

**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 the Town's Motions for Summary Disposition
and to Modify the Procedural Schedule)

Whereas: The Rhode Island Division of Public Utilities and Carriers ("Division") previously issued five 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; and Order No. 22045, issued on August 19, 2015. These five 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: As noted in Order No. 22030, *supra*, on July 21, 2015, the Town of New Shoreham (the "Town"), a party to the instant case, filed a motion for summary disposition, in accordance with Rule 19(e) of the Division's Rules of Practice and Procedure, wherein it argues that Rhode Island Fast Ferry's ("RIFF")

application must be dismissed for RIFF's failure to identify the dock it plans to use in Old Harbor.

In its supporting legal memorandum, the Town argued that RIFF has had over two years to locate and identify the dock it hopes to utilize in Old Harbor to facilitate its proposed fast-ferry services to the island. The Town contends that to obtain a certificate of public convenience and necessity ("CPCN"), RIFF must prove that it is "able" to perform its proposed services, which includes, *inter alia*, a showing that RIFF has a dock location in Old Harbor capable of accommodating the large aluminum catamaran that RIFF has identified as its planned vessel.¹

In further support of its motion, the Town argues that there are only four docks in Old Harbor where a ferry could land and that RIFF has not been able to demonstrate that it has acquired rights to use any one of them. The Town relies on the discovery it conducted in this case, including a deposition of RIFF's owner, to verify that RIFF has been unable to establish a legal connection to any of the four docks.² The Town adds that because RIFF has not identified its docking location in Old Harbor, "the Town has been prevented from conducting discovery or performing an evaluation with respect to the proposed site."³

Whereas: On September 11, 2015, RIFF submitted affidavits from its principal, Mr. Charles A. Donadio and from Mr. Paul Filippi, the principal member of Bluewater LLC ("Bluewater"), through which these individuals state that their respective companies have reached an agreement relative to the planned

¹ See: Motion of the Town of New Shoreham For Summary Disposition, pp. 1-6.

² Id. According to the Town, the only four suitable docks in Old Harbor are two docks owned by Intrastate Nav. Company, "Ballard's Dock," and a dock owned by the Town,

³ Id.

construction and use of a docking facility in Old Harbor. According to the affidavits, Bluewater has acquired rights to construct a wharf at either of two locations in Old Harbor and that RIFF plans to lease dock space from Bluewater once the wharf is constructed. RIFF has attached a copy of the relevant Lease Option Agreement (“Lease Agreement”) with Mr. Donadio’s affidavit. The affidavits and Lease Agreement also reflect that before construction can start, Bluewater must seek and receive the necessary permits from the Rhode Island Coastal Management Council and the U.S. Army Corps of Engineers, which it plans to file by November 1, 2015 and also a water quality certificate from the Rhode Island Department of Environmental Management.

Mr. Donadio’s affidavit also reflects that RIFF will no longer be seeking an alternative docking facility in New Harbor.

Additionally, Mr. Donadio’s affidavit stresses that RIFF plans to utilize the South Pier, so-called (a.k.a. South Wharf), in Old Harbor “only as an alternative docking facility in the event that the Bluewater facility is not constructed for whatever reason.”⁴

Whereas: On September 14, 2015, the Town served a notice of Deposition and a Subpoena Duces Tecum on Mr. Paul Filippi, the Principal Member of Bluewater, and requested that he appear at the offices of the Town’s attorney in satisfaction of said deposition and subpoena on September 21, 2015. The Town issued the notice of deposition and subpoena in furtherance of augmenting its discovery in the instant docket.

⁴ See September 11, 2015 affidavits and Lease Option Agreement.

Whereas: Also on September 14, 2015, the Town and Interstate Navigation Company (“Interstate”), also a party in the instant case, filed a motion to modify the procedural schedule in order to afford the Town and Interstate an opportunity to conduct additional discovery related to RIFF’s September 11, 2015 declaration of dock availability. Specifically, the Town and Interstate request that: (1) they be given 30 days to conduct discovery, (2) that they be given at least 30 days after the completion of discovery to file a response to RIFF’s declaration, and (3) that the public hearings be rescheduled from October 7 and 8, 2015 to a date in early 2016.

Whereas: On September 15, 2015, RIFF filed an objection to the Intervenor’s motion to modify the procedural schedule. In its objection, RIFF argues that in Order No. 22045, the Division only approved the possibility for additional discovery for the Town if RIFF pursued a docking facility in New Harbor. RIFF submits that since it is no longer considering a New Harbor location for its dock “that portion of the order is moot and the request to suspend and allow further discovery should be denied.”⁵ RIFF further maintains that the Division only required RIFF to identify a dock and offer proof of its availability. RIFF argues that it has satisfied this directive through its September 11, 2015 declaration. Moreover, RIFF argues that the Division has previously stated that it would not “decide matters relating to the appropriateness of the use of any docking facility...”⁶

RIFF also argues that Interstate’s motion exceeds the “proper scope of Interstate’s limited intervention status in this proceeding.” RIFF points out that in the Division’s order approving Interstate’s intervention in this docket (Order No.

⁵ RIFF September 15, 2015 Objection, pp., 1-2.

⁶ Id., p. 2.

21170, *supra*), the Division restricted Interstate’s involvement to matters related to the issue of whether there is a “public need” for RIFF’s proposed service. RIFF argues that the discovery and related delays that Interstate is jointly requesting goes beyond the scope of its limited intervention authorization.⁷

RIFF also takes exception to the Town’s unilateral steps to augment its discovery before the Division has authorized such additional discovery. RIFF requests that the Division conduct another scheduling conference to address this issue.⁸

Whereas: On September 16, 2015, the Town and Interstate filed a response to RIFF’s September 15, 2015 objection. In their joint response, the Intervenors argue that additional discovery is necessary and appropriate based on their belief that the Lease Option Agreement that was attached to Messrs. Donadio’s and Filippi’s affidavits “...is merely a sham which is designed to purportedly comply with the Division’s order that... [RIFF] ‘submit a written declaration... identifying the dock... and offer proof of the dock’s availability,’ and to buy time for RIFF to actually locate a dock.” In support of this claim, the Intervenors offer the following information:

According to the secretary of state’s records... [Bluewater] was formed a little over a year ago in June of 2014. Although the address of its principal office is listed as 42 Water Street, Block Island, Rhode Island, this is same address as Ballard’s Inn and there is no indication that Bluewater does any business from this address. In addition, an Internet search does not yield any information regarding Bluewater or any business conducted by it.

⁷ Id.

⁸ Id., p. 3.

A search of the New Shoreham tax assessors data base indicates that Bluewater does not own any real estate whatsoever on Block Island. Furthermore, a search of the New Shoreham tax assessor data base indicates that Paul Filippi does not own any real estate on Block Island. Accordingly, neither Bluewater nor Mr. Filippi owns any property which could be used as a staging area for a wharf or pier.

The Filippi affidavit states that Bluewater has acquired from the riparian owners of Plat 6, Lot 158, Plat 6, Lot 159 and Plat 7, Lot 23, ‘the right to wharf out at two locations, the first being the Northerly Ell of the stone jetty at the Inner Basin and the second being at the former location of the Mount Hope Pier adjacent to the Easterly Breakwater.’ An examination of these statements leads to the conclusion that they are highly suspect for the following reasons:

1. Plat 7, Lot 23 is owned by Ballard’s Inn Realty, LLC (see Exhibit A). The member of Ballard’s Inn Realty LLC authorized to sign on its behalf is Marion Filippi (See Exhibit B).
2. Plat 6, Lot 158 is owned by T&C Holdings LLC (See Exhibit A). The member of T&C Holdings, LLC authorized to sign on its behalf is Marion Filippi (see Exhibit D).
3. Plat 6, Lot 159 is owned by Ballard’s Wharf Realty, LLC (See Exhibit E). The manager of Ballard’s Wharf Realty, LLC is Blake Filippi (See Exhibit F).
4. By email dated September 11, 2015, Steven C. Filippi notified the New Shoreham Town Manager that “Ballard’s Inn, Marion Filippi, Blake Filippi and myself [sic] do not support the Bluewater project. Additionally, it is also clear that no riparian rights have been obtained at any property.”
5. The right to “wharf out” at the Northerly Ell of the stone jetty at the Inner Basin does not belong to Bluewater, but rather is held by the Town through a fifty-year lease agreement dated April 1, 2013 between

the Town and the Coastal Resources Management Council.⁹

The Intervenors conclude that RIFF's assertion that it has offered the Division proof of a "bona fide plan to dock the RIFF ferry in Old Harbor" is spurious. The Town and Interstate submit "that the information available to date clearly suggests that no such bona fide plan exists...."

Finally, with regard to RIFF's objection to the deposition of Paul Filippi, the Intervenors cite to Rule 21(b) of the Division's Rules of Practice and Procedure, which provides that the testimony of any witness may be taken by deposition at any time before the hearing is closed.¹⁰

Whereas: On September 17, 2015, RIFF filed a Surreply to the Intervenors' Joint Response to RIFF's Objection to the Intervenors' Motion to Modify the Procedural Schedule. Attached to its reply, RIFF attaches a copy of an assignment document, dated September 16, 2015, whereby "T & C Holdings LLC assigns Bluewater LLC the riparian rights of lot 158 plat 6 in the Town of New Shoreham to build docks and wharf out into Old Harbor."¹¹ RIFF asserts that this assignment document "completely contradicts the Town's assertion that the Bluewater LLC/RIFF Lease arrangement is not based on legitimate facts and support."¹²

⁹ See the Town's and Interstate's September 16, 2015 Response, p. 2.

¹⁰ Id.

¹¹ See RIFF's September 17, 2015 Reply.

¹² Id.

FINDINGS

As the Division has previously observed, RIFF filed its application in this case on July 2, 2013, over two years ago; and that most of the delays in this docket were precipitated by requests for extensions by RIFF. Based on this essentially self-inflicted protracted timeline, the Division is not persuaded by RIFF's suggestion that it would be prejudiced by any additional delays in this docket. During these past 26 months, RIFF has been unable to identify which dock it planned to utilize at Old Harbor in the performance of its proposed ferry services. This failure predictably triggered the Town's pending Motion for Summary Disposition, which the Division must still rule on. This open issue and the recent declaration by RIFF that it now plans to utilize a dock that neither currently exists nor is able to be constructed and made available to RIFF any time in the near future substantially weakens RIFF's objection to any postponement of the scheduled hearings coming up early next month. Further, the fact that the Town vehemently objects to the construction and use of the planned unconstructed dock, on legal grounds, guarantees additional delays in the adjudication of this matter before other regulatory bodies.

Regarding the Town's motion for a modification to the current hearing schedule, in effect, a request to cancel the hearings currently scheduled for October 7 and 8, 2015, the Division finds the request reasonable. Based on the preliminary information proffered by the Town in its motion, there appears to be sufficient reason to question Mr. Filippi's claims that Bluewater has legal standing to construct a dock at the lots described in the Lease Agreement. In his Affidavit, Mr. Filippi claims that Bluewater has acquired the riparian rights of Lots 158 and 159

in Plat 6, and Lot 23 in Plat 7 in Old Harbor. However, after challenged by the Town, RIFF now proffers an assignment document that purportedly buttresses its claims only to Lot 158 in Plat 6. Additionally, Mr. Filippi has claimed that Bluewater has the right to wharf out at two locations, “the first being the Northerly Ell of the stone jetty at the Inner Basin and the second being at the former location of the Mount Hope Pier adjacent to the Easterly Breakwater.” However, the Town has responded by asserting that it exclusively controls the rights to wharf out at the Northerly Ell of the stone jetty at the Inner Basin, thereby vitiating Bluewater’s claim. RIFF has not offered any support to reinforce Bluewater’s ability to wharf out at the former Mount Hope Pier or whether this location is in proximity to Lot 158.

Of additional concern to the Division, is the timeframe attached to RIFF’s plan to utilize a dock that does not presently exist. 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.

Toward this end, the Division will permit the Town to conduct additional discovery to fully explore the veracity and efficaciousness of Bluewater's plans to construct a new dock in Old Harbor. Consistent with the Town's request, the Division shall require the Town to submit a comprehensive response to RIFF's September 11, 2015 declaration on or before November 16, 2015.

Related to this discovery matter, the Division agrees with RIFF's assessment that Interstate's involvement in this additional discovery exceeds the scope of Interstate's limited intervention in this docket. As the instant issue relates only to RIFF's "ability" to perform the services described in its application, Interstate is not authorized to participate in this additional discovery.

Also, on or before 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.

After the Division receives the Town's response and RIFF's detailed chronology, the Division will revisit the issue of when or whether it would be appropriate to proceed with hearings in this docket. The Division shall also revisit the Town's outstanding motion for summary disposition at that time.

Now, therefore, it is

(22103) 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; and Order No. 22045, issued on August 19, 2015, are hereby adopted as the introduction to this Order and, by necessity, incorporated by reference.
2. That the Town's motion to modify the procedural schedule in this docket is approved. Specifically, the public hearings scheduled for October 7 and 8, 2015 are hereby postponed until further order of the Division. The Division shall determine after November 16, 2015, *infra*, when or whether it would be appropriate to proceed with hearings in this docket. The Town's request to conduct additional discovery, as described in its motion, is also approved.
3. That Interstate's motion to modify the procedural schedule for the purpose of conducting additional discovery is denied predicated on Interstate's limited intervention authority in this case.
4. That the Town shall submit a response to RIFF's September 11, 2015 declaration by November 16, 2015.
5. That also 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.

6. Consistent with the findings contained herein, the Division shall reserve final decision on the Town of New Shoreham's July 21, 2015 motion for summary disposition until after November 16, 2015.

Dated and Effective at Warwick, Rhode Island on September 21, 2015.

Division of Public Utilities and Carriers

John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____
Thomas F. Ahern
Administrator