

March 4, 2016

John P. Casey, Esq.
Robinson & Cole, LLP
88 Howard St., Suite C-1
New London, CT 06320

Re: Johnathan Kallman, et al. – Petition for a Declaratory Ruling

Dear Attorney Casey,

On January 14, 2016, your clients Jonathan Kallman, Stephen M. Zide, The 8 Indian Drive Nominee Real Estate Trust and John Shaw (the “Petitioners”) submitted a Petition for Declaratory Ruling (“the Petition”) with the Department of Energy and Environmental Protection (“the Department”) pursuant to General Statutes § 4-176 and Regs., Conn. State Agencies § 22a-3a-4.¹ As further discussed below, the Petition requested that I rule that certain moorings used by the Petitioners were not located in an oyster bed, and that accordingly Conn. Gen. Stat. § 26-157a(e) does not apply to such moorings. Pursuant to General Statutes § 4-176(e)(5), I have decided not to issue a declaratory ruling in response to the Petition for the reasons set forth below.

The Petition asserts certain facts relevant to my decision. The Petitioners and intervening party Karen A. Sadik-Khan (“the upland owners”) are the owners or residents of property which abuts Long Island Sound immediately landward of oyster beds that constitute part of a group of beds known as the “Ford Beds.” The Ford Beds are apparently controlled by Ellen Woelfel and used by Robert E. Griffith, pursuant to an agreement with Ms. Woelfel.²

The upland owners maintain, or have maintained in the past, moorings in the waters of Long Island Sound near their properties. General Statutes § 26-157a(e) states, in relevant part, that “[n]o person shall . . . set any mooring on any oyster bed without the permission of the owner or the lessee of such bed.” In April 2014, Mr. Griffith sought payment from the Petitioners in exchange for permission to maintain the moorings for one boating season, through an agreement the terms of which the upland owners found objectionable. The upland property owners’ moorings require permits issued by either the Greenwich Harbormaster or the Stamford Harbormaster, depending

¹ This is the date on which a complete affidavit regarding the service of notice, pursuant to Regs., Conn. State Agencies § 22a-3a-4(3) was filed with the Department. The Department and the Petitioners agree that the time frames found in General Statutes § 4-176 began on that date.

² Both Ms. Woelfel and Mr. Griffith have been granted intervening party status in this matter.

on the location of the beds. The Harbormasters have refused to issue permits without proof that Mr. Griffith has granted permission, relying on § 26-157a(e).

In July of 2015, one of the upland owners commenced a suit against Mr. Griffith, Ms. Woefel, and the Harbormasters from Greenwich and Stamford. On December 8, 2015, the Superior Court (Heller, J.) dismissed the action, ruling that Ms. Sadik-Kahn had failed to exhaust her administrative remedies. The court held that, “the issue of whether General Statutes § 26-157a(e) is applicable to the plaintiff’s moorings requires a declaratory ruling from the Connecticut Department of Energy and Environmental Protection prior to the court’s exercise of jurisdiction.” (*Sadik-Kahn v. Griffith, et al.*, Docket No. FST-CV15-6025758-S, “Memorandum of Decision on Motion to Dismiss,” January 27, 2016, p.6.) This matter is currently on appeal to the Connecticut Appellate Court.

After Judge Heller’s decision, but before it was appealed to the Appellate Court, the Petitioners submitted their Petition to the Department. The Petition asks me to rule that

[t]here is no proof that the Petitioners’ moorings are located in a shellfish bed and that, as such, § 26-157a(e) does not apply and the Petitioners do not require permission from Griffith or Woefel to maintain their moorings in their current locations....”

There are several reasons I have decided to decline to issue the rulings requested by the Petitioners.

First, the Petitioners acknowledge that Ms. Sadik-Khan’s lawsuit “concerns the same issues as in the petition.” (Petition, fn. 1). As such, to avoid the unnecessary expenditure of resources, there is no reason the Department should interject itself into this controversy when it may well be resolved by an on-going judicial process. At a minimum, Ms. Sadik-Khan’s appeal makes any ruling by the Department premature.

Even if Ms. Sadik-Khan had not filed an appeal, I still would not have issued a ruling in response to the Petition for several reasons. As identified by Judge Heller, two goals of the exhaustion of administrative remedies doctrine are (1) the protection of an agency’s role in administering its statutory responsibilities, and (2) that disputes be resolved at the administrative level, rendering judicial review unnecessary. In this case, neither goal would be furthered by my rendering a decision.

In this case, the Petitioners dispute the location of the Ford beds, hence the request that I determine that “there is no proof the Petitioner’s moorings are located in a shellfish bed . . .” However, determining the boundaries of shellfish beds is beyond my authority. The Department of Agriculture is the “lead agency on shellfish in Connecticut” (General Statutes § 26-192a), and in its role as lead agency is entrusted with resolving disputes regarding the boundaries of shellfish beds. General Statutes § 26-196. Even the Petitioners acknowledge that the disputed shellfish

maps are issued by the Department of Agriculture, not this Department. Since this matter cannot be resolved without determining the boundaries of the Ford beds, it is clear that any ruling issued by the Department is not only incapable of resolving this matter, but could encroach on the jurisdiction of another agency, and thereby interfere with the proper administration of each agency's responsibilities.

At best, the only question within this Department's jurisdiction concerns a determination as to whose rights are superior - the upland owners' littoral rights or the right of a shellfish bed owner or lessee to grant or deny permission to set a mooring under § 26-157a(e). I could only do so, based on certain assumptions as to the location of the oyster beds that may turn out to be incorrect, rendering this an academic exercise.

For example, to issue a ruling I would first need to assume that the moorings maintained or proposed by the upland owners do in fact lie in an oyster bed. I would also need to assume that the owner or lessee of those beds has been properly identified and has not already granted permission to set moorings. Both of these assumptions may turn out later to be incorrect.

In addition, I would also have to make a series of assumptions about the upland properties to evaluate their owner's claimed littoral rights. I would, for example, have to assume that a mooring is properly within the upland property owner's littoral rights even though that determination is fact bound, would be determined on a property by property basis, and is more typically made in the context of permitting a structure such as a fixed pier and floating dock. To avoid making these assumptions would require the Department to undertake a burdensome fact finding process.

Essentially, the Petition asks me to answer a compound hypothetical question which would require me to make a series of assumptions. As such, any ruling I issue may be of little value.

Finally, without intending to lessen the urgency or concerns of anyone involved, this is essentially a dispute between private parties. This dispute does not implicate principles or policies of particular importance to the Department, nor would the resolution have a meaningful impact on any regulatory programs administered by the Department. Yet issuing a ruling in this matter could result in a significant expenditure of resources. I have, therefore, decided to refrain from expending the Department's limited resources to address what, at its core, is essentially a private disagreement.

For all of the reasons set out above, pursuant to General Statutes § 4-176(e)(5), I have decided not to issue a declaratory ruling in response to the Petition.



Robert J. Klee, Commissioner

I hereby certify that copies of the foregoing were sent to those listed below on March 4, 2016:

Petitioners

Jonathan Kallman
Stephen M. Zide
8 Indian Drive Nominee Real Estate Trust
John Shaw

Intervening Parties

Ellen Woelfel
Robert E. Griffith

Karen A. Sadik-Khan

Courtesy Copies

Represented by:

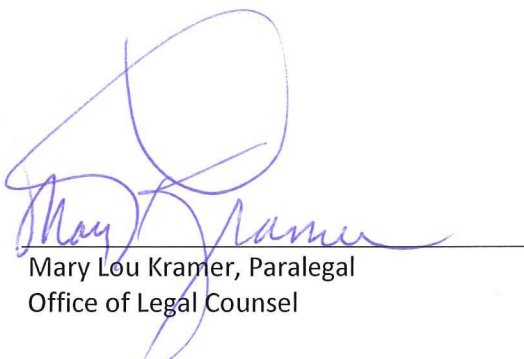
John P. Casey, Esq.
Robinson & Cole, LLP
88 Howard St., Suite C-1
New London, CT 06320
(via e-mail and certified mail)

Carolyn C. Swiggart, Esq.
165 West Punam Ave
Greenwich, CT 06830
(via e-mail and certified mail)

James R. Fogarty, Esq.
Fogarty, Cohen, Selby & Nemiroff, LLC
1700 East Putnam Ave, Suite 406
Old Greenwich, CT 06870
(via e-mail and certified mail)

Charles Walsh, Esq.
55 Elm St.
Hartford, CT 06106
(via first class mail)

David Carey
Connecticut Department of Agriculture
Bureau of Aquaculture
P.O. Box 97
Milford, CT 06460
(via first class mail)



Mary Lou Kramer, Paralegal
Office of Legal Counsel