STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.: Docket No.: D-13-51

BLUEWATER, LLC OPPOSITON TO

TOWN OF NEW SHOREHAM MOTION TO RECONSIDER

On October 20th, 2015 the Division found that, "after considering the arguments from Bluewater and the Town, the Division must find for Bluewater." The Division stated, "based on the documents attached to Bluewater's October 9th, 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 granted the Town a Motion to Reconsider due to, "the potentially dispositive nature of the claim that the Town made that the "Town must support Bluewater's application in writing before the Army Corps would accept the application from Bluewater."

Finally, the Division stressed that it still had concerns with the timeframe connected to RIFF and Bluewater's plans to build a dock stating, "that its concerns were amplified by the complexity of the proposal and the anticipated legal wrangling that will inevitably come from the Town's expected vehement opposition to Bluewater's efforts to convince the USACE and CRMC that its proposed wharfing out at the proposed locations identified in the record is in the public interest." We now address all of these in turn.

In their latest filing the Town speaks through every authority but their own, now claiming that Town permission is required to initiate the Federal USACE process *and* the CRMC process. To be very clear, the permission of the Town is not required to initiate, navigate, or complete either the USACE or CRMC process. The Towns claims have no basis in law. Indeed, it is telling that in eighty pages of filing

the Town fails to cite one case in support of these sweeping claims of authority. Yet a review of the Superior Court docket reveals why the Town's filing is devoid of any case law, as much of it has already been decided against them. As will be discussed herein, a review of the docket demonstrates an unwavering pattern of baseless claims of authority proffered solely to defend the Town's pecuniary interests and those of Interstate Navigation.

Specifically, an examination of the Superior Court docket (*infra*) demonstrates that in every ferry application, not made by Interstate, the Town has vowed "vehement opposition" based on illusory legal authority. Yet each time, the Superior Court has found the Towns arguments to be legally meritless. In addition, in each case the ferries, decried by the Town as the ruin of Block Island, have begun safe, prosperous operations. This case is the same. Therefore, rather than being an indicator of unviability, the Town's "vehement opposition" has been one of the best indicators of success.

The practical fact of the matter is that if the Town had the "dispositive" authority it claimed, it would have produced this information immediately after Bluewater's entry into this matter. As the Division aptly stated, "it was perplexed as to why the Town did not address this potentially dispositive claim in their earlier filings." Order Oct 26 2015. Yet instead of invoking this "dispositive" authority at any point, the Town spent the last two months making a string of supposedly dispositive arguments. This latest filing is no different, offering more false claims of present authority mixed with future predictions. All in an attempt to make the process appear intractable.

Specifically, the Town's first dispositive argument was that Mr. Filippi's company was a sham intended to merely satisfy the CPCN process. The Town's decision to not address this argument in their latest eighty-page filing indicates that they have conceded the point that Bluewater is in fact a very real company. Secondly, the Town claimed that Mr. Filippi's lack of riparian rights was dispositive of the viability of the sites. Yet once Mr. Filippi obtained them a day later, as previously filed with the Division, the Town abandoned this argument. Out of convenience, they now seek to ignore they very rights they

claimed were dispositive to site development. Finally, the Town claimed that ingress and egress was dispositive with regard to Lot 159. Yet when requested to produce the "red breakwater lease", out of convenience, the Town miscited Bluewater's own Motion to Quash claiming that only Lot 158 is relevant. In further irony, this was the same Motion to Quash the Town claimed was a nullity and relied upon as procedural basis for this Motion to Reconsider.

Consequently, this pattern clearly indicates the Town's "dispositive" arguments are, in fact, just disposable delays intended to make the process constantly appear lost before it has begun. In the latest installment, the Town has re-asserted a battery of ingress egress predictions, which the Division already considered when declaring the sites viability according to the condition subsequent process. For the Town's own filing attests that their property rights are the same as at the time of Bluewater's filing on October 9, 2015. Moreover, the Town claims that they have logistically foreclosed the future, somehow controlling all possibilities of ingress and egress and the future decisions of others not a party to this action. Yet in support of these assertions they offer only logistical arguments not made by Bluewater, combined with legal arguments not supported by (or citing) any law.

Yet the sheer volume of these ingress egress arguments is perhaps one of the best functional demonstrations of the lack of the Town's authority. For if the Town truly possessed the claimed authority over the CRMC and USACE process, there would certainly be no need to include the host of ingress egress arguments. The authority would simply be enough. Instead, the Town is hoping this Division will convey upon it a power it does not possess over a future process it does not control.

Mt. Hope/East Breakwater

First as to the USACE 408 process, as we anticipated, the Town has erroneously claimed they are the non-Federal sponsor of both sites. Yet as substantiation for this they cite no proof nor discuss any of the statutory provisions needed to qualify them as such. This is because they do not exist. Instead they

have curiously attached an entire USACE engineering circular which is not binding law, and an affidavit from the town manager, which somehow purports to certify their own erroneous assertion.

The actual law governing the matter is outlined in the attached letter (Exhibit A) from Joe Corrigan and Attorney David Frulla of Kelly Drye Warren. Specifically it states, "in short, the Town is not a non-federal sponsor of the project. ***The Town would only be a non-federal sponsor if it had a cost-share agreement with the Corps***. See 33 U.S.C. § 2211(e)." "The Town, however, does not have a cost-share agreement with Corps for this project. 33 U.S.C. § 2211 provides that non-federal interests (e.g. state, tribal, or local agencies or governments) for a navigation project for a harbor shall pay a percentage of costs associated with general navigation features for projects that were not awarded before November 17, 1986. See 33 U.S.C. § 2211(a)(1)." ***"The Corps' Block Island project was authorized in 1870. Therefore, there is no cost-sharing sponsor for the project"*** *KDW Letter*

The engineering circular that the Town inexplicably attached in its entirety as proof, "recognizes that a request for a section 408 permit can originate from either a non-federal sponsor or an *independent requester*." *KDW Letter* As KDW states, "more specifically, the EC delimits three specific circumstances that *require* a request to be made by a non-federal sponsor or require the concurrence of a non-federal sponsor." "***None of these circumstances apply to the Block Island project, so the Town has no basis to claim it must approve the Bluewater section 408 application as a non-federal sponsor***."

"First, approval by a nonfederal sponsor is required for a request involving certain local flood protection projects. See EC 1165-2-216 at 3." "The flood control statues and regulations regarding changes to local flood protection works are not implicated by the Corps' Block Island project authorization, and therefore the approval of a non-federal sponsor is not required for alterations to this project" *KDW Letter*

Second, the EC provides: "For USACE projects that were constructed in whole or in part pursuant to a cost-share agreement with a non-federal sponsor, but are operated and maintained by

USACE, the district will obtain written concurrence by each of the non-federal sponsors for the proposed alteration prior to USACE approval of a Section 408 request." See EC 1165-2-216 at 3. ***"As explained above, the Corps project at Block Island dates back to 1870 and was not constructed in whole or in part pursuant to a cost-share agreement with the Town. Therefore, no written concurrence from the Town is required for a section 408 request***." *KDW Letter*

Third, the EC states that "[f]or requested alterations located in inland and intracoastal waterways, the district will issue a public notice to notify users of the waterways, navigation stakeholders, and other interested parties as the district deems appropriate." See EC 1165-2-216 at 3. "Here, Bluewater's proposed docks are not located in inland or intracoastal waterways. Therefore, this provision of the Circular is inapplicable." *KDW Letter*

Finally, as a clear indication of the absence of the Town's authority, Bluewater has already initiated the 408 process at a meeting with the USACE on Sept 8th attended by New England Division USACE Chief Ed O'Donnell, Project Engineer Mike Elliott, and *Mike Walsh P.E.* The remainder of the Town's filing inexplicably provides facts that Bluewater was already aware of as conclusive proof, but of what we are not sure. For instance, the fact that Bluewater cannot touch or connect to the breakwater was well known to Bluewater by virtue of the fact that it has the benefit of a USACE expert who has overseen 408 processes literally hundreds of times in divisions around the US. Stating requirements of a process does not convey the Town authority in that process. Furthermore, we doubt that Mr. Walsh intended his correct answer to an undisclosed question posed by the Town would somehow be offered as proof of the Town's authority in a Federal matter. How could he?

As KDW states, "Bluewater is well aware of the Corps requirements, and the designs that are submitted to the Corps as part of the section 408 submission will fully comply with the Corps' engineering requirements." "We anticipate that the Corps will make a decision on the issuance of a 408 permit in accordance with federal regulations." The simple fact of the matter is Bluewater has begun,

and will continue, the process of developing the Mt. Hope dock as it is fully within its legal rights to do so.

Consequently, the Town has merely restated facts already known in an attempt to generate an authority they do not possess. Yet this clearly highlights the impropriety of the Towns efforts to not only conduct a pre-408/CRMC process within in these proceedings, but to claim the transcendent authority to decide such matters as well. Therefore, the primary grounds for granting the Town's Motion to Reconsider are completely without legal support, and the Town's Motion to Reconsider should be denied based on these grounds alone.

LOT 158 /Red Breakwater

Likewise, there is no basis for the claims that, pursuant to the CRMC Lease, "no other person or entity can construct any such dock without the express written consent of the Town as set forth in the statement of Grover Fugate, the Executive Director of the CRMC" (Schedule B). This authority is not conveyed expressly or impliedly by any of the documents submitted by the Town and is directly contrary to case law.

Specifically, the actual governing law defining the Towns rights in this matter are contained in a collection of cases. Specifically, *In re Champlains Realty Associates L.P., and Viking Quest, Inc. v Marc Tillson Building Official of the Town of New Shoreham, et al.* C.A. No. 01-0330 RI. Sup. Ct. 2001, *Champlain's Realty Associates v. Tikoian***,** C.A. No. PC 06-1659 RI. Sup Ct. 2009, *Town of New Shoreham Vs. The Estate of Paul Filippi* CA 2004 115 RI. Sup Ct 2006*, Palazzolo v Rhode Island* 533 U.S. 606 (2001). As indicated, in both of *Champlains* cases the Town were the defendants in misguided attempts to wrest jurisdiction from the CRMC, the very agency they now purport to speak for.

To be clear, Bluewater does not challenge the jurisdiction of the CRMC or Mr. Fugate's ability to determine how best to administer said authority. Unlike the Town, we recognize this as established law. However, what Mr. Fugate wrote was that, "any alterations to the Red Breakwater including

constructing a dock attached to it, or anchoring a dock to it, would require assent from the CRMC. The Town, as holder of the lease would have to consent to any such dock and be a party to any request for such assent." Firstly, this is not an issue. Bluewater does not plan to attach or anchor a dock to the Red Breakwater.

The Town then once again extends its jurisdiction past that which Mr. Fugate granted based on the statement that, "the property of the state of Rhode Island managed and controlled by the Town pursuant to the Lease." The "property" refers to the Red Breakwater, as carefully defined in the lease the Town attached. Any extension of control past that point is not supported by any express language contained in the Town's filings or in case law. For while the, "the council is authorized to grant permits, licenses, and easements for any term of years or in perpetuity . . ." the "[p]ermits, licenses or easements issued by the council are valid only with the conditions and stipulation under which they are granted and imply no guarantee of renewal. . . ." Section 46-23-16 (emphasis added)." *Champlain's Realty Associates v. Tikoian***,** C.A. No. PC 06-1659 RI. Sup Ct. 2009.

Pursuant to this lease, the Town has ostensibly been "given the right to construct and operate a dock on or near the Northerly Ell/Red Breakwater for the next fifty years, and "to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the Town hall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair." (Lease, Article V). Yet no express provision of the lease by Mr. Fugate has conveyed upon the Town the power to block any other riparian rights holder from doing the same. In fact the great weight of case law, much directly against the Town, supports the opposite.

Turning now to the case law governing this matter. For clarity and brevity we will refer to the respective *Champlains* cases as "*Tillson*" and "*Champlains*". In *Tillson*, "the Montauk (Ferry) was slated to dock at Champlain's, and the Island Hi-Speed Ferry vessel was to dock at Payne's Wharf…until the Building Official received a complaint relating to the Montauk Ferry's use of Champlain's Marina." *In re*

Champlains Realty Associates L.P., and Viking Quest, Inc. v Marc Tillson Building Official of the Town of New Shoreham, et al. C.A. No. 01-0330 at 2 RI. Sup. Ct. 2001 "The Building Official advised Champlain's that the zoning district in which Champlain's Wharf was located did not permit ferry terminals and that the (Zoning) Board was under the assumption that it had jurisdiction over the matter." *Id*. at 2 The Court did not agree stating that the Town relied, "on a one hundred and fourteen year-old legislative grant aimed at the maintenance of a breach way as an attempt to extinguish the public-trust doctrine." *Id.* at 7 "The goal of the 1887 conveyance was to promote the use of the Great Salt Pond by maintaining the breach which connected the Great Salt Pond to the ocean." Id at 7. "The aim of the state in making the above grant, according to the plaintiffs, was to increase the publics rights in fisheries, commerce and navigation, not to impair such a right, as the Town's Building Official is attempting to do in the instant matter." *Id*. at 7.

Likewise, in *Champlains* the Town, in defense of its mooring field, stated that the CRMC's failure to approve the Town's Harbor Maintenance plan gave the Town jurisdiction to approve their own. The Court in this case summarily disposed of the Towns argument stating, "because the Town fails to even allege injury in fact arising out of the decision and, examining the record, the Court cannot identify one, this Court must dismiss the Town's appeal." *Champlain's Realty Associates v. Tikoian***,** C.A. No. PC 06-1659 at 10 RI. Sup Ct. 2009.

In *Tillson* the Court stated, "that our state as well as other jurisdictions have long recognized the public-trust doctrine. However, another well recognized doctrine just as "ancient" and "vital" is the common law right of property owners to wharf out. *Tillson Id* P.7-8 *citing Town of Warren v. Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999).

"As stated in Whitehouse, each of these *doctrines limits the authority of municipalities to regulate tidal lands*." *Id*. at 8 "The court in Whitehouse explicitly found that because the legislature did not grant local authorities the power to regulate a riparian owner's right to wharf out such power

remained with the state and its agencies." *Id. at 8* ***"A riparian landowner has the right to construct whatever wharf or dock is necessary to gain access to navigable waters, as long as such construction does not interfere with navigation or the rights of other riparian land owners***." *Id.* at 8.

Therefore the Court found that the, "CRMC still maintains exclusive authority to regulate the Great Salt Pond because of the ***constitutionally protected right of riparian property owners to wharf out***. ***Because the legislature has not explicitly granted to municipalities the authority to limit this traditional common-law right to wharf out, the CRMC is vested with exclusive jurisdiction to regulate the use of those wharves in tidal waters.***" *Id.* at 9

Furthermore, in *Whitehouse,* "the parties argued extensively about whether CRMC's regulations require that applicants seeking to construct docks obtain local zoning approval and whether the agency could waive that approval." *Town of Warren v Whitehouse NOS. 97-648-APPEAL, 97-632-M.P. P.10 (RI 1999).*The Court stated that "***because we hold that the town lacks authority to give or withhold approval of the construction of the dock, we need not reach the question of whether the agency has bound itself to act only after such approval has been obtained."*** *Town of Warren v. Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999).*

Consequently, nothing in the Town's lease or the law prevents the ancient and vital right of a riparian rights holder to wharf out on their property. The attached letter (Exhibit B) from Attorney Sean Coffey further details the riparian rights case law with regard to the CRMC process. Attorney Coffey has been admitted to practice in Rhode Island courts since 1976, served as counsel and chief counsel to RIDEM from 1977 to 1983, and has practiced before RIDEM and CRMC for well more than three decades. During that time Attorney Coffey has been extensively involved in the permitting of commercial docks and marinas in Rhode Island waters and has naturally worked extensively in conjunction with Executive Director Fugate. Attorney Coffey has been advising Bluewater with respect

to regulatory permitting by the Rhode Island Coastal Resources Management Council (CRMC) and the Department of Environmental Management (RIDEM).

As Attorney Coffey states, "*Town of New Shoreham Vs. The Estate of Paul Filippi CA 2004 115 RI. Sup Ct 2006, "*the Superior Court ruled in 2006 that the Town at best holds an easement, originally acquired by condemnation by the Town for highway purposes in 1897, to a portion of land adjacent to the Red Jetty." *Id*. However, "the Filippi's retain the fee interest to the land underlying the highway easement." Id. "Littoral rights to the adjacent waters and submerged lands, including the right to wharf out, recognized under Rhode Island law, remains with the owner of the fee interest to the adjacent upland, in this case the Filippi's and their companies. These rights are superior to the easement interest at best held by the Town for highway purposes."

Furthermore, "the CRMC's jurisdiction, although broad with regard to coastal areas, is not unlimited and has specific boundaries." "The CRMC exercises legislatively delegated powers pursuant to rigorous statutory control and subject to judicial intervention at appropriate junctures." "The CRMC does not exercise judicial power. *Sartor v. CRMC*, 542 A.2d 1077 (R.I. 1988). As such it, "lacks jurisdiction to determine the owner of the littoral rights adjacent to upland property." "Determining littoral rights and boundaries is one area in which the CRMC unequivocally does **not** have jurisdiction, the Rhode Island Superior Court, in *Harbor Realty v. Coastal Resources Management Council*, confirmed this principal when it held in relevant part: "The CRMC has **no** jurisdiction to determine claims of private ownership of littoral space in the waters of the state. It **does not and cannot locate boundaries** between abutting littoral landowners in the…harbor. That jurisdiction is **exclusively judicial**. The parties agree on that conclusion. 1999 R.I. Super. LEXIS 63, at *3 (R.I. Super. Ct. 1999) (Israel, J.) (emphasis added)."

Moreover, while the "CRMC is authorized to lease filled lands adjacent to upland owned by the littoral owner for an initial term of up to 50 years, the 2012 CRMC-Town lease of the jetty makes no

reference to the basis of the littoral interests of the Town to the former submerged lands where the jetty is located." "In fact the littoral interest of the Town needed to support the CRMC lease of the jetty are held by the Filippi companies"

Based on this, Attorney Coffey's expert opinion is that, "the lease of the Red Jetty by CRMC to the Town was improvidently granted based on, at best, erroneous information provided by the Town supporting its littoral claim to the submerged land filled by Corps' construction of the Red Jetty and the Town's eligibility, as the purported littoral landowner, to lease the jetty from CRMC under RIGL section 42-23-6(7) (attached).

Furthermore, "my conclusion that the jetty lease was improvidently granted to the Town is further supported by the General Laws of Rhode Island, which specifically state that the CRMC is only "authorized … to enforce[e] and implement[] riparian rights in tidal waters ***after judicial decisions***." *See* R.I.G.L. § 46-23-6(4)(v) (emphasis added). "In short, the CRMC cannot locate boundaries between abutting littoral landowners as its jurisdiction is exclusively within the jurisdiction of the Rhode Island Judiciary. *See supra Harbor Realty*, 1999 R.I. Super at *3. The Town's assertions of ownership and control of upland and littoral areas lack legal and factual foundation."

Therefore, based on binding case precedent, the Town has no authority to prevent the riparian rights holder, Mr. Filippi, from wharfing out on his own property. The Town's lease certainly does not grant them superior rights to this parcel and, in fact, may be legally deficient. In any event, the lease and letter contain no more authority than Mr. Fugate expressly granted to the Town stating, "any alterations to the Red Breakwater including constructing a dock attached to it, or anchoring a dock to it, would require assent from the CRMC. The Town, as holder of the lease would have to consent to any such dock and be a party to any request for such assent." As stated, Bluewater does not plan to attach to the Red Breakwater and the Town does not have the jurisdiction to prevent construction of any dock that does not.

Ingress Egress

Finally the Town has once again made ingress and egress arguments which are not considered by the division at this point based on the condition subsequent standard. The standard, which the Town failed to mention once in its eighty-page filing. However, at the risk of allowing the Town to once again attempt to advance its substantive argument though improper procedural methods, we will address them in turn to finally demonstrate that the Town obviously cannot foreclose the future based on a lack of present authority.

Alternate Access

First the Town states that "Alternate Access portion of the docking facility would have physical contact with a USACE structure" Yet they cite no proof of this, just their conclusory statement reiterating and even citing information we have already produced. However, the Town does admit its Bait Dock "rests partially on the breakwater, the Bait Dock was built many years ago and has been grandfathered in." Yet, unsurprisingly, they attached no proof of this grandfathered status while simultaneously invoking a Federal rule they are currently violating.

Firstly, the Bluewater's alternate plan connects to the space behind the timber pier leased by the Town and will not connect or have physical contact with the USACE breakwater. An examination of the licensing agreement clearly reveals that the Town does not control the space behind the timber pier that they rent. Specifically, 18c states that, "all grants, conditions, and requirements herein enumerated are limited exclusively to the timber wharf and do not extend to the steel sheet piling bulkhead, the breakwater, and stone ballast located on the inner basin, harbor of refuge, Block Island, Rhode Island." USACE licensing agreement." Therefore, they are incorrect in their assertion regarding the design and location of a yet-unbuilt access ramp, and do not control the space through which it will run. Secondly, they once again attempt to stretch their authority by claiming that any ramp constructed will require a special use permit. The *Tillson* case is not a coincidental name as the Tillson in this case is the

very same building inspector, making the same erroneous argument, for the same reason. Curiously in their motion the Town cited Section 308 of Article 3, which pertains to "Residential C Zone (RC Zone)" and has no bearing on the matter.

However, Mr. Tillsons attached letter references an ordinance we are familiar with, as it has already been decided against the Town in the case bearing his name**.** As the Court stated, the Town misinterpreted its zoning powers believing that, "if the use of a dock or wharf is inimical to the appurtenant land it may regulate the dock or wharf itself." Again the Town is attempting to state that because the alternate access is not what it wants, it can somehow regulate the construction through zoning. The Superior Court has stated the Town cannot.

Specifically, Mr. Tillson relies upon the exact same zoning regulation at issue in the Tillson case, Section 318, Waterfront Overlay**.** As the Court stated, "it is uncertain that the ordinance, as enacted, even applies…as section 318 Waterfront Overlay contain language that the ordinances regulate land ward of the mean high-water mark.." *In re Champlains Realty Associates L.P., and Viking Quest, Inc. v Marc Tillson Building Official of the Town of New Shoreham, et al.* C.A. No. 01-0330 P.15 RI. Sup. Ct. 2001. The Court continued that "the court in Whitehouse warned that concurrent jurisdiction between the zoning board and CRMC would be antithetical to the social and economic well-being of Rhode Island coastal resources." *Id*. at 16. "The court cautioned: "if municipalities possessed concurrent jurisdiction over residential boat wharves, each one would be able to impose varying standards for the place, construction, and appearance of those wharves." *Id*. at 16. ***Some cities or towns acting out of parochial interest might make it more difficult to get approval to construct docks***" *Id*. at 16. Finally "although the operation of a ferry may be commercial, it is not the type of commercial activity that warrants concurrent regulation by the town zoning board as intimated by Whitehouse." *Id*. at 13

Finally, "they also proffer a legally meritless "zone of defense" argument stating that any attempt to "block" the Bait Dock will be met with Court action. This is unconcerning, as the claim is

unsupported by logic and the law. They have cited no other authority for bringing such a claim other than that they are the adjacent property holders. Yet if adjacent property holders could block appurtenant development on the sole basis of disapproval there would be very little development in America. If they would like to bring a nuisance claim against a public right of way for a public ferry when it is built, they are free to add yet another decision to the stack of precedent against this Town. Yet prior to the point of construction, the Town would have no legal grounds upon which to challenge a proposed right of way, which may or not be built on that site. As stated in *Champlains*, "in order for the Town to bring such an appeal, the Town must first qualify as a aggrieved party. Because the Town fails to even allege injury in fact arising out of the decision and, examining the record, the Court cannot identify one, this Court must dismiss the Town's appeal." *Champlain's Realty Associates v. Tikoian***,** C.A. No. PC 06-1659 P.10 RI. Sup Ct. 2009.

It fact it is Mr. Filippi who will have a cognizable claim in both Federal and State Courts ripe for adjudication. As the Town is attempting to use a claim of false authority on Federal and State processes to gain an administrative agency decision affecting Mr. Filippi's property rights. As set forth in the United States Supreme Court case *Palazzolo v Rhode Island* 533 U.S. 606 (2001), "although a landowner may not establish a taking before the land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation, *e. g.*, *MacDonald, supra,* at 342, once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." First, we have observed, with certain qualifications, see *infra,* at 629–630, that a regulation, which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas,* 505 U. S., at 1015; see also *id.,* at 1035 (Kennedy, J.,concurring); *Agins* v. *City of Tiburon,* 447 U. S. 255, 261 (1980). Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the

landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central, supra,*at 124."

Lot 159

Private Ingress Egress

In its latest filing the Town has effectively admitted that 159 is a viable ingress and egress, with only the present intent of Mr. Blake Filippi or Steven Filippi preventing access. As the Town failed to cite, Paul Filippi owns 1/3 share of 159 as well. Therefore, once again Mr. Paul Filippi is an owner of the property the Town is claiming to block him from using. The only evidence of the claim is a letter of present status from Blake Filippi. The letter does not indicate future resistance to the project, and as the Representative of the State of Rhode Island, if this Division decides a ferry is in the public interest, that would likely influence Representative Filippi's decision. In addition, Paul Filippi need only gain the approval of 2/3 of the owners, which includes Steven Filippi as well. Therefore, the Town is attempting to speak through the authority of co-landowners in an attempt to make ingress and egress appear intractable, when in fact an agreement in the matter could be reached over Thanksgiving dinner. Once again the Town has no authority in this matter and they possess no ownership rights over Lot 159.

Public Ingress Egress

Furthermore, contrary to the Town's claims, the Filippis have *already* permitted and constructed a dock on 159 that did not require Town permission. The Town naturally opposed it and delivered a host of zoning arguments that did not prevent its development. Furthermore, as part of that process, the Filippis granted a public right of way to the CRMC over Lot 159 to the water. The Town was obviously involved in this project but has failed to mention the right of way, which is free and open to the public across Lot 159. Therefore, if the Filippis do not reach an accord on the plan this public right of way is free and open to use as ingress egress for the dock built on Lot 158.

East Breakwater-Mount Hope

"Our Supreme Court has held that land owned in fee by the state and subject to the public-trust doctrine may be conveyed by the state to a private individual by way of legislative grant, ***provided the effect of the transfer is not inconsistent with the precepts of the public-trust doctrine.*** Hall v. Nascimento, 594 A.2d 874 (R.I. 1991).

As to the Bait Dock, we notice that the Town was unable to obtain a letter from Mr. Fugate, instead curiously offering the assertion of a CRMC employee that Town approval would be required and that any application submitted to CRMC for a, "permit to construct a dock in Old Harbor which connects or attaches to the Town's Bait Dock must be accompanied by the written approval of the Town as the owner of the Bait Dock." Once gain the Town has countered an argument not made with an authority not held. Bluewater is not planning on attaching to the Town's Bait dock as we have clearly submitted an alternate access plan previously discussed.

As for the East Dock, the Town states, "as certified by the CRMC employee assigned to Block Island who would be part of the CRMC permitting process (Schedule G), any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the East Dock must be accompanied by the written approval of the owner of the East Dock and also by the written approval of the Town as the licensee of the Bait Dock." This certification is once again provided by a biologist assigned to Block Island, he cites no CRMC regulation or specific portion of the license agreement, which supports this legal assertion. Instead he inexplicably cites, an entire Federal license agreement between the USACE and the Town, which unsurprisingly, contains absolutely no mention of a provision requiring Town approval prior to initiation of State application process in a Federal Lease document.

Yet there is a section of the license agreement, which is directly pertinent to this matter. Section 18D states, "*the grantee shall manage the Timber wharf in the interest of the general public and*

the facilities shall be available to all members of the general public on equal terms. Preferential treatment shall not be granted to residents of the surrounding local community or to any other persons" The simple fact of the matter is public ferry passengers could disembark directly across the East dock and once again the Town would have no authority to stop it, or they would be in express violation of a condition of their agreement. Yet we question again why they would even want to.

Public Good

As stated in Tillson by the Superior Court, the aim of the State in making the grant to the Town, "was to increase the publics rights in fisheries, commerce and navigation, not to impair such a right, as the Town's Building Official is attempting to do in the instant matter." *In re Champlains Realty Associates L.P., and Viking Quest, Inc. v Marc Tillson Building Official of the Town of New Shoreham, et al.* C.A. No. 01-0330 P.7 RI. Sup. Ct. 2001. Yet blocking public access and providing preferential treatment is exactly what the Town does on both the Mount Hope site and Lot 158. The truth of the matter is the Town is not protecting pubic interests, only its own pecuniary and parochial interests. Specifically, on both the Mount Hope site and Lot 158 the Town operates for-profit docks, with the Town picking and choosing which local residents do and don't have to pay wharfage. Moreover, the Town vows vehement opposition to any new ferry in unwavering defense of the for-profit intrastate monopoly held by INN for nearly sixty years.

For example, as discussed in *Tillson* the Town used taxpayer money to sue the CRMC in an attempt to stop the first high speed ferry from docking in New Harbor based on an unfounded claim of jurisdiction. However, when Interstate Navigation applied to run a high speed ferry into *Old Harbor* the Town stated without a hint of irony that the, "High Speed Ferry service is relatively new to Block Island and has clearly proven to be popular." "We hope that ferry service remains available from ***multiple points of embarkation***" *Application for Authority to Provide Hi-Speed Ferry Services Between Point Judith and Block Island (Old Harbor) and Between Newport and Block Island - Docket D-05-06 Town of*

New Shoreham Letter (Exhibit C). Continuing that, "the difference in time between the conventional and fast ferry transport could be critical in those situations where our lifestar helicopter is grounded because of weather" TL " Therefore, "*anything* that potentially aids Interstates competiveness, and income, in the summer months *has* to be supported as it can only strengthen the year round service." (emphasis added).

Consequently the Town sued a state agency with taxpayer money to prevent a popular, lifesaving ferry from docking in New Harbor until Interstate wanted to do it two years later. Therefore, the Town's unyielding desire to support "anything that aids Interstate's income" outweighed the allowance of a fast ferry that could be "critical in those situations where our Lifestar helicopter is grounded". We fail to see how denying this service to the public in defense of Interstate is in the public good.

Moreover, the argument that taxpayer money must be spent opposing all new fast ferries to protect the financial viability of Interstate Navigation is not in the public good and illogical, as stated by the Division itself. Specifically, the Division has already considered and rejected this argument stating that, "Interstate has asserted in this docket that its proposed fast ferry services are needed, in part, to keep its "lifeline" service-related rates from increasing. Interstate contends that the popularity of IHSF's and BI Express' high-speed ferries has resulted in lost business and revenues for Interstate, which Interstate says is exerting pressure on its lifeline service rates." *Order in Application for Authority to Provide Hi-Speed Ferry Services Between Point Judith and Block Island (Old Harbor) and Between Newport and Block Island - Docket D-05-06* P.61 "The Division has previously determined that "fast" ferry services and "conventional" ferry services are two distinctly different water carrier operations." P.61 "The Rhode Island Supreme Court has thoroughly vetted the issue and has agreed with the Division." P.61 "Therefore, the Division cannot accept Interstate's argument that the economic viability of the two services should be linked for licensing purposes. In short, the Division finds the argument

illogical from a licensing perspective" Therefore the Town has stated that their "issues stem from the need to protect and strengthen the year round service which is only offered by Interstate." *Order in Application for Authority to Provide Hi-Speed Ferry Services Between Point Judith and Block Island (Old Harbor) and Between Newport and Block Island - Docket D-05-06 Town Letter* Yet this is both legally and logically incorrect. For as the Division stated supporting or opposing fast ferry applications has *nothing* to do with lifeline activities.

Moreover Interstate Navigation is far from fragile, and has been providing ferry service to Block Island for sixty years. The owner of Interstate Navigation herself, Ms. Linda testified that, "she believes that there are "many prospective customers" who have avoided the trip to Old Harbor due to "seasickness issues." *Application By Interstate Navigation: Company for Water Carrier Authority : Docket No. D-05-06 P.11* "She opined that in view of the quicker trip to the Island and the special stabilizing design of the fast ferry, these individuals might try an Interstate fast ferry service to Old Harbor."Id. Ms Linda stated, "that Interstate would need approximately one year of lead-time for the construction of the vessel…and opined "we should easily produce a profit in the first year …assuming that we run at the same prices that IHSF is running."Id.

Mr. Joshua Linda also weighed in on the likelihood of success for a new fast ferry. He stated, "the industry has shown that essentially 'if you build it, they will come', and according to Fast Ferry Information, Ltd., over 1900 fast ferries are currently in service or on order." *Id*. at P.12 As further support, "Mr. Linda detailed the recent successes realized by IHSF's fast ferry services over the last four years, and other fast ferry operations located at Quonset Point (VFF), and in Connecticut (BI Express) and Massachusetts. Mr. Linda concluded that there is abundant evidence "of the local popularity of fast ferries."Id. at 12. He observed that even though fast ferries are much more expensive to travel on, the number of fast ferries operating in the area, and the large volume of passengers being transported by

these fast ferries continues to increase. ***He added that this conclusion was clearly borne out by the survey conducted by Interstate***. Id at 12.

Therefore, the Town is not defending the public good but its own pecuniary and parochial interests. Based on this long history of actions and precedent, it is the Town, not Bluewater, that will have a difficult time of convincing the CRMC and the USACE that a dock for a public ferry in Type 5 waters adjacent to two functioning commercial docks are not in the public interest.

Timetable

Now that we have addressed the Divisions concern regarding the Town's misguided opposition and financial motivations, we turn to questions of complexity and timing. As outlined the complexity will be exactly the same as in any other dock project. This dock will follow all of the same processes as any other being constructed. For example, the Division granted the CPCN in *A&R Marine* giving A&R 180 days to have a dock built. *A&R Application* D-13-05. Attorney Mc Elroy filed a motion to extend this time along with plans for construction of the dock. This dock was also in Type 2 waters and required a CRMC special exemption.

By contrast Bluewater has two site options in CRMC Type 5 waters where the Town itself operates three commercial docks and fishing vessels. The dock is consistent with the comprehensive plan and with CRMC guidelines for use of the waters. As evidenced by the attached letter from KDW, "the USACE permitting process typically requires 12 to 18 months to complete. The EC sets forth a nine-step process for review of a section 408 permit application. EC 1165-2-216 at 8-18.2 Bluewater has already completed the first step in the process, pre-coordination with the Corps. The Corps will also evaluate Bluewater's proposed docking facilities in accordance with section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 404; 404 of the Clean Water Act, 33 U.S.C. § 1344; and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1413."

In addition, "the Corps is currently preparing as built drawing of the Corps' breakwater and channels and will provide these drawings to Bluewater by the end of the month so that Bluewater can design its proposed docking facilities with the required setbacks and not impact the Corps' existing project. ***The Corps' schedule for review is concurrent with the various State permitting requirements and includes the time for required coordination with other state and federal agencies***. Significantly, the Water Resources Reform and Development Act of 2014 requires the Corps to significantly expedite the section 408 permit process. See Water Resources Reform & Development Act of 2014, § 1007, Pub. L. 113-121, 128 Stat. 1193 (June 10, 2014). Thus, the permitting timeline could shorten."

The letter from Mr. Sean Coffey outlines the CRMC process, which runs concurrently. Mr. Coffey states, "that in my experience practicing before CRMC, an application for an Assent to build a commercial dock in Type 5 waters should, in most cases, take six months to one year from the submission of a final application for an Assent to complete the CRMC application review and approval process."

"The dock will be located in CRMC designated Type 5 (Commercial and Recreational Harbors) waters, dedicated under the CRMC's Coastal Resources Management Program (CRMP) to supporting a broad array of commercial and recreational boating activities and facilities (CRMP section 200.5). Applications for a CRMC Assent to construct a commercial structure, including docks and marinas, in The CRMP contains detailed requirements for engineering plans and supporting materials and information to be submitted to CRMC with the Assent application. The CRMC also encourages use of a pre-application review process to enable the applicant to identify and address issues raised by CRMC staff under the CRMP before the final Assent application is submitted. In addition and in parallel to the CRMC process, a water quality certification for construction and operation of the dock will also be obtained from RIDEM based on its administrative staff review."

Finally, the construction timeline to build the Bluewater docks will also be in accordance with other docks and a methodology and timetable of that work is attached as Exhibit D by Anaconda MNNV

Conclusion

As stated, this long pattern clearly demonstrates that the Town's "dispositive" arguments are in fact just disposable delays intended to make the process constantly appear lost before it has begun. They have cited no authority, which allows them to stop Bluewater from proceeding with its plans. In addition, they have restated many ingress egress arguments that are not appropriate at this point in the condition subsequent process, and once again contrary to any authority possessed by the Town. The truth is the sheer volume and depth of this unprecedented discovery into the viability of these docks is a clear indication of their viability. Bluewater is far more informed as to the processes of permitting and construction of these sites than the Town. Bluewater has produced researched legal opinions from top marine experts and begun the process of developing both sites. As the Division has already stated it, "is satisfied that RIFF, through Bluewater has a realistic expectation of being able to develop a docking facility in Old Harbor." The Town's latest filing has produced no grounds to reverse this decision, instead relying on this Division to convey upon the Town an authority they do not possess over future processes they don't control. Therefore, we respectfully request that this Division deny the Town's motion and uphold its Order from October 20th, 2015 declaring the Bluewater's sites viable.

By and through its attorneys

/s/

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