

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

**RESPONSE OF THE TOWN OF NEW SHOREHAM
TO RHODE ISLAND FAST FERRY INC.'S DECLARATION OF SEPTEMBER 11, 2015**

The Order of the State of Rhode Island Division of Public Utilities and Carriers ("Division") which issued on September 21, 2015 requires that:

The Town of New Shoreham ("Town") submit a response to Rhode Island Fast Ferry, Inc.'s ("RIFF") September 11, 2015 Declaration by November 16, 2015; and that

RIFF submit by November 16, 2015 a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater, LLC's ("Bluewater") plans to construct a docking facility in Old Harbor, as well as the anticipated start date of its proposed services.

In the September 21, 2015 Order, the Division also reserved decision on the Town's Motion for Summary Disposition until after November 16, 2015.

RIFF's September 11, 2015 Declaration is made up of three documents:

- (i) The Affidavit of Paul Filippi dated September 11, 2015 ("Filippi Affidavit");

(ii) The Affidavit of Charles A. Donadio, Jr. dated September 11, 2015 ("Donadio Affidavit"): and

(iii) A Lease Option Agreement dated September 11, 2015¹ between RIFF and Bluewater ("Lease Option Agreement").

I. The Filippi Affidavit

In paragraph 2 of the Filippi Affidavit, Paul Filippi represented under oath that Bluewater had "acquired from the riparian landowners of Lots 158 and 159 in Plat 6, and Lot 23 in Plat 7 in Old Harbor, Block Island, the right to wharf out at two locations..." In response to these assertions, the Town and Interstate, on September 16, 2015, filed a joint memorandum with exhibits which demonstrated that the statements by Paul Filippi as to Lot 159 in Plat 6 and Lot 23 in Plat 7 were not accurate. The Town incorporates herein by reference its September 16, 2015 memorandum and exhibits.

It should also be noted that the Division's September 21, 2015 Order states: "In his Affidavit, Mr. Filippi claims that Bluewater has acquired the riparian rights of Lots 158 and 159 in Plat 6, and Lot 23 in Plat 7 in Old Harbor. However, after challenged by the Town, RIFF now proffers an assignment document that purportedly buttresses its claims only to Lot 158 in Plat 6." Since the issuance of the September 21, 2015 Order, neither Paul Filippi, Bluewater or RIFF has submitted any documentation in support of Mr. Filippi's assertions with respect to the acquisition of riparian rights to Lot 159 in Plat 6 or the acquisition of riparian rights to Lot 23 in Plat 7.

¹ All of these documents are dated as of the last date upon which RIFF was permitted by the Division to file its declaration.

The Filippi Affidavit further asserts in paragraph 6 that Bluewater would be filing "the applications for the necessary permits with the CRMC and the Army Corps no later than November 1st, 2015." To the best of the Town's information and belief, no such applications have been filed with either the Rhode Island Coastal Resources Management Council or the United States Army Corps of Engineers. Thus, any further representations as to time tables and dates must be viewed with skepticism.

II. The Donadio Affidavit

In Paragraph 2 of the Donadio Affidavit, Charles A. Donadio, Jr. asserts that the Affidavit "is submitted as the 'declaration' of RIFF identifying the docking facility it intends to utilize on Block Island and as an offer of proof of its availability..." On November 5, 2015, the Town submitted a detailed memorandum with exhibits which establishes that there is no reasonable expectation of Bluewater or RIFF being able to develop a docking facility in Old Harbor. The Town's November 5, 2015 memorandum and exhibits are incorporated herein by reference.

III. The Lease Option Agreement

The Lease Option Agreement is a nebulous, non-specific document which does not reference the dock that is the subject matter of the lease and which does not specify the date that the docking facility will be available.

IV. The South Pier in Old Harbor

a. Issuance of a Certificate of Public Convenience and Necessity ("CPCN") based on this docking facility would not be appropriate.

Paragraph 4 of the Donadio Affidavit states that RIFF intends to make use of the South Pier in Old Harbor as an alternative docking facility in the event that a Bluewater docking facility is not constructed. In other words, if Bluewater cannot construct one of the two docking facilities as proposed, RIFF expects the Division to issue the CPCN based on RIFF's anticipated use of the South Pier (also known as the South Wharf or South Dock), which is owned by the Town. This reasoning is flawed for several reasons.

In order to issue a CPCN pursuant to R.I.G.L. § 39-3-3, the Division must certify that the "public convenience and necessity" require the services. Based on the representations contained in the Lease Option Agreement regarding the effects of operating a ferry service out of the South Pier, it would not be possible for the Division to make such a determination.

Bluewater and RIFF recognize in the Lease Option Agreement, a document signed by the officers of both companies, that RIFF's use of the South Pier would violate the standards for issuance of a CPCN. Specifically, the Lease Option Agreement acknowledges that RIFF's use of the South Pier to operate a ferry service "will dramatically alter the use of the Inner Basin to the detriment of the commercial fishermen, charter boats, recreational boats and local commercial interests, as well as the Town of New Shoreham, which operates the South Wharf." (Whereas paragraph 4 on page 1 of the Lease Option Agreement.) Moreover, Whereas paragraph 5 on page 1 of the Lease Option Agreement recognizes that: "The Town of New Shoreham and the people of Block Island have a significant economic and cultural interest in maintaining the traditional

use of the Inner Basin *to the exclusion of ferries.*" (emphasis added) The Town agrees with these conclusions as quoted. Since all parties are in agreement on these points, it would be inappropriate for the Division to issue a CPCN based upon a RIFF docking facility at the South Pier.

b. RIFF does not have the right to use the South Pier as its docking facility in Old Harbor.

All parties agree that the Town owns and operates the South Pier. RIFF asserts that it has the right to use the South Pier for its ferry operations based upon the United States 1890 Rivers and Harbors Act; however, the legislation to which RIFF refers merely states that the Town may not implement tolls or charges for the use of the wharf by "public vessels of the United States." The term "public vessels of the United States" is not ambiguous. A public vessel of the United States is a vessel which is either owned by the United States government or bareboat chartered by the United States government as its owner *pro hac vice*. *City of Los Angeles v. United States of America*, 355 F.Supp. 461 (C.D.CA. 1972). In that case the court determined that the vessels in question were owned by the United States government and, therefore, were public vessels of the United States.

To contend that a private passenger ferry owned and operated by RIFF is somehow a public vessel owned by the United States government is absurd. No court has ever interpreted the language referenced above as mandating that the Town allow a private passenger ferry to use the South Pier for its operations. Moreover, RIFF's stated plan to "pursue a judicial declaration that it has the right to dock its ferry at the South Wharf, as well as injunctive relief ordering the relocation of all vessels that would obstruct its use of the South Wharf" (Whereas paragraph 6 on

page 1 of the Lease Option Agreement) has no legal merit, would be met by vigorous opposition from the Town, and would take years to make its way through the court system.

V. Conclusion

For the foregoing reasons as well as the reasons referenced in the Town's Motion for Summary Disposition, the Town respectfully submits that its Motion for Summary Disposition should be granted.

TOWN OF NEW SHORHAM
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CERTIFICATION

I hereby certify that, on November 16, 2015, I served this document via e-mail on the individuals listed on the attached service list.

/s/ Katherine A. Merolla

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Updated 10-21-15

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