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August 22, 2024

Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
Hughes Justice Complex
Trenton, New Jersey 08625

Re: IN THE MATTER OF P.T. JIBSAIL LIMITED PARTNERSHIP
TIDELANDS LICENSE NUMBER 1515-06-0012.1 TDI 190001
SUPREME COURT OF NEW JERSEY, DOCKET NO. 089547
ON PETITION FOR CERTIFICATION SEEKING REVIEW OF
FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION (A-699-22), ON APPEAL
FROM FINAL AGENCY DECISION; CIVIL ACTION; SAT
BELOW: HON. JESSICA R. MAYER, J.A.D., HON. LORRAINE
AUGOSTINI, J.A.D., HON. MARY GIBBONS WHIPPLE,
J.A.D.; AUGUST 22, 2024

Dear Honorable Justices:

Please accept this letter as Save Barnegat Bay's (SBB) *amicus curiae* brief
supporting the grant of certification ¹.

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¹ On the letter brief: Michele Donato (ID #023751977; Email: mdonato@MicheleDonatoEsq.com).

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I. THE TRC HAS NO AUTHORITY TO CONVEY
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STATEMENT OF THE MATTER INVOLVED²

The underlying dispute concerns a dock extending from West Point Island (Borough of Lavallette) into Barnegat Bay. The Assistant Commissioner of Watershed and Land Management approved the State Tidelands Resource Council's (TRC) decision to allow a tidelands license for a dock extension benefiting P.T. Jibsail Family Limited Partnership (Jibsail), the owner of 83 Pershing Boulevard. See Aa546. Janine Morris Trust (JMT), which owns 85 Pershing, complains that Jibsail's dock will impair its ability to enjoy its own tidelands license.

² References: "Sab__" (Save Barnegat Bay's *amicus* brief); "Aa__" (JMT's Appellate Division appendix); "SCa_" (JMT's Supreme Court appendix); "Sma__" (Save Barnegat Bay's motion appendix).

SBB appears as *amicus curiae* to protest the TRC's *ad hoc* riparian licensing procedure that the Appellate Division has expressly condoned. As discussed below, the TRC's conveyance of tideland interests, without the advance establishment of development boundaries through surveys and maps that establish the pierhead line in consultation with the New Jersey Department of Environmental Protection (NJDEP) and the Army Corps of Engineers (Corps) is both unlawful and dangerous to Barnegat Bay and dangerous to navigation and recreation in Barnegat Bay.

"The State owns in fee simple all lands that are flowed by the tide up to the high-water line or mark." Panetta v. Equity One, Inc., 190 N.J. 307, 318 (2007) (quoting O'Neill v. State Highway Dep't, 50 N.J. 307, 323 (1967)). The land "is held under the guardianship of the Legislature." Bailey v. Driscoll, 19 N.J. 363, 367 (1955). "[P]rior to any comprehensive legislation on the subject, the owner of upland on tidewater was recognized as having a license, arising from local custom, to make improvements within high and low water mark in front of his lands." Id. at 369. Local custom was replaced with various statutes beginning in the 19th Century, including portions of what is now the Tidelands Act, N.J.S.A. 12:3-1 to -71.

At issue is the following language in N.J.S.A. 12:3-19:

The Tidelands Resource Council, with the approval of the Commissioner of Environmental Protection and after

consultation with the Army Corps of Engineers, shall, from time to time, fix and establish, around or in front of all islands, reefs and shoals situate in the tidal waters of this State, exterior lines in said waters, beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind shall be made or maintained . . .

Under N.J.S.A. 12:3-20, the TRC "may sell or let . . . lands under water . . . embraced within the lines fixed and established pursuant to [N.J.S.A.] 12:3-19." The establishment of the lines under Section 19 necessarily precedes the sale, lease or other conveyance of interests in tidelands pursuant to Section 20.

JMT contended that Jibsail's dock would be beyond the pierhead line as it appears on the Borough Tax Map (Aa361). NJDEP took the position that the pierhead line was not "fixed and established" on the municipal tax map or on any State survey. Despite the explicit requirements in Section 19, the NJDEP position is that pierhead lines do not have to exist at all, unless and until individual riparian licenses and other conveyances are proposed to the TRC. This position advances the NJDEP's requirement that docks must be extended to a water depth of four feet based on maps adopted in 1983. N.J.A.C. 7:7-9.6(a) and (b)6. In those instances where homeowners seek to construct a dock in areas of submerged aquatic vegetation, the NJDEP encourages the TRC to ignore the established pierhead line, to the detriment of safe navigation and recreation.

The Appellate Division approved this piecemeal management of navigable waters, a position that is not merely beyond the agency's statutory authority but,

is actually and potentially injurious to navigation and recreation safety in Barnegat Bay.

The Appellate Division decision allows the TRC to ignore express statutory provisions that require approval of the Army Corps of Engineers in establishing the pierhead line. The requisite procedure in N.J.S.A. 12:3-19 is intended to assure safety and planning, not the *ad hoc* modification to the pierhead line as authorized by the Appellate Division decision in this matter.

INTEREST OF AMICUS CURIAE

As set forth in Britta Forsberg's certification in support of the motion to appear as *amicus curiae* (Sma25 to Sma31), SBB was formed in 1971 to protect the water quality and conserve the ecosystem and open space within the Barnegat Bay watershed. Part of the mission of SBB is to advance the safe use of Barnegat Bay for navigation and recreation.

PROCEDURAL HISTORY AND STATEMENT OF FACTS ³

Jibsail's initial TRC tidelands license for its dock extension issued on March 8, 2018. See Aa193 to Aa195. After Jibsail applied for a modified license, and on March 4, 2020, JMT appeared before the TRC to oppose same. See SCa1 to SCa20 (transcript of Council meeting). The TRC approved the

³ The factual and procedural histories are intertwined. They are presented together to avoid repetition.

modified license on September 14, 2022. See Aa551 to Aa555 (resolution). On October 6, 2022, the TRC's decision was approved by the Assistant Commissioner of Watershed & Land Management. See Aa546.

On May 26, 2023, JMT appealed. See notice of appeal and case information statement at Aa556 to Aa563. The Appellate Division affirmed on May 8, 2024. See slip opinion at SCa59 to SCa82. JMT's motion for reconsideration was denied on June 4, 2024. See SCa83 (order).

On June 11, 2024, JMT filed notice of its petition for certification (SCa84). The petition was filed on June 21, 2024.

On August 22, 2024, SBB is moving for leave to appear as *amicus curiae* and simultaneously submitting this brief.

LEGAL ARGUMENT

I. THE TRC HAS NO AUTHORITY TO CONVEY TIDELAND INTERESTS CONTRARY TO THE AUTHORIZING STATUTES; THE COURT SHOULD REVERSE THE APPELLATE DIVISION AND REQUIRE THE TRC TO ESTABLISH PIERHEAD LINES AS REQUIRED BY N.J.S.A. 12:3-19 PRIOR TO APPROVING LICENSES FOR JIBSAIL AND OTHERS.

"The State is the proprietor of all lands under tidewater below high water mark (tidelands) and possesses all of the incidents of ownership, including the absolute discretion in making conveyances or granting licenses to its tidelands, subject to the governing statutory criteria" In re Tideland's License 96-0114-T, 326 N.J. Super. 209, 212 (App. Div. 1999) (emphasis added). The

governing statutory criteria unambiguously require the TRC to establish in advance pierhead lines respecting Barnegat Bay and other tidelands and to do so with the approval of the NJDEP and in consultation with the Corps. Nowhere in N.J.S.A. 12:3-19 or -20 is it suggested that the TRC may draw lines improvisationally as each tidelands' application is received. "Normally, these lines would be established prior to a riparian grant" Bailey v. Council; of Div. of Plan. and Dev. of Dep't of Conserv. and Econ. Dev., 22 N.J. 366, 372 (1956). Pre-conveyance planning would have avoided the needless uncertainty underlying Bailey v. Driscoll:

If the exterior line to be established by the Council falls within the two arms of Barnegat Bay between Bailey's island and Kline's mainland so as to intersect the latter's grant, it must be voided to that extent. The preciseness of adjustment, if adjustment is required, is not for the judiciary to decide.

19 N.J. at 374-75.

SBB is at a loss to justify how State agencies can usurp the role of the Corps, ignore sound planning and the precedent of Bailey v. Driscoll to extend docks beyond the pierhead line. At the least, the State agencies should be required to comply with Section 19 before carving up a resource as crucial as the Barnegat Bay tidelands by granting *ad hoc* riparian licenses. This is not the comprehensive, surveyed system of pierhead and bulkhead lines that is required by the statutory scheme. The immediate dispute between JMT and Jibsail, a

dispute that occurs when the NJDEP requires docks to be extended, would have been avoided if the TRC complied with N.J.S.A. 12:3-19 and -20.

SBB is concerned with the threats to Barnegat Bay as detailed in the Certification of Britta Forsberg, including navigation safety and obstruction to water skiers and users of personal watercraft, as well as to the ecosystem caused by the TRC's allowance of excessively long docks. It is particularly disturbing that the TRC's actions are in disregard of its statutory duties to establish pierhead lines by comprehensive planning.

Citing N.J.S.A. 12:3-19, the Appellate Division refers to the TRC's "authority . . . to . . . establish . . . exterior lines outside of which no development can occur" (SCa81) (slip op. at 23). That is not merely the agency's "authority," it is its obligation. N.J.S.A. 12:3-19 states that the TRC "shall" establish the lines, "with the approval of the Commissioner of the Environmental Protection and after consultation with the Army Corps of Engineers..." The TRC is not statutorily authorized to establish the pierhead line unilaterally.. And, again, the TRC's power to sell or lease under N.J.S.A. 12:3-20 can only be "embraced within the lines fixed and established pursuant to [N.J.S.A.] 12:3-19...." If the TRC has not fixed and established lines under Section 19, then the agency has no power to convey under Section 20.

The appellate panel relied in the alternative on an opinion it published almost seventy years ago:

The TRC can also establish these lines through individual conveyances. In Schultz v. Wilson, this court stated:

We do not consider the Bailey [II] case ⁴ as requiring the Council to make an independent survey to establish the pierhead and bulkhead line prior to the execution of a riparian grant. No reason appears why the line cannot be established in the grant itself. It would be unreasonable to assume that in fixing [the riparian owner's] exterior line the Council did not have in mind that in future grants the same exterior course would be followed along the creek, so as to establish a practical uniformity and assure littoral owners reasonable access to navigable waters.

[44 N.J. Super. 591, 607 (App. Div. 1957).] ⁵

SCa81 (slip op. at 23).

That analysis is flawed. Schultz concerns N.J.S.A. 12:3-17 (L.1875, c. 308, as am. by L.1888, c. 291, see Bailey v. Driscoll, 19 N.J. at 372), which merely provided

[t]hat the riparian commissioners may and shall, at the request of the shore-owners, extend their surveys over the tide-waters of this state and prepare maps and have the same filed as now provided by the act to which this is a supplement and the supplements thereto . . .

⁴ Referring to 19 N.J. 363. "Bailey I" is Bailey v. Driscoll, 34 N.J. Super. 228, 255 (App. Div.), aff'd in part, rev'd in part on other grounds, 19 N.J. 363 (1955). See SCa72 to SCa73 (slip op. at 14-15).

⁵ Certif. denied, 24 N.J. 546 (1957).

(Emphasis added)

N.J.S.A. 12:3-17 -- which did not compel surveys absent a request by the riparian owners -- has since been repealed. See L. 1979, c. 311, s. 4. The Schultz Court mentioned N.J.S.A. 12:3-19 only in passing (see 44 N.J. Super. at 603) and Section 20 not at all.

Moreover, whether the Judiciary believes "[n]o reason appears why the line cannot be established in the grant itself," Schultz, 44 N.J. Super. at 607, it is the **Legislature** that maintains "guardianship" over the tidelands. Bailey v. Driscoll, 19 N.J. at 367. And the Legislature declared that the lines must be established under N.J.S.A. 12:3-19 before the TRC may convey tideland interests under N.J.S.A. 12:3-20. If, as the appellate panel believes, Schultz represents common law authority for individual agency conveyances before comprehensive statutory surveying and mapping has occurred, the opinion is bad law, and this Court should declare it so.

In rejecting JMT's arguments on N.J.S.A. 12:3-19 and -20, the Appellate Division relied on opinions from the mid-20th Century. Those courts could not have expected that, seventy years in the future, tideland conveyances would continue in an *ad hoc* fashion because the entrusted State agency never got around to the comprehensive surveying and mapping mandated by the Legislature.

CONCLUSION

For the foregoing reasons, for the reasons set forth in JMT's petition, and for the sake of Barnegat Bay and other threatened tideland resources in New Jersey, this Court should grant certification.

Respectfully Submitted,

s/ Michele Donato _____
Michele Donato
Counsel for Save Barnegat Bay

MD/mia