

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, DC 20007

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

JOSEPH W. CORRIGAN

DIRECT LINE: (202) 342-8577

EMAIL: jcorrigan@kelleydrye.com

NEW YORK, NY
LOS ANGELES, CA
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PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICE
MUMBAI, INDIA

November 12, 2015

State of Rhode Island and Providence Plantations
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, R.I. 02888

Attn: John Spirito, Jr., Hearing Officer

Re: In re: Rhode Island Fast Ferry, Inc., Docket No. D-13-51
33 U.S.C. § 408 and Bluewater, LLC's Proposed Docking Facilities

Dear Mr. Spirito:

We are writing in support of Bluewater, LLC's ("Bluewater") opposition to the Town of New Shoreham's ("the Town") Motion to Reconsider in connection with Bluewater's proposal to develop two docks in the Old Harbor of Block Island. Contrary to the Town's assertions in its Memorandum filed on November 5, 2015, Bluewater does not require the written consent of the Town to obtain a permit for the proposed docking facilities from the U.S. Army Corps of Engineers ("the Corps") pursuant to 33 U.S.C. § 408 ("section 408"). As detailed below, 33 U.S.C. § 408 does not require the Town's approval for a section 408 permit because the Town is not a non-federal sponsor of the Corps' Block Island project as that term is used in the section 408 process.¹

A brief history of the Corps' Block Island Harbor project is critical to the application of section 408 in these circumstances. The Block Island Old Harbor is a harbor of refuge constructed by the Corps of Engineers pursuant to a congressional authorization that dates back to 1870. There have been no significant changes to the original congressional authorization, with two notable exceptions. In 1986 and 2012, Congress de-authorized the outer harbor and inner breakwater. *See* Water Resources Development Act of 1986 ("WRDA"), Pub. L. 99-662 (Nov.

¹ This letter also responds to the Hearing Officer's request for additional information regarding the timeline for the section 408 process.

17, 1986); Consolidated Appropriations Act of 2012, Pub. L. 112-74 (Dec. 23, 2011). The table below contains the significant legislative actions for the federal project.

Block Island Harbor of Refuge, RI		
July 11, 1870	Main breakwater	Annual Report 1868, p. 785; S. Misc. Doc. 81, 40th Cong., 2d sess.
November 17, 1986	De-authorizing two 15-foot anchorages in the outer harbor authorized by the River and Harbor Act of 1912 Inner Harbor	Section 1002, Pub. L. 99-662
December 23, 2011	De-authorizing the inner breakwater	Section 113, Pub L. 112-74

Although both the outer harbor and inner breakwater have been de-authorized, the United States retains its navigational servitude and power over navigable waters for the purposes of commerce and national defense. Both of Bluewater’s proposed dock locations are within the boundaries of the federal project and thus controlled by the Corps.

The Town now apparently erroneously claims that it is a non-federal sponsor of the Corps’ Block Island project, entitling it to prevent the Corps’ consideration of a section 408 application by Bluewater. 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.

By its plain terms, section 408 does not require the written consent of the Town, even if the Town were a non-federal cost sharing sponsor, which it is not. The Corps requires a permit under section 408 for proposed modifications to authorized Corps projects. The Secretary of the Army’s authority to grant permission for temporary or permanent alterations to Corps projects is contained in Section 14 of the Rivers and Harbors Act of 1899, as codified in 33 U.S.C. § 408, which states, in relevant part:

Provided, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: *Provided further*, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

33 U.S.C. § 408. Nothing in the statute’s terms requires the approval of a non-federal sponsor for a section 408 permit.

Federal regulations governing the Corps' section 408 permitting process also do not state that the Town's approval is required, whether it is a federal sponsor or not. *See* 33 C.F.R. § 320.4.

Finally, the Town cites the provisions of the Corps' Circular 1165-2-216, Town's Mem. at 11, which provides guidelines on the permitting process under section 408, but its arguments applying the Circular to the Town's role are incorrect. *See* Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects (July 31, 2014), http://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC_1165-2-216.pdf.2-53 (hereinafter "EC"). Contrary to the Town's assertion, the EC recognizes that a request for a section 408 permit can originate from either a non-federal sponsor *or* an independent requester.

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 non-federal 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.

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.

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.

Finally, the EC describes the required elements for a permit request and provides that a written statement by a non-federal sponsor endorsing the proposed alteration is required, "if applicable." *See* EC 1165-2-216 at 9. As the foregoing demonstrates, there is no applicable requirement for a non-federal sponsor, and therefore no written consent from the Town is required for Bluewater's application for a section 408 permit.

Next, although the Town contends that an email from a Corps civilian project manager attached to its Memorandum shows that the Corps will not provide a section 408 permit to Bluewater, this email does not support the Town's position. While it is not clear what question

was posed to the Corps civilian employee, his answer does not address either of the two docks proposed by Bluewater since neither dock requires “modification or attachment” to a Corps structure, such as a breakwater.

An incomplete email from a Corps civilian engineer does not, moreover, represent any form of authoritative determination, formal or otherwise, from the Corps regarding what the Corps will or will not approve. A civilian engineer lacks the authority to bind the Corps. The United States Supreme Court has long held that such representations by agency officials, or their designees, cannot be relied on to establish the position of a federal agency. *See generally Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (“Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.”).

Indeed, any decision whether to provide a section 408 permit would only be made following a formal process as set forth in 33 C.F.R. § 325.2, governing the Army’s processing of permit applications. These procedures require review by the district engineer; issuance of a public notice; consideration of public comments; meetings between applicants and individuals who object to the application, where appropriate; review in accordance with the environmental procedures required by the National Environmental Policy Act of 1969; a determination of the need for a public hearing; issuance of a statement of findings or record of decision; and forwarding to higher headquarters, if required, for a decision in a format prescribed by the Chief of Engineers, among other requirements. *See* 33 C.F.R. § 325.2. The EC also provides detailed requirements for the District-led Agency Technical Review and requires the concurrence of the District Office of Counsel before a permit may be issued. *See* EC 1165-2-216 at 13-14. Thus, any Corps decision with regard to a section 408 permit that is pertinent to these proceedings would require completion of this prescribed process.

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.

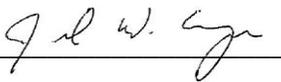
In sum, the applicable statute, regulations, and Corps’ Circular demonstrates that the Town is not a cost-sharing sponsor for the Block Island project. Therefore, the Town is simply another interested party, and it does not have a right to veto the section 408 permit; nor is Bluewater required to provide a letter of support from the Town to obtain a section 408 permit.

As for timing, the Corps 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;

² The relevant portions of the EC are attached. *See* Attachment A.

section 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. 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.

Sincerely,



Joseph Corrigan, Senior Advisor
David Frulla, Partner
KELLEY DRYE & WARREN LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8577
(202) 342-8451 (Fax)
jcorrigan@kelleydrye.com
dfrulla@kelleydrye.com

Attachment

A

the categorical permission and specify any special conditions that may apply on a site-specific basis may be used.

t. Section 408 Decision Level. Certain proposed alterations, once recommended by the district and division, will require a final decision by the Director of Civil Works at HQUSACE. All other decisions on proposed alterations may be rendered by the District Commander unless a Division Commander establishes a regional process that requires that the decision be made by the Division Commander. If the answer to any of the following questions is “yes” and the district and division recommend approval, then the Section 408 request requires HQUSACE level review and decision, reference paragraph 7.c.(7):

(1) Does the proposed alteration require a Type II IEPR, reference EC 1165-2-214?

(2) Does the proposed alteration require an Environmental Impact Statement (EIS) in which USACE is the lead agency?

(3) Does the proposed alteration change how the USACE project will meet its authorized purpose? An example would be a proposed alteration to permanently breach a levee system for ecosystem restoration purposes but raise all structures behind the levee to achieve the same flood risk management benefits. This project still meets the authorized flood risk management purpose, but in a different manner.

(4) Does the proposed alteration preclude or negatively impact alternatives for a current General Investigation (GI) or other study?

(5) Is the non-federal sponsor for a USACE project proposing to undertake the alteration as in-kind contributions eligible for credit under Section 221 of Flood Control Act of 1970, as amended?

(6) Is the proposed alteration for installation of hydropower facilities?

(7) Is there a desire for USACE to assume operations and maintenance responsibilities of the proposed navigation alteration pursuant to Section 204(f) of Water Resources Development Act (WRDA) of 1986?

If the district is unsure, the district should engage the division and HQUSACE, reference Paragraph 9 of this EC, Vertical Teaming.

7. Procedures.

a. District Section 408 Coordinator. The District Commander will designate a Section 408 Coordinator responsible for ensuring processes in this EC are met and to ensure the proper coordination occurs among all the necessary district elements, including but not limited to,

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regulatory, real estate, counsel, planning, engineering, programs and project management, and/or operations. The Section 408 Coordinator will also ensure proper coordination among other districts if the USACE project crosses more than one district's area of responsibility. In addition the Section 408 Coordinator will track district expenditures, including funding provided by any non-federal interests, for processing Section 408 requests on a fiscal year basis by funding source.

b. Description. In order to grant permission under Section 408, USACE must determine that the proposed alteration does not impair the usefulness of the USACE project, which includes retaining the project's authorized purpose, and is not injurious to the public interest. Because proposed alterations vary in size, level of complexity, and potential impacts, the procedures and required information to make such a determination are intended to be scalable. Based on the proposed alteration, districts will determine data, analyses and documentation necessary in order to make a determination regarding whether or not the proposed alteration does not impair the usefulness of the project and is not injurious to the public interest. Requirements for data, analyses and documentation may be subject to change as additional information about the Section 408 proposal is developed and reviewed.

c. Step-by-Step Procedures. The procedures have been grouped into nine steps: pre-coordination, written request, required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, HQUSACE review, notification, and post-permission oversight. Not all the steps will be applicable to every Section 408 request. In simple cases, steps may be combined or occur simultaneously. For more complex cases, there may be the need for extensive coordination between the district and requester throughout the process. Supplemental information for these steps specific to dams and reservoirs, hydropower, levees and floodwalls, flood risk management channels, and navigation can be found in the appendix appropriate to the type of infrastructure (Appendices B-E). At any time in the process if the district determines that the requirements will not or cannot be met, the district may deny the request prior to completing all the required steps. If a request is denied, the requester will be advised in writing as to the reasons for denial.

(1) Step 1: Pre-Coordination. Early coordination between USACE, the requester and/or non-federal sponsor, if applicable, is strongly recommended because it will aid in identifying potential issues, focusing efforts, minimizing costs, and protecting sensitive information. Districts shall ensure requesters are provided a hardcopy or electronic copy of this EC.

(2) Step 2: Written Request. The purpose of this step is to document the initiation of the Section 408 process. Information from this step will be used by the district to determine documentation and approval requirements.

(a) All requests for Section 408 permission must be submitted in writing to the District Commander of the appropriate USACE district office having jurisdiction over the USACE

project that would be impacted by the alteration. Each district has the flexibility to determine the format in which this written request is submitted; however,

(b) The written request must include:

i. a complete description of the proposed alteration including necessary drawings, sketches, maps, and plans that are sufficient for the district to make a preliminary determination as to the location, purpose and need, anticipated construction schedule, and level of technical documentation needed to inform its evaluation. Detailed engineering plans and specifications are not required at Step 2, but could be submitted at the same time if available;

ii. a written statement regarding whether the requester is also pursuing authorization pursuant to Sections 10/404/103 and, if so, the date or anticipated date of application/pre-construction notification submittal;

iii. information regarding whether credit under Section 221 of the Flood Control Act of 1970, as amended, or other law or whether approval under Section 204(f) of WRDA 1986 is being or will be sought;

iv. a written statement of whether the requester will require the use of federally-owned real property or property owned by the non-federal sponsor; and,

v. a written statement from the non-federal sponsor endorsing the proposed alternation, if applicable.

(3) Step 3: Required Documentation. The purpose of this step is to outline the documentation necessary for the district to determine whether the proposed alteration would impair the usefulness of the project or be injurious to the public interest. The list below is meant to provide an overview of the general requirements, but requirements are scalable to the nature of the proposed alteration.

(a) Technical Analysis and Design. The district should work closely with the requester to determine the specific level of detail necessary to make a decision for a particular alteration request. The minimum level of detail will be 60% complete plans and specifications and supporting technical analysis.

(b) Hydrologic and Hydraulics System Performance Analysis. The purpose of a hydrologic and hydraulics system performance analysis is to determine the potential hydrologic and hydraulics impacts of proposed alterations. Districts will determine if such an analysis is needed and, if so, the appropriate scope of analysis based on the complexity of the proposed alteration. The requester will be responsible for the analysis. Hydrologic and hydraulic system performance analyses will be applied to alterations that alter the hydrologic and/or hydraulic conditions (e.g., reservoir operations, bridge constrictions, hydropower installation, etc.) See Appendix F for

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more details regarding the requirements of a hydrologic and hydraulics system performance analysis.

(c) Environmental Compliance.

i. A decision on a Section 408 request is a federal action, and therefore subject to the National Environmental Policy Act (NEPA) and other environmental compliance requirements. While ensuring compliance is the responsibility of USACE, the requester is responsible for providing all information that the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and ordinances. NEPA and other analysis completed to comply with other environmental statutes (e.g. Endangered Species Act) should be commensurate with the scale and potential effects of the activity that would alter the USACE project. The district will work with the requester to determine the requirements, which will be scaled to the likely impacts of the proposed alteration and should convey the relevant considerations and impacts in a concise and effective manner.

ii. The NEPA compliance process should be completed in an efficient, effective and timely manner consistent with guidance issued by the Council on Environmental Quality on March 6, 2012 entitled *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*. NEPA compliance should follow the process set forth in 40 CFR Parts 1500-1508 and the USACE civil works NEPA implementing regulations found in 33 CFR Part 230. Documentation for Section 408 requests do not require the same level of analysis or documentation needed for planning studies and, therefore, Appendix A and other portions of Part 230 specific to planning studies do not apply. However, in some cases, documentation from studies may be used to inform a Section 408 decision, such as a report that would be required for Section 204(f) of the Water Resources Development Act of 1986.

iii. For any final Environmental Impact Statement (EIS) or Environmental Assessment (EA) or other environmental compliance document, the requester's proposal will be identified as the "requester's preferred alternative."

iv. USACE has jurisdiction under Section 408 only over the specific activities or portions of activities that have the potential to alter a USACE project. Therefore, if a proposed alteration is part of a larger project (and/or its associated features) that extends beyond the USACE project boundaries, the district should determine what portions or features of the larger project USACE has sufficient control and responsibility over to warrant their inclusion in the USACE environmental review. The scope of analysis for the NEPA and environmental compliance evaluations for the Section 408 review should be limited to the area of the alteration and those adjacent areas that are directly or indirectly affected by the alteration. For example, a pipeline can extend for many miles on either side of the USACE project boundary. In this example, the scope of analysis would likely be limited to the effects of the pipeline within the USACE project boundary, but would not address those portions of the pipeline beyond the USACE project boundary. In contrast, a proposal to alter a levee system might require USACE to examine that

proposal's potential effects on the reliability of the levee system to provide flood risk reduction to the area behind the levee system itself. As a general rule, if there are features of a larger project occurring outside of the USACE project boundaries that are so intimately connected to the features of the larger project altering a USACE project that they cannot be meaningfully distinguished (e.g., a setback levee that is located outside of the original project boundary of the levee being replaced), the USACE Section 408 NEPA document should be broad enough to address all those effects. Generally, elements of the larger project that are not intimately connected to the features that would alter the USACE project (e.g., concessions being constructed off USACE property by the same entity requesting permission to construct boat access to a USACE reservoir) should not be included in the USACE environmental review.

v. Only reasonable alternatives need to be considered in detail, as discussed in the CEQ NEPA regulations at 40 CFR Part 1502.14. Reasonable alternatives must be those that are feasible, and such feasibility must focus on the accomplishment of the underlying purpose and need (of the requester) that would be satisfied by the proposed federal action (granting of permission for the alteration). For Section 408 requests, reasonable alternatives should focus on two scenarios: 1) no action (i.e., no proposed alteration in place) and 2) action (i.e. proposed alteration in place). Thus, examination of alternative forms of a proposed alteration that the requester has not proposed should only be included to the extent necessary to allow a complete and objective evaluation of the public interest and informed decision regarding the alteration request.

vi. Districts must make diligent efforts to involve the public in the decision-making process, including soliciting appropriate information from the public to inform the environmental analysis and public interest determination. For the purposes of Section 408 requests that are expected to have less than a significant effect on the human or natural environment, a public notice soliciting input will serve as the method of advising all interested parties of the proposed alteration for which permission is sought and by which information necessary to inform USACE's evaluation and review is solicited. As such, this public notice must be circulated to the public as early in the evaluation of a proposed alteration as possible to generate meaningful public and agency input to inform the evaluation and decision-making processes. Generally, Section 408 EAs should not be circulated for public comment. In circumstances where a proposed alteration is associated with a current study or other uncommon circumstances, the decision to circulate the Section 408 component of that EA will be approved by the Division Commander or the Division Commander's designee. Any decision to circulate an EA/Finding of No Significant Impact (FONSI) for a Section 408 request that also requires a Section 10/404/103 permit decision must be coordinated with the Regulatory Program to ensure that only information pertinent to non-Regulatory Program matters is included in the documented to be circulated.

vii. A number of categorical exclusions that allow completion of the NEPA process in an efficient manner for those activities that individually and cumulatively would not result in significant effects on the environment are included in 33 CFR 230.9. For example, categorical exclusions in 33 CFR 230.9(b) and (i) may have applicability to some of the smaller scale

activities that may be encountered under Section 408. Real estate grants for rights-of-way as referenced in 33 CFR 230.9(i) should be broadly interpreted to include grants of rights-of-way by either USACE or the non-federal sponsor. A categorical exclusion may be used for Section 408, provided that care is taken to ensure that the proposed alteration is within the intended scope of the specific categorical exclusion used and extraordinary circumstances that may require the preparation of an EIS or EA have been taken into consideration. It is recommended that the applicability and use of the categorical exclusion be documented in accordance with recent CEQ guidance, *Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act*.

viii. The district should use, to the extent possible, any NEPA documentation that may already exist for the federal project. In some cases NEPA documentation has already been completed through an existing or ongoing civil works study. The districts should use the information to the extent feasible and supplement the existing information as needed.

ix. If the proposed alteration is covered by an EIS in which USACE is a cooperating agency, the district may adopt or supplement that EIS and develop a Record of Decision (ROD) that is specific to the proposed alteration. For hydropower alterations, USACE and FERC have entered into an MOU for meeting NEPA requirements (see Appendix C).

(d) Real Estate Requirements. A list of all real property interests required to support the proposed alteration must be provided, including those in federally managed lands and those owned by the requester. If a non-standard estate is proposed, the district must follow the normal approval requirements outlined in EC 405-1-11 and Chapter 12, ER 405-1-12 or subsequent regulation. Maps clearly depicting both existing real estate rights and the additional real estate required must also be provided. If the lands are under the control of the Army, the applicant will work with the district to determine lands impacted. Additional information may be needed. If it is determined that an outgrant of Army land is required, a *Report of Availability and Determination of Availability* must be completed by the district in accordance with AR 405-80 and Chapter 8, ER 405-1-12 or subsequent regulation.

(e) Discussion of Executive Order 11988 Considerations. The district may require the requester to submit sufficient data in order that the district may conduct its analysis in accordance with ER 1165-2-26 to ensure that the proposed alteration is compliant with EO 11988. The request should be assessed as to whether there would be induced development in the floodplain as a result of the proposed alteration and address the positive and negative impacts to the natural floodplain functions.

(f) Requester Review Plan Requirement. The district has the flexibility to decide whether or not the requester must prepare a review plan for the alteration for district approval. A review plan is required when a Type II Independent External Peer Review (IEPR) is required. If the district determines, by following procedures in EC 1165-2-214, a Type II IEPR is required, then at minimum the requester is required to submit a Type II IEPR review plan. The Risk

Management Center (RMC) will be the Review Management Organization (RMO) and is required to endorse in writing all review plans for Type II IEPRs to ensure that the review plans reflect a level of review commensurate with the scope and scale of the proposed alterations. All requester-generated review plans for Type II IEPRs will be approved by the Division Commander.

(g) Operations and Maintenance. Requesters must identify any operations and maintenance requirements needed throughout the life of the proposed alteration and the responsible entity for the operations and maintenance into the future. For instances when there may be a desire for USACE to assume or incorporate operations and maintenance of the proposed alteration as part of its responsibilities for the USACE project being modified, a justification must be provided. See Appendix E for federal assumption of maintenance associated with navigation features. Any alteration to a project operated and maintained by a non-federal sponsor and for which an update to the operations and maintenance manual is required, the non-federal sponsor will provide USACE with sufficient information to update the O&M manual. The modified O&M manual will be subject to environmental compliance in the same manner as the requested alteration. The non-federal sponsor will acknowledge in writing their continued responsibility to operate, maintain, repair, rehabilitate and replace the USACE project at no cost to the government and will hold and save the government free from all damages arising from construction, operation, maintenance, repair, rehabilitation, and replacement of the project.

(h) Other Information. Based on the alteration request, the district may require the requester to provide additional information to complete its evaluation.

(4) Step 4: District-Led Agency Technical Review.

(a) District Review Plans. The purpose of the district review plans is to define the requirements, procedures, and specific details of how the district-led Agency Technical Review (ATR) will be conducted for Section 408 proposals. In addition, district decisions about required documentation, Type II IEPRs and approval level should be documented in the review plans. Districts have the option to develop an overarching review plan, called a Procedural Review Plan, that establishes the review procedures to be used for Section 408 requests similar in nature and that have similar impacts. Procedural Review Plans must be endorsed in writing by the Risk Management Center and approved by the Division Commander. Otherwise, the district will develop an alteration-specific review plan to be approved by the Division Commander.

(b) District-led Agency Technical Review. For the purposes of Section 408, the purpose of a district-led ATR is to determine if requirements set forth in this EC have been met. Reviewers can be from the home district. If lacking the appropriate expertise, the district should supplement their staff with outside subject matter experts through appropriate communities of practice, centers of expertise, or other offices. Review teams should be comprised of reviewers with the appropriate independence and expertise to conduct a comprehensive review in a manner commensurate with the complexity of the Section 408 proposal. It should be noted, DrChecks

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can be used for Section 408 ATRs, but it is not required. The ATR team will make the following determinations:

i. Impair the Usefulness of the Project Determination. The objective of this determination is to ensure that the proposed alteration will not limit the ability of the project to function as authorized and will not compromise or change any authorized project conditions, purposes or outputs. All appropriate technical analyses including geotechnical, structural, hydraulic and hydrologic, real estate, and operations and maintenance requirements, must be conducted and the technical adequacy of the design must be reviewed. If at any time it is concluded that the usefulness of the authorized project will be negatively impacted, any further evaluation under 33 USC 408 should be terminated.

ii. Injurious to the Public Interest Determination. Proposed alterations will be reviewed to determine the probable impacts, including cumulative impacts, on the public interest. Evaluation of the probable impacts that the proposed alteration to the USACE project may have on the public interest requires a careful weighing of all those factors that are relevant in each particular case. The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. The decision whether to approve an alteration will be determined by the consideration of whether benefits are commensurate with risks. If the potential detriments are found to outweigh the potential benefits, then it may be determined that the proposed alteration is injurious to the public interest. This determination is not the same as the “contrary to the public interest determination” that is undertaken pursuant to Sections 10/404/103. Factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from the interested parties, including tribes, agencies, and the public.

iii. Legal and Policy Compliance Determination. A determination will be made as to whether the proposal meets all legal and policy requirements. District Office of Counsel concurrence is required. The compliance determination for any Section 10/404/103 permit decision associated with the proposed alteration is separate from and will not be included in this compliance determination.

(5) Step 5: Summary of Findings. Upon completion of the district ATR and demonstration of environmental compliance, the district will develop a Summary of Findings (content and format scalable to the alteration) to summarize the district rationale and conclusions for recommending approval or denial. The Summary of Findings will serve as the basis for the final decision on the proposed alteration. If the district determines that HQUSACE approval is required, the district will submit the Summary of Findings to the division for review. The Summary of Findings will be signed by the District Commander (or designee) and contain the following, if applicable:

- (a) Summary of rationale and conclusions for recommending approval or denial;
- (b) Written request;
- (c) A physical and functional description of the existing project, including a map;
- (d) Project history and authorization;
- (e) Impact to the usefulness of the USACE project determination;
- (f) Injurious to the public interest determination;
- (g) Policy Compliance certification;
- (h) Certification of Legal Sufficiency from District Office of Counsel;
- (i) Certification by the Chief of the District Real Estate Division that the real estate documentation is adequate;
- (j) A description of any related, ongoing USACE studies (if applicable), including how the proposed alteration may impact those studies;
- (k) Summary of any changes to the O&M manual. If the district has determined that USACE would assume O&M responsibilities as part of its responsibilities for the USACE project, include the rationale and any anticipated increase in USACE O&M costs.
- (l) Summary of any changes to a project partnership agreement (PPA) or local cooperation agreement (if applicable);
- (m) Applicable environmental compliance documentation including but not limited to NEPA documentation, Endangered Species Act (ESA) documentation, and other necessary documentation;
- (n) Finding of No Significant Impact (FONSI) or Record of Decision (ROD) (These will be signed concurrently with the Section 408 decision. If HQUSACE approval is required, these will be draft and will be signed by the Director of Civil Works);
- (o) Summary of the acceptance and use of funds pursuant to Section 214 or Section 139(j), if applicable, as outlined in Appendix G; and,
- (p) Any additional final conclusions or information, including any associated controversial issues.

(6) Step 6: Division Review (if required).

(a) Upon receipt of the district prepared Summary of Findings for HQUSACE review and decision, the division will review the submittal and provide comments to the district within 30 days unless the division notifies the district that additional review time is needed. The division will review the Summary of Findings for policy compliance and legal sufficiency; quality assurance and completeness; identification of conflicts with ongoing studies; and confirmation of the need for HQUSACE review and decision. The district is responsible for addressing division comments prior to submission to HQUSACE. The timeline required to address comments may vary depending on significance of the division comments. If the division decides the district may approve the Section 408, that rationale should be documented as part of the administrative record.

(b) The Division Commander will either deny the Section 408 request or recommend approval to HQUSACE. If the division denies the request, this decision will be transmitted to the district. If the division recommends approval, the division will forward an electronic copy of the Summary of Findings and the Division Commander's recommendation to the appropriate HQUSACE Regional Integration Team (RIT). This may be forwarded to HQUSACE during the publication period of the final EIS (if an EIS is required for the alteration).

(7) Step 7: HQUSACE Review (if required).

(a) Upon receipt of the Section 408 submittal from the division, the RIT will forward the Summary of Findings and division recommendation to the HQUSACE Office of Water Project Review (CECW-PC) for a policy compliance review. The RIT will ensure that the appropriate reviewers include engineering and other appropriate subject matter experts such as navigation, levee safety, dam safety, real estate and environmental. HQUSACE will review and provide comments within 30 days, unless HQUSACE notifies the division that additional review time is needed. The timeline required to address comments will vary depending on significance of the HQUSACE comments. The RIT will coordinate the results, as needed, to correct or improve the package as necessary to address concerns. The district is responsible for addressing HQUSACE comments or coordinating with the requester for comment resolution.

(b) The RIT will draft the final HQUSACE decision memorandum for the Director of Civil Work's signature.

(c) If the Summary of Findings contains a draft FONSI, the Director of Civil Works will sign the FONSI concurrently with the Section 408 decision, if permission is granted.

(d) If the Summary of Findings contains a draft ROD, HQUSACE will not finalize the Section 408 decision sooner than 30 days after the publication of the final EIS and the district has transmitted an updated draft ROD. HQUSACE will finalize the ROD concurrently with the Section 408 decision.

(e) The RIT will provide the final HQUSACE decision memorandum and signed FONSI or ROD, if applicable, to the division that will in turn provide the decision to the district.

(8) Step 8: Notification. The District Commander is responsible for providing a written notification to the requester for all Section 408 requests, regardless of the decision level. Appendix H contains an example letter.

(a) If the final decision is to deny the request, the requester will be advised in writing as to the reason(s) for denial.

(b) If the final decision is to approve the request, the District Commander will provide a written approval document. In situations where the district also is evaluating a Section 10/404/103 permit application, the district may forward the Section 408 decision letter with the Section 10/404/103 permit decision, once it is made. For cases involving a categorical permission, the written approval will be validation that the categorical permission is applicable.

(c) Special Conditions. For approved alterations, the District Engineer may include special conditions. Examples of special conditions may include:

i. The requester must obtain approval by the district of 100% plans and specifications prior to construction.

ii. The requester must have both the Section 408 permission and appropriate real estate document prior to construction.

iii. The requester must obtain the appropriate Section 10/404/103 permits prior to construction.

iv. The requester must be responsible for implementing any requirements for mitigation, reasonable and prudent alternatives, or other conditions or requirements imposed as a result of environmental compliance.

v. Note, in the event of any deficiency in the design or construction of the requested activity, the requestor is solely responsible for the remedial corrective action, and any permission granted under Section 408 should explicitly state this responsibility.

(9) Step 9: Post-Permission Oversight.

(a) Construction oversight. The district should develop procedures for monitoring construction activities. The purpose is to ensure the Section 408 permittee is constructing the alteration in accordance with the permission conditions. Any concerns regarding construction should be directed to the Section 408 permittee (and the non-federal sponsor if the Section 408

EC 1165-2-216
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Change 1

permittee is not the non-federal sponsor) for resolution. Oversight should be commensurate with the level of complexity of the alteration.

(b) As-builts. Drawings showing alterations as finally constructed will be furnished by the Section 408 permittee to the district after completion of the work. As-builts must be provided within 180 days of construction completion.

(c) Operations and Maintenance (O&M) Manual Updates. The Section 408 permittee and/or non-federal sponsor is required to provide the district with sufficient information to update the O&M manual, as required. O&M manual updates may range from simple removal and replacement of paragraphs or entirely new manuals depending on the scope and complexity of the alteration. The district is responsible for reviewing and approving or developing any updates needed to the O&M manual as a result of the alteration. At a minimum, the update should include a description of the new features, reference to the Section 408 approvals, as-builts, and instructions regarding O&M of any new features not included in the existing manual. Reference ER 1110-2-401 or ER 1130-2-500 for information on O&M manuals.

(d) Post Construction Closeout. Post construction closeout requires an on-site inspection of the completed alteration. The district may coordinate post construction closeout with the other federal, state or local agency. Where projects require an update to the O&M manual or PPA, the USACE district must conduct the post construction inspection and provide notification to the applicant and non-federal sponsor regarding acceptance or any corrective actions that are required. Notification that the alteration was constructed in accordance with the permit conditions must include a copy of the updated O&M manual.

(e) Administrative Record. The district will keep an administrative record for each Section 408 proposal. The administrative record should include all documents and materials directly or indirectly considered by the decision maker and should be ordered chronologically. It should include documents, materials, and a record of the offices and staff that are pertinent to the merits of the decision, as well as those that are relevant to the decision-making process.

8. Funding. Potential available sources of funds for review activities include:

a. Applicable project-specific appropriated funds in investigations, construction, operations and maintenance, or flood control - Mississippi River and Tributaries may be used for Section 408 reviews that are specific to the applicable project. Vertical team concurrence through division and HQUSACE RIT must be obtained prior to use of investigations or construction funds.

b. For federally authorized levee systems, channels, and dams operated and maintained by a non-federal sponsor, district Inspection of Completed Works funds may be used. In addition, on a case by case basis, for Section 408 requests critical to the functioning of these levee systems,

BURNS & LEVINSON LLP

November 16, 2015

ONE CITIZENS PLAZA • SUITE 1100
PROVIDENCE, RI 02903
T 401.831.8330 F 401.831.8359
BURNSLEV.COM
SEAN O. COFFEY
401.831.8173
SCOFFEY@BURNSLEV.COM

State of Rhode Island and Providence Plantations
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888
Attn: Mr. John Spirito, Jr., Hearing Officer

Re: *In re: Rhode Island Fast Ferry, Inc., Docket No. D-13-51*
33 U.S.C. § 408 and Bluewater, LLC's Proposed Docking Facilities

Dear Mr. Spirito:

The undersigned represents Bluewater LLC and its principal, Paul Filippi, with respect to state regulatory permitting by the Rhode Island Coastal Resources Management Council (CRMC) and the Department of Environmental Management (RIDEM) of the proposed dock in Old Harbor on New Shoreham to service a high speed ferry. I have been admitted to practice in Rhode Island courts since 1976, served as counsel and chief counsel to RIDEM from 1977 to 1983, and have practiced before RIDEM and CRMC for well more than three decades. During that time I have been extensively involved in the permitting of commercial docks and marinas in Rhode Island waters.

For purposes of the pending matter before the Rhode Island Public Utilities Commission, Bluewater has asked for my assessment of the time required to complete the process for obtaining a CRMC Assent to construct the proposed commercial ferry dock in Old Harbor. In addition Bluewater requested my counsel as to the CRMC "Red Breakwater" lease at issue in this case.

First as to the timing, 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 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). 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.

Secondly, I have reviewed the pleadings submitted by the parties in the PUC matter with respect to the littoral claims by the Town, the purported long term lease of the Red Jetty by CRMC to the Town in 2012, and relevant case law. Pursuant to RIGL section 46-23-6(7) (attached) 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 is held by the Filippi companies.

In *Town of New Shoreham Vs. The Estate of Paul Filippi*, 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, but the Filippis retain the fee interest to the land underlying the highway easement. (See attached transcript of case WC/2004-115, bench decision by Justice Rubine, page 4). 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 Filippis and their companies. These rights are superior to the easement interest at best held by the Town for highway purposes.

Based on that review I believe that, given the fee ownership of the adjacent land and littoral rights by the Filippis' companies, 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 the 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 46-23-6(7) (attached).

Further, only the Superior Court can resolve issues with respect to claims to real property and associated littoral rights. The CRMC lacks jurisdiction to determine the owner of the littoral rights adjacent to upland property. 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). The CRMC's jurisdiction, although broad with regard to coastal areas, is not unlimited and has specific boundaries. 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:

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*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).

My conclusion that the jetty lease was improvidently granted to the Town by CRMC 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 Superior Court. 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.

Very truly yours,



Sean O. Coffey

SOC\jhd
Enclosures

(iii) The applicant, to be eligible for this provision, shall apply no later than January 31, 1999.

(iv) The council is directed to develop rules and regulations necessary to implement this subdivision.

(v) It is the specific intent of this subsection to require that all pre-existing residential boating facilities constructed on January 1, 1985 or thereafter conform to this chapter and the plans, rules and regulations of the council.

(7) Lease of filled lands which were formerly tidal lands to riparian or littoral owners.

(i) Any littoral or riparian owner in this state who desires to obtain a lease from the state of Rhode Island of any filled lands adjacent to his or her upland shall apply to the council, which may make the lease. Any littoral or riparian owner who wishes to obtain a lease of filled lands must obtain pre-approval, in the form of an assent, from the council. Any lease granted by the council shall continue the public's interest in the filled lands including, but not limited to, the rights of navigation, fishery, and commerce. The public trust in the lands shall continue and run concurrently with the leasing of the lands by the state to private individuals, corporations, or municipalities. Upon the granting of a lease by the council, those rights consistent with the public trust and secured by the lease shall vest in the lessee. The council may approve a lease of filled lands for an initial term of up to fifty (50) years, with, or without, a single option to renew for an additional term of up to fifty (50) years.

(ii) The lessor of the lease, at any time, for cause, may by express act cancel and annul any lease previously made to the riparian owner when it determines that the use of the lands is violating the terms of the lease or is inconsistent with the public trust, and upon cancellation the lands, and rights in the land so leased, shall revert to the state.

(8) "*Marinas*" as defined in the coastal resources management program in effect as of June 1, 1997, are deemed to be one of the uses consistent with the public trust. Subdivision (7) is not applicable to:

(i) Any riparian owner on tidal waters in this state (and any successor in interest to the owner) which has an assent issued by the council to use any land under water in front of his or her lands as a marina, which assent was in effect on June 1, 1997;

(ii) Any alteration, expansion, or other activity at a marina (and any successor in interest) which has an assent issued by the council, which assent was in effect on June 1, 1997; and

(iii) Any renewal of assent to a marina (or successor in interest), which assent was issued by the council and in effect on June 1, 1997.

(9) "*Recreational boating facilities*" including marinas, launching ramps, and recreational mooring areas, as defined by and properly permitted by the council, are deemed to be one of the uses consistent with the public trust. Subdivision (7) is not applicable to:

(i) Any riparian owner on tidal waters in this state (and any successor in interest to the owner) which has an assent issued by the

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
WASHINGTON Sc. SUPERIOR COURT

TOWN OF NEW SHOREHAM)
)
 Vs.) WC/2004-115
)
THE ESTATE OF PAUL FILIPPI)

HEARD BEFORE THE HONORABLE JUSTICE ALLEN P. RUBINE
ON AUGUST 31, 2006

APPEARANCES:

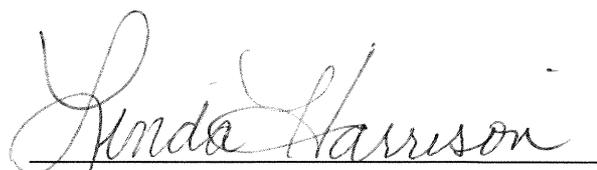
MERLYN O'KEEFE, ESQUIRE
FOR THE TOWN OF NEW SHOREHAM

JOSEPH DEANGELIS & KENDRA BEAVER, ESQUIRES
FOR THE DEFENDANT

LINDA HARRISON, RMR
COURT REPORTER

C E R T I F I C A T I O N

I, Linda Harrison, hereby certify that the succeeding pages, 1 through 20, inclusive, are a true and accurate transcript of my stenographic notes.

A handwritten signature in cursive script that reads "Linda Harrison". The signature is written in black ink and is positioned above a horizontal line.

Linda Harrison, RMR
Court Reporter

1 MR. DEANGELIS: No, Your Honor. Thank you.

2 THE COURT: Very well. This matter is before the
3 Court on cross-motions for summary judgment regarding the
4 ownership and/or the rights relative to an easement over
5 a triangular parcel of land located in the Old Harbor
6 section of the Town of New Shoreham. That parcel, the
7 Town suggests, was condemned by the Town Council in 1897
8 pursuant to the laws that were then pending, Title 10,
9 Chapter 71 of the General Laws, having to do with highway
10 condemnations. The Town requests of this Court an order
11 for a preliminary permanent injunction prohibiting the
12 defendants -- who are the current owners of the Ballard's
13 Restaurant and who made claim to the ownership of this
14 triangular parcel of land adjoining the restaurant -- and
15 the requested restraining order or preliminary injunction
16 that the defendant -- that the plaintiffs request would
17 be to prohibit the defendants from obstructing the Town's
18 use of the property as a public highway in any fashion,
19 painting or otherwise defacing or altering the subject
20 property in any way, and/or directing patrons to use the
21 property in any manner, including but not limited to the
22 parking of motor vehicles in association with the use of
23 the restaurant.

24 The defendants have objected to the Town's motion
25 for summary judgment and have themselves filed a

1 cross-motion for summary judgment and a motion to
2 dismiss. The cross-motion and the motion to dismiss are
3 based on the averment that the alleged condemnation of
4 1897 was an invalid condemnation, and that they are
5 owners of record of this parcel of land, and that their
6 ownership should not be encumbered by an easement or
7 should not be in any way affected by this 1897
8 condemnation by reason of its invalidity.

9 Briefly, the facts and travel of this case are as
10 follows: The Town filed it's amended complaint in
11 January of this year, January 27th of 2006, and that
12 complaint is in two counts. One alleges a trespass
13 against the defendants for allegedly entering this parcel
14 without consent or privilege and that the Town owns this
15 parcel in fee by reason of the condemnation; and that
16 they further entered the property unlawfully for the
17 painting of parking striping on the parcel and directing
18 its patrons to park their vehicles on this parcel.

19 Count 2 alleges an obstruction of a public highway
20 wherein the Town avers that the property was properly
21 laid out as a public highway in and around 1897, that the
22 public highway has never been abandoned by the Town, and
23 that the highway was laid out by the Town Council of the
24 Town of New Shoreham in 1897 when it accepted the report
25 of the commissioners that were previously appointed to

1 widen and lay out Water Street, and that that report of
2 the commissioners was duly and properly recorded, and
3 that said highway was established and laid out by the
4 Town.

5 I might mention initially that it appears undisputed
6 that the alleged condemnation of this parcel of land by
7 the Town in 1897 was performed under the Highway Act then
8 in effect, Title 10, Chapter 71 of the General Laws,
9 which includes Sections 1 through 17. Under the Act,
10 notwithstanding the condemnation of the land to use for
11 the use of the public for travel, the title to the soil
12 and all the profits thereof, consistent with the
13 existence of the easement, remain in the original owner.
14 And that's a quote from the case of Rhode Island Hospital
15 Trust company Vs. Hayden -- we get into some old cases
16 here -- 20 RI 544 at page 546, 40 A. 421, a 1898 case,
17 quoting an earlier 1860 case, Tucker Vs. Eldred, 6 RI
18 404. It appears, therefore, to the Court that it is
19 undisputed that if this condemnation was completed in
20 accordance with the Highway Act, all that the Town could
21 have acquired was an easement and not a fee simple
22 interest. Therefore, as a matter of law, the first order
23 of business is this Court cannot declare the Town to be
24 the rightful owner in fee simple as alleged in count 1 of
25 the amended complaint. That count, therefore, must be

1 dismissed as a matter of law. And, as part of my ruling,
2 I will order that count 1 be dismissed as a matter of law
3 because of the allegation that the Town owns the parcel
4 in fee simple, which it could not have accomplished even
5 if it properly condemned the property in 1897.

6 Moving on then, in accordance with Section 7 of the
7 Highway Act, the Town Council of New Shoreham, after
8 hearing from the commissioners which it appointed to
9 report upon the widening and laying out of the highway in
10 this area, approved, received and ordered the report
11 recorded on October 16th, 1897. And that appears to be
12 an undisputed fact.

13 Section 7 of the Highway Act -- Title 10, Chapter
14 71, Section 7 indicates that the council shall, after
15 hearing from all persons to be heard, proceed to receive
16 or reject the report, and, if the report is approved and
17 received, it shall cause the same to be recorded. That's
18 what the statute says. And the highway to be established
19 and laid open by removing all buildings, fences and other
20 impediments therein. So, Section 7 of the Highway Act
21 essentially requires that the report of the commissioners
22 be approved, received and recorded, and that the highway
23 thereafter be established and laid open by removing
24 buildings, fences and other impediments. That's the way
25 that a highway was determined to be a public highway back

1 in 1897.

2 So, basically, Mr. Priestly's first affidavit, at
3 least with regard to the manner in which the
4 commissioners were appointed, and the report that they
5 accepted and approved and received on October 16th, 1897,
6 appears to be an undisputed fact. The Town alleges that
7 the Town has never abandoned the highway, and that the
8 defendants have interfered with its use as a highway by
9 parking motor vehicles on the disputed parcel and
10 arguably interfering with the public's use of this area
11 as a highway parcel.

12 The defendants on the other hand take the position
13 that the condemnation was ineffective because the report
14 was never recorded in the land evidence records in
15 accordance with defendant's reading of the statute, and
16 the highway therefore was never -- and in addition, that
17 the highway was never properly laid out. The position
18 that the defendants take with regard to the recordation
19 is that they essentially read the provisions of Section 7
20 of the Highway Act, which requires that the report be
21 approved -- the report of the commissioners be approved
22 and received by the Town Council and then, thereafter,
23 recorded, to mean that the recordation must be in the
24 land evidence records. And they rely on the 1896 version
25 of the recordation statute, which essentially has

1 remained fairly static over the years, but it says
2 essentially that every conveyance of lands, tenements or
3 hereditaments, absolutely, by way of mortgage or
4 unconditioned use or trust, for any term longer than one
5 year, and all declarations of trust concerning the same
6 shall be void unless made in writing duly signed
7 acknowledged as hereinafter provided, delivered and
8 recorded in the records of land evidence in the town or
9 city where the said lands, tenements or hereditaments are
10 situated. And that's title -- in 1896 that was
11 incorporated in Title 22, Chapter 202, Section 2 of the
12 General Laws. And so, it's the position of the
13 defendants that the Town's alleged condemnation was not
14 perfected by reason of the recordation not having been
15 made in the land evidence records. Again, I believe it
16 is undisputed that there is no recordation of this
17 condemnation in the land evidence records of the Town of
18 New Shoreham.

19 At any rate, the defendants further aver that the
20 Town has never used the disputed parcel for highway
21 purposes, as is required by the condemnation statute, and
22 thus has abandoned any rights it may have acquired in the
23 land. The defendants further maintain that a
24 condemnation which is not carried out in strict
25 compliance with the statutory provisions is invalid and

1 that this Court may rule so as a matter of law based on
2 the undisputed facts before the Court.

3 It goes without staying that on a motion for summary
4 judgment, the judgment sought shall be rendered if, when
5 viewed in the light most favorable to the nonmoving
6 party, the pleadings, depositions, answers to
7 interrogatories and admissions on file, together with any
8 affidavits, show that there are no genuine issues of
9 material fact -- that's pretty much black letter law.
10 One of the more recent expositions of that provision of
11 Rule 56 is Benaski Vs. Weinberg, 899 A.2d 499, a 2006
12 case. A party opposing a motion for summary judgment
13 clearly has the burden of proving by competent evidence
14 the existence of disputed issues of material fact and
15 cannot rest on mere allegations or denials in the
16 pleadings, mere conclusions or legal opinions. Tanner
17 Vs. Town Council of East Greenwich, 880 A.2d 784 at page
18 791, a 2005 Rhode Island Supreme Court case. The Court's
19 purpose on summary judgments, and particularly on
20 cross-motions for summary judgments, is not to determine
21 issues, but to determine if there are issues, and, if
22 there are issues of fact in dispute, the motion for
23 summary judgment must be denied.

24 There have been extensive affidavits filed by both
25 sides, primarily from competing title examiners who have

1 given their opinions and set forth facts relating to
2 certain filings and recordings and what is or is not in
3 the public record, and what is or is not part of this
4 case. And the Court has reviewed those extensive
5 affidavits and the attachments and exhibits incorporated
6 by those affidavits as part of the process of determining
7 these cross-motions. It is well settled that acting in
8 pursuance of a statute which authorizes the condemnation
9 of land for highway purposes, there must be strict
10 adherence to the provisions of such act so as to
11 effectuate the condemnation. And that proposition has
12 been established by our Supreme Court long ago in Pettis
13 Vs. Chapman. I might add the Chapman in that case was
14 Courtland Chapman's great grandfather or something. His
15 name was Courtland Chapman, and he lived in Westerly, as
16 does Courtland, so... But, at any rate, that case is 11
17 RI 372, an 1876 case. And that same proposition is
18 incorporated in the Coy Real Estate Company Vs. Pendleton
19 case, 45 RI 477, 123 A. 562, a 1924 case.

20 Section 7 of the Highway Act that was in effect in
21 1897 expressly provides that the report, as accepted by
22 the Town Council, shall be recorded and the highway
23 established and laid open. However, the precise place or
24 location of said recordation is not specifically
25 prescribed in the statute.

1 It is undisputed that the report was not recorded in
2 the land evidence records for the Town in 1897 or at any
3 time thereafter. However, the title examiner for the
4 Town, Mr. Priestly, who's with us today in court, attests
5 that the report had annexed to it a plan described as an
6 exact draft or plat of said widened highway, and that
7 that report and that plan is found and recorded in the
8 Town Council records. And he attests to that in his
9 affidavit. Again, the recordation of both the plat, the
10 map and the report does not seem to be contested by any
11 of the affidavits filed by the defendants. What the
12 defendants do contest, however, is that recordation in
13 the Town Council records is insufficient to perfect the
14 condemnation without recordation in the land evidence
15 records of the Town. The Town Council minutes for
16 October 16th, 1897 provide that the Council order and
17 decree the return and report be recorded and that the
18 highway established and laid open. And those Town
19 Council records, Volume E, page 75, are attached to one
20 of Mr. Priestly's affidavits. The committee's report is
21 found at page 81 of the Town Council minutes, and the
22 report was duly recorded by the town clerk on November
23 15th, 1897. Again, Mr. Priestly's affidavit contains
24 that information, and, again, that recordation in the
25 Town Council records is not a fact that's disputed by the

1 defendants.

2 The defendants do argue, as I've said, that this is
3 not a proper recordation under the Highway Act and under
4 section 22-202-2 of the General Laws of 1896, because of
5 the lack of recordation in the land evidence records,
6 and, therefore the condemnation must be declared invalid.
7 While it is undisputed that Section 7 of the Highway Act
8 requires a recordation of the report prepared by the
9 commissioners, the statutory provision does not say where
10 the recording should take place. The legislature did, in
11 the 1896 statute I've previously mentioned, indicate that
12 every conveyance of lands shall be void unless properly
13 recorded in the records of land evidence, and the
14 legislature provided a specific location for the
15 recordation of such conveyances of land, whereas the
16 Highway Act does not provide exactly where the
17 recordation should take place.

18 It was not until 1962 that the General Assembly
19 enacted a provision which required the filing of a plat
20 and a declaration for the laying out of highways pursuant
21 to Title 24, Chapter 1 of the General Laws and, in
22 Section 2, required that the Town Council or the City
23 Council shall cause to be filed in the land evidence
24 records a copy of any resolution relative to the
25 condemnation of property for highway purposes. And the

1 plat and the copy of the resolution and the description
2 and plat shall be certified by the city or town clerk and
3 recorded in the land evidence records. Prior to the
4 enactment in 1962 of this provision, there is no evidence
5 that the legislature intended to require the recordation
6 of highway condemnations in the land evidence records.

7 Furthermore, under section 24-1-4, title to the real
8 estate vests in the city and town, and it is deemed
9 condemned and taken for use, and the right to just
10 compensation vests upon the filing of the copy of the
11 resolution description and plat in the land evidence
12 records. That's the way the statute reads now. The
13 formalities incorporated in the statute as it reads now
14 and as enacted in 1962 with regard to the vesting of
15 title is not similarly set forth in Section 7 of the
16 Highway Act of 1896, wherein the Town Council was merely
17 authorized to approve or reject the report and, if
18 approved, order the recordation and the highway
19 established.

20 Further, this Court distinguishes a conveyance from
21 a condemnation. A conveyance is defined as a voluntary
22 transfer of a right of property. And we have a Rhode
23 Island Supreme Court case Barrett Vs. Barrett, 894 A.2d
24 891 at page 898, a 2006 RI case, which stands for that
25 proposition and defines the word "conveyance". That

1 definition is also included in Black's Law Dictionary,
2 8th edition, 2004 at page 257. Condemnation, on the
3 other hand, is defined as "the determination and
4 declaration that certain property, especially land, is
5 assigned to public use, subject to reasonable
6 compensation; in exercise of eminent domain by a
7 governmental entity." That's from Black's Law
8 Dictionary, the same edition, at page 310. And also, I
9 quote or cite to the case of Sun-Lite Partnership Vs. The
10 Town of West Warwick, 838 A.2d 45, a 2003 Rhode Island
11 case where, at page 46, the Court cites to Article 1,
12 Section 16 of the Rhode Island Constitution, which
13 provides that private property shall not be taken for
14 public use without just compensation.

15 This Court believes and finds that the taking of
16 land by way of condemnation and the laying out of a
17 public highway by a municipality cannot, as a matter of
18 law, be deemed a voluntary transfer of property.
19 Accordingly, under the laws in effect in 1897, the
20 failure to record evidence of the condemnation in the
21 land evidence records is not fatal to the viability of
22 the condemnation, so long as the condemnation report was
23 duly recorded by the town clerk with the records of the
24 Town Council. And it appears undisputed to the Court
25 that that was accomplished.

1 Beyond the issue of recordation, which the Court
2 believes can and has been properly decided as a matter of
3 law, the remainder of the elements which the Town must
4 establish to perfect or show the perfection of its rights
5 in the disputed parcel appear to be mired in disputed
6 issues of fact and, therefore, it seems to the Court, are
7 inappropriate for disposition by way of summary judgment.

8 Obviously, I can rule on the recordation issue, and
9 I have ruled on the recordation issue. But that doesn't
10 end the inquiry or in and of itself necessarily resolve
11 the issues in favor of the Town. Section 7 of the
12 Highway Act requires that the Town Council establish a
13 highway and lay it open by removing buildings, fences and
14 other impediments. I refer to the case of Matteson
15 Vs. Whaley, again, an 1898 case, 20 RI 694, 41 A. 232.
16 In determining the parameters of the highway, it appears
17 from the affidavits that there is a dispute as to whether
18 the description contained in the report of the
19 commissioners, which was recorded with the Town Council
20 records in 1897, includes all or a portion of the
21 disputed parcel. And I would specifically compare
22 Mr. Priestly's second affidavit at paragraphs 34 through
23 36 with Mr. Wallin's second affidavit at paragraphs 16
24 and 17 and 24. But, if the plat as recorded with the
25 Town Council records cannot be relied upon to determine

1 the exact location of the road -- and I'm not sure that
2 it can based on what's been presented to me so far -- the
3 actual layout and use of the property must govern. And,
4 again, that's a proposition that our Supreme Court
5 indicated in the Matteson Vs. Whaley case.

6 The factual record as submitted on these
7 cross-motions for summary judgment is quite muddled with
8 regard to the layout and use of the property. Once laid
9 out and dedicated to public use, the public's rights are
10 not lost by nonuse or by adverse possession. Horgan
11 Vs. Town Council of Jamestown, 32 RI 528 at page 538 and
12 80 A. 271, 1911 case. Notwithstanding this proposition
13 that the Town can't, or that the public's rights to use
14 of the highway are not lost by nonuse or adverse
15 possession, the Town still must show that the disputed
16 parcel in its entirety formed at least a portion of the
17 land originally laid out and used for highway purposes.
18 It is unclear from the evidence and argument put forward
19 by the defendants whether they in fact dispute the
20 original use and dedication of the disputed parcel,
21 whether they are arguing that its change of use since
22 1897 results in the Town's loss of rights which it had
23 originally acquired, or whether their argument is more
24 limited to the legal proposition that use as a parking
25 area or for a gasoline filling station is not a highway

1 purpose.

2 For example, Mr. Priestly's affidavit suggests that
3 the disputed parcel has been paved for many years and
4 used by the public for parking of automobiles. That's
5 his second affidavit at paragraph 41. The defendants, on
6 the other hand, seem to contend that the disputed parcel
7 was not even paved until 1989, and that's from
8 Mrs. Filippi's affidavit at paragraphs 29 through 30. If
9 the Town is able to prove that it properly condemned an
10 easement for highway purposes in the disputed parcel by
11 way of a properly perfected condemnation under the
12 Highway Act, mere subsequent nonuse by the Town or the
13 public or another's use of the property in a manner
14 contrary to the Town's original stated purpose will not
15 result in the loss of the Town's rights. And that's the
16 Horgan case that I cited previously, and that proposition
17 is also set forth in the Knowles case, Knowles
18 Vs. Knowles, 25 RI 325, 55 A. 755, a 1903 case. The
19 easement would only be lost if the Town actually used the
20 property for purposes other than those relating to a
21 highway. Hospital Trust Company Vs. Hayden, 20 RI 544,
22 40 A. 421 (1898). Or, if the Town actually abandons the
23 easement by following the requisite statutory procedures;
24 O'Reilly Vs. Town of Gloucester, 621 A.2d, 697 at page
25 704, 1993 Rhode Island Supreme Court case.

1 The summary judgment record is simply inadequate to
2 address these issues at this time, as a matter of law.
3 The Court has tried to invite the parties on several
4 occasions to sharpen the factual and legal focus of this
5 case by submitting the case on an agreed factual
6 statement; thus limiting the Court's efforts to resolving
7 disputed legal issues. But, unfortunately, try as they
8 might, the parties have been unable to set forth those
9 facts pertinent to these cross-motions which they agree
10 are undisputed, but, rather, have submitted a series of
11 detailed -- very detailed -- affidavits, together with
12 documents -- many documents -- hoping that the Court
13 could find therein an undisputed record of facts upon
14 which to resolve this case short of trial. In other
15 words, the parties, having failed to articulate the facts
16 which are undisputed, now ask the Court to do so on an
17 exceedingly complex and confusing record. The Court, try
18 as I have, is unable to do so and, therefore, must, for
19 those reasons, deny the cross-motions for summary
20 judgment and schedule this matter for trial. I have
21 tried, ladies and gentlemen, in this decision, to at
22 least constrain some of the legal issues and focus some
23 of the legal issues and what facts I think may still be
24 in dispute with regard to those legal issues, so,
25 hopefully, it will be of some help to you in preparing

1 this case for a proper presentation at trial.

2 In addition, I ruled on the issue -- I have ruled on
3 the issue of recordation and what my feelings are on the
4 statutory interpretation as to whether or not the failure
5 to record in the land evidence records is fatal to the
6 condemnation, and I've ruled in favor of the Town in that
7 regard. I've also resolved the first count, the count in
8 trespass, because the nature of the condemnation, even if
9 it were to have taken place, does not create a fee simple
10 interest but only an easement. So, hopefully, I've been
11 of some assistance to the parties in getting this case
12 teed up and ready for trial.

13 I know this matter is important to the Town. I know
14 this matter is important to the defendants. And I
15 certainly am prepared to set this matter down for trial
16 as soon as possible to allow this matter not to linger
17 any further and to be resolved finally. Before we break,
18 does anyone have any suggestions as to a trial date?

19 MR. O'KEEFE: Mr. Priestly indicated 90 days would
20 be helpful to him, Your Honor.

21 MR. DEANGELIS: I'm pretty sure we can work within
22 that time period. Would it be before Your Honor?

23 THE COURT: Well, I'm here. I don't know if your
24 question is pregnant with who you'd rather have it
25 before, but...

1 MR. DEANGELIS: I heard you mention Judge Nugent's
2 name at the calendar call, and I thought that was a
3 signal as to the assignments.

4 THE COURT: Judge Nugent is being assigned to the
5 criminal calendar, and I'll continue to shepherd the
6 civil matters in Washington County for the foreseeable
7 future.

8 MR. DEANGELIS: Then we look forward to seeing Your
9 Honor in or within 90 days.

10 THE COURT: Why don't we do this: Why don't we pick
11 a Thursday about 90 days out and have you come in for a
12 trial calendar call, and, if something -- some event
13 happens between now and then that requires my attention,
14 you can bring it to my attention, but that way at least
15 we'll have a control date on this trial. Why don't we
16 say -- 90 days would be sometime the end of November,
17 early December? Is that right?

18 MR. O'KEEFE: Yes, Your Honor.

19 THE COURT: Why don't you come in on -- November
20 23rd is Thanksgiving I guess, so, why don't we say we'll
21 see you on November 30th for trial call. And, if the
22 parties feel that I can be helpful in preparing this case
23 for trial, or in trying to resolve the case before then,
24 let me know and we'll see if we can get you in sooner.
25 Otherwise, I'll see you on the 30th of November for a

1 trial call.

2 MR. DEANGELIS: Just one technical matter. I assume
3 the mutual restraining orders will remain in full force
4 and effect and neither party will do anything in the
5 interim with regard to the triangular portion.

6 MR. O'KEEFE: Absolutely, Your Honor.

7 THE COURT: So the status quo will be maintained.
8 There are orders already entered in the record?

9 MR. O'KEEFE: There are, Your Honor.

10 THE COURT: And those restraining orders will remain
11 in full force and effect until we try the case on the
12 merits. Thank you.

13 MR. O'KEEFE: Your efforts were appreciated. They
14 didn't fall on deaf ears, Your Honor. Thank you.

15 THE COURT: I've learned more about 19th century
16 real property law in Rhode Island than I care to. But...
17 that's what makes the job interesting.

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TOWN of NEW SHOREHAM

TOWN COUNCIL

OFFICE of FIRST WARDEN JOHN T. SAVOIE

TELEPHONE (401) 466-3200

FAX (401) 466-3219

TTY (800) 745-5555

CELL (401) 996-0877

John Spirito
Hearing Officer
Division of Public Utilities and Carriers
Jefferson Boulevard
Warwick, R.I.

Re: Application of Interstate Navigation Company
Docket D-05-06

Dear John:

The Town of New Shoreham appreciates the opportunity to make our concerns known with respect to Interstate Navigation Company's (Interstate) request to operate high speed ferry service between Point Judith and Block Island and between Newport and Block Island. While we are currently taking no formal position with regard to the application, we hope that the Division will take the following into consideration as the merits of the application are weighed.

The Town of New Shoreham has two areas of significant interest. First we would like to preserve passenger choice and options for ferry service to Block Island. Second, we are vitally interested in the viability of winter service and the ability to generate sufficient revenues in the summer to help support that winter service.

High speed ferry service is relatively new to Block Island and has clearly proven to be popular. We hope that this service remains available from multiple ports of embarkation. In Interstate Navigation's case, summer ridership clearly helps support winter service. Anything that potentially aids Interstate's competitiveness, and income, in the summer seasons has to be supported as it can only strengthen the year round service. We welcome the Division's review of whether what is proposed could potentially have a negative effect on the company's financial stability. We would seek assurances that the conventional ferries—that transport our food supplies and all our services such as trash, sludge, fuel oil, school trips, etc—will not be decreased in the future in favor of any high speed ferry runs.

We would not want the Division to discount the fact that fast transport to the mainland for our ambulance when weather only permits boat travel is welcomed by our

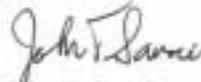
April 7, 2005
DIVISION OF
PUBLIC UTILITIES & CARRIERS
DOCKET NO. D-05-06
SPONSOR New Shoreham
EXHIBIT NO. 1
SENT (DATE) 6-13-05
RECEIVED (DATE) 7-11-05
RECEIVED BY JS

medical and Rescue personnel. The difference in time between conventional and fast ferry transport could be critical in those situations where our Life Star helicopter transport is grounded because of weather.

We hope that the Division will look at this application in light of the interests the Town has expressed and recognize that our issues stem from our need to protect and strengthen the year round service which is currently offered only by Interstate Navigation.

We, of course, look forward with great interest to your deliberations and decision. If you would like to speak with us further, we will be happy to submit any additional comments as appropriate.

Sincerely,



John T. Savoie
First Warden



November 15, 2015

Bluewater LLC
42 Water Street - PO Box 1818
Block Island RI 02807
Attention: Paul Filippi

Dear Paul:

Per our discussions concerning the development and build out of the Bluewater Marina Project located in Old Harbor BI, please find below the suggested phasing of the project as well as construction timing schedules. Also, as discussed, we are proceeding with the overall project from a combined build method approach - the Mt. Hope site will be designed and constructed as all floating while the Lot 158 site will be designed and constructed as all fixed piers. Also please be aware that many of the construction tasks will run concurrently. Example would be piling installation during the same period that docks are delivered and then relocated to the BI site. All materials required for the project including docks, composite pilings, power and water supply stations, power transformers, ramps and safety equipment will be ordered prior to the commencement of site work.

At this time we estimate total construction and activation of both Phase 1 Mt Hope, as well as the Phase 2 Lot 158 site will require approximately 80-100 working days post-dredging.

Phase 1 –Mt Hope - Floating Structures - the projected construction of this section will follow the preliminary design as supplied by St. Jean Engineering LLC dated 10/8/2015. It should be noted that using 641 linear feet of pre-constructed floating docks in this application will shorten installation considerably. Special needs will be addressed in the form of multi-stage ramps with slopes acceptable to USADA standards



P1 - Dredging - 10-20 working days. All material removal in the area to the West of the ACOE breakwater would occur prior to construction with a final target depth of 15' MLLW. It is our understanding the dredged material will not require multiple handling stages and this may shorten projected timing of any dredging activity but cannot be determined at this time. Project commencement would not include mobilization of equipment or weather impacts.

P1 – Utility Connection - 10 Working Days - We are assuming utility connection points will be pre-installed (water and sewer) as well as the power supplier to a location chosen by the Rhode Island State Electrical Code inspector.

P1 - Anchor Pilings - 10 Working Days - at this stage, this aspect will proceed under the assumption that composite pilings 14 inches in diameter and 50 feet overall length will be utilized to anchor the floating docks in place. Composite pilings are both extremely strong with long life and are environmentally safe, as they do not require CCA treatment and meet modern BMP's. 32 sections of floating dock would be utilized with each section requiring 3 anchor pilings for a total of 96 pilings. These pilings are driven completely as a stand alone function and the floating docks are then attached at a later stage. This approach is pre-set so all this work will be accomplished prior to dock arrival on site.

P1 - Floating Dock Build and Delivery - 5 working Days - post delivery to arrival at Staging Point at the BI site. The docks would be pre ordered and pre assembled by one of 3 servicing vendors we use for this type of work and would be delivered to a staging point on the main land. The docks would be launched and towed by our marine contractor to the BI site. This type of work can be contracted and in process in the very early stages immediately after permitting is secured and we will only address delivery to the construction site as part of timing. There will be another realized timing savings as the sections will be coupled in groups of 3 essentially arriving in 10 chains of 3 sections each.

P1 - Floating Dock Installation - 20 Working Days - post delivery to site. Assemble all sectional flexible connection points, dock anchoring cages and main pier access ramps. See anchor cages typical below. This anchoring design allows a very simple and straight forward installation of the docks as all connections as described previously can be adjusted in the field to allow for any site construction variations.



P1 - Utility Installation - 10 Working Days - this final activation step in the project would include installing all power, water and sewer services. Cabling and piping would be installed in pre engineered utility spaces in the floating docks so no extra time is needed for

construction. Utility supply pedestals are installed in pre determined locations and connected to common supply points.

Phase 2 – Lot 158 - 15 Working Days post material delivery - this fixed pier will be constructed of 2.5 CCA Marine Lumber with a Decking area approaching 2,680 Square feet. This entire area is designed as a Ferry landing which reduces the utility demands when compared to the East basin and will result in a minimal amount of time to construct. Special needs will be addressed in the form of multi-stage ramps with slopes acceptable to USADA standards.

Regards,

Jeff Boyd

Jeffrey D. Boyd
Chairman

#21 Sister Modesta Road, Simpson Bay, St. Maarten,
Office: 721-545-2500 Fax: 721-545-2501
Email: jboyd@mmcnv.com www.mmcnv.com

From: ReaganConstruct@aol.com

Date: October 30, 2015 at 12:49:09 PM EDT

To: paulfilippi@aol.com

Subject: Re: Draft PUC Letter and Drawing, Bluewater LLC, Block Island

Paul,

I reviewed the proposed dock extension for Old Harbor provided by St. Jean Engineering. With typical wood pier construction, I would estimate the construction of these 2 piers would take approximately 3 months after delivery of materials. Any dredging of the sand on the west side of the Army Corps breakwater would need to be completed prior to building the 641-ft. dock. This would take approximately 2 to 4 weeks depending on the quantity of material to be removed.

Thanks,

Larry Ahearn
Reagan Construction Corp.
ReaganConstruct@aol.com

Cell (401) 640-5429