to Ballard's Inn Realty, LLC to "Replace existing canopy entrance to a Victorian front porch entrance, replace windows, doors & dormers.". The pergola was not permitted by CRMC assent M2010-12-043 and is therefore unauthorized and requires authorization. You must submit a complete application for the pergola. Submittal of an application does not confer approval.

Sincerely,

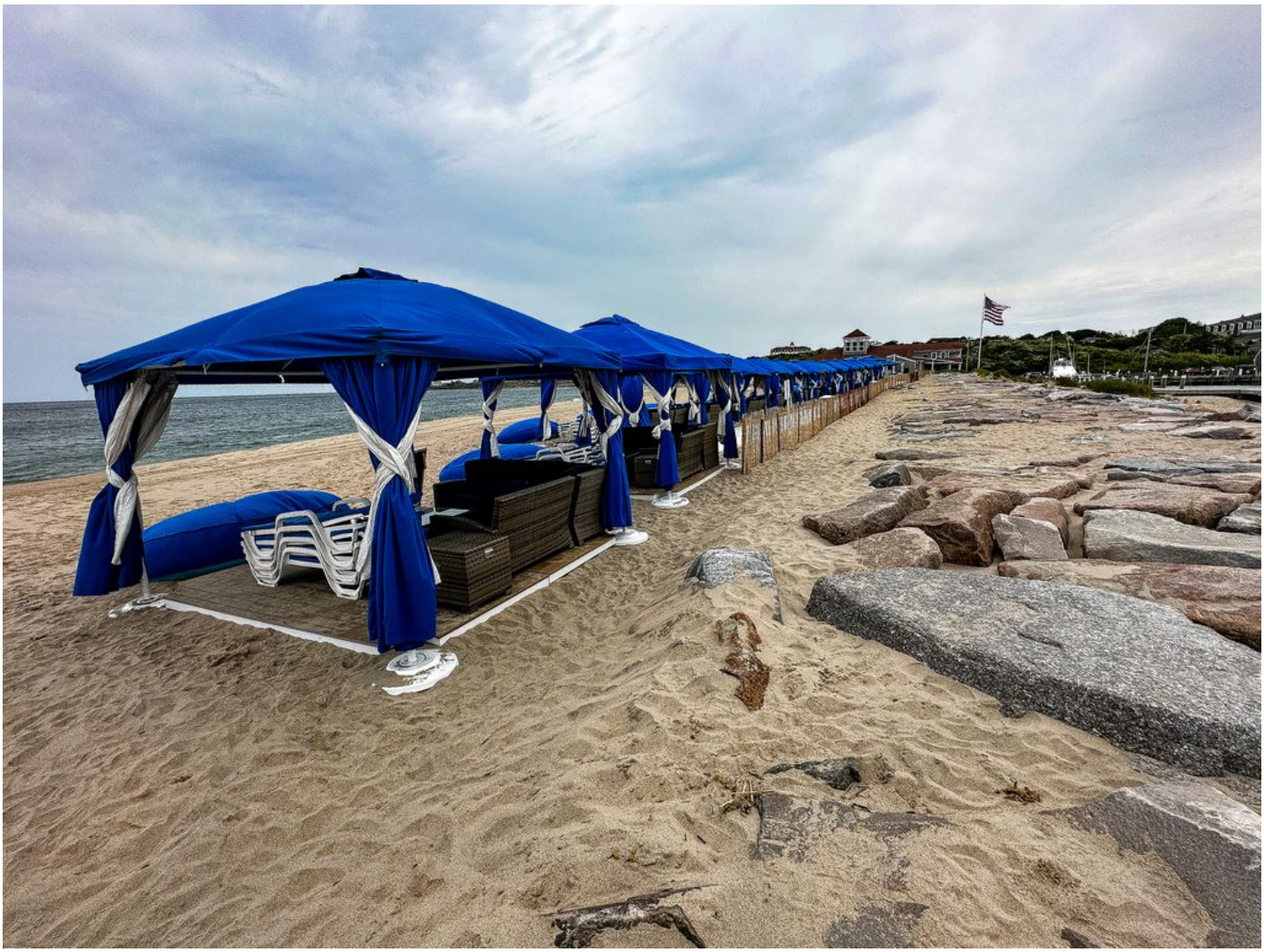
Brian Harrington, Environmental Scientist II
Coastal Resources Management Council

cc: Anthony DeSisto, Esq. (via email to tony@adlawllc.com)
Maryanne Crawford, Town Manager, New Shoreham (via email to mcrawford@newshorehamri.gov)

RHODE MAP

R.I.'s new shore access law washes up at Ballard's

By Brian Amaral Globe Staff, Updated July 19, 2023, 8:46 a.m.



Dozens of cabanas lined the beach at Ballard's Beach Resort on Block Island on a chilly day in mid-June. ALEXA GAGOSZ/GLOBE STAFF

It's been on the books for only about a month, but already, Rhode Island's new law on shore access rights is having an effect on the state's beaches.

That includes Ballard's Beach Resort on Block Island. The famed bar just steps from the ferry is locked in a dispute with the state's coastal regulatory agency about what it can and can't have on the beach there.

And in its most recent letter, sent on July 14, the Coastal Resources Management Council told a lawyer for Ballard's that the bar had to remove snow fencing running perpendicularly to the water in part because of the new access law.

Ballard's owner Steve Filippi told me on Tuesday that the fencing had already been rolled back 10 feet to comply with the new law.

"Ballard's is enjoying a fun and busy 2023 summer season," Filippi said in a text. "To be clear, Ballard's is in full compliance" with the new shore access law, he added.

In other words: Because of the new law, a snow fence at Ballard's that ran to the water is now 10 feet shorter. It's a high-profile and concrete example of the way the law – which provides people access if they're no more than 10 feet landward of the recognizable high tide line – is playing out in Rhode Island.

But a shorter fence won't resolve all of Ballard's issues with CRMC and the town of New Shoreham.

CRMC spokeswoman Laura Dwyer said in an e-mail Tuesday that even if the fence in question is no longer blocking lateral access, it's still not permitted, according to CRMC's previous findings, so Ballard's has to remove it or apply for it. To simplify things a bit, CRMC issues approvals for building things along the shore and enforces the rules when people ignore them.

The July 14 CRMC letter, written by CRMC environmental scientist Brian Harrington, also took issue with the snow fencing to the north of the property along the jetty, which CRMC said appeared to have been installed on property that Ballard's doesn't own and

wasn't authorized. And the tiki bars on the beach also lacked CRMC approval, Harrington wrote. CRMC issued a cease-and-desist order to Ballard's on June 22.

Ballard's lawyer, Dean J. Wagner, previously told CRMC that the tiki bars didn't need CRMC approval and has challenged the agency's facts and legal conclusions on other matters. No doubt more volleys of letters will follow.

Ballard's has been in the spotlight recently after a tumultuous 2022 season. Filippi says things at Ballard's will be new and improved this year, but some on the island look at the continued issues over things like tiki bars on the beach as evidence to the contrary.

"I'm pleased that CRMC is actively engaged on this," Keith Stover, first warden of the New Shoreham Town Council, said in an e-mail. "The real question is what's next – the Notice of Violation was issued last year; the Cease and Desist last month; and this latest letter this past week. At some point, enforcement has to happen, or faith in the process will be shaken."

Elsewhere in the state, CRMC has gotten a number of e-mails and phone calls about other access issues, Dwyer said, although a flurry of cease-and-desist orders hasn't yet ensued.

Some private property owners are suing to block the law, but it remains in effect.

This story first appeared in Rhode Map, our free newsletter about Rhode Island that also contains information about local events, links to interesting stories, and more. If you'd like to receive it via e-mail Monday through Friday, you can sign up here.

Brian Amaral can be reached at brian.amaral@globe.com. Follow him @bamaral44.

Exhibit 3

New R.I. shore access law, new shore access disputes this summer

"You can do whatever you would normally do on the beach in that 10-foot window," said Westerly Town Manager Shawn Lacey, part of a group of town officials who met with state regulators to discuss the law

By Brian Amaral Globe Staff,Updated August 17, 2023, 1 hour ago

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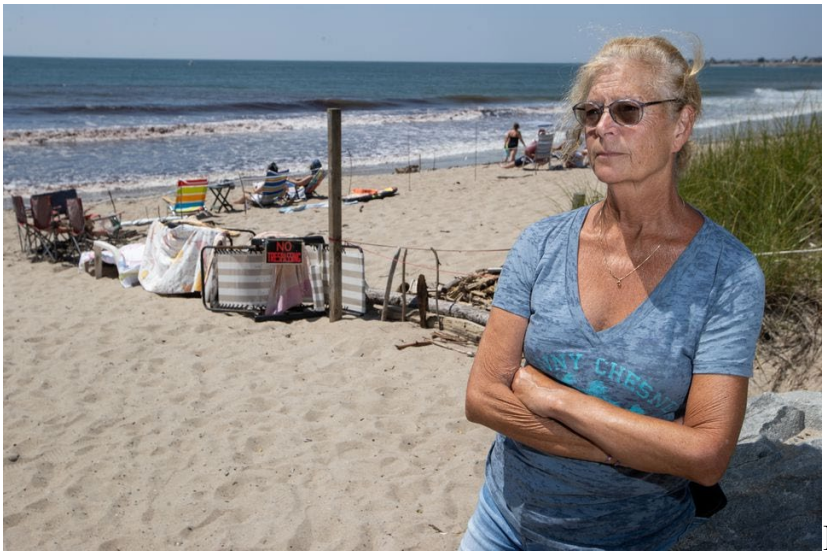


Laurie Bates poses for a photo on the beach in front of her home on Ocean Avenue on the eastern end of East Matunuck Beach in Jerusalem, Narragansett, R.I., on August 9. Bates has expressed frustration over the makeshift barrier her neighbor has created to block off their portion of the beach, at left, and considers it an eyesore and unnecessary.MATTHEW HEALEY FOR THE BOSTON GLOBE

NARRAGANSETT — The Jerusalem-East Matunuck area is sometimes called a hidden JEM, and it's easy to see why: beautiful beach, bright sunshine, views of the ferry heading out of Galilee.

But one particular section of beach is, according to some neighbors, tarnishing the JEM. And it has a nickname, too, although this one can't be printed in a family newspaper. The situation began about a month or so ago, when neighbors say a property owner set up a row of chairs, sticks, and other things to mark off a rectangular portion of the beach in front of a house on Succotash Road as private. Someone responded by scrawling on one of the chairs: "Welcome to [Anatomical Insult To Describe Mean Person] Beach. Do not enter!"

Laurie Bates and Rex Santerre can see [Anatomical Insult To Describe Mean Person] Beach from their house next door. They're not the ones who set up the beach chairs, or who scrawled the vulgarity on them. But they don't like the chair barrier, either. Like others in the area, they consider it unsightly and unneighborly.

"This has just put a cloud over the neighborhood," said Bates, a retired economics professor whose house is called Equilibrium and whose dog is named Pax.

Neither balance nor peace has been the order of the day in some cases after a new law improving the public's right to access the shore passed in Rhode Island. As any economics professor could tell you, it's not clear whether correlation equals causation, and the plural of anecdote is not data. It's hard to say whether there are more of these sorts of shoreline issues, more complaints about them, more attention, or some combination.

What's certainly the case, though, is that towns and state regulators are working through a changed landscape along the shore, all during the most popular time of year to get there and the most common time of year to argue about it. The resulting disputes, like a certain beach's nickname, haven't always been suitable to print in a family newspaper. But they are getting resolved, bit by bit — often in favor of more access, unless a federal lawsuit gets in the way.

The new law gives people the right to access the shore if they are no more than 10 feet above the recognizable high tide line.

Issues that have come up since its passage this summer have varied, but have sometimes involved property owners setting up new obstacles at or near the new 10-foot boundary. The chairs at the beach next to Bates' house didn't appear to be blocking the new public-access zone, at least where the tide was on a recent weekday. A few days after the Globe's visit, the chairs had been moved up closer to the dunes, Bates said.

In other cases, signage and barriers have unambiguously sought to block the sort of access that the law allows. That includes legacy signs like, "private beach to wet sand," which isn't the case anymore under the law (and never was, some would argue).

And finally, some beachgoers have gotten into arguments with property owners about what the law actually means.

For example, in Westerly recently, Dunns Corners resident Dan Roy has tried to take advantage of the new law by going to the Weekapaug Fire District's Fenway Beach. A security guard told him on multiple visits, including on a recent Friday, that he wasn't allowed to be there. Even if he was within 10 feet of the recognizable high tide line, the new law was for transiting the shore, not sticking around, Roy said the guard told him.

Roy begged to differ. The state's Constitution enshrines rights including, *but not limited to*, passage, collecting seaweed, fishing, and swimming. On Friday, Roy himself called police, and they sided with him. He could stay. What really surprised him, Roy said, was that a security guard in a state-created fire district was telling him otherwise.

"That's really not right," Roy said.

The Weekapaug Fire District didn't respond to a request for comment.

Roy later contacted Westerly Town Manager Shawn Lacey. Lacey was part of a group of South County town officials who met with the state Coastal Resources Management Council recently to discuss how the new law should be interpreted and enforced. The upshot: People can indeed put down a towel

and a chair, or even toss around a frisbee, if they're under the 10-foot boundary line.

"You can do whatever you would normally do on the beach in that 10-foot window," Lacey said in an interview.

CRMC spokeswoman Laura Dwyer concurred that it's not merely a law allowing for passage. People can set down a towel and chair and stay. In part that's because the law itself says it is to be "liberally construed," Dwyer said.

The law itself doesn't allow people to go on lawns or use privately owned cabanas and beach chairs. And in general, everyone should try to be courteous and respectful as people work their way through the new law, Dwyer said. CRMC is working on educating the public about the new law, an effort that's still under development.

"The goal is to continue this conversation with all groups," Dwyer said.

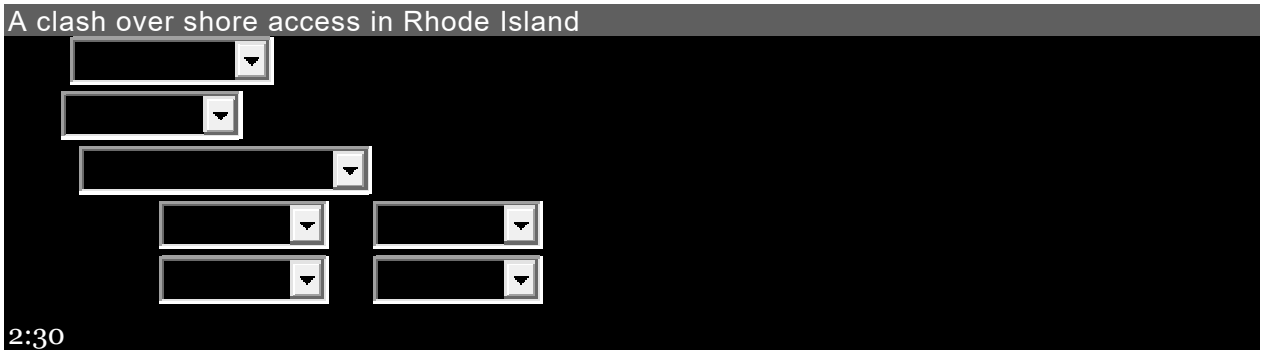
Other issues have come up in North Kingstown, where signs off the town beach — within the new 10-foot public access zone — were installed for a time, and at Green Hill Beach in South Kingstown, where someone reportedly put up a sign right on the wrack line using the Coast Guard emblem.

False signage has always been a problem, but it seems to be getting extra attention now — probably because the problem itself is growing and awareness of it is growing, too, said Cate Brown, a shore access advocate whose friend saw the sign in South Kingstown.

Property owners have "really been trying to double down on putting their line in the sand," Brown said.

Elsewhere, police have raised the theory that the new law is going to lead to issues while everyone figures out what it means. In one well publicized incident in Middletown, a would-be visitor to the shore walked onto a man's lawn after being blocked by bushes from getting to the end of a public access path. Cheyne Cousens then got into a profanity-laced argument with the property owner who tried to shoo him off the lawn (lawns aren't included in the new horizontal public access zone). The resulting video Cousens took went viral on TikTok.

Body camera footage captured even more angles than the TikTok video.



In Middletown, R.I. a would-be visitor to the shore walked onto a man's lawn after being blocked by bushes. A profanity-filled argument ensued.

"Unfortunately, until people better understand the new legislation, we're going to have issues with it," the officer told the owner in the body camera footage.

Cousens was charged with misdemeanor trespassing. Cousens said he was simply confused about where the shore access was, but said he could have handled the situation better. The incident has led to renewed attention on why the actual public path next to the property is blocked.

In addition to the trespassing case against Cousens, shore access disputes will play out in civil court, too, as private property owners sue to block it. A hearing is set for Sept. 6 on the state's motion to dismiss the lawsuit.

Meanwhile shore access advocates are planning another appearance of an airplane banner making their case, part of a back-and-forth aerial campaign with private property owners who got their own banner. The latest banner is expected to say: "The RI Shore Is Still Not Private."

One of the places this plane might be visible from is Equilibrium, Bates' house on East Matunuck Beach.

The name of the home may celebrate balance, but even Bates and Santerre — also a retired economics professor — don't agree completely on the new shore access law. Bates said in an interview that "property is theft" and that the beach is a public good; Santerre said in a separate interview that he didn't think it was right to take private property without compensation.

These married economics professors do agree on other shoreline things. Neither of them mind when people set up on the beach in front of their house. And they agree that the beach chair-turned fence next door had no place in the JEM.

“Why can’t we all enjoy the beach on a nice, sunny day?” Bates said.

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Exhibit 4

Attorney General petitions to intervene in CRMC proceedings to designate Spring Avenue in Westerly as public right-of-way

Published on Wednesday, June 07, 2023

Attorney General Peter F. Neronha announced today that his Office has petitioned Rhode Island's Coastal Resources Management Council (CRMC) Subcommittee on Rights-of-Way to intervene in the matter of the Spring Avenue Extension in Westerly, a case that affects the State's coastal and environmental resources.

As an intervening party in the CRMC's ongoing review of whether the Spring Avenue Extension in Westerly is a public-right-of-way the Attorney General seeks to affirmatively re-establish and proactively protect from encroachment an important public access point to the Westerly waterfront.

"The time has come to turn back the tide on private encroachment on the public's right to access our coast and waterways, a right that is enshrined in our state's constitution," said Attorney General Neronha. "This Office will fight vigorously to ensure that the coastal access provided by the Spring Avenue right of way will be restored and preserved permanently."

Motion to intervene

In the motion filed with the CRMC, the Attorney General has asked to intervene as the public officer charged with representing the State of Rhode Island, the public interest, and the people of the State, which includes environmental and public access matters. The Attorney General contends that the Spring Avenue Extension should be legally designated by the CRMC as a public right-of-way, describing the path as an important public access point to the Westerly waterfront and to valuable public trust resources.

On November 21, 2022, the Attorney General submitted a comment letter to the CRMC, explaining that the Spring Avenue Extension was accepted as a public right-of-way via both incipient dedication and statutory dedication. For generations, this access point has been used by beachgoers, fishermen, and other community members, a tradition that has recently been blocked by abutters and other interested parties.

Public Right-of-Way Protection by Attorney General Neronha

Public access to Rhode Island's coastal and waterfront resources is a priority mission of the Attorney General, who is empowered to protect the public's rights and interests in accessing our state's coastal resources.

This action dovetails with previous efforts by Attorney General Neronha to protect Rhode Islanders' access to coastal and waterfront access. Similar action has been taken by Attorney General Neronha, in coordination with CRMC and Save the Bay, in Providence (Public Street) and downtown Newport Harbor (Lee's Wharf), where public access to the state's waterways were or will be restored after the removal of hindrances.

View the filed motion here .

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