

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DIVISION OF PUBLIC UTILITIES AND CARRIERS  
89 JEFFERSON BOULEVARD  
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :  
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

**ORDER**

(In response to Bluewater LLC's Objections to the Town's Request For  
Production of Documents and to Depose Paul Filippi)

Whereas: The Rhode Island Division of Public Utilities and Carriers ("Division") previously issued seven Orders ("Orders") in the instant docket, specifically, Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; and Order No. 22141, issued on October 8, 2015. These seven previously issued Orders are inextricably linked with this Order, and accordingly shall be adopted as the introduction to this Order and, by necessity, incorporated by reference. As the travel of this docket is long and complicated, the Division will skip all discussion of this travel in the instant Order, relying instead on the incorporation of the above-identified Orders as a comprehensive prologue, thereby permitting the Division to limit its focus to the outstanding motions.

Whereas: In response to the Town's September 14, 2015 notice to depose and request documents from Mr. Paul Filippi and Bluewater LLC, (collectively, "Bluewater"), Bluewater has retained counsel who has entered an appearance in this docket on his client's behalf. On October 9, 2015, through

counsel, Bluewater filed a Response and Objection to the Town's demand to depose and request documents from Mr. Filippi.<sup>1</sup>

In its supporting memorandum, Bluewater initially cites to a number of Division decisions in similar CPCN cases where the Division held that it was not a requirement for an applicant requesting authority to provide ferry services to prove, as a condition for application approval, that it already possessed legal access to a dock(s). Bluewater properly interprets Division precedent as allowing a case to move forward and for an approval order to issue from the Division without the applicant having first acquired all of the necessary governmental permits and approvals, or, in some cases, even before the dock is constructed. As Bluewater has correctly observed, the Division has adopted a "condition-subsequent" standard in such cases. However, in all the cases cited by Bluewater, the record evidence in those cases suggested a very strong likelihood that the applicant would ultimately prevail in its efforts to utilize, access and/or construct the dock or docks identified in the record. The same standard shall apply in the instant case.

In order to demonstrate its likelihood of acquiring access to a dock in Old Harbor, in compliance with the Division's "condition-subsequent" standard, Bluewater next offered a letter from a Washington D.C. law firm, who specializes in permitting cases before the Army Corps of Engineers ("USACE"). The letter, from two attorneys at Kelley, Drye & Warren LLP ("KDW"), reflects that KDW has been assisting Bluewater "to obtain permits from... [USACE] for

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<sup>1</sup> See Bluewater's October 9, 2015 Response And Objections To Request For First Request For Production.

additional dock space in the Old Harbor at Block Island.” The letter indicates that Bluewater is seeking authorization for two docks designated as the ‘Lot 158’ site and the ‘Mount Hope’ site. Through the letter, the KDW attorneys assert that under the Rivers and Harbors Act of 1899, as codified in 33 U.S.C. §408 (“Section 408”), USACE is authorized to grant permission for the temporary or permanent alteration or occupation of civil works projects built for the United States. The KDW attorneys also assert that “authorization under Section 408 extends to all lands encompassed by the proposed project in the Old Harbor...” They argue that under the Commerce Clause, the federal government derives a navigational servitude that gives the government the power to interfere with the ownership of riparian or submerged lands without paying compensation. Based on this authority, the KDW attorneys contend that USACE maintains control of the submerged lands under Block Island’s federal harbor without having a deeded real estate interest. Predicated on multiple reasons outlined in the letter, the KDW attorneys contend that ‘Lot 158’ and ‘Mount Hope’ are viable sites for USACE permitting and approval.

Bluewater also proffered a letter from a local licensed engineering firm, wherein its president, Mr. Richard St. Jean, writes that his company has met with the USACE, on Bluewater’s behalf, to discuss Bluewater’s interest in seeking a permit for its planned dock project. Mr. St. Jean relates that based on the meeting, “we feel that the project is a viable solution to the lack of docking opportunities in Old Harbor for the Rhode Island Fast Ferry.”

Bluewater additionally proffered a letter from Messrs. Jeff Boyd and Tom Delotto of MMCNV / Anaconda Ltd., which is a Netherlands Antilles’ company

that specializes in marina development projects. The letter was offered to confirm that Messrs. Boyd and Delotto have been working with Bluewater for approximately two years “to evaluate the design, construction, and economic viability of both Bluewater, LLC pier sites located on ‘Lot 158’ and ‘Mount Hope’ sites.” After extensive analysis, Messrs. Boyd and Delotto state: “...it is our professional opinion that both of these locations provide a viable spot for the successful construction and operation of a dock.”

Additionally, Bluewater proffered a letter from Natural Resources Services, Inc., a wetland permitting consultant, who was retained by Bluewater to conduct a “submerged aquatic vegetation survey.” The survey was performed in accordance with the standards established under the Rhode Island Coastal Resources Management Program. The survey indicated that there is no Eelgrass or Widgeon Grass growing at the proposed dock location, which is a required finding for CRMC approvals.

On the question of ownership and riparian rights, Bluewater asserts that “neither are required” in either the USACE 408 permitting process or under the Division’s CPCN condition-subsequent standard. Moreover, as to the ownership issue, Bluewater argues that “the area of both proposed dock sites is all Federal land, completely controlled by... [USACE].” Bluewater maintains that in view of USACE’s exclusive control over the properties in issue, requiring Bluewater to possess riparian rights, as the Town demands, “is a logical impossibility.”

Concerning the Town’s claim that it will deny Bluewater ingress and egress access at the Mount Hope site, Bluewater, again, contends that the

Section 408 permitting process before the USACE will ultimately decide this issue. Bluewater also argues that the Division's adopted "condition-subsequent" standard in such cases does "not require the potential dock site owners to demonstrate how passengers would disembark from the ferry which may or may not receive approval." As an alternative argument, Bluewater adds that Mr. St Jean's engineering firm "has prepared an alternate access plan which completely circumvents the Town 'Bait Dock.'"

Bluewater next argues that if the Division decides to allow further discovery and depositions in this matter, then Bluewater must request that the scope of that discovery be limited and that Bluewater also be permitted to depose Town Manager Nancy Dodge "to determine the factual basis, if any, for the Town's continued opposition to the availability of Bluewater's sites."

Whereas: In reply to Bluewater's Response and Objections, the Town filed a responsive pleading with the Division on October 15, 2015. In its response, the Town argues that the Division must consider Bluewater's Response and Objections to be a nullity due to the fact that Bluewater's principal attorney, Steve Overturf, Esq., is not licensed or approved to practice law in Rhode Island.<sup>2</sup> The Town also argues that Attorney Overturf's pending *pro hac vice* petition has been filed by Attorney Overturf in an improper court. The Town contends that the petition should have been filed in the Superior Court and not the Supreme Court.<sup>3</sup>

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<sup>2</sup> See Town's October 15, 2015 Response Of The Town Of New Shoreham To Bluewater's, LLC's Response And Objection To First Request For Production.

<sup>3</sup> See October 16, 2015 email from the Town's attorney to the hearing officer (and Service List).

Whereas: On October 16, 2015, Attorney Overturf replied that although it is true that his *pro hac vice* petition is still pending, the pleadings that Bluewater has submitted have been co-signed by a second attorney who is licensed to practice in Rhode Island. Accordingly, attorney Overturf and Bluewater maintain that the pleadings that Bluewater has submitted are “valid and should be accepted by the Division.”<sup>4</sup>

### **FINDINGS**

As an initial finding, the Division accepts the pleading it has received from Bluewater. Though the Town is correct in its legal assertions regarding Attorney Overturf’s inability to properly represent Bluewater until his *pro hac vice* petition has been approved, the Division must recognize that Bluewater’s only pleading in this docket has been co-signed by Lauren T. Balkcom, Esq. who is licensed to practice law in Rhode Island. Further, as the email messages the Division has received from Attorney Overturf have related to the discovery matters addressed in Bluewater’s pleading, the Division is inclined to overlook Attorney Overturf’s extraneous comments and contentions. However, the Division must instruct Attorney Overturf to refrain from further communications to this hearing officer, on Bluewater’s behalf, until such time as his *pro hac vice* petition has been approved. Otherwise, Attorney Balkcom (or another Rhode Island attorney) shall be required to represent Bluewater in all future communications and pleadings addressed to the Division in this docket.

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<sup>4</sup> See October 16, 2015 email from Attorney Overturf to the hearing officer (and Service List).

Moving to the discovery matter in issue, after considering the arguments from Bluewater and the Town, the Division must find for Bluewater. Based on the documents attached to Bluewater's October 9, 2015 Response and Objections, the Division is satisfied that RIFF, through Bluewater, has a realistic expectation of being able to develop a docking facility in Old Harbor. The Division finds that additional discovery into this matter is unnecessary.

However, as previously stressed in Order No. 22103, *supra*, the Division has significant concerns with the timeframe attached to RIFF's plan to utilize a dock that does not presently exist. As stated in Order No. 22103:

Before the Division conducts any hearings in this docket, it must know the likely duration of time that will be needed for Bluewater to complete the processes attached to all of the regulatory permits and approvals connected to this dock construction plan as well as the time that will be required to actually construct the dock and outfit it for use by RIFF. The Division observes that the Lease Agreement is silent with respect to a planned availability date. On this point, the Division finds that it is not in the public interest to consider an application for a CPCN potentially years ahead of the date on which service may first become available, if ever. Especially an application that is so strenuously objected to by the town in which the service is to be offered. Accordingly, RIFF must provide the Division with a realistic timeline for its proposed ferry services before any additional adjudicatory action will be taken on RIFF's pending application before the Division.<sup>5</sup>

The Division's concerns with the timeframe connected to RIFF's and Bluewater's plans to construct a new dock in Old Harbor were not allayed by the documentary offerings received from Bluewater. Indeed, the Division's concerns were amplified by the complexity of the proposal and the anticipated

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<sup>5</sup> See Order No. 22103, pp. 9-10.

and legal wrangling that will inevitably come from the Town's expected vehement opposition to Bluewater's efforts to persuade USACE and CRMC that its proposed wharfing-out in the locations identified in the record is in the public interest. Therefore, the Division will reiterate its directive, that RIFF provide the Division with a realistic timeline for the implementation of its proposed ferry services before any additional adjudicatory action will be taken on RIFF's application before the Division.

Now, therefore, it is

(22166) ORDERED:

1. That Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015, and Order No. 22141, issued on October 8, 2015, are hereby adopted as the introduction to this Order and, by necessity, incorporated by reference.
2. That Bluewater's motion to quash the Town's request to conduct additional discovery at this time with respect to Mr. Paul Filippi's and Bluewater's efforts to develop a dock in Old Harbor is hereby granted.
3. That Attorney Overturf is instructed to refrain from further communications to this hearing officer, on Bluewater's behalf, until such time as his *pro hac vice* petition has been approved. Otherwise, Attorney Balkcom (or another Rhode Island attorney) shall be required to

represent Bluewater in all future communications and pleadings addressed to the Division in this docket.

4. That by November 16, 2015, RIFF shall submit a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor. RIFF shall also provide the Division with an anticipated start-date for its proposed services. RIFF's projected start-date should include a detailed breakdown of how the start-date was determined.
5. That unless modified by this decision, the findings and directives contained in the Orders enumerated in paragraph "1," above, shall remain in full force and effect.

Dated and Effective at Warwick, Rhode Island on October 20, 2015.

Division of Public Utilities and Carriers



John Spirito, Jr., Esq.  
Hearing Officer

APPROVED:



Thomas F. Ahern  
Administrator