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Old Harbor Land Dispute

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MEMORANDUM

TO: Nancy Dodge, Town Manager, Town of New Shoreham
FROM: Jonathan Lew, Sea Grant Law Fellow
RE: Old Harbor Land Dispute
DATE: May 12, 2007

SUMMARY

A new marina facility proposal has been informally announced for the Old Harbor area on Block Island, Rhode Island. Since the proposal has become public knowledge, issues of ownership and validity of title have arisen concerning the property in question. On June 30, 2006 a letter from Margaret Comings of the Old Harbor Task Force to the Town Council & Planning Board outlined the Task Force’s plan for the proposed board walk and possible hurdles that may be faced. Primarily, the letter indicates that although the town presently has no control over the harbor, it would like to take control by “whatever means possible i.e. court cases, purchase of land, condemnation, port authority, etc.”

A review of recent Rhode Island case law and the applicable statutory law indicates that condemnation would be the most plausible route for the task force to pursue. This memo will also address the possibility of an action for adverse possession and an action under the public trust doctrine.

OWNERSHIP OF THE PARCELS

Ralph T. Lewis, Master, issued a report naming the owners of the parcels on February 12, 1986. Lewis (“master”) named 13 individuals, 2 of whom are now deceased, as the owners of Lot 146 of Plat 6. Ownership of the land in question is broken into 90ths. The following is a list of the owners and their respective shares:

1. Ruth B. Rose Barrel - 7/90
2. Anne Whitney (hackstaff) Garnett - 7/90
3. Richard A. Gardner Jr. - 2/90

4. Linda Ann Gardner - 2/90
5. M.E. Construction Co. - 18/90
6. Harriet Phelan - 15/90
7. Frank C. Payne Jr. - 15/90
8. Anna S. Brewer - 6/90
9. Barbara Frances Conlong/A. Taylor - 6/90
10. Gladys Jones Hodge - 6/90
11. Claire Slate Pike - 3/90
12. Leslie Dodge Slate - 1/90
13. Della B. Slate - 1/90
14. Beverly Sharpe Johnson - 1/90

CONDEMNATION

Applicable Law:

Section sixteen of the Rhode Island Constitution reads in pertinent part:

[c]ompensation for taking of private property for public use -- Regulation of fishery rights and shore privileges not public taking. -- Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property. R.I. Const., Sec. 16

R.I. Gen. Laws § 42-64-9: Condemnation Power reads in pertinent part that

If, for any of the purposes of this chapter, the Rhode Island economic development corporation shall find it necessary to acquire any real property,

whether for immediate or future use, the corporation may find and determine that the property, whether a fee simple absolute or a lesser interest, is required for the acquisition, construction, or operation of a project, and upon that determination, the property shall be deemed to be required for public use until otherwise determined by the corporation; and with the exceptions hereinafter specifically noted, the determination shall not be affected by the fact that the property has been taken for, or is then devoted to, a public use; but the public use in the hands or under the control of the corporation shall be deemed superior to the public use in the hands of any other person, association, or corporation....

The full text of this statute is attached in the appendix to this memorandum.

Analysis:

To successfully condemn, or ‘take’ land for public use, the state must satisfy two requirements: (1) the land must be taken for public use; and (2) just compensation must be paid to the property owner.” See *Parking Co.*, 892 A.2d at 100. “The ultimate determination of the character of the use or purpose is a judicial and not a legislative question, yet where the legislature declares a particular use or purpose to be a ‘public use’ such a declaration must be given weight and will control unless the use or purpose in question is obviously of a private character.” *Narragansett Electric Lighting Co. v. Sabre*, 50 R.I. 288, 298, 146 A. 777; *City of Newport v. Newport Water Corp.*, 57 R.I. 269, 275, 189 A. 843. In *Block v. Hirsh*, 256 U.S. 135, at 154, 65 L. Ed. 865, 41 S. Ct. 458, the supreme court said that ‘a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect.’” *Opinion to Governor*, 69 A.2d 531 (R.I. 1949). In fact, the Rhode Island Supreme Court made clear in its opinion to the governor that the analysis is fact intensive and there is no clear test as to whether the use intended for land is one of a public nature. History has shown, however, that the Court has not shied away from condemning land where the use can be shown to benefit the public, whether for economic, environmental, and even recreational use. *Id.*

Moreover, public necessity can be shown even where the party seeks to “justify condemnation of private land for [the] transfer to a private party envision[ing] a scenario where

the existence of the transferee's enterprise depends on using land that can only be assembled by the government. Referring to such parties as "instrumentalities of commerce," the frequent example is the railroad, where only the government's use of eminent domain can avoid the pitfalls of the holdout that could derail the construction of the line entirely." Colin McNiece, *A Public Use for the Dirty Side of Economic Development: Finding Common Ground Between Kelo and Hathcock for Collateral Takings in Brownfield Redevelopment*, 12 Roger Williams U. L. Rev. 229, 240 (2006). In *Kelo v. City of London*, the proposed plan "was intended to create jobs, increase tax revenue, make the city more attractive, create recreational opportunities on the waterfront, and build momentum for other revitalization efforts." *Id.* at 237. The proposal at the Old Harbor site on Block Island appears to meet this same description. Not only is a new marina a 'instrumentality of commerce', it is intended to create recreational opportunities and revive the site in a manner only possible through public ownership and management. The continued dispute between the various parcel owners only hinders these efforts.

ADVERSE POSSESSION

Applicable Law:

Under Rhode Island law, to state a claim for adverse possession a complainant must satisfy section 34-7-1 of the R.I. General Laws, which states:

Where any person or persons, or others from whom he, she, or they derive their title, either by themselves, tenants or lessees, shall have been for the space of ten (10) years in the uninterrupted, quiet, peaceful and actual seisin and possession of any lands, tenements or hereditaments for and during that time, claiming the same as his, her or their proper, sole and rightful estate in fee simple, the actual seisin and possession shall be allowed to give and make a good and rightful title to the person or persons, their heirs and assigns forever; and any plaintiff suing for the recovery of any such lands may rely upon the possession as conclusive title thereto, and this chapter being pleaded in bar to any action that shall be brought for the lands, tenements or hereditaments, and the actual seisin and possession

being duly proved, shall be allowed to be good, valid and effectual in law for barring the action.

If the elements set forth in the above statute are satisfied, therefore, the claimant has proven that good and rightful title will vest in the adverse possessor. Those elements are: “actual, open, notorious, hostile, under claim of right, continuous, and exclusive for the statutory period of ten years.” See DeCosta v. DeCosta, 819 A.2d 1261 (R.I.2003).

Analysis:

Given the facts of this case, the claimant here will bear the burden of proving that each of the elements of adverse possession is present. The master’s report indicates that previous attempts to gain title to this land by adverse possession have failed for lack of evidentiary basis. Here, however, if the town can establish that the elements discussed in further detail below are met, a successful claim may be asserted in the Superior Court.

Actual and Continuous:

“The elements of actual and continuous are successfully established when the claimant shows that ‘the use to which the land has been put is similar to that which would ordinarily be made of like land by the owners thereof.’” See CHRISTOPHER D. DISANO & BRIAN LAPLANTE, EFFECTIVE BOUNDARY DISPUTE RESOLUTION IN RHODE ISLAND 30 (2004) [hereinafter BOUNDARY DISPUTES], citing Lee v. Raymond, 456 A.2d 1179, 1182 (R.I. 1983). “Additionally, the continuity of the possession must be sufficient to signal the true owner of the land that a claim of title contrary to his own is being asserted.” Id. See also Sherman v. Goloski, 188 A.2d 79, 84 (1963) (holding that where the land in question is of such a nature as to preclude actual occupation thereon, or intense use thereof, the requisite possession may be shown absent those uses).

Open & Notorious:

“The ‘notorious’ and ‘open’ elements are established by a showing that the ‘claimant goes upon the land openly and uses it adverse to the true owner. The owner then becomes chargeable with knowledge of what is done openly on land.” BOUNDARY DISPUTES, at 31, citing Gammons v. Caswell, 447 A.2d 361, 367 (R.I. 1982).

Hostile:

“A claimant makes a showing that the possession was ‘hostile’ if a determination is made ‘that the possession of the occupier is to a visible line in all events, regardless of the location of the true boundary line.’” BOUNDARY DISPUTES, at 31, citing LaFreniere v. Sprague, 271 A.2d 819, 822 (R.I. 1970).

Claim of Right & Exclusivity:

“Regarding the elements of ‘claim of right’ and ‘exclusivity’, in order for a party to successfully defend against an adverse possession claim of disputed land, ‘there would have to be evidence indicating that [the record of the subject property] or others had made improvements to the land or, at the very least, had used the land in a more significant fashion than merely walking across it.’” BOUNDARY DISPUTES, at 31, citing Gammons, 447 A.2d at 368.

PUBLIC TRUST DOCTRINE

Applicable Law:

Section 17 of the Rhode Island Constitution reads in pertinent part:

Fishery rights -- Shore privileges -- Preservation of natural resources. -- The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

Navigable Waters

The public trust doctrine applies only to navigable waters, which are waters subject to tidal influence. "Waters are considered navigable if they can be used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water, and are generally and commonly useful to purposes of trade and commerce." BOUNDARY DISPUTES, at 54, citing Asselin v. Blount, 14 A.2d 696 (1940).

Analysis:

The public trust doctrine, which came before the Rhode Island constitution, mandates that the state hold all lands "below the high-water mark in a proprietary capacity for the benefit of the public." See Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995). Moreover, the public trust doctrine vests within the General Assembly both the authority and responsibility to regulate and preserve tidal lands and also to determine the appropriate uses for tidal land, grant tidal land to another, or "delegate the authority to regulate that land on the state's behalf." See Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259-60 (R.I. 1999) (citing Greater Providence Chamber of Commerce, 657 A.2d at 1040). The state's plenary authority over tidal lands is nevertheless restricted by article 1, section 17, which preserves "all the rights of fishery, and the privileges of the shore" to the state's inhabitants, "to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values." State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, (R.I. 2005) (citing Town of Warren v. Chamber of Commerce, 657 A.2d at 1040).

It appears as though the interests that are to be protected by the public trust doctrine are in line with those sought to be protected by the town in implementing the proposed marina project. By taking ownership of the land in question the town will be able to regulate and

preserve the Old Harbor in the manner that was envisioned even before the Constitution of this state was drafted.