STATE OF RHODE ISLAND
ENERGY FACILITY SITTING BOARD

IN RE: Sea 3 Providence, LLC	**:**	
d/b/a Sea 3 Providence	**:**	**Docket No. SB-2021-03**
(Rail Service Incorporation Project	**:**	
25 Fields Point Drive and Seaview Drive	**:**	
Providence, Rhode Island)	**:**	

PETITIONER'S REPLY TO THE BRIEF SUBMITTED BY THE CONSERVATIVE LAW FOUNDATION

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I. THE BURDEN OF PROOF ON SEA 3 PROVIDENCE LLC IS TO DEMONSTRATE THAT THE RAIL INCORPORATION PROJECT IS NOT AN ALTERATION TO THE REASONABLE SATISFACTION OF THE ENERGY FACILITY SITTING BOARD AS SUPPORTED BY SUBSTANTIAL EVIDENCE, NOT CLEAR AND CONVINCING EVIDENCE

Sea 3 Providence, LLC ("Sea 3"), by and through counsel, hereby submits this Reply to the brief submitted by the Conservative Law Foundation. This Reply solely addresses the Conservative Law Foundation's suggestion that this Energy Facility Sitting Board (the "Board") must conduct its review of Sea 3's declaratory petition through the lens of a "clear and convincing" standard of proof. Under the Energy Facility Sitting Act (the "Act"), the Board's decision must be reasonable. Sea 3, and even the City of Providence, suggest to the Board that in order for its decision to be reasonable, it must be supported by substantial evidence—which is an amount of legally sufficient evidence that is more than a scintilla but less than a preponderance. *Caswell v. George Sherman Sand & Gravel Co.*, 424 A.2d 646, 647 (R.I. 1981).

The decision of the Board must ultimately be supported by evidence that may survive future judicial scrutiny. The Act, although silent on which specific standard applies, provides that judicial review of a decision of the Board will be made "in the manner and according to the standards and procedures provided in chapter 5 of title 39." § 42-98-12. Chapter 5 of title 39 deals with appeals from decisions of public utilities and carriers. R.I. Gen. Laws 1956 § 39-5-1, entitled "Judicial Review," provides for the review of "a decision or order *of the commission*" by writ of certiorari to the Supreme Court.[1]

Citing § 39-5-1, the Supreme Court in *In re Providence Water Supply Bd.'s Application to Change Rate Schedules* held that its review of a decision of the Rhode Island Public Utilities Commission was limited to whether the Commission's findings were "lawful and reasonable,

[1] "Commission," in this context, "means the public utilities commission." § 39-1-2(a)(5).

supported by legal evidence and sufficiently specific to allow [the Court] to determine if the evidence before the [Commission] reasonably support[ed] its decision." 989 A.2d 110, 114 (R.I. 2010). In so holding, the Court clearly articulated the standard with which the commission was charged: rendering a decision that is "supported by legal evidence."[2] *Id.* Legal evidence is the fundamental component of substantial evidence. In this context, substantial evidence has been defined by the Supreme Court as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion . . . in amount more than a scintilla but less than a preponderance." *Caswell*, 424 A.2d at 647.

As the Board is acting in an administrative capacity, and the language of § 39-5-1 and § 39-5-3 as to when the Board's decision may be overturned is extremely similar to that contained in the APA, the Board must render a reasonable decision on Sea 3's declaratory petition supported by "substantial evidence." The Board must support its decision on evidence that would allow a reviewing court to determine if the evidence "reasonably support[ed] its decision." *In re Providence Water Supply Bd.'s Application to Change Rate Schedules*, 989 A.2d at 114. That decision is reasonable if evidence would allow a reviewing court to determine that the Board's decision is based "on relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Caswell*, 424 A.2d at 647. Accordingly, the Board must rest its decision on evidence that reasonably supports its conclusion, which must be more than a scintilla but need not be greater

[2] It is notable that, on challenge of a decision setting a utility rate, a challenger must overcome the presumption that the Commission's conclusions are reasonable by "clear and convincing evidence." *In re Providence Water Supply Bd.'s Application to Change Rate Schedules*, 989 A.2d 110, 115 (R.I. 2010). This heightened standard only applies in the limited instance in the regulatory process when a party is challenging a rate already established. That is not the posture of this case, which is an administrative permitting action by a quasi-judicial administrative board. At no point has the Supreme Court stated that it conducts the same review as the agency. If it did, it would so have stated. In the summary judgment context, for example, the Court often states that it "follow[s] the same standards and criteria as the trial justice." *Takian v. Rafaelian*, 53 A.3d 964, 970 (R.I. 2012). By contrast, in this context, the Court stated that the Commission's conclusions would be upheld if they were, *inter alia*, "supported by legal evidence." *In re Providence Water Supply Bd.'s Application to Change Rate Schedules*, 989 A.2d at 114.

than a preponderance. *Caswell*, 424 A.2d at 647. Clear and convincing evidence, by contrast, is a heightened evidentiary standard requiring a finder of fact to believe the conclusion is not just reasonable but "highly probable." *Parker v. Parker*, 238 A.2d 57, 61 (1968). It is a standard situated between that of a preponderance and beyond a reasonable doubt. *Id.* It is not a standard regularly applied in the context of the quasi-judicial acts of an administrative board. The statute does not require the conclusion to be highly probable, just reasonable.

Although there is no hard-and-fast rule on when courts will employ the "clear and convincing" standard, a cursory review of Supreme Court precedent reveals that the standard most often applies where (1) it is compelled by statute; or (2) where an individual's liberty interests or constitutional rights are directly at stake. When not compelled by statute, the clear and convincing standard applies in situations including:

1. When establishing the elements of adverse possession. *Acampora v. Pearson*, 899 A.2d 459, 466 (R.I. 2006).
2. When establishing the required elements in a petition for divorce from bed and board. *Parker v. Parker*, 103 R.I. 435, 441, 238 A.2d 57, 60 (1968).
3. Before terminating a parent's right to their child. *In re Domenic B.*, No. 2019-360-APPEAL., 2021 WL 4979159, at *3 (R.I. Oct. 27, 2021).
4. When establishing "actual malice" in a defamation case. *Henry v. Media Gen. Operations, Inc.*, 254 A.3d 822, 838 (R.I. 2021).
5. When finding a party in civil contempt. *Harris v. Evans*, 250 A.3d 553, 560 (R.I. 2021).
6. When establishing the elements of an implied easement. *Martin v. Wilson*, 246 A.3d 916, 925 (R.I. 2021).

7. When establishing that a criminal defendant waived their *Miranda* rights. *State v. Alvarado*, 232 A.3d 1067, 1074 (R.I. 2020).

8. When establishing that a premarital agreement is unenforceable. *Boschetto v. Boschetto*, 224 A.3d 824, 829 (R.I. 2020).

9. When establishing a mutual mistake of a term of an agreement, when a party seeks reformation of that agreement. *Mgmt. Cap., L.L.C. v. F.A.F., Inc.*, 209 A.3d 1162, 1172 (R.I. 2019).

10. When establishing that continued guardianship is in the best interests of a child. *In re Indiana M.*, 230 A.3d 577, 586 (R.I. 2020).

In this case, as explained *supra*, the Board is not compelled by statute to use the clear and convincing standard. Rather, the Board must render a decision based upon evidence that reasonably supports its conclusion.[3] This case also does not implicate the kind of constitutional considerations that could support any argument that the clear and convincing standard should be applied in spite of the statutory provisions, as cross-referenced in the Act, to the contrary. With reference to the above-identified examples, this case does not implicate, for example, the fundamental right to parent, a person's rights over the own land, waivers of *Miranda* rights,

[3] R.I. Gen. Laws 1956 § 39-5-3. This section provides that "[a]n order or judgment of the commission made in the exercise of administrative discretion shall not be reversed unless the commission exceeded its authority or acted illegally, arbitrarily, or unreasonably." This section is markedly similar to § 42-35-15(g), which provides the standard of review that courts employ pursuant to the APA. Pursuant to § 42-35-15(g), a reviewing court may "affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if . . . the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, under either statute a reviewing court may reverse the decision of an agency or an administrative board if said decision is not supported by substantial evidence.

pursuant to the Fifth Amendment of the United States Constitution, or the First Amendment's protection of free speech.

Accordingly, as the City of Providence recognized in its Brief, the clear and convincing standard offered by the Conservation Law Foundation is inapplicable to the instant matter and the Board must reach a reasonable conclusion on Sea 3's declaratory petition supported by substantial evidence, which is an amount of legally competent evidence amounting to more than a scintilla but less than a preponderance. *Caswell*, 424 A.2d at 647.

Respectfully Submitted,
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