STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: February 11, 2020]

CHAMPLIN'S REALTY ASSOCIATES	:	
	:	
VS.	:	**C.A. Nos. WC 11-0615 and**
	:	**WC 11-0616**
PAUL E. LEMONT, et al.	:	
		-CONSOLIDATED WITH-
TOWN OF NEW SHOREHAM	:	
	:	
VS.	:	**C.A. No. WC 11-0333**
	:	
COASTAL RESOURCES MANAGEMENT COUNCIL OF THE STATE OF RHODE ISLAND	:	

DECISION

K. RODGERS, J. The proposed expansion of the marina owned and operated by Champlin's Realty Associates (Champlin's) in the Town of New Shoreham (the Town or Block Island) is back before the Superior Court on appeal from certain decisions by the Rhode Island Coastal Resources Management Council (CRMC or the Council).

After remand from the Rhode Island Supreme Court reversing an earlier decision issued by the Superior Court, the CRMC issued its decision on May 6, 2011, denying Champlin's proposed expansion plan in Great Salt Pond. Champlin's appealed both CRMC's oral vote and subsequent written decision to this Court. After briefing by all the parties, Champlin's alleged that a decision issued by the CRMC shortly after its May 2011 decision, in which a neighboring marina's request for expansion in Great Salt Pond was granted without the scrutiny accorded Champlin's application, demonstrated that the CRMC had treated Champlin's application

arbitrarily and capriciously. This Court remanded the case to the CRMC for a second time for the presentation of evidence into whether Champlin's received disparate treatment from the CRMC. On September 27, 2013, the CRMC issued its decision finding that there was a rational basis for treating Champlin's application differently than the neighboring marina's application and therefore declined to modify its decision denying Champlin's the relief requested. Following that decision, the parties filed additional briefs addressing the CRMC's findings.

Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons that follow, Champlin's appeals are denied in their entirety.

I

Travel of Case

A

Champlin's Application

Champlin's navigation through the administrative waters in its quest to expand has an extensive history. In 2003, Champlin's applied to the CRMC for an assent (or permit) to expand its marina in Great Salt Pond. Champlin's Marina consists of a three-pronged, trident pattern of fixed docks with multiple associated floating docks which, combined, measure approximately 6000 feet of docking space. Champlin's Marina currently has the capacity for 225-250 vessels and extends roughly 500 feet from the southwestern shore of Great Salt Pond. In addition to the docks, Champlin's Marina offers a beach, a fuel dock, bumper boats for rent, a dinghy dock and showers available to the public, and a launch service for bringing people from moored and anchored vessels to the marina.

Great Salt Pond consists of 611 acres, of which 360 acres are CRMC-designated Type 1 waters and therefore unavailable for marinas or commercial moorings. One hundred ninety-four

acres are CRMC-designated Type 2 waters in which moorings can be located. The remaining fifty-seven acres are CRMC-designated Type 3 waters that are open to marinas and moorings. Champlin's Marina currently occupies nine acres of Type 3 waters in Great Salt Pond. To its east and along the southern shore of Great Salt Pond is the Block Island Boat Basin; further to the east and along the southeastern shore of Great Salt Pond is Payne's Marina.

Champlin's 2003 application requested approval to expand its marina by an additional 2990 feet of dock space, including 755 feet of floating docks. The proposed expansion sought to accommodate an additional 140 vessels. All told, the fixed docks would extend an additional 240 feet into Great Salt Pond, and the entire marina would expand by approximately four acres into Great Salt Pond, for a total of thirteen acres. The proposed expansion of the area encompassing Champlin's Marina implicated the adjacent area known as Mooring Field E, the designated area in which the Town is permitted to and maintains rental moorings for transient boaters.

Champlin's application was opposed by the Town, the Conservation Law Foundation (CLF), the Committee for the Great Salt Pond, and the Block Island Conservancy. The latter three organizations were permitted to intervene in the CRMC proceedings and in the corresponding appeals therefrom (collectively, the "Intervenors").

B

Mooring Field E

To understand the interplay of Mooring Field E and Champlin's 2003 application, it is necessary to briefly touch upon the history of that designated area.

The Town began operating rental moorings in Great Salt Pond in 1983. In 1988, the United States Army Corps of Engineers (ACOE) issued the Town a permit to retain the fifty-five existing rental moorings and place an additional twenty-five moorings in the rental mooring field.

Thereafter, in 1991, the Town adopted its first Harbor Management Plan (the 1991 Plan) which was approved by the CRMC. The 1991 Plan identified the rental mooring field as Mooring Field E, and its configuration reflects an imperfect triangular shape with its southern border situated one hundred feet from the outermost dock of Champlin's Marina and a portion extending around the western boundary of Champlin's Marina forming a so-called lobe.

In 1995, the Town again obtained a permit from the ACOE which reconfigured Mooring Field E to be consistent with the configuration in the 1991 Plan. In addition, the ACOE authorized the Town to increase the number of permissible rental moorings to one hundred.

In 1999, the Town approved a new Harbor Management Plan (the 1999 Plan). The 1999 Plan did not alter or otherwise reconfigure Mooring Field E from that which was plotted and approved in the 1991 Plan, approved by the CRMC and permitted by the ACOE in 1995. The 1999 Plan was submitted to the CRMC for review and approval to ensure consistency with the Coastal Resources Management Program (CRMP). *See* CRMP § 300.15.

The CRMC did not begin its review of the 1999 Plan until 2003, when Champlin's application was filed. Because Champlin's application, in part, sought to expand into the adjacent Mooring Field E and/or relocate certain rental moorings therein, which configuration and number of permitted moorings had remained the same since ACOE's 1995 permit, the CRMC consolidated the Town's request to approve the 1999 Plan with Champlin's expansion application.

C

The CRMC Decision and First Appeal

Champlin's application came before a duly constituted subcommittee of the CRMC. After twenty-three public hearings, the subcommittee issued a recommendation on January 10, 2006, with forty-seven findings of fact. The subcommittee, *inter alia*, recommended that the full Council

approve a 170 foot seaward expansion rather than the 240 foot seaward expansion Champlin's had originally requested. By a tie vote of five-to-five, the full Council did not approve the subcommittee's recommendation and instead, by written decision issued on July 5, 2006, denied Champlin's application. It was that decision that came first before the Superior Court and then the Supreme Court in *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427 (R.I. 2010).[1]

One subject on appeal to this Court and as reviewed by the Supreme Court concerned the creation and consideration of the so-called "Goulet plan." The Goulet plan was a compromise plan to Champlin's requested relief that was drafted by CRMC staff engineer Danni Goulet at the behest of Grover Fugate, CRMC's executive director, after the subcommittee public hearings had concluded. *Id.* at 435. Relying upon a then-recently decided case *Arnold v. Lebel*, 941 A.2d 813, 821 (R.I. 2007), the Supreme Court concluded that two subcommittee members' communications with the CRMC staff outside of the subcommittee hearings and the Goulet plan itself constituted *ex parte* contacts which are prohibited under the holding in *Arnold*. *Champlin's Realty*, 989 A.2d at 441. The Court expressly found that the Goulet plan, developed after the subcommittee public hearings and before the subcommittee met in a workshop to formulate its recommendation, "represents the very type of 'secret evidence' proscribed in *Arnold*, and the Superior Court should have remanded the matter to the CRMC for supplementation of the record." *Champlin's Realty Associates*, 989 A.2d at 442. Of particular importance to the remand directive to the CRMC and the issues now before this Court on Champlin's instant appeal, the Supreme Court held as follows:

> "In this case . . . the record is not complete because the impermissible *ex parte* information must be made available for the examination of the parties. It is therefore our opinion that the interests of justice are best served by a remand. . . .

[1] Except as needed to provide context, this Court will not repeat all the facts and issues raised in Champlin's first appeal to this Court and on certiorari to the Supreme Court.

> "In our opinion, the case should be returned to the Superior Court with an order that the tribunal remand the matter to the CRMC. That body should be ordered to expeditiously reopen the hearing on the Champlin's application. The record is to be expanded to include the Goulet plan and all supporting materials. Any party may cross-examine individuals involved in the creation of the Goulet plan. The current composition of the CRMC's membership may vote on the matter. Each 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 (footnotes omitted).

D

The CRMC Decision on Remand

Pursuant to the remand directed by the Supreme Court, hearings were conducted before the full CRMC on May 27, 2010, June 25, 2010, and July 15, 2010. After briefing by all the parties, the CRMC scheduled a hearing for final decision on Champlin's application for January 11, 2011, along with the consolidated request by the Town for approval of its 1999 Harbor Management Plan, as specifically limited to the location and size of Mooring Field E.[2] Seven members of the CRMC, constituting a quorum, were present for the January 11, 2011 meeting and each attested to having read "all of the documents that have been engendered over the years of the deliberation of this matter." CRMC Tr. 6-7, Jan. 11, 2011. Counsel for the CRMC summarized the charge to the members as follows:

> "[T]he Supreme Court case law is very clear, that when a matter is remanded to an agency with the hearing of additional evidence . . . that that matter is then heard de novo by the agency, and I stated that on previous occasions. Additionally, I believe the Supreme Court decision invalidated both the full Council decision and the

[2] Although consolidated, the CRMC did not issue a decision relating to the 1999 Plan at the time of its 2006 denial of Champlin's application. The Town filed an appeal based on the CRMC's failure to act on that matter, but that appeal was denied and dismissed by the Superior Court in the earlier appeal. *See Champlin's Realty Associates v. Tikoian*, Nos. PC 06-1659, PC 06-3900, 2009 WL 3161831, at *4 (Vogel, J.) (R.I. Super. Feb. 24, 2009).

> subcommittee recommendation. So, that being said, hearing the matter de novo, you are here to approve, modify or deny the application filed by Champlin's Realty as well as the request of the Town of New Shoreham for the location of Mooring Field E.
>
> "That being said, the members having read the entire record and having the complete record before them, if any of the findings of either the previous full Council's decision or the subcommittee recommendation still have vitality to them, they are certainly free to adopt those as their own findings." *Id.* at 8.

Thereafter, each of the seven members present offered specific comments on Champlin's application. *Id.* at 20-34. A motion to deny Champlin's application was made, seconded, and unanimously approved by the seven members.[3] Consistent with that unanimous decision to deny Champlin's application, CRMC issued a written decision on May 6, 2011, containing ninety-one separately numbered findings of fact, ten conclusions of law, and the signatures of each of the seven members who voted thereon.[4] Champlin's appealed that written decision to this Court on June 1, 2011. *See* Complaint, *Champlin's Realty Associates v. Paul E. Lemont, et al.*, WC 2011-0616.

In addition to denying Champlin's application on January 11, 2011, the members of the CRMC offered comments on the location of Mooring Field E. CRMC Tr. 10-20, 36-50, Jan. 11, 2011. At the hearing, the CRMC unanimously voted to adopt the location of Mooring Field E as to allow a 300 foot fairway from Champlin's existing structure to Mooring Field E, an increase from the existing one hundred foot fairway, and to eliminate the lobe that was situated to the west

[3] Champlin's filed an appeal to this Court on February 4, 2011, in response to the January 11, 2011 oral vote taken by the CRMC. *See* Complaint, *Champlin's Realty Associates v. Paul E. Lemont, et al.*, WC 2011-0615. The gravamen of that appeal is that the CRMC's January 2011 denial of Champlin's application failed to give consideration to the subcommittee recommendation. *Id.* ¶ 34.

[4] This Court will address the pertinent findings of fact and conclusions of law in Section III(B)(1)-(6), *infra.*

of Champlin's existing dock. *Id.* at 50-51. CRMC's written decision issued on May 6, 2011, however, concluded that "Mooring Field E must be drawn so as to allow a 300 foot-wide navigational channel between the mooring field and Champlin's marina *as well as the other existing marinas in [Great Salt Pond]*." Decision at 13, ¶ 8, May 6, 2011 (emphasis added). The Town appealed this portion of the written decision on May 19, 2011. *See* Complaint, *Town of New Shoreham v. Coastal Resources Management Council*, WC 2011-0333.

The three above-captioned matters were consolidated on appeal for consideration by this Court.

E

Payne's Dock Application and Second Remand

In the course of the comprehensive briefing of the various issues raised in these consolidated appeals, Champlin's compared CRMC's treatment of its own expansion application to that of neighboring Payne's Dock. Specifically, Champlin's maintained that it was subject to disparate treatment wherein Payne's Dock was readily granted an expansion of its marina in Great Salt Pond within months of Champlin's application being denied following many years of contested hearings. By way of a single meeting before the full Council on June 28, 2011, and in a subsequent written decision issued on July 12, 2011, the CRMC approved an expansion of Payne's existing dock by eighty feet to the north for an additional fifteen boats. Neither the Town nor any of the Intervenors had objected to Payne's Dock's application while pending before the CRMC.

Champlin's thereafter moved to expand the record before this Court or, in the alternative, to have this Court take judicial notice of CRMC's decision on Payne's Dock. This Court, however, treated Champlin's motion as a request for presentation of additional evidence in accordance with § 42-35-15(e) and issued an order granting the same. A second order was thereafter issued by the

Court in response to what Champlin's characterized as the CRMC's refusal to accept additional evidence.

By way of this Court's second order dated September 17, 2012, the parties were ordered to present, and the CRMC was ordered to accept, additional evidence into the record that related to the Payne's Dock expansion and any similarities or dissimilarities between Champlin's Marina and Payne's Dock, including but not limited to the distance between them, the markets they serve, the size of vessels using each marina, their locations relative to any mooring fields and boating traffic, and the nature and extent of boating traffic generated by each marina. Any CRMC member not previously sitting on the consolidated Champlin's matters and the Payne's Dock expansion were required to read and review the entire record of each prior to any action being taken by CRMC. Following the introduction of such additional evidence, the Court required that the CRMC consider whether Champlin's Marina and Payne's Dock are similarly situated and whether there is a rational basis for treating their expansion applications differently. The CRMC was also authorized, pursuant to § 42-35-15(e), to modify its findings and decisions in the consolidated matters on appeal to this Court.

Four additional evidentiary hearings were held on this second remand to the CRMC. By written decision dated September 27, 2013, and signed by six members of the CRMC, the CRMC expressly stated the similarities between the two marinas, their dissimilarities, and the basis upon which their respective applications were approved and denied.[5] Decision ¶¶ 6-8, Sept. 27, 2013. The CRMC concluded that there was a rational basis for the denial of Champlin's application and the approval of Payne's application. *Id.* ¶ 10. The CRMC also addressed and modified its May 6, 2011 decision on the configuration of Mooring Field E, noting the discrepancy between the

[5] This Court will address the pertinent findings as needed in Section III(D), *infra*.

Council's January 11, 2011 oral vote and its May 6, 2011 written decision, *see id.* ¶ 9, and expressly adopted a 300-foot fairway between Mooring Field E and each of the marinas in Great Salt Pond—Champlin's Marina, Payne's Dock and Block Island Boat Basin. *Id.* ¶ 12. Thereafter, on February 20, 2014, the Town withdrew its appeal in *Town of New Shoreham v. Coastal Resources Management Council*, WC 2011-0333.

II

Standard of Review

As extensive as the record and briefing are in these consolidated cases, they remain administrative appeals governed by the Administrative Procedures Act, §§ 42-35-1 *et al*. (APA). Section 42-35-15(g) sets forth the standard of review this Court must employ in reviewing the record before the CRMC and the various decisions at issue:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error of law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g).

This statutory standard of review has been construed and explained many times by the Rhode Island Supreme Court. In reviewing a decision of an administrative agency, the Superior

Court 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) (quoting *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992)). "If competent evidence exists in the record considered as a whole, the court is required to uphold the agency's conclusions." *Barrington School Committee*, 608 A.2d at 1138. It has been repeatedly held that "legally competent evidence" requires the presence of "some" or "any" evidence supporting the agency's findings. *Strafach v. Durfee*, 635 A2d. 277, 280 (R.I. 1993); *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993); *Sartor v. Coastal Resources Management Council*, 542 A.2d 1077, 1082-83 (R.I. 1988).

Section 42-35-15(g) prohibits this Court from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. *See also Interstate Navigation Co. v. Division of Public Utilities*, 824 A.2d 1282, 1286 (R.I. 2003) (citation omitted). Thus, this Court may not substitute its judgment for that of the agency in regard to credibility of witnesses. *Tierney v. Department of Human Services*, 793 A.2d 210, 213 (R.I. 2002); *Baker v. Department of Employment and Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994) (citing *Costa v. Registrar of Motor Vehicles*, 543 A.2d 1307, 1309 (R.I. 1988)). This is true even when this Court "'might be inclined to view the evidence differently and draw inferences different from those of the agency.'" *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 805 (R.I. 2000) (quoting *Rhode Island Public Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 485 (R.I. 1994)).

Notwithstanding the deference to be accorded the agency's assessments on credibility and the weight of the evidence, "an administrative decision can be vacated if it is clearly erroneous in

view of the reliable, probative, and substantial evidence contained in the whole record." *Costa,* 543 A.2d at 1309 (citing *Newport Shipyard, Inc. v. Rhode Island Commission for Human Rights,* 484 A.2d 893, 897 (R.I. 1984)). This Court will reverse factual conclusions of administrative agencies when they are "'totally devoid of competent evidentiary support in the record.'" *Bunch v. Board of Review, Rhode Island Department of Employment and Training,* 690 A.2d 335, 337 (R.I. 1997) (quoting *Milardo v. Coastal Resources Management Council of Rhode Island,* 434 A.2d 266, 272 (R.I. 1981)); *see also Nguyen v. Chater,* 172 F.3d 31, 35 (1st Cir. 1999) (*per curiam*) (establishing that the court will invalidate findings of fact which are "derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts[ ]") (citations omitted). Additionally, if the agency's decision is arbitrary or capricious, it may be vacated. In applying the arbitrary and capricious standard, reviewing courts will uphold administrative decisions so long as the agency has acted within its authority to make such decisions and its decisions were rational, logical, and supported by substantial evidence. *Goncalves v. NMU Pension Trust,* 818 A.2d 678, 683 (R.I. 2003) (citing *Doyle v. Paul Revere Life Insurance Co.,* 144 F.3d 181, 184 (1st Cir. 1998)); *see also Coleman v. Metropolitan Life Insurance Co.,* 919 F. Supp. 573, 581 (D.R.I. 1996) (explaining that the outcome is neither arbitrary nor capricious "[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome").

With regard to Champlin's argument that its expansion application received disparate treatment from the CRMC as compared to Payne's Dock's expansion application, the standard of review on appeal to this Court is not so firmly established. Our Supreme Court has considered a selective enforcement argument, and by extension a claim of disparate treatment, in the context of a zoning appeal. *See Mill Realty Associates v. Crowe,* 841 A.2d 668, 675 (R.I. 2004) (rejecting selective enforcement argument where petitioner's building permit application was not similarly

situated to other applications). Thus, it appears imperative that a party asserting disparate treatment vis-á-vis the selective enforcement of an ordinance or regulation must first establish that it is similarly situated to other applicants. *See id.* Additionally, the United States Supreme Court has upheld the right to bring an equal protection claim against a municipal authority under traditional equal protection analysis where there is intentional and different treatment from others similarly situated *and* no rational basis for difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).

In analyzing whether two applicants are similarly situated, the First Circuit stated:

> "To carry the burden of proving substantial similarity, 'plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.' *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). While the applicable standard does not require that there be an '[e]xact correlation,' *Tapalian v. Tusino*, 377 F.3d 1, 6 (1st Cir. 2004), there must be sufficient proof on the relevant aspects of the comparison to warrant a reasonable inference of substantial similarity. Thus, the proponent of the equal protection violation must show that the parties with whom he seeks to be compared have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile." *Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007); *see also Perkins v. Brigham & Women's Hospital*, 78 F.3d 747, 751 (1st Cir. 1996).

The "similarly situated" requirement "is meant to be a 'very significant burden.'" *Cordi-Allen*, 494 F.3d at 251 (quoting *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277, 283 (7th Cir. 2003)). If it were not such an exacting requirement, then virtually every zoning or regulatory decision would be subject to an equal protection claim with a mere argument that another applicant was treated differently. *See id.*

Whether Champlin's argument is couched as selective enforcement, disparate treatment, a violation of equal protection, or arbitrary and capricious as compared to Payne's Dock's application, Champlin's must first establish that the two applications are similarly situated.

III

Argument

A

There Is One CRMC Decision on the Champlin's Application

Through its two distinct appeals[6] and its argument on these consolidated matters, Champlin's attempts to distinguish between the May 6, 2011 written decision and the January 11, 2011 "decisional hearing" as if they were separate decisions by the CRMC. Champlin's Brief 10, 11, 12, 40, 43, Dec. 30, 2011. There is no such distinction. There is one CRMC decision on the Champlin's application—the written document issued by the CRMC May 6, 2011, bearing the signature of all seven voting members.

The APA requires that "[a]ny final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order *shall include* findings of fact and conclusions of law, separately stated." Section 42-35-12 (emphasis added). Not only are findings of fact and conclusions of law mandatory, but the absence of these required findings renders the agency decision void. *East Greenwich Yacht Club v. Coastal Resources Management Council,* 118 R.I. 559, 568, 376 A.2d 682, 687 (1977).

Champlin's is well aware of the custom and practice of the Council conducting a public vote and thereafter issuing a written decision as required by § 42-35-12. Indeed, at the conclusion

[6] *See* Complaint, *Champlin's Realty Associates v. Lemont,* WC 2011-0615; Complaint, *Champlin's Realty Associates v. Lemont,* WC 2011-0616.

of the January 11, 2011 hearing, CRMC's legal counsel openly advised the CRMC members, "when you conclude, I will circulate a draft decision for your edit, comment and final signature." CRMC Tr. 51, Jan. 11, 2011. No objection to the process was raised by Champlin's or by any other interested party.

Champlin's now argues that the breadth of issues addressed in the findings of fact and conclusions of law contained in the May 6, 2011 written decision is somehow evidence of wrongdoing by the Council. *See* Champlin's Brief 11-18, 21-24, Dec. 30, 2011. Champlin's asserts that it was improper for the CRMC to even address certain issues in its decision because they were not discussed during the meeting of January 11, 2011, namely, the likely cost of dredging to the west of the existing marina, the impacts of the proposed expansion on water quality, and the credibility and reliability of Champlin's expert witness on water quality issues. *Id.* This completely misapprehends the nature and purpose of the CRMC proceedings on remand.

As described above, the Supreme Court very clearly articulated the mechanics on remand. The record was to be expanded to include the Goulet plan and all supporting materials; any party could cross-examine individuals involved in the creation of the Goulet plan; the current composition of the CRMC may vote on the matter on remand provided each voting member certify that he or she has read the *entire* record before the Council, including the transcripts of the subcommittee hearings and the workshops and the accompanying material. *Champlin's Realty Associates*, 989 A.2d at 449. At the time of the remand proceedings, only three members of the CRMC had remained on the Council since its 2006 decision. Thus, in all respects, the current body had the obligation of weighing the evidence presented in the voluminous record to determine if Champlin's had satisfied all of the criteria for a Category B assent to allow the expansion of its

marina.[7] This was to be a decision *de novo,* and the current members were not bound in any way to the findings of the subcommittee in its 2006 recommendation or to the 2006 decision of the full Council, both of which had been tainted by the "secret evidence" that was the Goulet plan and the *ex parte* communications surrounding that plan. Indeed, in submitting post-hearing briefs to the CRMC after the first remand and the conclusion of the hearings in 2010, Champlin's and the other parties addressed or attempted to address all of the regulatory criteria that Champlin's was required to satisfy.

Champlin's seems to adopt the position that the Council's decision must be confined to those topics expressly addressed at the January 11, 2011 public hearing leading up to the roll call vote. Champlin's offers no authority to support this assertion. Notably, the APA does not require such detailed oral discussions before a written decision, with the required findings of fact and conclusions of law, is issued. *See* § 42-35-12. However, if the "final order" were to be stated on the record and not in writing, then the agency would be required to set forth on the record its findings of fact and conclusions of law, separately stated. *Id.* The purpose of such separately stated findings of fact and conclusions of law is for a reviewing court to be able to engage in a meaningful review of an administrative decision. *See East Greenwich Yacht Club*, 118 R.I at 567, 376 A.2d at 687.

Although the CRMC was not required to address each of its ultimate findings of fact and conclusions of law during the January 11, 2011 public hearing, a review of the comments made by each of the seven members reveals that the issues that Champlin's contends were not addressed were indeed alluded to by various Council members on January 11, 2011, as was the criteria that

[7] The pertinent regulations and criteria that Champlin's was required to satisfy is discussed in Section III (B)(1), *infra*.

Champlin's was required to satisfy. Bruce Dawson expressed concern with the uniqueness of Great Salt Pond and the impact that Champlin's proposed expansion would have on other water-dependent activities. CRMC Tr. 21, Jan. 11, 2011. David Abedon stated that Champlin's present configuration is not the most efficient use of the public trust resources, that there was significant navigational congestion almost to the point of being dangerous, and that Champlin's offered no meaningful public access plan. *Id.* at 22. Donald T. Gomez specifically considered the evidence offered surrounding the Goulet plan and expansion to the west, including rocks and dredging, and ultimately rejected that plan, although he suggested that another plan that included western expansion may be considered. *Id.* at 23-24. Robert Driscoll questioned whether Champlin's was serving the public by seeking to expand or was seeking to profit from larger boats, and commented on the already heavy use of Great Salt Pond by boaters. *Id.* at 25-26. Raymond Coia, who had previously voted in favor of the subcommittee recommendation, considered the Goulet plan and the evidence therein that suggested an expansion to the west was possible. *Id.* at 27-28. Robert Ballou reflected upon the delicate ecosystem that exists in Great Salt Pond which presently has not been impacted because of the existing uses are balanced, well-managed, and in harmony with the pond's natural resources, and ultimately stated that he could not support expansion because Champlin's Marina presently is an inefficient and ineffective configuration and because of public trust issues, navigational issues, and conflicting uses. *Id.* at 29-31. Finally, Chairman Paul E. Lemont commented as follows:

> "the evidence demonstrates that there are still unresolved issues regarding impacts to water quality, that those CRMC members opposed do not believe issuance of the [water quality certificate], water quality, alone ensures that there will be no detrimental impact to finfish, shellfish or submerged aquatic vegetation. My concern is still about the navigation, about shellfish, about dredging, about the public trust and what that means . . . about the scenic impact, about geological conditions, about the mooring field." *Id.* at 33-34.

To suggest that the May 6, 2011 written decision addressed far beyond the vote taken at the conclusion of the January 11, 2011 public hearing is to wholly ignore the multitude of issues raised by the seven CRMC members. As indicated on January 11, 2011, to which Champlin's did not object, CRMC's counsel prepared and circulated to the Council members a draft decision that embodied all of the requisite findings from the record. The Council members had the opportunity to review and edit that draft. The decision that was issued on May 6, 2011 is the culmination of that process and represents a consensus of the CRMC on all of the findings of fact and conclusions of law that are contained therein. The only question for this Court on review is whether there is legally competent evidence in the record that supports those findings, and whether the legal conclusions are erroneous in view of the reliable, probative and substantial evidence contained in the whole record. *See Barrington School Committee*, 608 A.2d at 1138; *Costa*, 543 A.2d at 1309.

B

Substantial Evidence of Record Exists that Champlin's Failed to Sustain Its Burden Before the CRMC

1

Pertinent Regulations

The legislative grant of authority to CRMC expressly states that "it shall be the policy of this state to preserve, protect, develop, and, where possible, restore the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long range planning and management designed to produce the maximum benefit for society from these coastal resources." Section 46-23-1(a)(2). To that end, the CRMC is authorized to develop policies, programs and regulations that pertain to Rhode Island's coastal resources. Section 46-23-6. The

regulations promulgated by the CRMC are entitled the Rhode Island Coastal Resources Management Program (CRMP).

Consistent with the statutory requirement that all alterations and activities proposed for tidal waters or areas contiguous to shoreline features require CRMC assent (or permit), *see* § 46-23-6(2)((ii), Champlin's applied for a Category B assent. A Category B assent is required when the proposal seeks to increase the number of vessels to be accommodated beyond 25% of the capacity as originally approved and/or if the proposal extends the facility beyond its defined perimeter. CRMP § 300.4(E)(1)(g).[8] CRMC's May 6, 2011 written decision identified—and the parties do not dispute—the following CRMP regulations as being applicable to the Champlin's application: CRMP §§ 200.3, 300.1, 300.4, and 335. *See* Decision ¶ 4, May 6, 2011.

Section 200.3 is entitled "Type 3 High-Intensity Boating" and governs "intensely utilized water areas where recreational boating activities dominate and where the adjacent shorelines are developed as marinas, boatyards, and associated water-enhanced and water-dependent businesses." CRMP § 200.3(A). The CRMP further provides, and the CRMC accurately reflects in its decision, that:

> "Type 3 waters and the adjacent shoreline, while utilized intensely for the needs of the recreational boating public, nevertheless retain numerous natural assets of special concern to the Council. These include coastal wetlands, and the value these areas provide as fish and shellfish spawning and juvenile rearing grounds. These factors must be weighed when the Council considers proposals that may impact these assets." CRMP §. 200.3(B)(6); *see also* Decision ¶ 24, May 6, 2011.

[8] Whether Champlin's existing capacity is viewed as 225 vessels or 250 vessels, its proposal to allow an additional 140 vessels constitutes an increase of between 56% and 62% of the existing capacity.

Additionally, the CRMP recognizes the increasing demand for marina facilities based upon the limited coastal areas that are suitable for marinas and the steady growth in the number of recreational boats, and concludes that "[t]he solution to growing demand is therefore to use the available facilities more efficiently and to recycle already altered sites." CRMP § 200.3(B)(3); *see also* Decision ¶ 23, May 6, 2011.

Pursuant to Section 300.1 of the CRMP, all applicants for a Category B assent must satisfy eleven criteria, including the following:

> "(5) Demonstrate that the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life;
>
> "(6) Demonstrate 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;
>
> . . .
>
> "(8) Demonstrate that there will be no significant deterioration in the quality of the water in the immediate vicinity as defined by DEM; [and]
>
> . . .
>
> (10) Demonstrate 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." CRMP § 300.1(5), (6), (8), (10); s*ee also* Decision ¶ 28, May 6, 2011.

The policies of the CRMC pertaining to recreational boating facilities are specified in § 300.4(B) of the CRMP. Among those policies are that marinas are encouraged to utilize techniques that make the most efficient use of space and increased demand for mooring, dockage and storage space by considering innovative slip and mooring configurations. CRMP § 300.4(B)(1); *see also* Decision ¶ 30, May 6, 2011. Further, "[i]t is the policy of the Council to manage the siting and construction of recreational boating facilities within the public tidal waters

of the state to prevent congestion, and with due regard for the capability of coastal areas to support boating, and the degree of compatibility with other uses and ecological considerations." CRMP § 300.4(B)(2); *see also* Decision ¶ 31, May 6, 2011. It is required that any entity proposing to expand an existing marina facility "undertake measures that mitigate the adverse impacts to water quality associated with the proposed activity." CRMP § 300.4(B)(8); *see also* Decision ¶ 33, May 6, 2011. Section 300.4(B)(11) further identifies the criteria to be applied by the CRMC in assessing a proposal for recreational boating facilities. That regulation reads as follows:

> "The construction of marinas, docks, piers, floats and other recreational boating facilities located on tidal lands or waters constitutes a use of Rhode Island's public trust resources. Due to the CRMC's legislative mandate to manage Rhode Island's public trust resources for this and subsequent generations, the Council must assess all proposed uses of public trust lands or waters on a case by case basis, examine reasonable alternatives to the proposed activity, and ensure that public's interests in the public trust resources are protected. In assessing a proposed recreational boating facility, the Council shall evaluate the following: a) the appropriateness of the structure given the activities [sic] potential to impact Rhode Island's coastal resources; b) the appropriateness of the structure given geologic site conditions; c) the potential impacts of the structure and use of the structure on public trust resources (*e.g.*, fin fish, shellfish, submerged aquatic vegetation, etc.); d) the potential navigation impacts of the structure and the associated use of the structure; e) the potential aesthetic and scenic impacts associated with the structure; and f) the cumulative impacts associated with the increased density of existing recreational boating facilities in the vicinity of the proposed project. In considering these factors, the Council shall weigh the benefits of the proposed activity against its potential impacts while ensuring that it does not cause an adverse impact on other existing uses of Rhode Island's public trust resources." CRMP § 300.4(B)(11); s*ee also* Decision ¶¶ 35-37, May 6, 2011.

Finally, CRMP § 335 sets forth policies and guidelines that serve to protect and enhance the public access to the shore. Importantly, Champlin's proposed expansion is a significant one, and is therefore considered to be an activity "which require[s] the private use of public trust

resources to the exclusion of other public uses [and] necessarily impact[s] public access." CRMP § 335(B)(9). To balance the public and private use of public trust resources, it is the policy of CRMC "to require applicants to provide, where appropriate, on- site access of a similar type and level to that which is being impacted as the result of a proposed activity or development project." CRMP § 335(C)(2).

2

Plant and Animal Life

Champlin's offered the testimony of its professional wetland scientist, Scott Rabideau (Rabideau), who opined that Champlin's proposed expansion would not significantly impact the shellfish resources in that area of expansion. Champlin's urges this Court to accept its expert's findings along with the Water Quality Certificate (WQC) issued by the Rhode Island Department of Environmental Management (DEM)[9] as conclusive evidence that its proposed seaward expansion would have no negative impact on fin fish, shellfish, or submerged aquatic vegetation.

The CRMC expressly addressed Rabideau's testimony and concluded that Champlin's had not sustained its burden of showing that the proposed expansion would not significantly impact plant and animal life. *See* Decision ¶ 52, May 6, 2011. Specifically, the CRMC faulted the applicant for failing to conduct the follow up surveys that Rabideau himself opined were necessary:

> "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 conducted 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.

[9] Because Champlin's relies so heavily on the WQC and the conditions therein as evidence that its proposed expansion will not negatively impact water quality, this Court will address that contention separately. *See* Section III(C), *infra*.

> "46. The evidence demonstrates that there are still unresolved issues regarding impacts to water quality.
>
> "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.
>
> "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.
>
> "49. As a result, the applicant's expert recommended that because of those conditions, an additional survey of the shellfish resources be conducted during the fall season, prior to the opening of the shell fishing seasons for the [Great Salt Pond]. No such survey has been provided to the CRMC." Decision ¶¶ 45-49, May 6, 2011.

The failure of proof is supported by Rabideau's own testimony and report. Rabideau acknowledged on cross-examination that the primary depths in the area of the terminus of Champlin's existing docks is twenty feet where sampling for shellfish was not done, yet shellfish exist at depths of twenty feet. CRMC Tr. 1043, June 11, 2004. Additionally, the evidence cited by the CRMC in its decision as to the time of year and conditions under which the survey was conducted and the need to do a follow-up survey comes from Rabideau's own report that had been introduced before the CRMC and marked as Champlin's Exhibit 22, as well as his testimony. *See* Decision ¶¶ 48-49, May 6, 2011; CRMC Tr. 1198-99, Dec. 7, 2004; *cf.* Champlin's Ex. 22 at 2-3. Accordingly, there exists legally competent evidence in the record for the CRMC to conclude that Champlin's did not sustain its burden of proof on whether its proposed expansion would not have a significant impact on plant and animal life in the area. *See* CRMP § 300.1(5).

Although it remained Champlin's burden to demonstrate its proposed expansion would not have a significant impact on plant and animal life in the area, there was additional competent evidence which affirmatively established that Champlin's proposed expansion would impact shellfish in the area, thus further supporting CRMC's denial of Champlin's application. Specifically, the CRMC relied upon the deposition testimony of Arthur Ganz (Ganz), a supervising marine biologist having been employed by DEM who also served as an advisor to the Block Island Shellfishing Commission. *See* Decision ¶ 50, May 6, 2011. Ganz testified that he co-authored two shellfishing surveys concerning Great Salt Pond, one in 1992 and one in 2000. Ganz Dep. Tr. 8-10, July 1, 2005. Although he was not offered as an expert, Ganz did testify that his studies showed that there are shellfish in the area of Champlin's proposed expansion, that the expansion would have a significant impact on those resources, and that the report issued by Rabideau did not alter his factual findings. *Id.* at 22-25. The CRMC noted the following in its decision:

> "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." Decision ¶ 50, May 6, 2011.

Importantly, the CRMC immediately concluded as follows:

> "51. Therefore, the evidence demonstrates that water quality issues have not been adequately addressed notwithstanding the issuance of the WQC.
>
> "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.* ¶¶ 51-52.

As noted, the burden rests with the applicant to demonstrate that "the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life." CRMP § 300.1(5). The burden does not shift to the agency or an intervenor to demonstrate

otherwise. The CRMC considered the credibility of the witnesses and the weight of the testimony offered concerning the impact on animal and plant life, and ultimately determined that Champlin's did not sustain its burden on this issue. To accept Rabideau's incomplete analysis would require that this Court substitute its judgment on the weight of such evidence over that of the agency and overlook what the CRMC determined to be a lack of credible evidence, an intolerable result as dictated by our case law. *See Tierney*, 793 A.2d at 213. Limited to an examination of the record to determine if there is legally competent evidence to support the CRMC's decision on this issue, this Court is satisfied that there indeed exists legally competent evidence that Champlin's failed to sustain its burden of proving that its proposed expansion would not result in significant impacts on the abundance and diversity of plant and animal life.

3

Navigation

Among the numerous and lengthy briefs filed by Champlin's,[10] Champlin's takes issue with several aspects relating to navigation in and around its proposed expansion area. One central theme in Champlin's arguments[11] is that the CRMC wrongfully imposed a 300-foot fairway between its perimeter and Mooring Field E based upon the erroneous determination that boats of 165 feet in length are seeking to dock at Champlin's, and its erroneous application of the ratio 1.5

[10] Champlin's filed a forty-six page initial brief on its consolidated appeals on December 30, 2011, a thirty-six page reply brief on February 24, 2012, an eighty-two page brief following the second remand to the CRMC on January 14, 2013, and a thirty-two page reply brief following the second remand on March 17, 2014. Additionally, Champlin's filed a separate eleven-page brief on February 10, 2012, in response to the Town's brief filed in its appeal from the CRMC decision imposing a 300-foot fairway between each of the three marinas in Great Salt Pond and Mooring Field E.

[11] In addition, Champlin's argues that approval of the subcommittee recommendation would not negatively impact navigation around Champlin's Marina. *See* Champlin's Brief 27-38, Dec. 30, 2011. Champlin's misplaced reliance upon that recommendation is addressed separately in Section III(E), *infra*.

to two times the size of the largest vessel used in its calculation. Champlin's also suggests that it is error to conclude that the proposed expansion would increase congestion in the area.

a

The 300-Foot Fairway

In its May 6, 2011 decision, the CRMC issued the following findings of fact relating to navigation:

> "53. The evidence demonstrates that Champlin's regularly attracts yachts in excess of 100-feet in length and 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.
>
> "54. The appropriate size and design of a navigational channel around a marina to provide for a safe maneuvering zone between a marina and a mooring field based upon the evidence before the Council is at least 1.5 to 2.0 times the length of the largest vessel that can be expected to use the marina. The evidence demonstrates that a vessel of at least 165-feet is expected to use the marina and Champlin's hopes to accommodate vessels up to 300-feet.
>
> . . .
>
> "56. Consequently, the appropriate distance to use in assessing navigational impact is the 310-foot distance to the mooring field.
>
> "57. [M]ain channels need to have enough width for a vessel to maneuver safely and if need be turn around.
>
> "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 . . . ." Decision ¶¶ 53-54, 56-58, May 6, 2011.

As a threshold matter, Champlin's argued extensively that the CRMC erroneously imposed a 300-foot fairway upon all three of the marinas in Great Salt Pond in its written decision, contrary to the Council vote taken on January 11, 2011. Champlin's Reply Brief 18-19, Feb. 24, 2012. On the second remand to the CRMC, the CRMC was authorized to modify its findings and decisions

in these consolidated matters, *see* Order, September 17, 2012; *see also* § 42-35-15(e), and the CRMC did just that in response to Champlin's arguments and the Town's appeal. The CRMC reaffirmed the establishment of a 300-foot fairway between Champlin's Marina and Mooring Field E, and also conclusively established the same distance as between Payne's Dock and Mooring Field E, and between Block Island Boat Basin and Mooring Field E.[12] *See* Decision ¶ 12, Sept. 23, 2013. As it relates, then, to the 300-foot fairway between Champlin's Marina and Mooring Field E, the evidence introduced both before the May 6, 2011 decision and on the second remand to the CRMC constitutes the record for this Court to review.

The CRMC's establishment of a 300-foot fairway in front of Champlin's Marina is based upon legally competent evidence presented to the full Council. Champlin's owner Joseph Grillo (Grillo) not only testified that Champlin's attracted boats up to 125 feet in length, but also confirmed that Champlin's has allowed a 165-foot yacht to be med-moored[13] to the outermost dock at Champlin's, with its anchor thereby extending 170 feet beyond the dock. CRMC Tr. 138-39, Feb. 4, 2004; *see also* Champlin's Ex. 2. At the time of its application, and pending the reconfiguration of Mooring Field E, there existed only one hundred feet of fairway between Champlin's outermost dock and Mooring Field E. Accordingly, this single vessel to which Grillo testified occupied the entire width of the fairway plus an additional seventy feet into Mooring Field E. Then-Harbormaster Christopher Willi confirmed that vessels ranging from 100 to 150 feet in length have been med-moored to Champlin's main pier, thus decreasing the fairway available for other vessels to enter or leave Champlin's Marina. Moreover, Champlin's application itself

[12] Curiously, and without standing to assert a legal challenge thereto, Champlin's takes issue with CRMC's imposition of a 300-foot fairway between Block Island Boat Basin and Mooring Field E. *See* Champlin's Brief on Second Remand 10, Jan. 14, 2013.

[13] Med-moored is the method of docking a vessel perpendicular to the dock, thus extending out from the dock as opposed to the length of the vessel running alongside the dock.

expressly states that it seeks to attract "deep draft oceangoing yachts up to 300 feet." Record Vol. II, at 24; *see also id.* at 31[14] ("The marina will give 140 more boats up to 300-feet long a refuge in a storm in New Harbor."). Harbormaster Steven Land testified that Champlin's attracts large vessels, between fifty and seventy feet in length as well as megayacht vessels which he considered to be one hundred feet and more. CRMC Tr. 350, Nov. 16, 2012. The CRMC was well within its authority to consider this evidence and conclude that the 165 foot vessel should be used as its multiplier in calculating the required fairway width, as the length of the largest vessel expected to use the marina.

In further objection to the CRMC's calculation that a 300-foot fairway is required between Champlin's outermost dock and Mooring Field E, Champlin's next takes issue with the ratio applied of between 1.5 to 2.0 times the length of the largest vessel that can be expected to use the marina. Champlin's contends that a CRMC regulation not in effect at the time of its 2003 application[15] would allow for a different calculation, namely, just 1.5 times the length of the average vessel utilizing the fairway. *See* Champlin's Brief 32, Dec. 30, 2011 (citing CRMP § 300.4(E)(1)(f) (effective 2008)). Thus, using Grillo's testimony that the average length of boats visiting Champlin's was only thirty-four to forty feet, Champlin's maintains that a fairway only seventy feet in width should be imposed. *See* Champlin's Brief 32, Dec. 30, 2011. Further, Champlin's suggests that larger vessels need not ever have to turn around at Champlin's if it were to enter Champlin's using an unmapped "courtesy fairway" coming in from the north of Great Salt

[14] Champlin's application is contained in Volume II of the original certified record at pages 19-52, as those page numbers are delineated by the agency forwarding that certified record. The text of the application appears at pages 24-31 in that same volume.

[15] Champlin's itself attests that it was agreed at the start of the January 11, 2011 hearing that the CRMC regulations in effect at the time of Champlin's application in 2003 would control. *See* Champlin's Brief 32, Dec. 30, 2011; *see also* CRMC Tr. 9, Jan. 11, 2011.

Pond between Mooring Field D and Mooring Field E and leave by way of the other fairway running between Champlin's and Mooring Field E and travelling in front of Block Island Boat Basin and Payne's Dock. *See* Champlin's Brief 33, Dec. 30, 2011.

Contrary to Champlin's desire to use the lower factor of 1.5 as established in an inapplicable regulation, there remains legally competent evidence in the record which supports the use of a ratio of 1.5 to 2.0 times the size of that vessel to determine the appropriate distance between Champlin's and Mooring Field E. CRMC staff engineer Ken Anderson testified that "fairway width is generally in the order of one-and-a-half to three times the vessel length. CRMC Tr. 1671, Feb. 17, 2005. Another CRMC staff engineer, Danni Goulet, stated that using a factor of 1.5 times the largest vessel is the "bare minimum" width for a navigational channel or fairway. CRMC Tr. 314-15, July 15, 2010. Two experts retained by Intervenor Block Island Land Trust further supported the use of that ratio. *See* CRMC Tr. 2251, June 15, 2005 (John Roberge testified that "if the site allowed it, we would want to go to a 1.5 times the length of the largest vessel. Some people use 1.75."); CRMC Tr. 2808, Aug. 16, 2005 (Devin Santa testified that "fairways need to be designed to accommodate the largest vessel anticipated and it needs to allow for the ability for vessels to turn and maneuver. Typically, fairways will range in width from one-and-a-half to two times the largest vessel length.") Importantly, Champlin's own navigation expert, Eric Williams, did not disagree with this standard: "[L]ots of people who say 1.5 of length, some say two point the length. That's the fairway. . . . I think a one-and-a-half, depending on location." CRMC Tr. 1087, June 11, 2004. There is ample evidence in the record, then, that supports the CRMC's use of a 1.5 to 2.0 ratio in its calculation to determine proper fairway width.

That there exists an unmapped "courtesy channel" for boats to enter Champlin's Marina from the north between Mooring Field D and Mooring Field E does not alter the need for a fairway

that is between 1.5 to 2.0 times as wide as the longest vessel expected to use the marina. That courtesy channel, or courtesy fairway, was a means by which the then-Harbormaster intended to keep Champlin's-destined boats out of the private Mooring Field D and the Town's rental Mooring Field E by designating a one hundred foot wide channel between those mooring fields. CRMC Tr. 2640-41, July 26, 2005. No testimony was proffered in any way that qualified the need for space between a marina and a mooring field if there were two means of access to the marina. Champlin's contention that the unmapped courtesy channel justified a reduction in fairway width, then, is without evidentiary support.

The navigational evidence introduced demonstrates the rationale for and accepted practice of using the length of the longest vessel expected to use the marina as opposed to the average vessel length as Champlin's urges. As expert Devin Santa testified: "fairways need to be designed to accommodate the largest vessel anticipated and it needs to allow for the ability for vessels to turn and maneuver." CRMC Tr. 2808, Aug. 16, 2005. The CRMC acted within its discretion and authority to consider this evidence and calculate the required fairway width between Champlin's Marina and Mooring Field E as between 1.5 and 2.0 times the length of the largest vessel anticipated to use the marina, a 165 foot vessel.[16] This Court finds no error in the CRMC doing so.

[16] Based on Grillo's own testimony and Champlin's application, arguably the CRMC could have determined that the length of largest vessel anticipated to use Champlin's Marina was the 300-foot yachts that Champlin's has sought to attract. The use of a 165-foot vessel instead demonstrates the considered approach and discretion that the CRMC used in calculating a safe fairway width.

b

Congestion In Front of Champlin's Marina

The CRMC decision found as follows:

> "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.
>
> "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.
>
> . . .
>
> "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." Decision ¶¶ 60-61, 64, May 6, 2011.

The overwhelming evidence of record supports these findings. Testimony was offered by then-Harbormaster Willi that the combination of boat traffic in and out of Champlin's Marina, those waiting to access the fuel pump located at the end of the main pier, the med-mooring of several larger vessels at the end of the main pier and the anchor lines attached to such vessels all contribute to the high degree of congestion right in front of Champlin's Marina in its present state. *See* CRMC Tr. 2546-47, July 26, 2005. 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. The area around Champlin's Marina was described as being like a holding area akin to that of a major airport; instead of planes waiting to land, there are boats waiting to fuel up at the very end of Champlin's main pier. *See* CRMC Tr. 2931, September 16, 2005 (testimony of Wendell Corey). Recreational water users, such as kayakers, rowers, canoers, and a sailing

instructor, also offered testimony about the hazardous conditions they face when using the area in and around Champlin's Marina. *See id.* at 2993, 3053. Then-Harbormaster Willi testified that additional traffic in front of Champlin's Marina as proposed would further degrade the situation because of the bottleneck effect. CRMC Tr. 2547, July 26, 2005.

The CRMC's finding of congestion is supported by legally sufficient evidence in the record.

4

Conflicts with Water-Dependent Uses

Champlin's next suggests that the CRMC erred in considering other uses of Great Salt Pond and the public trust. *See* Champlin's Brief 25-27, Dec. 30, 2011. Additionally, Champlin's maintains that the CRMC's reliance on the uniqueness of Great Salt Pond is error. *Id.* More specifically, Champlin's states that because the CRMC has designated fifty-seven acres of Great Salt Pond as Type 3 waters, which specifically allows high intensity boating such as marinas, denying Champlin's the right to expand its existing marina creates legal error. *Id.* at 26-27. Champlin's view of the record and the criteria it must satisfy in seeking a Category B assent is entirely off base.

The approval for siting or expanding a marina is not considered by the CRMC in a vacuum as Champlin's urges. To the contrary, the CRMP expressly requires that the applicant demonstrate that its proposed activity will not unreasonably interfere with existing public access to or use of tidal waters, nor significantly conflict with water-dependent uses and activities. CRMP § 300.1(6), (10). Additionally, it is the policy of CRMC to manage siting of recreational boating facilities to prevent congestion, to consider the capability of the coastal area to support boating, and to consider "the degree of compatibility with other uses and ecological considerations." CRMP § 300.4(B)(2).

Indeed, Council member Ballou reflected upon the balance of interests to be considered in approving recreational boating facilities, specifically where allowing Champlin's to expand would result in a reduction of public moorings, and stated "it is a trade-off, like everything else this Council does, it's about balancing mixed uses, all of which are valid." CRMC Tr. 49, Jan. 11, 2011. Finally, while it is accurate that marinas are the "highest priority use[] of Type 3 waters," so too are mooring areas. CRMP § 200.3(C)(2).

The CRMC decision addresses the many ways in which the proposed expansion would negatively impact competing uses. It found that Mooring Field E and Champlin's Marina are in direct competition for use of the public trust resources. *See* Decision ¶ 66, May 6, 2011. Additionally, the CRMC found that Champlin's expansion will affect and impair competing uses in Great Salt Pond. *Id.* § 70. It lists the existing uses of Great Salt Pond which Champlin's seeks to expand into, including recreational boating, mooring, shell fishing and fishing. *Id.* ¶ 78. Ultimately, the CRMC concluded that "[t]hese competing uses would be constricted if not eliminated by the proposed expansion" and that "Champlin's has failed to sustain its burden of proving that its proposed project will not unreasonably interfere with, impair, or significantly impact existing public uses of, or result in significant conflicts with water-dependent uses and activities in, the [Great Salt Pond.]". *Id.* ¶¶ 79-80.

These findings are supported by legally sufficient evidence in the record. The pertinent testimony of then-Harbormaster Willi and Harbormaster Land, and other recreational users of Great Salt Pond, *see* Section III(B)(3)(a)–(b), *supra*, is reflective of the navigation and congestion issues in the vicinity of Champlin's Marina as well as the significant and detrimental impact Champlin's proposed expansion would have on other water-dependent uses and activities. Further, then-Harbormaster Willi confirmed that Mooring Field E, although approved for one hundred

rental moorings to be made available to the general public, only has ninety. CRMC Tr. 2565, July 26, 2005. CRMC staff engineer Anderson testified that any seaward expansion of Champlin's Marina would result in a corresponding displacement of three acres within Mooring Field E, and that the additional acreage Champlin's sought would reduce the Town's rental moorings by thirty to forty less than the one hundred that are authorized. CRMC Tr. 1656-59, Feb. 17, 2005. Surely these are the types of water-related uses and activities with which Champlin's may not unreasonably interfere and which the CRMC is required to consider. CRMP § 300.1(10), § 300.4(B)(2). It would be error if the CRMC had not addressed these factors and the nature of Great Salt Pond within which these activities exist. The Court finds no error in the CRMC's findings in this regard.

5

Efficiency and Reasonable Alternatives

Champlin's next takes issue with the CRMC's finding that its existing configuration is not the most efficient utilization of the area, nor would the proposed expansion be an efficient use. Champlin's Brief 24-25, Feb. 24, 2012.

The CRMC founds as follows:

> "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.
>
> . . .
>
> "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.

> "75. The Champlin's application does not embody any innovative solutions to meet what it characterizes as an increasing demand on its facilities.
>
> "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.
>
> . . .
>
> "85. The applicant's evidentiary presentation did not address in any meaningful way the possible cumulative impact of granting its application." Decision ¶¶ 71, 74-76, 85, May 6, 2011.

Additionally, and significantly, the CRMC expressly found that the testimony and conclusions of the CRMC staff are credible, particularly as such testimony and conclusions related to the alternative designs, more efficient use of the existing facilities and area, and the costs of dredging and expanding to the west of Champlin's existing dock. *Id.* ¶ 40.

While Champlin's places blame on the CRMC for failing to state how its docks should be reconfigured more efficiently, *see* Champlin's Brief 25, Dec. 30, 2011 ("the Council opted to opine that Champlin's should in some unstated way re-design its docks"), the CRMP clearly places the burden on the applicant to demonstrate not only that it presently makes the most efficient use of space, uses innovative designs and minimizes interference with competing use of resources, but also that reasonable alternatives to the proposed project have been considered. CRMP § 300.4(B)(1), (2), (11). Champlin's erroneously attempts to shift the burden away from itself to establish both efficiency and reasonable alternatives.

The evidence of record indeed supports the CRMC's findings that the existing configuration is inefficient and that Champlin's failed to explore reasonable alternatives. CRMC staff engineer Ken Anderson attested to the inefficient utilization of the area. CRMC Tr. 1544, Jan. 31, 2005. By comparison, Champlin's waterfront engineering expert John Bourne analyzed

efficiency of the existing marina by factoring in investments already made, and then offered testimony to broadly disregard any alternative expansion to the west of Champlin's existing structures. *See* CRMC Tr. 752-53, 772-74, Apr. 28, 2004. Bourne opined that any western expansion would require dredging and boulder removal, which he "sort of came up with some broad numbers of 200, 250 thousand dollars," an amount he concluded would be "very costly and cost prohibitive." *Id.* at 773-74. Similarly, another expert witness engaged by Champlin's, Matthew Melchiori, testified that use of the western side of its docks is "cost prohibitive from the owner's standpoint." CRMC Tr. 827, Apr. 28, 2004. CRMC staff member Danni Goulet, who had previously authored the so-called "Goulet plan" that the CRMC, on remand, was required to consider and allow cross-examination thereon, had earlier testified contrary to both Bourne and Melchiori. Using a conservative estimate, Goulet calculated the cost of dredging 6700 cubic yards from the west of Champlin's existing docks at $131,400. CRMC Tr. 2083, 2089, June 7, 2005. Additionally, he testified that less dredging may be needed if a proposed expansion to the west accounted for docking shallower draft vessels in the shallower waters. CRMC Tr. 77-78, May 27, 2010.

The CRMC clearly weighed the competing evidence and concluded that Goulet's testimony held more water. When mandated by the Supreme Court on remand to consider the Goulet plan and allow cross-examination thereon, the CRMC did give weight to the plan not for the purpose of providing a viable or acceptable plan to expand to the west, but rather as evidence "that other viable alternative layouts, configurations and locations had not been sufficiently explored by Champlin's." Decision ¶ 41, May 6, 2011. Additionally, the CRMC made clear its credibility findings on this matter: the evidence relating to Champlin's position "that expansion to the west would be 'cost prohibitive' is not credible," and the testimony of the CRMC staff

"relating to the use of alternative designs, more efficient use of the existing facilities and area, and the costs of dredging and expansion to the west" is credible. Decision ¶¶ 40-41, May 6, 2011. To ignore such clear credibility and weight determinations would run afoul of this Court's authority, *see* § 42-35-15(g); *see also Tierney*, 793 A.2d at 213, and the legally sufficient evidence of record. Accordingly, this Court finds no error in the CRMC's conclusion that Champlin's failed to sustain its burden of demonstrating that its present use is efficient and that it explored reasonable alternatives to expansion, as required under CRMP § 300.4(B)(11).

6

Public Access Plan

Champlin's public access plan presents little if anything more than what Champlin's already provides to the public. For instance, Grillo recited the many amenities that Champlin's presently offers to its guests: launch service; a dinghy dock; garbage containers; pool, shower and bathroom facilities; tennis court; fuel; electricity; water; and a private beach. CRMC Tr. 112-116, Feb. 4, 2004. There are also notable entertainment features: restaurant, snack bar, bakery, ice cream store, video arcade, bumper boats, pontoon boats, kayaks, paddle boats; movie theater; and a playground. *Id.* at 111; *see also* Champlin's Application at 24. According to Champlin's application and Grillo's testimony, the proposed expansion would allow for 140 more boats to dock at its facilities, have a larger dinghy dock, and provide a few public parking spaces. Champlin's Application at 30-31.

To rely upon the 140 additional boats as additional public access would render CRMP § 335 meaningless. The space Champlin's seeks to use—four additional acres of Type 3 waters in Great Salt Pond—is four acres of public trust waters for which Champlin's is required to compensate by affording public access to such resources. Not only is four acres sought to be used

for additional dockage by Champlin's, but the immediate effect thereof is a commensurate reduction in the public mooring space, further taking from the public trust resources. *See* Decision ¶¶ 66, 70, May 6, 2011; *see also* CRMC Tr. 1656-59, Feb. 17, 2005 (additional acreage that Champlin's seeks to expand into would reduce the Town's rental moorings by thirty to forty less than the one hundred moorings presently authorized). This evidence supports the CRMC's findings that Champlin's application "would result in an unacceptable impingement on other uses of the public of [Great Salt Pond] including the Town's dedicated mooring areas" and "would facilitate only one priority use of Type 3 waters, marinas, while unacceptably restricting another priority use, mooring areas." Decision ¶¶ 89-90, May 6, 2011.

This Court finds no error in the CRMC's conclusion that Champlin's proposed expansion would negatively infringe upon the Town's mooring areas. Additionally, in comparing what Champlin's seeks to use with what Champlin's would offer to the public, the CRMC found as follows:

> "81. The applicant has proposed by his public access plan to offer launch service, 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.
>
> "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.
>
> "83. The applicant's proposed public access plan is inadequate to compensate for the acquisition of public trust resources requested in its application." Decision ¶¶ 81-83, May 6, 2011.

In response, Champlin's merely points this Court to the findings of the subcommittee recommendation, with no corresponding testimony or evidence identified in support of those findings. In any event, the seven members of the CRMC reviewed all the testimony and evidence, including that which was presented to the subcommittee, and reached a contrary result. The CRMC was entitled to that in its *de novo* review of the record. In light of the significant reduction in the Town's mooring rentals and the little to no change in Champlin's offerings to the public in its expansion plan, as compared to what it presently offers, there is legally sufficient evidence in the record to support the CRMC's finding that Champlin's public access plan does not provide meaningful access to the public, as required by CRMP § 335.

C

Water Quality Certificate from DEM is Not Binding on the CRMC

Champlin's argues extensively that its Water Quality Certificate issued by DEM, and the conditions imposed therein, demonstrates that its proposed expansion will have no negative impact on plant or animal life. *See* Champlin's Brief 15-24, Dec. 30, 2011. Champlin's has improperly elevated the significance of a WQC to that of a final determination to be made by CRMC. By contrast, the CRMC explained the interplay between a DEM-issued WQC and CRMC's approval process:

> "42. Although the CRMP requires a [WQC] prior to the issuance of an assent, it is well settled that CRMC's review regarding water quality issues is independent and broader than DEM's review of water quality issues.
>
> . . .
>
> 44. Issuance of a WQC alone does not ensure there will be no detrimental impact to finfish, shellfish or submerged aquatic vegetation. All issues associated with water quality are not resolved by its issuance." Decision ¶¶ 42, 44, May 6, 2011.

CRMC's consideration of the WQC issued by DEM is accurate and consistent with Rhode Island Supreme Court precedent. In *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266 (R.I. 1981), an applicant seeking to build a summer home challenged, *inter alia*, the requirement that his plan for sewage disposal be reviewed by two agencies, the Rhode Island Department of Health (DOH) and the CRMC. *Id.* at 273. Like the case at bar, one agency in *Milardo*, the DOH, approved the applicant's proposed individual sewage disposal system (ISDS), but the CRMC denied the application based upon the significant probability of damage to a surrounding marsh and barrier wetland. *See id.* at 267-68. In coming to different conclusions about the acceptability of the applicant's ISDS, the Court found "that this result derived from the distinct functions of these tribunals as was implicit in the [DOH's] requirement that [the applicant] present his plan to the [CRMC]." *Id.* at 273. The Court went on to state:

> "The Legislature in its wisdom established two different forums for control over the coastal environment. The [DOH] was charged with the specific task of determining whether [applicant's] ISDS would 'pollute' the 'waters' of the state under very specific definitions of those terms. Concurrently, the [CRMC] was given the broader responsibility to protect against a reasonable probability of harm to the total coastal environment from various activities, including sewage disposal. We have no doubt that the Legislature could have assigned both functions to the same agency. In choosing not to do so, the Legislature doubtless considered the need for special types of expertise in the discharge of the separate but similar functions of both agencies." *Id.* at 273.

Just as the *Milardo* Court could not find fault in the CRMC reaching a conclusion separate and distinct from the DOH, *id.* at 274, so too does this Court recognize the propriety in the CRMC reaching a different result than DEM did in issuing the WQC. The criteria that Champlin's is required to satisfy for a Category B assent includes several distinct areas which all deal with water quality in different ways:

> "4. Demonstrate that the alteration or activity will not result in significant impacts on erosion and/or deposition processes along the shore and in tidal waters;
>
> "5. Demonstrate that the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life;
>
> . . .
>
> "7. Demonstrate that the alteration will not result in significant impacts to water circulation, flushing, turbidity, and sedimentation;
>
> "8. Demonstrate that there will be no significant deterioration in the quality of water in the immediate vicinity as defined by DEM." CRMP § 300.1(B)(4), (5), (7), and (8).[17]

Had it been intended that a WQC issued by DEM would satisfy the criteria that there be no significant impact on the abundance and diversity of plant and animal life, then CRMC's regulations would be worded differently, in a manner similar to § 300.1(B)(8) (referencing DEM definition). However, § 300.1(B)(5) is a separate and distinct criteria that Champlin's was required to satisfy. Because the CRMC found that the surveys offered by Champlin's coastal biology expert Scott Rabideau were incomplete, the WQC did not fill the void that was left when he failed to complete the surveys as he said needed to be done to address the skewed results based upon the time of the year that he had conducted his survey. *See* Champlin's Ex. 22, at 2-3; CRMC Tr. 1198-99, Dec. 7, 2004. While the conditions attached in the WQC may, in other instances, satisfy the CRMC, in this particular case, given the admittedly skewed results and the follow-up survey that never took place, the CRMC was justified in finding that the "[i]ssuance of a WQC alone does not

[17] Neither the CRMC nor any party takes issue with the criteria identified in CRMP § 300.1(B)(4) and (7), and this Court makes no findings in this regard. However, the criteria itself demonstrates the CRMC's "broader responsibility to protect against a reasonable probability of harm to the total coastal environment from various activities," *see Milardo*, 434 A.2d at 273, including siting or expanding a marina.

ensure there will be no detrimental impact to finfish, shellfish or submerged aquatic vegetation. All issues associated with water quality are not resolved by its issuance." Decision ¶ 44, May 6, 2011.

Moreover, the testimony of a DEM witness and its written clarification of the WQC that had been issued to Champlin's demonstrate the narrower focus of DEM's review. Angelo Liberti, then-Chief of the Office of Water Resources within DEM, testified that a WQC is "driven primarily with complying to anti-degradation, which is basically looking at a change in water quality." CRMC Tr. 159, June 25, 2010. He also referenced the computer model that analyzes the amount of fecal coliform that exists in the gray water discharge from vessels. *Id.* at 144-45, 160-61. Acting Director Frederick Vincent also issued a letter to CRMC then-Chairman Michael Tikoian which clarified several points regarding the WQC that had been issued to Champlin's and which approved a total of 300 vessels if Champlin's Marina was allowed to expand.[18] With regard to DEM's water quality review, Acting Director Vincent stated:

> "The total vessel limit of 300 was arrived at using a methodology that involved modeling of the estimated fecal coliform impact from additional vessels compared to impacts from existing marina operation. The total vessel limit of 300 is the maximum value that complies with the anti-degradation standards of the Water Quality Regulations and represents 75 additional vessels from the maximum capacity of 225, or a 1/3 expansion." CRMC Ex. 4-12-7-3.

DEM's analysis of the number of vessels that will result in a permissible amount of fecal coliform is limited in scope as compared to the CRMP, and specifically the eleven criteria for a

[18] DEM approved only a portion of the expansion Champlin's requested—just seventy-five more vessels than what the DEM states is the present maximum capacity of 225 vessels. This is far less than the 140-vessel increase that Champlin's has sought, and demonstrates, then, that the water quality in the vicinity of Champlin's Marina *would* deteriorate if Champlin's were approved for the 140 additional vessels it requested.

Category B assent. *See* CRMP § 300.1. The CRMC did not err in considering all the evidence and reaching a different result than DEM did by denying Champlin's application.

D

The Expansion Requested By Champlin's Marina and Payne's Dock Were Subject to the Same Standards And Properly Reached Different Results

After the second remand, and in its decision issued on September 27, 2013, the CRMC found that Champlin's Marina and Payne's Dock are similarly situated in the following ways: (1) they are both located in Great Salt Pond and are in the same water use type and water quality classifications established by the CRMC and DEM, respectively; (2) they are in close proximity to one another, separated by approximately one quarter mile; (3) they serve the same markets and are business competitors; (4) they both accommodate large vessels on occasion; (5) they are both located proximate to a heavily used fairway running along the seaward ends of three marinas and between the three marinas and the Town's Mooring Field; and (6) they are both located proximate to the intersection of the fairway and associated navigational channels. Decision ¶ 6, Sept. 27, 2013. The CRMC went on to find the ways in which Champlin's Marina and Payne's Dock are not similarly situated: (1) Champlin's Marina's fuel pump is located at the end of the tee pier and Payne's Dock's fuel pump is located along the side of the marina; (2) Champlin's Marina has a dinghy dock that provides public access between the shore and moored vessels while Payne's Dock does not; (3) Champlin's Marina is larger, occupying about three times the amount of acreage that Payne's Dock does and servicing significantly more vessels; (4) the dock configuration at Payne's Dock is a reasonably efficient use of the waters to accommodate the maximum number of vessels while Champlin's Marina's irregular shape of its fixed docks is not the most efficient utilization of the waters in which it lies; (5) Champlin's Marina's location in relation to the Town's Mooring Field would cause the elimination of forty of the Town's rental moorings whereas Payne's Dock's

location to the Town's Mooring Field would impact only one of the Town's rental moorings; and (6) Champlin's Marina's larger operation, location of its fuel pump and its proximity to the Town's Mooring Field results in a greater amount of vessel traffic and congestion as compared to Payne's Dock. *Id.* ¶ 7.

Based upon these findings, the CRMC declined to modify the Champlin's decision, concluding that both applications were subject to the same standard of review but that Champlin's was a contested case and sought approval for a significant expansion, which the Payne's Dock's application did not. Decision ¶ 8(a)-(c), Sept. 27, 2013. Champlin's, then, was required to proceed before the subcommittee while Payne's Dock was not. *Id.* ¶ 8(c). Ultimately, both applications were fully reviewed by CRMC staff and considered by the full Council. *Id.* The CRMC concluded that Champlin's failed to demonstrate that its proposed project would not cause significant impact on navigation and plant and animal life in Great Salt Pond notwithstanding its WQC issued by DEM, whereas Payne's Dock's application showed no evidence of such impact on navigation or plant and animal life in Great Salt Pond. *Id.* ¶ 8(e)-(f). The CRMC decision concluded that there was no disparate treatment, bias, prejudice, procedural inequities or selective enforcement in the review and consideration of the Champlin's and Payne's Dock applications. *Id.* ¶ 8(d).

Beyond its comparison of the Champlin's and Payne's Dock applications, the CRMC's Findings of Fact in Response to Superior Court Remand also reconsidered its earlier conclusion that a 300-foot fairway should exist between Mooring Field E and each of the three marinas in Great Salt Pond, which conclusion had been appealed by the Town. In its September 27, 2013 Findings of Fact, the CRMC stated:

> "Erroneously, the Council's [May 6, 2011] decision—at Conclusion of Law # 8—established a 300-foot setback between the Town's mooring field and Champlin's 'as well as the other existing marinas in the [Great Salt Pond].' That Conclusion is in error because the

> record reflects that the Council only voted to establish the 300-foot setback between the Town's mooring field and Champlin's. In view of that error, and because the Council in 2011 did not fully and formally establish the configuration of the Town's mooring field, the review and approval of the Payne's application was not governed by the mandatory 300-foot setback requirement. Notwithstanding the error regarding Conclusion # 8 and the associated issue of (non)applicability with regard to Payne's, the Council did, in fact, uphold the 300-foot standard in its decision pertaining to Payne's. That is reflected by the Council's decision to eliminate a single town mooring at the southeast corner of the mooring field, resulting in a final site plan for the expanded marina showing a 320-foot distance between the new marina perimeter line and the edge of the mooring field." Decision ¶ 9, Sept. 27, 2013.

The CRMC then specified its conclusion on the configuration of Mooring Field E:

> "With regard to Mooring Field E, that is the Town's rental mooring field located off of the three marinas, the Council finds that the field shall be configured in accordance with the following parameters:
> "a. The field shall be situated 300 feet off of all three marinas (Payne's, Block Island Boat Basin, and Champlin's) in order to provide for a 300-foot-wide fairway that affords safe and convenient navigation in the area.
> "b. The field shall abut the main navigational channel that runs from the entrance to the Great Salt Pond southeasterly to Payne's.
> "c. The field shall preserve and abut a 100-foot wide buffer between its western/northwestern boundary and the eastern boundary of Mooring Field D." Decision ¶ 12, Sept. 27, 2013.

Whether Champlin's characterizes CRMC's decision denying its application as disparate treatment, a violation of its constitutionally protected equal protection rights, or as arbitrary and capricious, *see* § 42-35-15(g)(1), (6); *see also* Champlin's Brief on Second Remand 52, Jan. 14, 2013, Champlin's relies entirely on the granting of Payne's Dock's application to support its claims. In so doing, it is incumbent on Champlin's to demonstrate that it is similarly situated to Payne's Dock and that there was no rational basis for the difference in treatment. *See Mill Realty Associates*, 841 A.2d at 675 (affirming trial court's decision on zoning appeal rejecting petitioner's claim of selective enforcement and disparate treatment where petitioner's building permit

application was not similarly situated to other applications); *see also Village of Willowbrook*, 528 U.S. at 564-65 (upholding right to bring equal protection claim against municipal authority under traditional equal protection analysis where plaintiff alleges intentional and different treatment from others similarly situated and no rational basis for difference in treatment). Champlin's has failed to do this.

1

The Two Marinas Are Not Similarly Situated

These two marinas are not similarly situated, and the CRMC's express findings of dissimilarities are supported by legally sufficient evidence. Champlin's starts out a larger facility than Payne's Dock, presently covering almost three times the area that Payne's Dock occupies. Champlin's was considered a significant expansion of its existing facility, while Payne's Dock was not.[19] Champlin's sought approval for an additional 140 vessels, or between 56% and 62% more than its authorized number of vessels[20]; Payne's Dock only sought approval for an additional fifteen vessels beyond the seventy presently approved, or 21%. Champlin's sought an additional four acres of Type-3 waters in Great Salt Pond, while Payne's Dock sought only an additional 0.38 acres. It is abundantly clear that Champlin's Marina is a much bigger operation than Payne's

[19] The CRMC referenced CRMP § 335(B)(9) as its basis for finding that Champlin's sought a significant expansion while Payne's Dock did not. Section 335(B)(9), in effect at the time of Champlin's application, cite to CRMP § 300.4 for the definition of "significant expansions." Section 300.4(E)(1)(g)(iii) requires that alterations proposing to increase the number of vessels at the in-water facilities beyond 25% of its original capacity or extend beyond the defined perimeters requires a Category B assent. CRMP § 300.4(E)(1)(g).

[20] The range in this calculation results from two different figures that are in evidence. In Champlin's application, it states that Champlin's Marina "can comfortably accommodate 225 boats." Record Vol. II, at 24. The clarification provided by DEM's acting director states that Champlin's Marina has a maximum capacity of 225. *See* CRMC Ex. 4-12-7-3. However, Champlin's owner, Joseph Grillo, testified that Champlin's Marina operates with a maximum capacity of 250. CRMC Tr. 110, Feb. 4, 2004.

Dock, and the expansion proposed by Champlin's would increase its footprint exponentially as compared to that of Payne's Dock even with Payne's Dock's approved expansion.

Champlin's fuel dock is located at the tee pier at the end of the marina while the fuel dock at Payne's Dock is located along the side of the marina. In addition to the higher volume of vessels that travel to get in and out of Champlin's Marina, the location of Champlin's fuel dock contributes to the congestion in that area while vessels are waiting for services. *See* CRMC Tr. 349, Nov. 16, 2012 (Harbormaster Land); CRMC Tr. 640, Feb. 26, 2013 (Henry Dupont); CRMC Tr. 669, Feb. 26, 2013 (Sven Risom). By comparison, congestion in the area in the vicinity of Payne's Dock is less because there are less boats going to Payne's Dock and because the fuel dock is "not located right where you would try to get in, so people aren't waiting for fuel and waiting to dock." CRMC Tr. 349, Nov. 16, 2012 (Harbormaster Land.)

The evidence presented on the second remand also establishes the difference in the efficiencies of the existing marina designs. CRMC staff engineer Ken Anderson repeated his criticism of Champlin's Marina's inefficient three-pronged, trident configuration, noting that its dock layout impedes navigation and safe passage in and out of the marina, and also restricts Champlin's Marina from even accommodating all 250 vessels for which it is presently approved. CRMC Tr. 490, Feb. 12, 2013. The fact that only 170 vessels have been counted as being docked at Champlin's Marina further demonstrates the inefficient layout of its existing docks whereby it cannot maximize the number of boats on the minimum space. *Id.* at 488, 490-91. By comparison, Payne's Dock was more efficient than Champlin's Marina, although admittedly was not "ideally efficient." *Id.* at 491. Payne's Dock is a simple, rectilinear design that is lacking the odd angles present in the Champlin's Marina configuration. Thus, the evidence presented during the second

remand proceedings establishes the differences in size, navigational impact and congestion, and efficiencies in existing facilities as between the two expansion applications.

The impact on animal and plant life from each of the applications also differed. With respect to Champlin's application, there was evidence by DEM that there was "healthy and productive shellfish resources within the proposed [Champlin's] expansion area," and CRMC staff biologist Amy Silva thereafter opined that there were "significant impacts" anticipated to shellfish resources within the affected area. Ex. 2-4-6. Thus, Champlin's engaged its professional wetlands scientist, Scott Rabideau, to rebut CRMC's staff biologist. As discussed *supra*, Section III(B)(2), the CRMC remained unsatisfied with the evidence offered by Rabideau and concluded that there were unresolved issues relating to water quality. Decision ¶ 46, May 6, 2011. By comparison, there was no concern raised by DEM or by CRMC's staff biologist concerning the impact that Payne's Dock's expansion would have on plant and animal life. Indeed, CRMC staff biologist David Reis stated that "[m]inimal impacts are expected on fish, shellfish or wildlife from the proposed seaward expansion which avoids impacts to coastal features and shallow water habitats." Payne's Dock Record at 104.

Finally, and importantly, is the difference in the impact that each of the two expansions applications has on the Town's rental moorings located in Mooring Field E. Although Mooring Field E was not conclusively reconfigured by the CRMC until its September 27, 2013 decision on this second remand,[21] the evidence of record established that the Town would lose up to forty of its rental moorings (from the currently approved one hundred rental moorings) if Champlin's expansion were granted. CRMC Tr. 1657-59, Feb. 17, 2005 (testimony of CRMC staff engineer

[21] The propriety of reaching that final configuration during these second remand proceedings is addressed in Section III(D)(3), *infra*.

Ken Anderson); CRMC Tr. 372, Nov. 16, 2012 (Harbormaster Land). By comparison, Payne's Dock expansion resulted in the loss of only one of the Town's rental moorings.

Although Champlin's appeal to this Court has extended into a comparison to another application in an attempt to prove Champlin's was subject to an arbitrary and capricious decision by the CRMC which also violated its right to equal protection, *see* Champlin's Brief on Second Remand 49-52, this case remains an agency appeal. As such, this Court must uphold the CRMC's conclusions if they are supported by legally competent evidence. *Strafach*, 635 A.2d at 280; *Environmental Scientific Corp.*, 621 A.2d at 208; *Sartor*, 542 A.2d at 1082-83. While Champlin's expends much effort questioning the evidence considered by the CRMC as it relates to Payne's Dock, this Court may not substitute its judgment for that of the CRMC even if this Court might be inclined to view the evidence differently and draw inferences different from the CRMC. *Johnston Ambulatory Surgical Associates, Ltd.*, 755 A.2d at 805. Additionally, Payne's Dock's assent is not the subject of this appeal.

After careful review of the record—on remand and on second remand—this Court does not find that the CRMC acted arbitrarily or capriciously in its treatment of Champlin's, either alone or as compared to its treatment of Payne's Dock, or that its conclusions and decisions were otherwise erroneous in view of the reliable, probative, and substantial evidence in the whole record. The evidence of record demonstrates that Payne's Dock, while similar in some respects to Champlin's Marina, was dissimilar in important respects which provide a rational basis for the CRMC to reach different results on their respective applications. Having concluded that Champlin's and Payne's Dock are not similarly situated in accordance with the legally sufficient evidence of record, neither a selective enforcement claim under *Mill Realty* nor an equal protection claim under *Village at*

Willowbrook can succeed. The CRMC did not err in rejecting Champlin's claim that it was subject to disparate treatment.

2

The Representations Concerning the Length of Vessels Using Payne's Dock

In Champlin's quest to challenge the approval of Payne's Dock's application as compared to its own, Champlin's offered evidence at the second remand hearing that warrants further discussion. However, this evidence and the discussion below do not alter this Court's finding that the CRMC did not subject Champlin's to disparate treatment as compared to Payne's Dock.

Champlin's presented evidence at the second remand hearing that Payne's Dock was utilized by vessels measuring up to 200 feet in length. Decision ¶ 6(d), Sept. 27, 2013. However, Payne's Dock affirmatively represented in a communication to the CRMC that the "average" boat size had been "replaced by the 40-50- foot boat." Second Remand Record, Vol. I, at 125. Additionally, the plans submitted by Payne's Dock depicted vessels approximately fifty to fifty-five feet in length. *Id.* at 93; *see also* CRMC Tr. 491-92, Feb. 12, 2013 (CRMC's staff engineer Ken Anderson's interpretation of Payne's Dock's plans).

Contrary to Champlin's suggestion that the CRMC had an obligation to verify the accuracy of the representations made by an applicant, *see* Champlin's Brief on Second Remand 11, 14-15, the CRMC was entitled to rely on the information provided by the applicant. *See Mall at Coventry Joint Venture v. McLeod*, 721 A.2d 865, 868 (R.I. 1998) (in quasi-judicial proceedings, agency not under duty to verify information in applicant's proposal; duty to depict accurate information in proposal is on applicant). Using the information provided that the longest vessel length expected to use Payne's Dock after expansion would be between fifty and fifty-five feet, the CRMC applied the same ratio of 1.5 to 2 times the largest vessel length as it did to Champlin's to determine the

sufficiency of the fairway width and found that there would be a navigational channel of at least 200 feet to the existing mooring field with Payne's Dock's proposed 80-foot expansion.

Importantly, after the presentation of this evidence in the second remand proceedings, the fate of Payne's Dock's assent was raised. Three CRMC members, including Chairman Lemont, commented on the material misrepresentation made by Payne's Dock. As set forth in the CRMC application, misrepresentation or omission of information in a CRMC application is grounds for revocation of a permit that had been granted. *See* Second Remand Record, Vol. I, at 112.[22] An investigation into the misrepresentation made by Payne's Dock appears to have been initiated after the second remand proceedings, which investigation and outcome falls far outside the scope of this administrative appeal. The fact remains, however, that the CRMC applied the same ratio in calculating the appropriate size of a navigational channel to provide for safe maneuvering between a marina and the mooring field as it did to Champlin's, based on the dimensions known to the CRMC at the time. Accordingly, for the same reasons discussed in Section III(D)(1) *supra*, this Court finds that Champlin's was not subject to disparate treatment, and the CRMC's decision denying Champlin's application was neither arbitrary nor capricious, nor erroneous in light of the reliable, probative and substantial evidence in the whole record.

[22] That form application completed by Payne's Dock states in pertinent part:

> "The applicant [ ] acknowledges by evidence of their signature that they to the best of their knowledge the information contained in the application is true and valid. If the information provided to the CRMC for this review is inaccurate or did not reveal all necessary information or data, then the permit granted under this application may be found to be null and void." Second Remand Record, Vol. I, at 112.

3

The 300-Foot Fairway Was Properly Considered On Second Remand

Finally, Champlin's takes issue with the CRMC even considering the applicability of the 300-foot fairway between Mooring Field E and each of the other two marinas during the second remand proceedings. Having issued the second remand order, this Court finds it acceptable for the CRMC to have modified a portion of its May 6, 2011 decision that Champlin's argued was in error and inconsistent with the January 11, 2011 vote. *See* Champlin's Reply Brief 4-5, 18-19, Feb. 24, 2012. Indeed, the September 17, 2012 order permitted such modification pursuant to § 42-35-15(e). *See* Order ¶ 3, Sept. 17, 2012.

These consolidated matters were returned to the CRMC at Champlin's urging that it had been subject to disparate treatment. Surely, Champlin's would have welcomed a modification of CRMC's decision if it were favorable to Champlin's. That this modification was issued and *did not* affect Champlin's application does not render the CRMC's actions unauthorized.

Even beyond its claim that the CRMC did not have authority to modify its decision, Champlin's is without standing to complain that the 300-foot wide fairway has been imposed between Mooring Field E and both Payne's Dock and Block Island Boat Basin.

E

The Subcommittee Recommendation Has Been Rejected By the CRMC

The pervasive theme throughout Champlin's multitude of briefs is that this Court should adopt the subcommittee recommendation. *See* Champlin's Brief 2-10, 15-20, 27-38, Dec. 30, 2011; Champlin's Reply Brief 33-34, Feb. 24, 2012; Champlin's Brief following Second Remand 53-55, Jan. 14, 2013; Champlin's Reply Brief following Second Remand 29-31, Mar. 17, 2014. Not surprisingly, that subcommittee recommendation was favorable to Champlin's inasmuch as it

recommended a 170-foot seaward expansion rather than a 240-foot seaward expansion, a modification to its original request that Champlin's owner remains willing to accept. However, the Supreme Court made it abundantly clear: "The subcommittee recommendation remained just that, a mere recommendation to the full council." *Champlin's Realty Associates*, 989 A.2d at 448.

The clear mandate by the Supreme Court on remand to the CRMC was to expand the record to include all previously impermissible *ex parte* communications, including the Goulet plan, allow cross-examination by any party on such additional testimony or evidence, and render a decision based upon the entire record—the subcommittee and workshop records, supporting data, supplementary material and, naturally, the records of all proceedings before the full Council. *Id.* at 449. The CRMC did just that. Each of the seven members of the CRMC who voted on January 11, 2011 and executed the May 6, 2011 written decision attested to having read the entire record. CRMC Tr. 7, Jan. 11, 2011. Thereafter, the members of the CRMC were properly advised by CRMC legal counsel as follows:

> "[T]he members having read the entire record and having the complete record before them, if any of the findings of either the previous full Council's decision or the subcommittee recommendation still have vitality to them, *they are certainly free to adopt those as their own findings*." CRMC Tr. 8, Jan. 11, 2011 (emphasis added).

Unquestionably, the members of the CRMC decided *not* to adopt the recommendations of the subcommittee. This was so notwithstanding the written arguments submitted by Champlin's to the CRMC following the first remand. *See generally* Champlin's Brief to CRMC Following Remand 18-27, 36-40, Aug. 30, 2010. Instead, as Champlin's itself points out, many of the CRMC's findings of fact in its May 6, 2011 decision echo the findings of fact issued by the CRMC in 2006, prior to its first appeal to this Court and then to the Supreme Court. *See* Champlin's Brief 22-23, Dec. 30, 2011. This was the full Council's prerogative. Absent a basis under § 42-35-15(g)

to reverse that decision, the full Council's decision must stand and Champlin's appeal must be denied.

Champlin's has engaged in an exercise in mental gymnastics in its quest to have this Court adopt the subcommittee's recommendation. Champlin's asserts in its appeal from the January 11, 2011 oral vote that the CRMC erred by not giving consideration to the subcommittee's recommendation. *See* Complaint, WC 11-0615. Next, Champlin's contends that this Court should modify the CRMC decision by following the road map laid out by the subcommittee in its recommendation. Champlin's Brief 43, Dec. 30, 2011. Champlin's then states that it does not argue that the recommendation "can be substituted as the decision of the agency . . . [but that] a reasonable way for the Court to rule on this matter in necessarily reversing or modifying the vote of the agency below, would be to render a decision which could be reflective of the Recommendation." Champlin's Reply Brief 33, Feb. 24, 2012. After the second remand to the CRMC, Champlin's then argued that CRMC's rejection of the subcommittee's findings is legal error because the CRMC did not consider Champlin's willingness to accept a smaller expansion that had been approved by the subcommittee. *See* Champlin's Brief on Second Remand 53-55, Jan. 14, 2013.

No matter how Champlin's attempts to define its argument, the only standard by which this Court is required to review an administrative appeal is set forth in § 42-35-15(g). As set forth in Section III(B)(1)-(6), *supra*, there is legally competent evidence to support CRMC's decision. To suggest that the CRMC erred or otherwise acted arbitrarily or capriciously by not adopting "a mere recommendation" would circumvent the authority of the full Council. *Tikoian*, 989 A.2d at 448. As it relates to this very subcommittee recommendation, our Supreme Court has stated, "[t]he wholesale replacement of the agency's decision with a mere recommendation of the subcommittee

is not one of the options available to the trial justice under [§ 42-35-15(g)]." *Id.* This Court will not entertain a clearly unauthorized result.

IV

Conclusion

For these reasons, this Court affirms in all respects the May 6, 2011 decision and the September 27, 2013 decision of the CRMC. There is legally sufficient evidence in the record to support the CRMC's denial of Champlin's application to expand its marina, CRMC acted within its authority to deny Champlin's application, and that decision was rational, logical, and supported by substantial evidence. Similarly, there is legally sufficient evidence to support the CRMC's determination that there are significant differences in Champlin's and Payne's Dock's applications, that they are not similarly situated, and that there is a rational basis to treat them differently based upon such differences. Champlin's rights have not been prejudiced by any constitutional violations, error of law, or arbitrary or capricious conduct on the part of CRMC.

Champlin's appeals are denied and dismissed.

Counsel for CRMC shall submit an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	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
CASE NO:	WC-11-0615 and WC 11-0616; WC 11-0333
COURT:	Washington County Superior Court
DATE DECISION FILED:	February 11, 2020
JUSTICE/MAGISTRATE:	Rodgers, J.
ATTORNEYS:	
For Plaintiff:	For Plaintiff: Robert D. Goldberg, Esq.
For Defendant:	R. Daniel Prentiss, Esq.; Jerry H. Elmer, Esq.; Anthony DeSisto, Esq.; Peter F. Skwirtz, Esq.; Katherine A. Merolla, Esq. (Defense Counsel)