

**Commonwealth of Massachusetts
County of Middlesex
The Superior Court**

CIVIL DOCKET#: MICV2006-04633-F

RE: DeJesus v Chilmark et al

TO: Ronald H Rappaport, Esquire
Reynolds Rappaport & Kaplan
106 Cooke Street
PO Box 2540
Edgartown, MA 02539

NOTICE OF DOCKET ENTRY

You are hereby notified that on **12/10/2009** the following entry was made on the above referenced docket:

**JUDGMENT: This action came on before the Court, Dennis J. Curran, Justice, presiding, on defendants' Town of Chilmark and Messrs. Parker and Jason motion for summary judgment and plaintiff, Paul DeJesus' motion for partial summary judgment, and upon consideration thereof, It is ORDERED and ADJUDGED: That the defendants' motion for summary judgment is ALLOWED, thereby rendering moot their motion to strike, and plaintiff's motion for partial summary judgment is DENIED. The complaint be and hereby is DISMISSED. Dated at Woburn, Massachusetts this 7th day of December 2009 and copies mailed 12-10-09
Dated at Woburn, Massachusetts this 10th day of December, 2009.**

Michael A. Sullivan,
Clerk of the Courts

BY: Martha Fulham Brennan
Assistant Clerk

Telephone: 781-939-2769

Disabled individuals who need handicap accommodations should contact the Administrative Office

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

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NOTICE OF DOCKET ENTRY

You are hereby notified that on 12/10/2009 the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER (which see) ORDER: For these reasons, it is **ORDERED** that the Town of Chilmark, J.B. Riggs Parker, and Dennis Jason's motion for summary judgment is **ALLOWED**, their motion to strike is **moot**, and Paul DeJesus' motion for partial summary judgment is **DENIED**. **FOR THE COURT**, (Dennis J. Curran, Associate Justice). **Dated 12-4-09 and Copies mailed 12-10-09**

Dated at Woburn, Massachusetts this 10th day of December, 2009.

Michael A. Sullivan,
Clerk of the Courts

BY: Martha Fulham Brennan
Assistant Clerk

Telephone: 781-939-2769

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Commonwealth of Massachusetts
County of Middlesex
The Superior Court

CIVIL DOCKET# MICV2006-04633

Paul DeJesus
vs
Town Of Chilmark,
E. Riggs Parker, Individually & Selectmen

JUDGMENT

This action came on before the Court, Dennis J. Curran, Justice, presiding, on defendants' Town of Chilmark and Messrs. Parker and Jason motion for summary judgment and plaintiff, Paul DeJesus' motion for partial summary judgment, and upon consideration thereof,

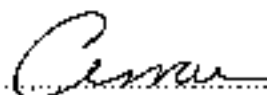
It is **ORDERED and ADJUDGED**:

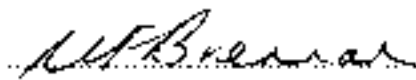
That the defendants' motion for summary judgment is **ALLOWED**, thereby rendering moot their motion to strike, and plaintiff's motion for partial summary judgment is **DENIED**. The complaint be and hereby is **DISMISSED**.

Dated at Woburn, Massachusetts this 7th day of December 2009.

Michael A. Sullivan,
Clerk of the Courts

Approved as to Form:


Justice of the Superior Court

By:..........
Assistant Clerk

Copies mailed

**COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT**

MIDDLESEX, ss.

DOCKET NO.: 06-CV-4633-F

**PAUL DEJESUS,
Plaintiff**

v.

**TOWN OF CHILMARK,
J.B. RIGGS PARKER, INDIVIUALLY,
and ACTING IN HIS OFFICAL CAPACITY,
and DENNIS JASON, INDIVIDUALLY,
and ACTING IN HIS OFFICIAL CAPACITY,
Defendants**

MEMORANDUM OF DECISION AND ORDER

Mr. Paul DeJesus alleges that his constitutional and other legal rights were violated by his inability to dock his fifty-five (55) foot boat at Martou's Vineyard during part of the summer season. He has sued the Town of Chilmark, Selectman J.B. Riggs Parker, individually and officially, and Harbormaster Dennis Jason, individually and officially.

Chilmark, and Messrs. Parker and Jason move for summary judgment on Mr. DeJesus' complaint and move to strike his affidavit. Mr. DeJesus moves for partial summary judgment on Count I of his complaint and as to liability only on Counts V and VI. For the following reasons,

the defendants' motion for summary judgment is **ALLOWED**, thereby rendering moot their motion to strike, and Mr. DeJesus' partial motion for summary judgment is **DENIED**.

I. BACKGROUND

The Court provides the following relevant facts in the light most favorable to the nonmoving party (here, Mr. DeJesus). See *Foster v. Group Health, Inc.*, 444 Mass. 668, 672 (2005).

Menemsha Harbor, located in Chilmark on the island of Martha's Vineyard, Massachusetts, "is principally a commercial fishing port and a family oriented harbor with limited facilities" for boats belonging to non-residents, *i.e.*, transient boats. 2005 Chilmark Waterways Rules & Regulations ("2005 Regulations"), § I. In the summer of 1985, Mr. DeJesus began traveling by boat to Menemsha Harbor. Mr. DeJesus has owned four boats at various times between 1985 and 2001: a twenty-eight-foot Carver called *Obsession*; a thirty-seven-foot Egg Harbor called *Obsession II*; a fifty-five-foot vessel called *Perfect Timing*; and a seventy-foot Hatteras also called *Perfect Timing*. The length of Mr. DeJesus' stays in the Harbor grew longer over the period of 1985 through 1996, ranging from fourteen non-consecutive days, to ten to seventeen consecutive days; by 1996, Mr. DeJesus began staying in the Harbor for longer than three weeks each summer.

Until 2001, Mr. DeJesus typically kept his boat on one of the docks intended solely for transient boats.¹ Once he purchased the seventy-foot *Perfect Timing* in 2001, Mr. DeJesus began docking on the Commercial Channel Dock; Mr. DeJesus was aware that the Commercial

¹ According to the 1996 and 1999 Regulations, the docks providing dockage for transient boats were Dutcher Dock and Yacht Dock. In the 2005 Regulations, the docks providing transient boat dockage were Dutcher Dock and Transient Boat Dock.

Channel Dock was not a transient dock.² During his stays, Mr. DeJesus would have to move his boat to different locations within the Harbor to accommodate other boats, such as commercial fishing boats or large transient boats.

Since 1996, Waterways Regulations have governed Menomsha Harbor. “The purpose of these regulations is to establish standard policies and practices within Chilmark waters to provide for the safety of moored and berthed vessels, safety on all Chilmark waters and to preserve the historic uses of the ponds and harbor.” *Id.* The regulations first enacted in 1996 limited transient boats:

“...In a total of 14 days in slips, on the bulkhead, or on moorings from July 1st through Labor Day. This includes all town facilities. After the 14 day limit, boats may remain in the harbor on a space available basis; boats must [sic] move to a new space after the first 14 days and then may stay an additional 7 days in that new space, then they can stay at a town space only on a day by day space available basis.”

1996 Regulations, § VII(2) (emphases added).³

The 1996 Regulations “grandfathered” certain vessels, exempting them from the fourteen-day limitation: “As has been traditional on Dutcher Dock and the Yacht Dock, five slips shall be reserved for the season that have spent the season during at least the four years prior to 1994. Morgenthau, who was moved from the West Dock, is grandfathered for the month of August as long as he actively use [sic] his boat. No new long-term dockage shall be allowed

² Mention of this dock first appears in the 1999 Regulations. 1999 Regulations, § VI(F)(4) (describing dock as “accommodat[ing] the loading/unloading and maintenance of commercial fishing vessels, temporary tie-ups”).

³ The reference to “town facilities” and “town space” appears to be in recognition of the fact that private companies may rent out moorings and slips. *E.g.*, 1996 Regulations, § II(C) (defining “Commercial Mooring” as “any mooring placed in Chilmark waters” by Chilmark marine service businesses “for which a rental fee may be charged”); 1996 Regulations, § III(8) (requiring commercial mooring and marina owners to provide Harbormaster with “alphabetical list of current renters of moorings and slips”).

in the transient berths” 1996 Regulations, § VII(2a). The language in the fourteen-day limitation and grandfathering provisions are identical to those in the Waterways Regulations promulgated in 1999. 1999 Regulations, §§ VII(2), VII(2a).

Mr. Parker was elected to Chilmark’s Board of Selectmen in 2004. From that point until approximately 2007, he was the Board’s liaison to Menemsha Harbor. Sometime in 2005, Mr. Parker, Mr. Jason, and the third member of the Mooring Assignment Committee⁴ set about amending the Waterways Regulations for a third time.⁵ After posting the revisions on the Chilmark website and holding a televised public meeting during which the Board of Selectmen discussed the revisions and made changes, the Board of Selectmen approved the 2005 Regulations.

The 2005 Regulations changed the fourteen-day limit provision:

“Transient Boat dockage in the harbor is limited in time to promote turnover and fair access to transient cruising boats. No one Transient Boat will be allowed to stay in regular transient space for extended periods. Transient Boats are limited to a total of 14 continuous days in slips, on bulkhead, or on Moorings from July 1st through Labor Day. Once the limit has been reached, the Transient Boat must leave the harbor for at least one week. The Harbormaster may make reasonable exceptions for bad weather or breakdowns.”

2005 Regulations, § VII(N). The 2005 Regulations also changed the grandfathering provision:

“As has been tradition on Dutcher Dock and the Filled Dock, three slips may be reserved for the

⁴ The Mooring Assignment Committee consists “of the Harbormaster, a member of the Board of Selectmen and one other person appointed by the Board of Selectmen.” 2005 Regulations, § III(F). In 2005, Alex Preston was the third member of the committee.

⁵ At his deposition, Mr. Parker testified that he had received complaints about transient boaters remaining in Menemsha Harbor for longer than fourteen days, in violation of the rule set forth in the regulations and in contrast to the Harbor’s “master plan” of limiting the stay of pleasure boats. Parker Deposition, at 75. When he asked Mr. Jason about this practice, Mr. Jason replied that these alleged abuses “had been happening for a long time” *Id.*

season for long term Transient Boats: 'Phalaope', 'Jest' and 'Releamar'. No new long-term transient dockage shall be allowed. Slips must be used for some portion of each year to retain the privilege." 2005 Regulations, § VII(C). Maurice Tempelsman owns *Releamar*, a seventy-foot Flatteras, which he had been docking in the Commercial Channel Dock since 1985 for approximately one month each summer.⁶

Additionally, while the 2005 Regulations gave enforcement authority to the Harbormaster, assistant harbormaster, and police officers, similar to the 1996 and 1999 Regulations, it also provided that "[t]he Harbormaster shall have the authority to interpret these regulations where uncertainty exists in order to carry out the purpose of the regulations The Board of Selectmen will support the Harbormaster in such interpretation unless the interpretation is patently unreasonable." 2005 Regulations, § VIII(B).

After obtaining a copy of the draft regulations in Fall 2005, Mr. DeJesus telephoned Mr. Jason. He told Mr. Jason that some of the rules "just didn't make sense for the safety of the harbor" and he questioned the grandfathering of *Releamar* because Mr. DeJesus "always was under the assumption that [one] could never get grandfathered – but if they are going to change

⁶ In a July 20, 2006, letter to the *Vineyard Gazette*, Fred Littleton wrote that he had been Chilmark's Harbormaster from 1985 through 1994.

"When [he] was appointed, there were four yachts whose owners had been spending the bulk of the summer season in the transient space. They were not Chilmark residents, but summer visitors. The selectmen instructed [him] to allow them to stay for the summer because they had been doing that for several years, but to limit all other visiting yachts to 2 weeks In that year the 'Releamar' arrived for the first time. . . . [Mr. Littleton] told the owner that, because of the size of his vessel, [he] could not put him anywhere except on the North end of the drive on dock, where the fishermen 'took out' . . . or worked on their gear, and that whenever a commercial fishing vessel wanted to make use of that space for its intended purpose the 'Releamar' would have to leave until the work was finished. . . . Mr. Templesman [sic] agreed to those conditions. Since this was not part of the transient yacht dock [Mr. Littleton] did not put any time limit on [Releamar's] stay. That is how it was set up and it worked without any problems."

these rules that [Mr. DeJesus] [could not] come for [his] month, [he] want[ed] to consider being grandfathered, too.” DeJesus Deposition, at 79. Mr. Jason suggested that Mr. DeJesus write a letter to the Board of Selectmen, which he did, dated October 23, 2005.⁷

After the Board of Selectmen approved the regulations, Mr. DeJesus telephoned Mr. Jason again, asking how the regulations’ would affect him. At Mr. Jason’s suggestion, Mr. DeJesus telephoned Mr. Parker. The substance of their conversation is in dispute. First, Mr. DeJesus asked Mr. Parker why *Releamar* was grandfathered. Mr. DeJesus claims and Mr. Parker disputes that Mr. Parker told him that Mr. Tempelsman “was an old man, that he had been coming to the harbor for a long time, and he had a special relationship with a former first lady of the United States, Jackie Onassis.” DeJesus Deposition, at 92. According to Mr. Parker, however, an earlier Harbormaster had obtained the approval of the Board of Selectmen to allow *Releamar* to dock on the commercial dock because it was too large to fit on the transient dock; whenever a commercial fishing vessel needed that space, *Releamar* would leave. *See supra* n.6. “[F]or all those years, that privilege continued. . . . [T]he [2005] regulations provided for more transient use of the commercial dock. And the word ‘grandfathered’ had been used to describe transient vessels who used the transient space and could stay longer than the normal period.” Parker Deposition, at 143; Parker Deposition, at 150-151 (“In 2005 when the regulations were amended to include use of the commercial dock more by transient boats, it was necessary to name *Releamar* or else revoke his privilege that he had for all those years. . . . It was a confirmation of his privilege.”).

⁷ In this letter to Chilmark’s three selectmen, Mr. DeJesus wrote that the limitation on the length of time a boat can stay in the Harbor is unnecessary not only because, other than himself, only four other boats regularly stayed longer than one week, but also because it would take revenue away from the Harbor. Mr. DeJesus also wrote that he wished to be considered for the list of grandfathered vessels, pointing out that *Releamar* was not previously grandfathered.

Second, Mr. DeJesus asked Mr. Parker for an interpretation of the 2005 Regulations' fourteen-day limitation, setting forth the following hypothetical: "[I]f I come in for 13 days and I leave for a night or two, can I come back for two weeks after that?" DeJesus Deposition, at 94. In response to Mr. DeJesus' question, Mr. Parker replied, "Those rules don't apply to that side of the harbor[,]"; to which Mr. DeJesus asked, "Well, why are we having this conversation?" *Id.* After this conversation, Mr. DeJesus still did not "know where [he] [stood]" with respect to the regulations' effect on him. *Id.* According to Mr. Parker, he told Mr. DeJesus that his plan "would not be in keeping with the spirit of the regulations. [T]hat's . . . not what the regulations were intended to say." Parker Deposition, at 221. Further, Mr. Parker testified at his deposition that it is true that until the enactment of the 2005 Regulations, the regulations did not apply to the Commercial Channel Dock because it was not transient space, but he could not recall if he made that statement to Mr. DeJesus.

Mr. DeJesus would usually begin planning his summer trip to Chilmark by telephoning the Harbormaster in January. He understood that the Harbormaster could not guarantee that he would be able to keep his boat in the same location in the Harbor for the entire time period. Mr. DeJesus testified in his deposition that when he telephoned Mr. Jason in January 2006 about the summer of 2006, Mr. Jason, without having read the regulations, told him, "Don't worry. Nothing has changed. I will work with you. You may have to leave the harbor for a day, . . . to leave the dock and take a cruise and go out of the harbor." DeJesus Deposition, at 95.

Mr. DeJesus testified to two more substantive telephone conversations with Mr. Jason in the spring of 2006. During the first conversation, Mr. Jason told Mr. DeJesus that "nothing had changed" but that he still had not read the regulations. During the second substantive conversation, Mr. Jason told Mr. DeJesus that he learned from the Board of Selectmen that the

rules for transient boats applied ““wherever you are in the harbor or in Chilmark waters. . . . So whatever transient boater rules are, no matter what dock you are tied onto, you are tied to transient rules.”” DeJesus Deposition, at 96-97. At that point, Mr. DeJesus made two reservations with Mr. Jason. ““book[ing] a reservation for the 14 days. . . . [after which he would] leave the harbor for two [days], and . . . [then] come back for 14.”” DeJesus Deposition, at 97. Mr. Jason took the two reservations and, after speaking with Mr. Parker, spoke again with Mr. DeJesus in or around May 2006 and informed him that he could not take the two reservations because, although Mr. DeJesus would not be ““breaking the rules, . . . staying for 14 days, leaving for two, and coming back for 13, . . . wasn’t the intent of the rule.”” DeJesus Deposition, at 98; Jason Deposition, at 221-222; see *supra* n.8.

On Friday, July 14, 2006, Mr. DeJesus docked *Perfect Tuning* at the Harbor’s Commercial Channel Dock. The following day, the assistant harbormaster provided Mr. DeJesus with a form, asking him to fill it out so he could enter the information into the computer. The form was titled, “Application for Berth” and purported to provide an “abstract of the Chilmark Waterways Rules and Regulations.” The Application also warned that “**[v]iolation of any town rules or regulations, or the failure to comply with the lawful orders of the Harbor Master will be cause for the removal of the vessel at owner/operator expense. Violations also will be subject to fines and or arrest by the Harbor Master or Police Department.**” (Bold in original).

Mr. DeJesus filled out the requested information, but he removed the portion with his signature, refusing to sign because he claimed the Application inaccurately stated the fourteen

⁴ It is unclear if Mr. DeJesus’ testimony that he made both reservations for fourteen days was a misstatement given that he had previously made clear his intent to dock for thirteen days, leave for one day, then dock for the full fourteen days.

day limitation set forth in the 2005 Regulations. Mr. Jason accepted the torn, unsigned Application from Mr. DeJesus, who told Mr. Jason that he had spoken to an attorney about taking legal action. The phrase on the Application with which Mr. DeJesus took issue stated, “[f]ourteen days maximum stay, July through Labor Day[.]”

On July 17, 2006, Mr. Jason, wearing full dress uniform with Mr. Parker’s agreement, hand-delivered the following letter to Mr. DeJesus at his boat:

“Every vessel seeking transient dockage at the Town of Chilmark facilities in Menemsha harbor must sign the ‘Application for Transient Berth’ form furnished by my office. Upon your arrival on July 14, 2006, you submitted an unsigned and incomplete form for ‘Perfect Timing.’ You are hereby ordered to sign and submit a complete form to my office, or remove “Perfect Timing” from the harbor.

“You have twenty-four (24) hours from the receipt of this letter to comply with my order. Pursuant to the authority granted to me by G.L. c. 102, §§ 21, 24, and 25, your failure to comply with this order will be cause for me to remove ‘Perfect Timing’, at your expense, from the harbor, and may also subject you to fines and/or arrest by me or the Police Department.

“Please do not hesitate to contact me with any questions. The Town of Chilmark hopes that you will comply with this order and the Chilmark Waterways Rules & Regulations.”

Mr. Jason signed the letter in his capacity as Harbormaster, but he testified at his deposition that he did not write it. After receiving this letter, Mr. DeJesus signed the Application and returned it to Mr. Jason.

Mr. DeJesus attended Chilmark’s Board of Selectmen’s meeting on July 18, 2006, at which time an attendee quoted Mr. Parker as having stated that Mr. Tempelman was grandfathered under the 2005 Regulations because of his relationship with Jacqueline Kennedy Onassis. In response, Mr. Parker stated, “the reason [for grandfathering Mr. Tempelman] is he’s been coming here since basically the beginning of time, and that has been honored” by

grandfathering him in the 2005 Regulations. Transcript of July 2006 Meeting, at 35. In response to another attendee who also quoted Mr. Parker as having attributed Mr. Tempelman's grandfathered status to his relationship with Jacqueline Kennedy Onassis, Mr. Parker stated, "[Mr. Tempelman] was grandfathered, it was [Mr. Parker's] understanding, because he had been here since the beginning." Transcript of July 2006 Meeting, at 39.

II. DISCUSSION

"The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Humphrey v. Byron*, 447 Mass. 322, 325 (2006), quoting *Anderson St. Assoc. v. Boston*, 442 Mass. 812, 816 (2004); see Mass. R. Civ. P. 56(e), 365 Mass. 824 (1974). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy its burden either by submitting affirmative evidence negating an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourmavasilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. *LaLonde v. Eisner*, 405 Mass. 207, 209 (1989); see *Polaroid Corp. v. Rollins Envtl. Servs., Inc.*, 416 Mass. 684, 696 (1993) ("[B]are assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment.")⁹

⁹ Although the defendants have moved for summary judgment together on all of Mr. DeJesus' claims against them, the summary judgment record makes clear that certain

I. 2005 Regulations

Both the 1996 and 1999 Regulations essentially permitted transient boats to remain in the Harbor indefinitely on a space-available basis. Consistent with their stated purpose of encouraging transient boat turnover, the 2005 Regulations changed prior practice by limiting transient boats “to a total of 14 continuous days in slips, on bulkhead, or on Moorings from July 1st through Labor Day. Once the limit has been reached, the Transient Boat must leave the harbor for at least once week.” The 2005 Regulation also changed the grandfathering provision set forth in the 1996 and 1999 Regulations, decreasing the amount of grandfathered boats to three. Whereas the earlier regulations left the grandfathered boats unnamed, the 2005 Regulations identified them as *Phalarope* and *Jest*, which were among the five unnamed boats in the 1996 and 1999 Regulations, and *Releamar*.

Additionally, the 2005 Regulations added a description for the Commercial Channel Dock. This dock did not appear in the 1996 Regulations, although the summary judgment record indicates that the dock itself existed as early as 1985; the 1999 Regulations describe the dock as “accommodat[ing] the loading/unloading and maintenance of commercial fishing vessels, temporary tie-ups.” The 2005 Regulations described the Commercial Channel Dock similarly, and also gave the Harbormaster discretion to use Commercial Channel Dock space “for Transient Boats up to 75’ LOA [length, overall] if not needed for fishermen or fish buyers.”

Mr. DeJesus’ argument that the 2005 Regulations’ fourteen-day restriction applied only to boats docked in “regular transient space” – and thus not the Commercial Channel Dock – is

claims cannot lie against all defendants (e.g., Mr. Jason was not involved in the decision to grandfather *Releamar*, thus the equal protection claim cannot lie against him). For the sake of simplicity, however, this court will assume that each claim properly applies to all defendants, both in their individual and official capacities. *But see infra* n. 10.

incorrect. As noted, the 2005 Regulations permitted transient boats to dock for fourteen days, leave for one week, then return to the Harbor, presumably for another fourteen days. This limitation applied to “[t]ransient [b]oats” located, without exception, “in slips, on bulkhead, or on Moorings” Added to that restriction, however, was the provision that “[n]o one [t]ransient [b]oat will be allowed to stay *in regular transient space for extended periods*” (Emphasis added). This provision does not appear to apply to the Commercial Channel Dock which serves as transient space on an as-needed basis. Thus, in interpreting the regulations in a way that carried out their purpose, the Harbormaster could have limited transient boats from docking in regular transient space for “extended periods[.]” a phrase that likely referred to the period of time after the initial fourteen-day stay and one-week absence from the Harbor.

For transient boats docked in non-regular transient space such as the Commercial Channel Dock, however, it does not appear that the Harbormaster had the same discretion. Thus, pursuant to the 2005 Regulations, and provided that space was available, Mr. DeJesus could have docked his boat on the Commercial Channel Dock, left for one week, and then returned to the Harbor, repeating the process until Labor Day, assuming there was space available.

II. Due Process – Count VII

Mr. DeJesus argues that the vagueness and arbitrary interpretation of the 2005 Regulations violated his due process rights.

“A law is void for vagueness if persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’ . . . Vague laws violate due process because individuals do not receive fair notice of the conduct proscribed by a statute. . . . and because vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement”

Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 522 (1986) (internal quotations omitted), quoting *Commonwealth v. Jaffee*, 398 Mass. 50, 54 (1986). As described above, the provisions of 2005 Regulations at issue here — namely the fourteen-day limitation and grandfathering provisions — are clear.

First, the regulations limited transient boats, such as Mr. DeJesus' boat, to fourteen continuous days "in slips, on bulkhead, or on Moorings from July 1st through Labor Day." Once the transient boat reached the fourteen-day limit, the regulations required the boat to "leave the harbor for at least one week." See *The American Heritage Dictionary*, 317 (2d ed. 1985) (defining "continuous" as "[e]xtending or prolonged without interruption or cessation; unceasing"). While the 2005 Regulations, as written, appear to permit Mr. DeJesus' plan to stay at the Harbor for thirteen days, leave for one day, then return for the full fourteen days, Mr. DeJesus learned at least two months prior to July 2006 that his plan was impermissible as contrary to the intent of the regulations. Therefore, he did not have to guess at the meaning of the fourteen-day limitation and had fair notice of the conduct the regulation proscribed.

Department of Youth Servs., 398 Mass. at 522

Further, this interpretation of the fourteen-day limitation is not arbitrary because, otherwise, the limitation would have no meaning. See *id.* In fact, under the 1996 and 1999 Regulations, transient boats could stay in a slip for fourteen days, then move to a new space for an additional seven days, and remain in the Harbor on a day-by-day basis thereafter. The 2005 Regulations, which revised the time-limit provision, expressly sought to limit the time transient boats stayed in the Harbor in order "to promote turnover and fair access to transient cruising boats." Refusing Mr. DeJesus' attempt to circumvent the 2005 Regulations by staying at least

twenty-seven days with only a one-day interruption was based on a reasonable interpretation of the 2005 Regulations and did not violate Mr. DeJesus' due process rights.

Second, the grandfathering provision, naming three boats deserving of grandfathered status, is also clear and did not deprive Mr. DeJesus of his due process rights. The court discusses this provision more fully, below, in the context of Mr. DeJesus' equal protection claim.

The defendants' motion for summary judgment on Count VII is consequently **ALLOWED**.

III. Equal Protection – Count VI

Mr. DeJesus alleges that he is a “class of one” whom the defendants, through the 2005 Regulations, intentionally treated differently from others similarly situated thereby violating his equal protection rights. “The equal protection clause of the Fourteenth Amendment mandates that ‘all persons similarly situated should be treated alike.’” *Martens v. Massachusetts Interscholastic Athletic Ass'n*, 453 Mass. 116, 128 (2009), quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); see *Dickerson v. Attorney General*, 396 Mass. 740, 743 (1986) (“[The] standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution.”). Class of one equal protection allegations “may serve as the basis of a valid equal protection claim, because ‘the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.’” *Martens*, 453 Mass. at 124 n.19, quoting *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

“Where applicable state law vests the decisionmaker with discretionary authority to award or withhold a state benefit, a plaintiff who grounds an equal protection claim on the denial of that benefit faces a steep uphill climb.” *Id.* at 129 (alteration omitted), quoting *Pagan v Calderon*, 448 F.3d 16, 34 (1st Cir. 2006). The Board of Selectmen had the authority to amend the regulations, and, within that authority, had the discretion to grant *Releamar* the benefit of grandfathered status. To establish a violation of his equal protection rights, Mr. DeJesus “must show that ‘(i) he was treated differently than other similarly situated supplicants and (ii) the differential treatment resulted from a gross abuse of power, invidious discrimination, or some other fundamental procedural unfairness.’” *Id.* Mr. DeJesus has not demonstrated that he will be able to prove these elements at trial.

First, there is no dispute that Mr. DeJesus is a transient boater, and from Mr. DeJesus’ own account, the defendants applied the 2005 Regulations to him as worded, limiting his stay to fourteen days. He points only to Mr. Tempelman as the transient boater to whom he is similarly situated and argues that, by grandfathering Mr. Tempelman and not Mr. DeJesus, the defendants have violated Mr. DeJesus’ equal protection rights. Mr. Tempelman and Mr. DeJesus, however, are not similarly situated. The size of Mr. Tempelman’s boat, *Releamar*, required that he dock it on the Commercial Channel Dock since 1985; the size of Mr. DeJesus’ boat necessitated that he dock it on the Commercial Channel Dock only since 2001. The 2005 Regulations do not contain a provision similar to that in the 1996 and 1999 Regulations describing grandfathered boats as having “spent the season [docked in the Harbor] during at least the four years prior to 1994[.]” the notion that a grandfathered boat has to have been present in a particular spot for several years, however, was clearly behind the decision to grandfather Mr. Tempelman’s boat, and not Mr. DeJesus’.

Second, even if Mr. DeJesus “presented evidence sufficient to prove that other similarly situated persons were [grandfathered], [he has] introduced no evidence tending to show that this alleged differential treatment resulted from ‘invidious discrimination,’ ‘fundamental procedural unfairness,’ or a ‘gross abuse’ of [the defendants’] power.” *Mancuso*, 453 Mass. at 129-130, quoting *Pagan*, 448 F.3d at 34. Mr. DeJesus’ complaints about the reasoning he alleges Mr. Parker gave for grandfathering Mr. Tempelsman “are not indicative of the kind of ‘egregious procedural irregularities or abuse of power . . . conceivably rising to the level of a federal equal protection violation.’” *Id.* at 130, quoting *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991). Chilmark’s Board of Selectmen posted proposed revisions to the regulations on the Chilmark website, discussed the revisions at a televised public meeting, and, finally, approved these Regulations in 2005.

Mr. DeJesus “has not alleged that [he] was subjected to invidious discrimination, *i.e.*, that the [defendants] denied [to provide him with grandfathered status] . . . on the basis of some suspect or quasi-suspect classification.” *Id.* at 130. As noted above, *Releamar*’s presence on the Commercial Channel Dock since 1985 supported the decision to afford it grandfathered status. This decision appears to be similar to the grandfathering of Morganthau in the 1996 and 1999 Regulations: those regulations note that Morganthau, “who was moved from the West Dock, [was] grandfathered for the month of August[;]” similarly, *Releamar* had been docking on a non-transient boat dock for the month of August since 1985.

Finally, even “‘an arbitrary denial of a [discretionary benefit] in violation of state law – even in bad faith – does not rise above the constitutional threshold for equal protection . . . claims.’” *Mancuso*, 453 Mass. at 129 (alteration and ellipses in original), quoting *Baker v. Cox*, 230 F.3d 470, 474 (1st Cir. 2000). Therefore, taking as true Mr. DeJesus’ assertion that Mr.

Parker attributed Mr. Tempelsman's grandfathered status to his relationship with Jacqueline Kennedy Onassis, Mr. DeJesus has not set forth an equal protection claim.

Accordingly, the defendants have demonstrated that Mr. DeJesus has no reasonable expectation of proving the elements of this claim at trial, thus their motion for summary judgment on Count VI is **ALLOWED**.

IV. Agreement – Counts II, III, and IV

Counts II, III, and IV of Mr. DeJesus' complaint are based on his allegation that the defendants agreed to permit him to remain in the Harbor for longer than the fourteen-day period allowed for in the 2005 Regulations without having to leave for one week. As discussed above in the context of Mr. DeJesus' due process claim, Mr. DeJesus knew months prior to his July 2006 arrival that he would not be permitted to dock in the Harbor for longer than fourteen days without leaving for the one-week period specified in the 2005 Regulations. There was no agreement otherwise on which Mr. DeJesus could rely. *See, e.g., Rhode Island Hosp. Trust Nat'l Bank v. Faradian*, 419 Mass. 841, 848 (1995) (“An essential element under promissory estoppel theory is that there be an unambiguous promise”); *id.* at 850 (“[A]n action based on reliance is equivalent to a contract action, and the party bringing such an action must prove all the necessary elements of a contract other than consideration.”).

“[B]ecause the evidence . . . [does] not warrant a finding that a ‘promise’ in the contractual sense had been made, any reliance by [Mr. DeJesus] . . . would be unreasonable as a matter of law.” *Rhode Island Hosp. Trust Nat'l Bank*, 419 Mass. at 850; *see, e.g., Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 448 Mass. 15, 27-28 (2006) (requiring that plaintiff asserting promissory estoppel demonstrate that plaintiff acted or chose not to act “in reasonable reliance on the representation” and that plaintiff suffered “detriment as a

consequence of the act or omission”). In all but his final conversation with Mr. Jason, Mr. DeJesus was aware that Mr. Jason had not yet read the 2005 Regulations. Additionally, even if his version of his post-November 2005 conversation with Mr. Parker is accurate, by Mr. DeJesus’ own deposition testimony, it left him unclear on the meaning of the 2005 Regulations and where he stood with respect to the length of time he could stay in the Harbor in Summer 2006.

Accordingly, the defendants’ motion for summary judgment on Counts II, III, and IV is **ALLOWED**.

V. Massachusetts Civil Rights Act – Count V

Mr. DeJesus next contends that the circumstances relating to the letter he received on July 17, 2006, violated his civil rights under G.L. c. 12, § 111.¹² General Laws c. 12, § 111, “creates remedies for “[a]ny person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with [by any person, whether or not acting under color of law, by threats, intimidation or coercion].” *Manenso*, 453 Mass. at 130-131 (alterations in original), quoting G.L. c. 12, § 111. “To establish a claim under [G.L. c. 12, § 111], the plaintiff’s “must prove that (1) [their] exercise of enjoyment of rights secured by the Constitution or laws of the United States or the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by ‘threats, intimidation or coercion.’” *Kennie v. Natural Resource Dep’t of*

¹² Mr. DeJesus does not appear to assert this claim against Chilmark, but, to the extent that he does, the defendants are correct in that the claim can only lie against Mr. Parker and Mr. Jason individually. *E.g., Howeralt v. Peabody*, 51 Mass. App. Ct. 573, 591-592 (2001) (“[A] municipality is not a ‘person covered by the Massachusetts Civil Rights Act”).

Dennis, 451 Mass. 754, 759 (2008), quoting *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 644 (2003).

First, in his own motion for summary judgment and opposition to the defendants' motion for summary judgment, Mr. DeJesus enumerates the rights he alleges the defendants interfered with: (1) his right to retain counsel and consider litigation; (2) his right to use and enjoy his property; and (3) his right to follow the 2005 Regulations as written, *i.e.*, docking in the harbor for fourteen days, leaving for one week and then returning to the Harbor. Assuming Mr. DeJesus did possess those rights, the defendants did not interfere or attempt to interfere with them.

A particular phrase on the Application caused Mr. DeJesus not to sign, which, in turn, led to Mr. Jason's presenting Mr. DeJesus with the letter several days later. As an initial matter, and contrary to Mr. DeJesus' assertion, the phrase "[f]ourteen days maximum stay, July through Labor Day[.]" is not an inaccurate statement of the 2005 Regulations. Transient boats could dock for a maximum of fourteen days between July and Labor Day; at the end of that fourteen-day period, the regulations required the transient boats to "leave the harbor for at least one week[.]" upon returning to the Harbor after that one-week period, the transient boats would likely receive another Application and could then dock again for a maximum of fourteen days.

It is undisputed that Mr. DeJesus declined to sign the Application and that he had threatened the defendants with litigation. It is also undisputed that, with the letter, the defendants sought to direct Mr. DeJesus to sign the Application. The Application itself contained the warning to boat owners, in bold-face type, that "[v]iolation of any town rules or regulations, or the failure to comply with the lawful orders of the Harbor Master will be

cause for the removal of the vessel at owner/operator expense. . . . [and subject owner/operator] to fines and or arrest by the Harbor Master or Police Department.”

Refusal to sign the Application constituted a “failure to comply with the lawful orders of the Harbor Master” (Bold omitted). Mr. DeJesus was therefore on notice of the possible ramifications of his non-compliance. The letter reiterated those ramifications, informing Mr. DeJesus that he had twenty-four hours to comply with the Harbormaster’s order to fill out the Application completely; otherwise “[his] failure to comply with this order [would] be cause for [Mr. Jason] to remove ‘*Perfect Timing*’, at [Mr. DeJesus’] expense, from the harbor, and may also subject [Mr. DeJesus] to fines and/or arrest by [Mr. Jason] or the Police Department.”

Mr. Jason properly issued an order, *i.e.*, the Application; Mr. DeJesus refused to comply with that order; and Mr. Jason properly issued an additional order, *i.e.*, the letter, reminding Mr. DeJesus of the consequences of failing to comply. Obviously, neither the Application nor the letter precluded Mr. DeJesus from retaining counsel or considering litigation. Additionally, as long as Mr. DeJesus complied with Mr. Jason’s order, the Application and the letter did not interfere with Mr. DeJesus’ using and enjoying his property, *i.e.*, his boat, or his following the time-limitation provision of the 2005 Regulations. Mr. DeJesus thus has no reasonable expectation of proving the second element of this claim.

Second, even if the defendants did interfere with Mr. DeJesus’ rights, they did not do so through threats, intimidation, or coercion. “A ‘threat’ is ‘the intentional exertion of pressure to make another fearful or apprehensive of injury or harm[.]’ . . . “[i]ntimidation’ involves putting one ‘in fear for the purpose of compelling or deterring conduct.’ . . . [and] ‘[c]oercion’ is the application to another of force ‘to constrain him to do against his will something he would not otherwise have done.’” *Kemite*, 451 Mass. at 763 (internal citations omitted), quoting *Planned*

Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474 (1994). “Both threats and intimidation often rely on an element of actual or threatened physical force. . . . an element that is missing in this case.” *Id.* “[T]he statute’s coercion requirement is satisfied “where the *natural effect* of the defendant’s actions [is] to coerce [the plaintiffs] in the exercise of [their] rights[.]”” *Bronell v. Lynn Pub. Sch.*, 433 Mass. 179, 183 (2001) (first and last alterations added), quoting *Redgrave v. Boston Symphony Orch., Inc.*, 399 Mass. 93, 100 (1987).

Here, Mr. DeJesus remained in the Harbor for the entire fourteen-day period that the 2005 Regulations permitted without the defendants’ interference, thus the letter did not have an impact on the rights with which Mr. DeJesus alleges the defendants interfered. *See id.* Additionally, the defendants did not employ “an unwarranted ‘heavy-handed use of police power’” to ensure compliance with the Harbormaster’s order.¹¹ *Id.* at 184, quoting *Reproductive Rights Network v. President of the Univ. of Mass.*, 45 Mass. App. Ct. 495, 508 (1998). Mr. DeJesus was aware that non-compliance could result in arrest, as that information appeared on the Application itself. Moreover, Mr. Jason’s wearing his dress uniform served only to emphasize Mr. Jason’s authority as Harbormaster.

¹¹ Mr. DeJesus argues that the threat of arrest, alone, satisfies the statute’s “threats, intimidation, and coercion” requirement. The two cases on which he relies, however, involve a private party rather than a state actor who possessed the authority to compel compliance with his order. In *Batchelder v. Allied Stores Corp.*, 393 Mass. 819 (1985), the court found “sufficient intimidation or coercion to satisfy the statute” where “[a] uniformed [mall] security officer ordered [the plaintiff] to stop soliciting and distributing his political handbills.” *Id.* at 823. In *Sarvis v. Boston Safe Deposit & Trust Co.*, 47 Mass. App. Ct. 86 (1999), the bank official and real estate agent threatened arrest if the plaintiffs refused to leave the property, thereby interfering with the plaintiffs’ right to summary process, *id.* at 92; and they brought about that arrest, “enlisted the unwitting aid of the police by giving them false information to remove the plaintiffs expediently.” *Id.* at 94. Those cases are distinguishable from this case where the actor was a town official with authority to enforce the regulations and his own orders.

The defendants have accordingly demonstrated that Mr. DeJesus does not have a reasonable expectation of proving the essential elements of this claim at trial, thus their motion for summary judgment on Count V is **ALLOWED**.

VI. Declaratory Judgments – Count I

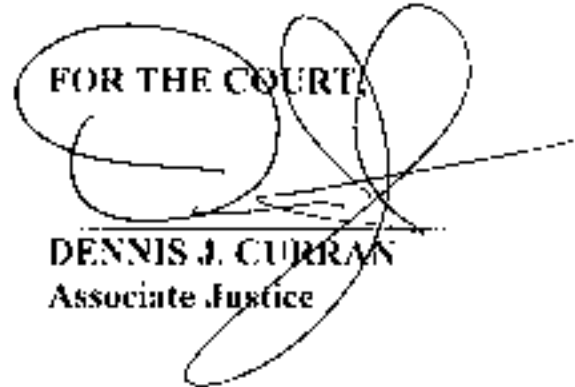
Finally, Mr. DeJesus seeks a declaration that he had grandfathered rights to dock his boat in the Harbor in the same manner as *Relema*, or, alternatively, that the 2005 Regulations can be interpreted in such a way to permit him to dock his boat in the Harbor for longer than fourteen days without having to leave the Harbor for one week. As the above discussion indicates, Mr. DeJesus is not entitled to either declaration. The defendants' motion for summary judgment on Count I is, accordingly, **ALLOWED** as well.

VII. Defendants' Motion to Strike Mr. DeJesus' Affidavit

The defendants have also moved to strike Mr. DeJesus' affidavit, contending that it contains legal conclusions, interpretation of regulations, hearsay, misrepresentation of deposition testimony, and self-serving assertions. This court did not rely on Mr. DeJesus' affidavit in rendering its decision on the cross-motions for summary judgment. Given this court's conclusions, the defendants' motion to strike is moot and this court takes no action on it.

ORDER

For these reasons, it is **ORDERED** that the Town of Chilmark, J.B. Riggs Parker, and Dennis Jason's motion for summary judgment is **ALLOWED**, their motion to strike is moot, and Paul DeJesus' motion for partial summary judgment is **DENIED**.

FOR THE COURT,

DENNIS J. CURRAN
Associate Justice

December 4, 2009