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Reviewer: Justin Coutu

STATE OF RHODE ISLAND
SUPREME COURT

CHAMPLIN'S REALTY ASSOCIATES v. PAUL E. LEMONT, et al.	:	
TOWN OF NEW SHOREHAM v. COASTAL RESOURCES MANAGEMENT COUNCIL OF THE STATE OF RHODE ISLAND	:	SU-2020-168 MP SU-2020-169 MP

ATTORNEY GENERAL'S MEMORANDUM IN OPPOSITION TO JOINT MOTION

NOW HERE COMES the Attorney General for the State of Rhode Island, Peter F. Neronha (hereinafter "the Attorney General" or "the State") and submits this Memorandum of Law in Opposition to the Joint Motion to Enter a Memorandum of Understanding ("Joint Motion"). For the reasons set forth below, Champlin's Realty Associates ("Champlin's") and the Coastal Resources Management Council's ("CRMC") Joint Motion requesting this Court to "incorporate and merge" the legally and factually deficient Memorandum of Understanding ("MOU") into a consent order should be denied.

I. INTRODUCTION

Over the past seventeen years, proceedings related to Champlin's application to expand its marina into Block Island's Great Salt Pond have taken place before the CRMC, the Superior Court and this Court – for both the review and the resolution of various legal and procedural concerns. Over the years, the concerns raised were related to improper CRMC procedure, unauthorized *ex parte* communications between CRMC council members acting as quasi-judicial officers and CRMC staff, and inadequate support for the agency decision in the record. Sometimes these concerns were advanced by Champlin's, sometimes by the intervenors, but until now, all of the parties – whether an applicant or an intervenor – have participated fully in the proceedings regardless of the forum. Given the long and complicated history associated with the Champlin's application, it is troubling that now, before this final stage of review, the CRMC, in partnership with only the applicant, has moved this Court to allow a form of the very expansion that has been at issue these past seventeen years and which has been repeatedly rejected by the CRMC after opportunities for hearings and the review of evidence in the record.

Without proper justification or authority, the CRMC now asks this Court to ignore the findings of fact it made with respect to the application, cast aside the administrative record lodged with this Court, and ignore the Rhode Island Administrative Procedures Act (herein "APA"), the applicable CRMC procedural

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rules and the legal precedent in this case. The Attorney General submits that this ask is too big. To grant such a request would undermine the rules of fair play that have been infused into agency processes by the legislature and reinforced by this Court. A request of this nature hides the agency's thought process from the public and improperly shields the CRMC's actions from review.

II. SUMMARY OF THE ARGUMENT

CRMC's participation in the mediation itself was inappropriate. The MOU was improperly reached off-the-record between a single member of the full council, Champlin's, and the CRMC's Executive Director, while this Court held exclusive jurisdiction over the matter. Cases appealed by preorogative writ are explicitly exempt from this Court's Appellate Mediation Program, unless at the time the writ is granted an order for mediation is issued. Such an order was not issued here. Even if the mediation had been otherwise appropriate, the fact that a council member, otherwise expected to function in a quasi-judicial capacity, participated in the mediation and then voted to approve the MOU in executive session, violates the requirement of impartiality in contested cases. CRMC's and Champlin's argument that the intervenors waived their rights to challenge the MOU because they declined to participate in a mediation and because they are not "full parties" is misguided and incorrect. While it is true that this Court has denied intervenors' abilities to control settlements in ***enforcement proceedings***, it did not contemplate nor address such a

limitation in the context of contested licensing proceedings that are quasi-judicial in nature.

Even assuming that it were appropriate for the CRMC to participate in the mediation, the MOU is not a valid agency order because it does not carry out the CRMC's legislative charge consistent with its enabling legislation, ignores the requirements set forth in CRMC's regulations and procedures, violates the APA, and contradicts this Court's precedent with regard to this application. Accordingly, the Joint Motion should be denied to ensure the adequate protection of the state's resources and to dissuade agency actions that so blatantly ignore the procedures that protect the public interest and the State's resources.

III. BACKGROUND AND TRAVEL

In 2003, Petitioner, Champlin's applied to the CRMC for an assent to allow an expansion of its existing marina into Block Island's Great Salt Pond by 240 feet. On January 10, 2006, a subcommittee of the CRMC, tasked with reviewing the application in the first instance, issued a recommendation to the full council supporting a modified expansion of 170 feet. The subcommittee's recommendation to modify the requested expansion was supported by forty-seven findings of fact after twenty-three public hearings. Five members of the full council voted to accept the recommendation of the subcommittee and to allow a modified expansion and five members voted not to accept the subcommittee's recommendation, instead

denying the application. The tie vote resulted in a denial. The decision denying the application was issued on July 5, 2006.

Champlin's sought judicial review of the July 5, 2006, CRMC decision in superior court under the APA. Champlin's alleged that bias against the application by certain council members and other procedural irregularities required reversal of the full council's decision. After extensive evidentiary hearings in the superior court to determine whether and to what extent council members relied on *ex parte* information or communications as a basis for their respective votes and to what extent council members demonstrated bias toward Champlin's application, Champlin's moved to disqualify six council members from further participation in the application upon remand and further moved to disqualify four of the five council members who voted to deny Champlin's application. During the evidentiary hearings in the superior court, it came to light that one council member, Paul Lemont, who was also acting as the chair of the subcommittee, had advocated for a compromise plan, off the record, after the subcommittee hearings, but before the subcommittee issued its recommendation to the full council. This compromise became known as "the Goulet Plan" because it was prepared by the CRMC staff member Dan Goulet at the request of Paul Lemont and the CRMC's Executive Director, Grover Fugate. The superior court found that Champlin's substantial rights had been prejudiced by the off the record consideration of the Goulet Plan and that

council member Paul Lemont and the CRMC chair, Michael Tikoian, should not have voted on the application due to evidence of bias. For a number of reasons, rather than remanding the administrative record to the CRMC to correct the procedural irregularities, the superior court reversed the full council's decision and upheld the subcommittee's January 10, 2006, recommendation for a reduced expansion and elevated that recommendation to a final agency decision.

This Court eventually overruled the superior court's decision in part (upholding the findings of bias with respect to certain council members but overturning the superior court's decision to elevate the subcommittee recommendation to an agency decision). Instead, this Court remanded the case to the CRMC directing the agency to include the Goulet Plan in the administrative record, requiring all council members to certify that they have read the entire record before voting, and further disqualifying biased council members from participating in the review of the application on remand. See Champlin's Realty Associates v. Tikoian, 989 A 2.d 427, 462 (R.I. 2010) (hereinafter "Tikoian").

On January 11, 2011, the remaining council members, after certifying they had read the entire record, voted again to deny Champlin's 2003 application and issued a written decision on May 6, 2011, supported by ninety-one findings of fact and ten separate conclusions of law. On June 1, 2011, Champlin's appealed that

written decision, beginning the instant lawsuit. See Champlin's v. Lemont, Nos. WC 11-0615, WC 11-0616, 2020 R.I. Super. LEXIS 11, at *8 (Super. Ct. Feb. 11, 2020).

Not long after reaffirming its denial of the Champlin's application for expansion, the CRMC approved Payne's Dock, a neighboring marina's request for a smaller dock expansion. Viewing the subsequent approval of an application for a neighboring dock expansion as evidence of disparate treatment and arbitrary and capricious behavior on the part of the full council, Champlin's petitioned the superior court to expand the record or to take judicial notice of the CRMC assent granted to Payne's Dock (hereinafter the "Payne's Dock proceedings"). The superior court instead viewed Champlin's petition as a request for the presentation of additional evidence. On September 17, 2012, the superior court issued an order remanding the administrative record to the CRMC and requiring the parties to present, and the CRMC to accept, additional evidence into the record that related to the neighbor's expansion, including the bases for which both applications were either approved or denied. The order instructed the CRMC to consider any similarities or dissimilarities and, again, required each council member to certify that they had read the entire record prior to casting a vote. On September 27, 2013, after additional hearings, the CRMC issued a written decision stating that there was a rational basis to approve the neighboring application for expansion and to deny the dissimilar Champlin's application.

On February 11, 2020, the superior court affirmed both the May 6, 2011, and the September 27, 2013, CRMC decisions. See February 11, 2020, Super. Ct. Decision at 1-2 (hereinafter "Decision"). Specifically, the lower court found that there was "legally sufficient evidence in the record" to support the CRMC's May 6, 2011, decision and that it was "rational, logical, and supported by substantial evidence." Decision at 55. Likewise, the superior court found that the September 27, 2013, decision treating the two marinas differently had a rational basis and was supported by legally sufficient evidence. Id.

On October 19, 2020, this Court granted Champlin's petition for writ of *certiorari* to review the Decision. On December 7, 2020, Champlin's and the CRMC filed a "Joint Motion of Champlin's Realty Associates and Coastal Resources Management Council" (hereinafter "Joint Motion") requesting this Court "incorporate and merge the [MOU] attached [thereto] into a consent order of this Court." Joint Motion at ¶ 2. The MOU attached to the Joint Motion described an agreement reached during a closed-door mediation between Champlin's and the CRMC, which allows, most notably, a 156 foot seaward expansion of piers, an extension of the western portion of the existing fuel dock by sixty-five feet, and an extension of the eastern portion of the existing fuel dock by twenty feet. MOU at 3-4.

IV. ARGUMENT

As set forth herein, the mediation between CRMC and Champlin's was inappropriate. Even if CRMC's participation in the mediation were proper, the resulting MOU is invalid.

A. THE MEDIATION BETWEEN CRMC AND CHAMPLIN'S WAS NOT APPROPRIATE IN THIS CASE

1) The Supreme Court Maintains Exclusive Jurisdiction Upon Certification of the Record

When the CRMC convened an executive session on December 8, 2020, and voted unanimously to (1) approve the proposed mediated settlement, and (2) approve the MOU signed on December 7, 2020, it did not have jurisdiction over the case. Indeed, the MOU itself reflects the CRMC's understanding of where jurisdiction vested at the time of the mediation: "[t]he Supreme Court *shall maintain* jurisdiction over this matter." MOU at ¶ 8 (*emphasis added*). The MOU was negotiated and approved by the CRMC *after* the administrative record was certified to the superior court in 2013 and after the superior court certified the administrative record with this Court on writ of certiorari.

The record was docketed with this Court on November 30, 2020, and this Court has had and will continue to have exclusive jurisdiction over this case unless and until the record is remanded to either the superior court or the agency. See R.I. Sup. Ct. Art. I, Rule 11(f) ("*From the time of the docketing of an appeal* in the

Supreme Court, *the Court shall have exclusive jurisdiction* to supervise the further course of such appeal and enter such orders as may be appropriate . . .") (*emphasis added*); see also Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1131–32 (R.I. 1992) ("It is evident that once a certification order has been entered, the party affected adversely can obtain no additional level of review within the ambit of the board. There is no further opportunity for the party to vindicate its rights in the administrative process itself."); Yellow Cab Co. of Providence v. Public Utility Hearing Bd., 101 R.I. 296, 222 A.2d 361 (1966) ("In short . . . when the decision of the agency has become final, *judicial review* by a justice of the Superior Court pursuant to the provisions of § 42-35-15 *is the only remedy available* if it constitutes a remedy adequate at law in all of the circumstances of the case.") (*emphasis added*).

In the recent APA appeal filed in the Superior Court by the Town of New Shoreham, both the CRMC and Champlin's argue that the Superior Court lacks jurisdiction to review the MOU as a final agency order because the Supreme Court has exclusive jurisdiction over the case. Ironically, neither the CRMC nor Champlin's see this same reasoning as a bar to the CRMC mediating a resolution while the matter was pending before this Court. See Def.'s Mem. Supp. Mot. to Dismiss at 1-2, Town of New Shoreham, et al v. Champlin's Realty Assoc. & Coastal Res. Mgmt. Council (Super. Ct. Feb. 26, 2021) (No. WC-2021-0044) ("The

Supreme Court granted certiorari in this matter and the case has been docketed in the Supreme Court. Therefore, the Supreme Court has sole and exclusive jurisdiction of this matter . . . the Superior Court does not have jurisdiction in this matter and has no authority to act in the case that has been docketed in the Supreme Court."); Def.'s Mot. to Dismiss at 1, Town of New Shoreham, et al v. Champlin's Realty Assoc. & Coastal Res. Mgmt. Council (Super. Ct. Feb. 10, 2021) (No.WC-2021-0044) ("the Supreme Court now has exclusive jurisdiction of this matter.").

Accordingly, because this case remains in the exclusive jurisdiction of this Court, CRMC's participation in the mediation was not appropriate.

2) Petitions for Extraordinary Relief are Exempted from this Court's Rule 35 Mediation Program

While this Court does allow, and even promotes, settlement through mediation, it recognizes that not all civil cases are eligible for participation in the Appellate Mediation Program ("AMP"). Specifically, Article I, Rule 35 exempts from the AMP seven categories of civil cases that have been appealed (or otherwise granted review), including "all petitions for prerogative writ." See R.I. Rules of App. Proc., Art. I, Rule 35(b). There is no debate that Champlin's petition for writ of certiorari brought "pursuant to R.I.G.L. § 42-35-16 and Article I, Rule 13 of the Rhode Island Rules of Appellate Procedure," is a petition for an extraordinary writ. See Writ of Certiorari—Scope and purpose, Wollin, Rhode Island Appellate Procedure § 13:1 (2020-2021 ed.) ("Rule 13 is the procedural mechanism for seeking

a writ of certiorari or other extraordinary writ from the Supreme Court."); see also Def.'s Mem. Supp. Mot. to Dismiss at 1, Town of New Shoreham, et al v. Champlin's Realty Assoc. & Coastal Res. Mgmt. Council (Super. Ct. Feb. 26, 2021) (No. WC-2021-0044). Therefore, unless the matter was assigned to the AMP "by order of the Court at the time the prerogative writ [was] issued" – and it was not - it is exempt from the AMP. R.I. Rules of App. Proc., Art. I, Rule 35(b)(7). Though facilitation of the discussions during mediation between Champlin's and the CRMC may have been viewed by council members and staff at the CRMC as having the imprimatur of this Court, the discussions proceeded without direction from this Court, and without the participation of the intervenors who had attained party status in this case.

3) Even if the Mediation were Otherwise Appropriate, the CRMC – Acting as a Quasi-Judicial Decision-Making Body – Should Not Have Participated.

It is well recognized that the CRMC performs functions that are "quasi-legislative, executive, and quasi-judicial in nature." In re Request for Advisory Opinion from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 941 (R.I. 2008). When the CRMC, or any other public body, is acting as an administrative tribunal in a proceeding where the intervenors have the same rights as those available to them in a court then the agency is acting in a quasi-judicial capacity and it must act accordingly. See Town of Richmond v. Wawaloam

Reservation, Inc., 850 A.2d 924, 933–34 (R.I. 2004) ("An administrative tribunal acts in a quasi-judicial capacity when it affords the parties substantially the same rights as those available in a court of law, such as the opportunity to present evidence, to assert legal claims and defenses, and to appeal from an adverse decision."). This means that the CRMC is bound to preserve its impartiality as a decision-maker in the contested licensing case, which ultimately may be remanded to it by this Court for further proceedings. See Tikoian, 989 A.2d at 443–44 ("The Fourteenth Amendment of the United States Constitution requires that agencies performing a quasi-judicial function must act impartially and unbiased so as to render a fair and impartial decision.") (quoting Davis v. Wood, 444 A.2d 190, 192 (R.I. 1982)). While carrying out a quasi-judicial function, each member of the CRMC is required to continue to meet her or his "obligation of impartiality on par with that of judges." Id. at 443.

In Tikoian, this Court reaffirmed the principle that while agency adjudicators enjoy the "presumption of honesty and integrity," that presumption can be overcome with evidence that "the same person(s) involved in building one party's adversarial case is also adjudicating the determinative issues." See id. at 443-44 (quoting Davis, 444 A.2d at 192 and Kent County Water Authority v. State (Department of Health), 723 A.2d 1132, 1137 (R.I. 1999) (citing La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights, 419 A.2d 274, 285 (R.I.

1980))). This Court has made clear that conflating the role of adjudicator withthe role of a participant , could cost the agency the presumptions it enjoys while working in a quasi-judicial capacity. On this point, this Court explained:

> [s]ignificantly, an agency adjudicator must not become an "advocate *or participant*." Davis v. Wood, 427 A.2d 332, 337 (R.I. 1981). To maintain public confidence in the fairness of the agency's decision making, an agency adjudicator also must not prejudge a matter before the agency.

See id. at 443-44 (quoting Barbara Realty Co. v. Zoning Board of Review of Cranston, 85 R.I. 152, 156, 128 A.2d 342, 344 (1957)(*emphasis added*)). On a separate, but related point, Rhode Island law explicitly prohibits *ex parte* communications in adjudicatory hearings to ensure that all litigious facts be heard by the decision-maker on the record. See R.I. Gen. Laws § 42-35-13 ("members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative."); see also Arnold v. Lebel, 941 A.2d 813, 820 (R.I. 2007).

Here, the CRMC Vice Chair's participation in an off-the-record discussion to identify an alternative to the application that ultimately would need to be approved by the full council is almost identical to the actions that, in part, precipitated this Court's remand in Tikoian. The CRMC's Vice Chair's participation in the off-the-

record mediation with the CRMC's Executive Director, the CRMC's legal counsel, and Champlin's, improperly exposed him to *ex parte* information which may effect his ability to to continue as an adjudicator in this case if remanded.. See R.I. Gen. Laws § 42-35-13; Arnold, 941 A.2d at 820. A decision-maker participating in a private mediation with only some of the parties, who then will also be required to adjudicate the application or a modification to it, – is precisely the type of conduct that the prohibition of *ex parte* communications in the APA is designed to prevent. See CRMC Meeting Notes from December 29, 2020, at ¶6.

4) The Town of Richmond Decision is Inapposite to a Contested Licensing Case in a Quasi-Judicial Proceeding

In its objection to the Attorney General's intervention and in response to intervenors' objections to the Joint Motion, Champlin's relies on Town of Richmond v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 151 (R.I. 2008) to assert that intervenors have no rights or role when an agency decides to settle a matter to avoid litigation. Town of Richmond does not support Champlin's assertion. Town of Richmond speaks only to the rights of intervenors in discretionary agency enforcement matters. Agency licensing proceedings, which are quasi-judicial in nature and weigh the interests of the applicant against the proposed project's potential impacts to public trust resources, are fundamentally different.

This distinction is demonstrated in Town of Richmond, where the Rhode Island Department of Environmental Management ("DEM") issued a notice of

violation to the defendants, Charbert, Inc., Alton Realty Corp., and NFA Corp. (collectively "Charbert"). Charbert requested a hearing on the notice of violation before DEM's Administrative Adjudication Division ("AAD"). Prior to the hearing, Charbert negotiated a resolution of the notice of violation with DEM. The resolution was incorporated into a proposed consent agreement between DEM and Charbert. In an apparent attempt to assume the role of enforcer – a responsibility delegated to DEM by the legislature – the Town of Richmond objected to the consent agreement as an inadequate resolution to the enforcement action. Charbert subsequently withdrew its request for a hearing on the notice of violation before the AAD. As discussed more fully below, unlike a contested licensing proceeding which requires a hearing to determine the parties' rights, review of an enforcement action is not automatic or mandatory. In fact, a hearing is not triggered unless the party that has been cited requests one. In that posture, an intervenor has only the rights of a party in the proceeding itself, and does not have rights in the underlying agency action. Quite obviously, the Town of Richmond could not invalidate the consent agreement because the Town was an intervenor to the discretionary appeal of an original enforcement action initiated by DEM against Charbert. See Town of Richmond, 941 A.2d at 157. As stated, the Town of Richmond did not have the authority, as an intervenor, to prevent the resolution of the action because the Town was not a party to the underlying notice of violations. See id. This Court's decision in Town of

Richmond reaffirmed the discretionary nature of enforcement actions, and the unique authority and responsibility of DEM in an enforcement context when it concluded that "the General Assembly did not envision an administrative proceeding in which a non-party intervenor with divergent interests . . . could control the outcome in favor of its own interests over those of *the agency responsible for enforcing the state's . . . laws*." Id. at 157 (*emphasis added*). See also § 14:43. Intervention from the practitioner's perspective, 2 State Environmental L. § 14:43 (2020) ("[I]ntervention cannot prevent parties from settling an administrative *enforcement* action.") (*emphasis added*).

This distinction between enforcement actions and licensing proceedings is supported by the CRMC Management Procedures, which state "[i]n resolution of a contested enforcement action, the CRMC and alleged violator may enter into negotiated settlement discussions. The purpose of such discussions will be to formulate an acceptable resolution of the *enforcement action* by a consent agreement executed by all parties." 650-RICR-20-00-2.12(D) (*emphasis added*). Notably, the CRMC Management Procedures are silent on the option of negotiated settlement discussions in the licensing context.[1]

[1] Even where proceedings are heard before the same tribunal, the Rhode Island legislature used language to distinguish enforcement proceedings from licensing proceedings. See R.I. Gen. Laws § 42-17.7-2 ("All contested *enforcement*

Therefore, while some agency actions, like the affirmative action taken by an agency to issue a notice of violation or to proceed with an enforcement action against an alleged violator, are discretionary agency functions assigned to government agencies and officials, other agency actions, like proceeding to a hearing on a contested licensing application, are not discretionary and do not implicate the delegation of enforcement authority. See Pine v. Clark, 636 A.2d 1319, 1324 (R.I. 1994) (referencing State v. Ouimette, 117 R.I. at 363, 367 A.2d 704 (1976) (This court has previously acknowledged "the overall reluctance to interfere with what must necessarily be highly discretionary decisions.").

The only part of Champlin's application to the CRMC that is discretionary, is the decision to submit an application for CRMC assent to the expansion in the first place, and/or the applicant's decision to withdraw the application. But once the application is filed, the CRMC Management Procedures *require* the CRMC to provide public notice of the complete application, to initiate a public comment period, and to consider and act upon the application. See 650-RICR-10-00-1.5.1(B), (E), (I). And if the application, per CRMC Management Procedures § 1.5.2(A), becomes a contested case (*i.e.*, the CRMC receives a substantive formal written objection or a request for a hearing regarding the application) then the CRMC "*shall*

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proceedings, all contested *licensing* proceedings . . . shall be heard by the division of administrative adjudication . . .") (*emphasis added*).

. . . schedule a public hearing." See 650-RICR-10-00-1.5.2(A)(*emphasis added*). The rules that apply to the actions of the CRMC in the context of a contested licensing proceeding are designed to constrain and guide the agency in the exercise of a quasi-judicial function. For this reason, the procedures are not discretionary and rights of intervenors as parties in the required proceedings are firmly established.

Indeed, the CRMC itself has determined that intervenors to contested cases have the same rights as parties. The CRMC Management Procedures state that intervenors are parties to the proceeding if "the person is entitled to status of a party under R.I.G.L. § 42-35-1 or any other provision of law" or "upon application for leave to intervene, the *person is allowed to do so by the Council* on the ground that (a) such applicant is entitled by law to the status of a party; or (b) such applicant could have been a complainant in such proceedings, or (c) such applicant has a complaint or defense which has question of law or fact in common with the main proceeding." (*emphasis added*). See 650-RICR-10-00-1.1(E)(2). In this case, CRMC granted party status to the intervenors and therefore it was improper for these full-party status intervenors to be excluded from the mediation.

B. THE MOU IS NOT A VALID AGENCY ORDER

Even assuming arguendo that it had been appropriate for the CRMC to mediate and approve an alternative to the Champlin's application, and that Vice

Chair Coia's involvement in the mediation was proper, the MOU itself is not a valid agency order and should not be incorporated into a final order of this Court.

In Ratcliffe v. Coastal Res. Mgmt. Council, this Court adopted a three-part rule to evaluate the validity of an agency order:

> …[W]e find that there are three constraints upon any action taken by [the] CRMC. The CRMC must comply with the terms set forth in its enabling legislation. The CRMC is also bound by its own regulations. Finally, [the] CRMC is subject to the provisions of the Rhode Island Administrative Procedures Act (RIAPA), G.L.1956 (1988 Reenactment) chapter 35 of title 42.

584 A.2d 1107, 1110 (R.I. 1991). In this case, there is an additional limitation that should have further constrained the CRMC – the direction and guidance provided by this Court and the superior court in prior decisions in this case. As discussed below, the MOU is invalid because it is not consistent with CRMC's enabling legislation, CRMC regulations and procedures, the APA, or this Court's precedent.

1) The MOU is Inconsistent with the Legislature's Charge in CRMC's Enabling Statute

The CRMC's charge to protect and restore the coastal ecology of the State under its enabling legislation, R.I. Gen. Laws § 46-23-1, cannot be met without the consistent and effective implementation of policies and laws in place to effectuate this purpose. CRMC's enabling statute, R.I. Gen. Laws § 46-23-1(b)(1), not only codifies the common law rights that the public have in their coastal resources but

also describes how these important rights are to be guarded by the CRMC. The enabling statute makes it clear:

> That *effective implementation of these policies is essential* to the social and economic well-being of the people of Rhode Island because the sea and its adjacent lands are major sources of food and public recreation, because these resources are used by and for industry, transportation, waste disposal, and other purposes, and because the demands made on these resources are increasing in number, magnitude, and complexity; and that these policies are necessary to protect the public health, safety, and general welfare.

See R.I. Gen. Laws § 46-23-1(b)(1) (*emphasis added*). Adhering to the procedures that provide for transparency, participation of aggrieved parties, and evidence-based decision-making is the road-map for effective implementation and preservation of resources. By failing to adhere to the APA and its own regulations and procedures, as discussed below, the CRMC is acting inconsistently with the objectives of its enabling legislation.

For example, the Coastal Resources Management Program ("CRMP") § 300.1(5) requires the Council to consider the impact of a proposed action on wildlife. Accordingly, the May 6, 2011 decision finds that "Champlin's evidence failed to sustain its burden of showing that the proposed project will not cause significant impacts on plant and animal life of the [Great Salt Pond]." Decision ¶ 52, May 6, 2011. However, the MOU inexplicably contains no information on wildlife impacts in the proposed plan. Did the full council's vote to implement the MOU consider

wildlife impacts? Were there updated studies performed for the new proposed layout? Procedural failures such as these deprive the public and the courts of any means to evaluate whether CRMC's decision protects the wildlife, navigation, competing uses, or any other resources that the CRMC is charged with managing and protecting.

The CRMC's sudden and unexplained departure from its findings of fact in its May 6, 2011 decision, coupled with the inconsistencies between the 2011 decision and the MOU, serve to demonstrate how far afield the MOU is from the CRMC's charge to protect and restore the coastal ecology of the State.

2) The MOU Does not Comport with the Requirements in the CRMC's Regulations and Procedures

The Coastal Resources Management Program ("CRMP") establishes evaluative criteria that must be addressed by the full council when reviewing an application for a license. Additionally, the CRMC Management Procedures establish the rules for evaluating modifications to previously filed applications and govern the CRMC's decision-making process in contested cases. See 650-RICR-20-00-01 et seq., 650-RICR-10-00-1 et seq. As shown below, the MOU does not address

the requisite criteria laid out in CRMP § 300.1 and is violative of the procedural requirements outlined in the CRMC Management Procedures.[2]

a. The MOU Does not Address the Criteria in the CRMP

The CRMC's May 6, 2011 decision explained through findings of fact and conclusions of law why Champlin's application did not sufficiently demonstrate that its proposed expansion would comply with the requirements of CRMP § 300.1. Contrary to the CRMC's fact-based May 6, 2011 decision, the MOU fails to provide any reasoning to support its newly compromised position, which in all meaningful respects contradicts the CRMC's May 6, 2011 decision upheld by the lower court in June of 2020.

The tables below outline several of the unexplained contradictions between the May 6, 2011 decision and the December 7, 2020 MOU as related to a specific requirement in the CRMP. More significantly, they demonstrate that the MOU fails to address the criteria in any meaningful way. Many of the criteria required to be addressed by the applicant and the CRMC in accordance with CRMP § 300.1 in a final agency decision were simply ignored in the MOU.

Table 1.
CRMP § 300.1(5): Impacts to Wildlife - The CRMC must "[d]emonstrate that the alteration or activity will not result in significant conflicts with water-dependent uses

[2] The CRMP's statutory numbering has been adjusted since the original application in 2003. Accordingly, the requirements listed here as CRMP § 300.1 refer to § 1.3.1(A) of the updated CRMP.

and activities such as recreational boating, fishing, swimming, navigation, and commerce."

Joint Memorandum of Understanding	Decision, May 6, 2011.
Discussion about wildlife impact is absent in the MOU.	"45. Mr. Rabideau's shellfish survey had no sampling points within the area of the proposed expansion. Further, his report acknowledged that his survey was concluded at a time of year when shellfish would not be expected to be found, and that *a follow-up survey should be conducted.* He never conducted such a follow-up survey." Id. at ¶ 45 (*emphasis added*).
	"46. *The evidence demonstrates that there are still unresolved issues impacts to water quality*." Id. at ¶ 46 (*emphasis added*).
	"47. [T]he study by the applicant was conducted in early spring which is at the end of the prime shell fishing season and *was conducted only in the vicinity of the existing docks, not in the area of the proposed expansion despite evidence that there were shellfish or finfish in that area*." Id. at ¶ 47 (*emphasis added*).
	"48. The Testimony presented by the *applicant acknowledged that the results of the study may have been 'skewed' because of the time of year* when it was conducted. They further acknowledged that the shell fishing resources within the Existing Marina might have been harvested prior to the survey. Further, due to the low water temperatures some shellfish species could have been deeper in the sediment than what was surveyed." Id. at ¶ 48 (*emphasis added*).
	"50. Arthur Ganz, *a biologist with [DEM] testified by deposition that his studies had shown that there are shellfish resources in the area of the proposed Champlin's marina expansion, and that the expansion would have a significant impact on those resources*." Id. at ¶ 50 (*emphasis added*).
	"51. therefore, *the evidence demonstrates that water quality issues have not been adequately addressed notwithstanding the issuance of the WQC*." Id. at ¶ 51 (*emphasis added*).

	"52. *Champlin's evidence failed to sustain its burden of showing that the proposed project will not cause significant impacts on plant and animal life* of the [Great Salt Pond.]" Id. at ¶ 52 (e*mphasis added*).

Table 2.
CRMP § 300.1(6): Public Access – The applicant must "[d]emonstrate that the alteration will not unreasonably interfere with, impair, or significantly impact existing public access to, or use of, tidal waters and/or the shore."

Joint Memorandum of Understanding	Decision, May 6, 2011.
6.a. That marinas are a principal means by which the boating public gains access to tidal waters, and thereby provide an important public service.	"81. The applicant has proposed by his public access plan to offer launch services, use of its beach by the public and use of its dinghy dock as measures for enhancing public access to the shore in exchange for its requested expansion of its use of public trust resources. *The proposed expansion will not maximize the public's use and enjoyment of the public trust, rather, it will only benefit a small segment of the public to the exclusion of a larger segment.*" Decision ¶ 81, May 6, 2011 (*emphasis added*).
	"82. The applicant's proposed public access plan differs slightly, if at all, from the existing uses that are in place in the existing marina. Additionally, the *applicant's witness stated that currently during the summer the areas adjacent to the beach are not safe for swimming. Therefore, the plan does not constitute meaningful access.*" Id. at ¶ 82 (*emphasis added*).
	"83. The *applicant's proposed public access plan is inadequate to compensate for the acquisition of public trust resources requested in its application*." Id. at ¶ 83 (*emphasis added*).

Table 3.
CRMP § 300.1(10): Conflicts with Other Uses – The applicant must "[d]emonstrate that the alteration or activity will not result in significant conflicts with water-dependent uses and activities such as recreational boating, fishing, swimming, navigation, and commerce."

Joint Memorandum of Understanding	Decision, May 6, 2011.

6.b. There is sufficient room between Champlin's existing docks and the Town's Mooring Field to permit some expansion of Champlin's existing docks, accommodate the moorings historically located within the Town's Mooring Field, and maintain navigational safety.	"53. The evidence demonstrates that *Champlin's regularly attracts yachts in excess of 100-feet in length* that it has been used by vessels of at least 165-feet in length. Further, Champlin's application notes *it hopes to attract deep water draft ocean going yachts up to 300-feet*." Id. at ¶ 53 (*emphasis added*).
	"56. Consequently, *the appropriate distance to use in assessing navigational impacts is the 310-foot distance to the mooring field*." Id. at ¶ 56 (*emphasis added*).
	"58. Therefore, applying appropriate and proper marine design criteria under the existing situation with a 165-foot vessel utilizing Champlin's facility *an appropriate channel would be as much as 330—feet, which is more than the 310-feet available under the current configuration.*" Id. at ¶ 58 (*emphasis added*).
	"60. *The waters adjacent to the Existing Marina are heavily used* for a variety of recreational purposes, including kayaking, sailing, canoeing. fishing, and power boating. The waters are also used by vessels entering and leaving the Existing Marina, by vessels traveling to and from other marinas on the [Great Salt Pond], and vessels that utilize Mooring Field E." Id. at ¶ 60 (*emphasis added*).
	"61. The combination of recreational uses and the operation of the Existing Marina and Mooring Field E *result in the waters in the vicinity of the Existing Marina being extremely congested during the summer months*." Id. at ¶ 61 (*emphasis added*).
	"64. The evidence demonstrates that *even under existing conditions* when there are large vessels at the Champlin's facility *there is significant congestion resulting in navigation problems*." Id. at ¶ 64 (*emphasis added*).
	"*Harbormaster Land testified that the area in front of Champlin's Marina remains congested*, and that *on occasion boats waiting to dock at Champlin's* Marina have drifted into Mooring Field E and have hit boats on moorings." CRMC Tr. 347-48, 351-52, Nov. 16, 2012 (*emphasis added*).

6.c. The Council's Subcommittee which conducted the 23 hearings on the Champlin's application recommended a 170-foot seaward expansion.	"71. The existing configuration of Champlin's marina *is not the most efficient utilization of the area* of the [Great Salt Pond] that it occupies or of the immediately adjacent areas. The irregular shape of the fixed docks results in fewer vessels being able to be docked within its marina than would be the case with a more carefully planned dock layout." Decision ¶ 71, May 6, 2011 (*emphasis added*).
6.d. Champlin's is permitted to extend its existing fuel dock up to sixty-five (65) feet on its western edge, and up to twenty (20) on its eastern edge so that both the western edge and the eastern edge approximate the east/west width of the dock immediately landward thereof. The revised fuel dock will be approximately 314 feet east — west.	"74. *By simply building on the Existing Marina, the proposed expansion would build on an already inefficient use of the [Great Salt Pond]* and impinge on competing existing uses if the area of the [Great Salt Pond] into which the expansion is proposed. The proposed expanded marina would not be an efficient use of the public trust waters." Id. at ¶ 74 (*emphasis added*). "76. Champlin's *failed to explore any reasonable alternatives* to its proposed expansion that would have less or no impact on competing uses of the [Great Salt Pond], and that would ensure that the public's interests in the public trust resources are protected." Id. at ¶ 76 (*emphasis added*).
6.e. Champlin's is permitted to extend piers, seaward up to one hundred and fifty six feet (156) seaward off of the revised fuel dock (herein," the Seaward Expansion"), and laterally (east-west) to the same extent as the revised fuel dock, i.e., 314 feet.	"74. By simply building on the Existing Marina, the proposed expansion would build on an already inefficient use of the [Great Salt Pond] and impinge on competing existing uses if the area of the [Great Salt Pond] into which the expansion is proposed. The proposed expanded marina would not be an efficient use of the public trust waters." Id. at ¶ 74. "76. Champlin's *failed to explore any reasonable alternatives* to its proposed expansion that would have less or no impact on competing uses of the [Great Salt Pond], and that would ensure that the public's interests in the public trust resources are protected." Id. at ¶ 76 (*emphasis added*).

6.f. Champlin's Marina Perimeter Limit shall be extended 10 feet beyond the outer edge of all new docks, provided however that Champlin's is permitted without restriction to dock boats with a beam of up to 25 feet "side-to" along the seaward side of the new face dock at the seaward end of the 156-foot Seaward Expansion (herein, the "FaceDock"). There shall be no med-mooring off of the Face Dock. This approximates a 1.5-acre expansion to Champlin's Marina Perimeter Limit.	
6.g. Champlin's is granted a variance to CRMP Section 300.4.e.1(b) for vehicular parking.	Not addressed in the CRMC May 6, 2011 decision.
6.h. Notwithstanding the boat capacity increases set forth in the DEM issued Water Quality Certificate, Champlin's boat count shall be limited to its current 250 boat maximum.	"51. … therefore, *the evidence demonstrates that water quality issues have not been adequately addressed notwithstanding the issuance of the WQC*." Id. at ¶ 51 (*emphasis added*).
6.i. There will be no med — mooring seaward of the 156-foot dock extensions.	Not addressed in the CRMC May 6, 2011 decision.
6.j. In-slip pump — outs shall be provided on any new finger docks.	Not addressed in the CRMC May 6, 2011 decision.
6.k. Current standards of fire protection shall be incorporated into all additional dockage constructed pursuant to this Memorandum of Understanding.	Not addressed in the CRMC May 6, 2011 decision.
6.l. Pedestal lighting shall be installed on new finger docks. Overhead lighting is not permitted on new finger docks.	Not addressed in the CRMC May 6, 2011 decision.

b. CRMC did not Comply with its CRMC's Management Procedures When it Agreed to the Modification of its Decision in the MOU

In addition to the failure of the MOU to address the substantive criteria in the CRMP, the CRMC also failed to follow its own Management Procedures in modifying its May 6, 2011 decision. The CRMC Management Procedures §1.5.13 require that any modifications to the CRMC decisions be "for good cause" and that

a majority of the council may "vote to modify any said action . . . *provided reasons for such modifications are set forth on the record and in the minutes* of the meetings" (*emphasis added*). First, the reference to "on the record" in the CRMC Management Procedures is to the administrative record, which was lodged with this Court on November 30, 2020. Therefore, whatever evidence may be contained in the sealed minutes with regard to the CRMC's vote to approve the MOU is not the "record" referenced in the CRMC Management Procedures. Second, there is no way for this Court to determine if the CRMC modified its decision for "good cause," because the meeting at which this decision was made was closed to the public and the meeting minutes sealed from public view. We might reasonably assume that the CRMC included all of its' rationale and "good cause" in the MOU. Presuming the CRMC relied on the MOU to meet its obligation to set forth the bases for its decision, as outlined in the prior section, its stated justifications are woefully inadequate. The MOU is therefore in violation of § 1.5.13 and is not a proper modification under the CRMC Management Procedures.

The CRMC Management Procedures § 1.8(C) also provide a different option for modification of a CRMC decision whereby the Executive Director in his discretion can:

> [M]odify an assent or final decision of the Council *when the requested modification is consistent with the prior approval* of the Council and the applicant and staff review have *clearly demonstrated* to the Executive Director's

> satisfaction *that the project's overall impact* to the state's coastal resources *will be less than or equal to the existing assent or decision*.

650-RICR-10-00-11.8(C)(2) (*emphasis added*). While the Executive Director of the CRMC participated in the mediation, which led to the MOU, and Champlin's conceivably requested this modification, the remaining conditions of the regulation are not met. The modification is not "consistent with the prior approval of the Council." Indeed, the full council's prior decision denied the application. Furthermore, the modification cannot "clearly demonstrate" that the "project's overall impact to the state's coastal resources *will be less than or equal to the existing assent or decision*," because: 1) there is no existing assent, 2) there is no possible scenario where a marina expansion of any size would impact the coastal resources less than no expansion at all, and 3) as discussed more fully below there are no findings of fact included in the MOU to support the CRMC's decision. Id. (*emphasis added*). Accordingly, to find the MOU a proper modification of the May 9, 2011 decision would be contrary to the CRMC Management Procedures.

3) The MOU Does Not Satisfy the Requirements of the APA

The MOU is also fatally flawed because it does not meet the standards required of agency orders by the APA. Indeed, this Court has consistently ruled that it will not review a decision of the CRMC when it substantively and procedurally violates the APA. See E. Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118

R.I. 559, 569, 376 A.2d 682, 687 (1977) (holding that a petition for certiorari with no findings of fact, as required by R.I. Gen. Laws § 42-35-15, is not entitled to judicial review); Ratcliffe, 584 A.2d at 1110; Cullen v. Town Council of Town of Lincoln, 850 A.2d 900, 904 (R.I. 2004) ("if a tribunal fails to disclose the basic findings upon which its ultimate findings are premised, the Supreme Court will *neither search the record for supporting evidence nor* will it *decide for itself* what is proper in the circumstances") (*emphasis added*).

This Court has repeatedly confirmed that an agency, when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the action taken. See Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (quoting Irish Partnership v. Rommel, 518 A.2d 356, 358 (R.I. 1986). Further, "those findings must, of course, be factual rather than conclusional [sic], and the application of the legal principles must be something more than the recital of a litany." Id.; see also Irish Partnership v. Rommel, 518 A.2d 358, 359 (R.I. 1986) (quoting May-Day Realty Corporation v. Board of Appeals of City of Pawtucket, 267 A.2d 400, 403 (R.I. 1970)). When a municipal board acts in a quasi-judicial capacity, public confidence in its process requires the municipal board to produce findings of fact, thereby dispelling questions of fairness and impartiality. See White Columns Properties, Inc. v. The Zoning Bd. of Review of the City of Providence, No. PC-2020-02088, 2020 WL 5923218, at *12 (R.I.Super. Sep. 30, 2020).

In Sakonnet Rogers, Inc. v. Coastal Resources Mgt. Council, the Court observed, "even if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and for the reasons stated by the agency." 536 A.2d 893, 897 (R.I. 1988) (quoting 3 K. Davis, Administrative Law Treatise, § 14.29 at 128 (2d Ed. 1980)).

In East Greenwich, this Court evaluated an agency decision it determined to be substantively deficient and conclusory. 376 A.2d at 687. There, this Court determined that the following line of reasoning failed to satisfy the statutory requirements of the APA: "the Council feels that there will be no substantial detriment to the ecological balance of the area. As the evidence shows the impact upon various ecological systems involved will be minimal, it is hereby the decision of this Council to grant the petition." Id. Specifically, this Court concluded that "absence of required findings makes judicial review impossible, clearly frustrating § 24-35-15." Id. This Court also explained that judicial appellate review "is circumscribed and limited to an examination of the *certified record* to determine if there is any legally competent evidence therein to support the agency's decision." Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004) (*emphasis added*). Upon review of the certified record, if competent evidence exists, the Court must uphold the final agency decision. Barrington Sch. Comm., 608 A.2d at 1138. In other words,

where an agency action is taken upon an administrative record, in this case, the CRMC's decision to deny the Champlin's application, "it must be reviewed based only on that record, subject to limited exceptions." Ace Lobster Co., Inc. v. Evans, 165 F.Supp.2d 148, 165 (D.R.I. 2001).

The limited findings contained within the MOU fail to provide any substantive basis for the full council's decision to approve this modification, leave unaddressed the question as to why the concerns it previously raised in the May 6, 2011 decision are no longer valid or have somehow been mitigated. Instead, the MOU is, without any explanation, completely divorced from the May 6, 2011 CRMC decision and outside of the administrative record certified to this Court. The MOU provides one single supportive fact that "marinas are a principal means by which the boating public gains access to tidal waters and thereby provide an important public service," followed by the conclusory finding that "there is sufficient room between Champlin's existing docks and the Town's Mooring to permit some expansion of Champlin's existing docks, accommodate the [town's] moorings, and maintain navigational safety." MOU at ¶ 6(a-b). These minimal findings do not shed light on the CRMC's analysis or its decision to modify its prior findings and therefore frustrate judicial review of the MOU.

4) This Court's Precedent Instructs the CRMC as to how to Proceed with Compromised Plans for This Project

The off-the-record mediation between the CRMC and Champlin's is also improper because it blatantly ignored the directives provided by this Court in this case over the course of nearly two decades as to how the agency must regard evidence not properly included in the administrative record. This Court has been clear: council members who are also acting as hearing officers may not seek out or rely upon *ex parte* communications to inform their votes, council members must certify that they have read the entire administrative record before voting to demonstrate a working knowledge of the matter they are adjudicating and the administrative record must include any and all information that contributed to the full council's final vote so that parties to the contested case may have an opportunity to cross examine the evidence and to ensure that the administrative record certified on appeal is complete. See Champlin's, Nos. WC 11-0615, WC 11-0616, 2020 R.I. Super. LEXIS 11, at *8.

In the proceedings involving the Goulet Plan, this Court applied its analysis in Arnold and explained:

> Thus, under § 42–35–9(e) and § 42–35–10(4), if the decision maker "intends to consult any documentary source or person concerning facts or opinions about the merits of an appeal," he or she must notify the parties so that they may "contest any such evidence" and "cross-examine any people consulted." Arnold, 941 A.2d at 821. This prohibition extends to the decision maker's

> communications with agency staff members, although communication regarding general matters is permissible. Id.

Tikoian, 989 A.2d at 441 (quoting Arnold, 941 A.2d at 820).

As set forth in the Joint Motion, the CRMC voted unanimously to approve the MOU "thus . . . granting a negotiated expansion permit to Champlin's." Joint Motion at ¶ 7. However, one look at the public notice attached to the Joint Motion reveals that the "discussion and action" on this matter occurred in an executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2). Joint Motion at ¶¶ 7-8. Removing this contested case to executive session where Champlin's sought approval of the MOU from the CRMC – after Champlin's and representatives of the CRMC had just negotiated the MOU in closed-door mediation – flies in the face of this Court's previous rulings in Arnold and Tikoian. Any information or opinions provided to the full council in that executive session have been hidden from view. As such, the information and opinions considered by the full council were not available for cross-examination or comment by the parties or the public and likely included information that would be considered *ex parte* under Arnold and Tikoian. Whether the discussion in executive session included any lobbying for one compromise approach versus another or contributed to any prejudgment with regard to the final vote on the MOU remains to be seen because the minutes have been sealed by the CRMC. It is this MOU that CRMC and Champlin's ask this Court to bless.

In Tikoian, this Court considered the communications that led to the creation of the Goulet Plan and warned:

> It is clear to us . . . that Lemont's and Tikoian's communications with the CRMC staff members about the Goulet plan and the plan itself represent ex parte contacts under our holding in Arnold. The Goulet plan is an ex parte contact under § 42–35–13 because Lemont, a decision maker, consulted the director of the CRMC, Fugate, about facts concerning the merits of an appeal, specifically, whether another feasible plan might be conceived. See Arnold, 941 A.2d at 821.

989 A.2d at 441. The reasoning and instruction applied in this case eleven years ago also applies to this case today.

The MOU that the CRMC and Champlin's now ask this Court to adopt and enforce was created during a mediation between the Executive Director of the CRMC, counsel for the CRMC, and the CRMC's Vice Chair. See CRMC Meeting Notes from November 26, 2020 at ¶ 7-8 (stating that "Mr. Hudson motioned for the Council to direct CRMC Legal Counsel DeSisto, Mr. Coia, and Mr. Willis to follow the discussion contained in the executive session to authorize mediation with Champlin's Realty Associates and the CRMC."). On December 29, 2020, CRMC's Vice Chair, after having participated in the mediation, then also voted to seal the minutes of the executive session, to approve the MOU, and to instruct the Executive Director to sign the MOU on behalf of the CRMC. CRMC Meeting Notes from December 29, 2020, at ¶ 6. Without a view into the discussions at the mediation and

the executive sessions, there is no record to support the CRMC's approval of the MOU or to inform whether the Vice Chair (or other council members, like some council members a decade ago), relied on *ex parte* communications or other information for their decision-making contrary to Arnold and Tikoian. If *ex parte* communications, or "secret evidence" as this Court described it in Tikoian, were presented to the full council, it would add an additional layer of concern. See 989 A.2d at 442. The fact that the Vice Chair and the Executive Director participated together in Champlin's effort to mediate a resolution is a violation of R.I. Gen. Laws § 42–35–13 and this Court's previous ruling with respect to the Goulet Plan conversations. Id.

Additionally, in both the Goulet proceedings and the Payne's dock proceedings, this Court required that "[e]ach voting member must certify that he or she has read the entire record before the council, including the transcripts of the subcommittee hearings and workshop and any accompanying evidence, supporting data, and supplementary material." Id. at 449; see also Champlin's, Nos. WC 11-0615, WC 11-0616, 2020 R.I. Super. LEXIS 11, at *8. Since this certification requirement for the adjudicators in this contested case was required by this Court twice with respect to this matter, arguably it should apply to any subsequent votes on this application by the full council. The certification requirement is especially important given the significant passage of time between the last full council vote on

this matter and the vote to approve the MOU. The make-up of the full council has changed with the addition of many new council members. Without such a certification, the public has no assurance that voting council members, making decisions about this public trust resource are even familiar with the details of the matter upon which they are voting, let alone the extensive history in this case. Given all of the above, it is clear that the MOU is not a valid final agency decision and accordingly, the Joint Motion should be denied.

V. CONCLUSION

At every phase over the past seventeen years, all of the parties with an interest in the Champlin's application have had opportunities to seek appellate review of the CRMC's decisions with respect to this application – until now. The CRMC and Champlin's mediated resolution circumvented this open and required process where any aggrieved party could be heard.

For these reasons, and the reasons set forth in this memorandum, the Attorney General prays that the Joint Motion for entry of the MOU be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2021, the within document was e-filed via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via regular mail to the following attorneys of record:

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