SEAN LYNESS
Faculty Fellow
NEW ENGLAND LAW | BOSTON
154 Stuart Street, Boston, MA 02116
SLyness@nesl.edu

April 10, 2022

Rhode Island House Judiciary Committee
Representative Robert E. Craven, Sr., Chair
Representative Carol Hagan McEntee, First Vice Chair
Representative Jason Knight, Second Vice Chair

RE: House Bill H8055

Dear Honorable Members of the House Judiciary Committee:

At the April 5, 2022 hearing on H8055, the bill to clarify shoreline protections, two things became clear: (1) there are shoreline abutters who might sue; and (2) the Committee has serious—and justified—questions about the constitutional implications of the bill. I thought it prudent to further detail my opinion that the bill does not constitute a takings violation.

To be sure, shoreline protections often encounter lawsuits from private property owners. But these lawsuits are rarely successful.[1] United States Supreme Court precedent ensures that any putative plaintiff private property owners bear a heavy burden to prove a taking. In *Stop the Beach Renourishment* a unanimous court held that the state's action in dumping new sand so as to create an intervening public beach strip, 75-feet in width, separating the littoral owners from the water did *not* constitute a taking.[2] In reasoning that only garnered a plurality, the Court held that a plaintiff must show a property interest that is "established" and that the government action has "eliminate[d]" it.[3] These interests must be "established under state law," making the legal inquiry a state-specific one.[4] And, crucially, "[a] decision that *clarifies* property

[1] *See, e.g.*, *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. App. 2015) (upholding public's right to access privately-owned dry-sand beaches above the mean high tide line); *see also Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005) (affirming public's right to recreate in upland sands of private beach club); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied* 510 U.S. 1007 (1994) (reiterating that state law of custom of public use of dry-sand area was a background principle that defeated takings claims); *Pavlock v. Holcomb*, 532 F.Supp.3d 685 (N.D. Ind. 2021) (finding no taking of private property where state supreme court opinion and statute merely clarified existing property interests).

[2] *Stop the Beach Renourishment, Inc. v. Fl. Dept. of Envt'l Protec.*, 560 U.S. 702 (2010) (unanimous in the judgment).

[3] *Id.* at 728.

[4] *Id.* at 732 (unanimous); *see also Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) ("[P]roperty rights protected by the Takings Clause are creatures of state law."); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.").

entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not eliminate established property rights."[5]

That is exactly what H8055 seeks to do here: clarify existing rights. Rhode Island has a unique—and generally consistent—history of public access to the shore. From the 1663 Charter to the 1843 State Constitution to the 1986 Constitutional amendments, the public's shoreline rights have been constitutionalized. Judicial precedent has—with one exception—recognized these rights. In 1895 the Rhode Island Supreme Court recognized a right of "passage" as part of the constitutionally protected "privileges of the shore[,]" thus allowing a quahogger to upset a neighbor's marsh.[6] And in 1941 the Court reiterated in *Jackvony* that the constitution protected "a public right of passage along the shore," one that had long existed under the "usages of this state[.]"[7] The Court did so there in spite of a General Assembly enactment that granted the City of Newport the right to erect fences jutting into the sea.[8] The Court recognized shoreline privileges that were "beyond the power of the general assembly to destroy."[9] Specifically, these include "rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also, as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the shore."[10]

Centuries of protections for public passage along the shoreline were interrupted in 1982 with *State v. Ibbison*.[11] There, the Rhode Island Supreme Court set the extent of the public's rights at the theoretical mean high tide line, a delineation that was admittedly "under water" and derived in the absence of guidance from the General Assembly.[12] And while private property owners may point to *Ibbison* as "establishing" their property rights, they skip the 1986 Constitution. Just four years after *Ibbison*—and in direct response to it—the people overwhelmingly voted to enumerate certain shoreline rights to the Constitution, including the right of "passage along the shore."[13] One cannot have "passage along the shore" under *Ibbison*'s mean high tide line. The 1986 Constitution "established" the extent of property interests along the shore; property interests that include the public's right to fish, swim, gather seaweed, and pass along the shore.[14] This was a codification of *Jackvony*.[15]

---

[5] *Id.* (emphasis added).
[6] *Allen v. Allen*, 19 R.I. 114, 32 A. 166 (1895).
[7] *Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554, 557 (1941) (cleaned up).
[8] *Id.* at 554.
[9] *Id.* at 556.
[10] *Id.*
[11] 448 A.2d 728 (R.I. 1982).
[12] *Id.* at 732 ("This court has held that the common law governs the rights and obligations of the people of the state unless that law has been modified by our General Assembly.").
[13] R.I. Const., Art. I, § 17.
[14] *Id.*
[15] *See* Annotated Constitution of the State of Rhode Island and Providence Plantations: Done in Convention at Providence on the Fourth Day of December, A.D. 1986, 8–10 (1988), available at helindigitalcommons.org/cgi/ ("The committee strongly affirmed that the *Jackvony* case accurately reflected those shore privileges which have been in place in Rhode Island historically. The resolution reflected that sentiment."); *Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554, 557 (1941).

Thus, all H8055 does is clarify the interests established in the 1986 Amendments.

Rhode Island is not alone in seeking to clarify a thicket of precedents by setting a clear boundary. Indiana, too, sought to spell-out the extent of the public's right in the shoreline (there, along Lake Michigan), first by judicial opinion and then by statute.[16] In facts that closely parallel this case, Indiana had a disputed shoreline that marked the extent of the public's rights: (1) a lower line that was referenced in old federal land patents or (2) a higher line that would allow the public to walk along the shore.[17] When the state court in *Gunderson* selected the second line,[18] and the state legislature codified that choice in statute, Indiana faced a takings claim.[19]

That case, a federal district court lawsuit called *Pavlock*, made short work of the claim.[20] Although "there was significant ambiguity in that field of property law[,]" Indiana had not effected "a sudden change in state law regarding a well-established property right."[21] As such, "[w]ithout a clearly established property interest in the land, the subsequent state clarification—either by the judiciary or the legislature of where the boundary between state and private property and where the public trust had always existed ***—cannot be considered a taking."[22]

So too here. The rights claimed by the private property owners do not meet the standard of "well-established" or "clearly established." Indeed, the opposite is true. Rhode Island's unique constitutional protection of the public's shoreline access rights is longstanding and well-established. It constitutes a background principle of state law sufficient to defeat any takings claims.

The threat of litigation should not preclude the General Assembly from clarifying that which has existed for centuries.

Thank you for your time and consideration.

Respectfully submitted,

Sean Lyness

Sean Lyness

---

[16] *See Pavlock v. Holcomb*, 532 F.Supp.3d 685 (N.D. Ind. 2021).
[17] *Gunderson v. State*, 90 N.E.3d 1171, 1188 (Ind. 2018).
[18] *See id.*
[19] *Id.*
[20] *Pavlock*, 532 F.Supp.3d at 697–702.
[21] *Id.* at 699, 701.
[22] *Id.* at 701–02. Notably, the court also said, as a threshold matter, that the litigation belonged in state court, not federal court.