PACIFIC LEGAL FOUNDATION

April 4, 2022

Rep. Robert E. Craven
Chairman, House Judiciary Committee
State House
Providence, RI 02903

Testimony of Pacific Legal Foundation (PLF) before the Rhode Island House Judiciary Committee on H.B. 8055

Chairman Craven and members of the Committee, thank you for the opportunity to testify **in opposition** to H.B. No. 8055.

Established 50 years ago, donor-supported Pacific Legal Foundation is a nonprofit law firm that litigates in defense of individual liberty and private property rights. PLF attorneys have successfully litigated numerous cases in the Supreme Court in defense of the right to be free from uncompensated takings of property, including in the cases of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), *Knick v. Township of Scott*, 139 S. Ct. 2069 (2019), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). PLF attorneys also regularly litigate as lead attorneys in coastal property rights disputes. *See*, *e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (holding that imposition of a public beach easement on private shoreland is a taking); *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012) (holding that state common law did not authorize the state to enforce a public beach easement on shoreland lying inland of the mean high water mark).

The Bill under consideration would significantly expand public access to private coastal shorelands by shifting the private/public beach boundary line inland from the traditional mean high water mark (MHW) boundary to a more landward boundary. This would likely result in an unconstitutional taking of private property and subject the state to an action for damages and attorneys' fees under 42 U.S.C. Section 1983.

As the Bill recognizes, the mean high-tide line has long served as the public/private beach boundary in Rhode Island. While land lying seaward of the MHW mark is subject to public access, uplands lying inland of the MHW are held in private ownership, and the owners have all the usual rights attendant to that ownership—including the right to control access to, and use of, their land. *See*, *e.g.*, *State v. Ibbison*,

448 A.2d 728 (R.I. 1982). This MHW-based private/public boundary regime is consistent with the law of almost every other coastal state in the union.

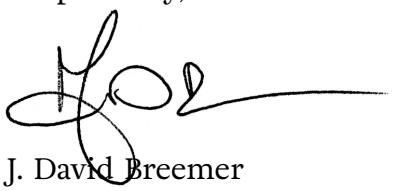
The Bill would change state beach boundary rules long after they were established and relied upon by those purchasing and owning beachfront land. H.B. 8055 would specifically shift the public beach boundary line inland from the current MHW mark to a line lying 10 feet inland of the "seaweed" line—which itself lies landward of the MHW mark. The Bill would thus take a ribbon of shoreland that has always been private under the traditional MHW mark boundary regime and make it into a public beach area. It would do so without any promise of compensation to those who have their beachfront land turned into a de facto public park by the Bill.

The Bill almost certainly amounts to a violation of the constitutional proscription that private property shall not "be taken for public use without just compensation." U.S. Const. amend V. It is well established in federal constitutional precedent that laws which convert historically private land into a public area without compensation qualify as a *per se* (i.e., automatic) unconstitutional taking. *See Nollan*, 483 U.S. at 831 (an uncompensated creation of a public access easement across beachfront property is a taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (holding that a government order requiring public access to a private pond was a taking); *Cedar Point*, 141 S. Ct. 2063 (holding that a regulation granting union access to private property was a taking). As the Supreme Court recently explained in *Cedar Point*, "government-authorized invasions of property—whether by plane, boat, cable, *or beachcomber*—are physical takings requiring just compensation." *Cedar Point*, 141 S. Ct. at 2074–75 (emphasis added).

Further, citizens subject to a taking of their property arising from the extension of public access rights onto their private land have a right, under 42 U.S.C. Section 1983, to sue for damages and attorneys' fees in state court. Alternatively, they can seek an injunction against the legislation in federal court and obtain attorneys' fees if they prevail. *See* 42 U.S.C. § 1988. Since the Bill would, "by ipse dixit, [] transform private [beach] property into public property without compensation," *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), as explained above, a court is likely to find (1) that the Bill amounts to a taking of private property within the meaning of the Fifth Amendment to the United States Constitution, and (2) that it is unconstitutional due to the lack of just compensation to aggrieved landowners. As such, passage of the Bill will likely subject the state to significant monetary liability, either through a damages award or attorneys' fees. The Committee should decline to move it forward.

I am happy to answer any questions that you may have. Please feel free to contact me: JBreemer@pacificlegal.org.

Respectfully,



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