

STATE OF RHODE ISLAND  
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

**OBJECTION OF THE TOWN OF NEW SHOREHAM TO  
RHODE ISLAND FAST FERRY'S MOTION FOR EXTENSION  
TO COMPLY WITH CPCN CONDITIONS**

The Town of New Shoreham ("Town") objects to the motion filed by the Rhode Island Fast Ferry ("RIFF") for an additional continuance to satisfy the conditions precedent that were attached to the Division of Public Utilities and Carriers' ("Division") approval of RIFF's Certificate of Public Convenience and Necessity ("CPCN") application. In support of this objection, the Town submits the following objection and memorandum.

**1. The Division lacks jurisdiction to grant RIFF's motion.**

As a result of the appeals filed in this matter, the Superior Court has exclusive jurisdiction over this case. This legal principle was recognized by the Division in its order of September 18, 2017 wherein RIFF's initial extension request was granted following a remand by the Superior Court.

**2. RIFF has failed to establish "just cause" for the requested extension.**

The Town respectfully submits that RIFF has not established that just cause exists so as to justify the requested extension. *Black's Law Dictionary* 235 (8<sup>th</sup> ed. 2004) defines "just cause" as a "legally sufficient reason." The reason proffered by RIFF for its failure to obtain the requisite permits for a docking facility in Old Harbor is that there is an appeal pending in the

Superior Court regarding the Division's conditional granting of the CPCN to RIFF; however, there has been and is no legal impediment to RIFF and/or Bluewater, LLC ("Bluewater") submitting the appropriate applications pertaining to the permitting of their proposed docking facility based on the pendency of the appeal, and this alleged justification is disingenuous for the following reasons:

(i) There is no stay of the Division's conditional CPCN order nor could there be a stay as R.I.G.L. § 39-3-3 (c) provides that no agency nor reviewing court may issue an interlocutory stay of any order of the Division with respect to an application entered under § 39-3-3.1, and/or certificate under § 39-3-3.1.

(ii) The Army Corps of Engineers ("ACOE") has not required nor does it require that the Superior Court appeal be concluded as a condition of RIFF or Bluewater filing an application with the ACOE. RIFF has cited no procedural or other rule of the ACOE to the contrary.

(iii) The Coastal Resources Management Council ("CRMC") has not required that the Superior Court appeal be concluded as a condition of RIFF or Bluewater filing an application with the CRMC. RIFF has cited no procedural or other rule of the CRMC to the contrary. Moreover, the Notice of Deficient Application issued by the CRMC and referenced below lists no requirement whatsoever regarding the pending Superior Court appeal.

(iv) During the April 4, 2018 hearing, Mr. Filippi of Bluewater never stated that the pendency of the Superior Court appeal was in any way an impediment to Bluewater making the appropriate filings with the ACOE and the CRMC. Indeed, as discussed below, Mr. Filippi testified on April 4, 2018 that the ACOE and CRMC filings would be made within the next ten days to two weeks.

Division Order No. 22877 granted RIFF a one-year extension to comply with the CPCN conditions. Thereafter, the Town and Interstate Navigation Company (“Interstate”) filed a joint motion to vacate that order in light of information subsequently obtained. This motion had several bases including, without limitation, that RIFF and Bluewater had failed to submit the applications requisite to the permitting of a docking facility in Old Harbor. Interstate and the Town urged the Division to give no weight to Bluewater’s prior claims regarding the timing of the permitting and related applications. In this regard, it was noted that the attorney working on Bluewater's application filings, Joseph Corrigan of Kelley Drye & Warren LLP, had advised the Division in November of 2015, that the permitting process would be completed in twelve to eighteen months.<sup>1</sup>

In support of its objection to the motion to vacate, RIFF contended that Bluewater had been working diligently to secure permits for a docking facility for RIFF in Old Harbor, and that the Division had not been misled concerning the efforts made to obtain the requisite permitting.

In denying the motion to vacate, the Division’s order of January 25, 2018 stated: “The evidence and arguments proffered by the Town and Interstate can be revisited in the event that RIFF seeks an additional continuance after September 22, 2018.” Division Order p. 6.

Subsequently, a hearing was held on the Town and Interstate’s requests to the Division to revisit and withdraw its conditional CPCN approval order pursuant to a Superior Court remand order. In opposing these requests, RIFF argued in its post-hearing memorandum that the ACOE and the CRMC processes were moving forward; however, the Town demonstrated that

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<sup>1</sup> Bluewater hired Joseph Corrigan of Kelley Drye & Warren LLP to assist with its ACOE application for the proposed docking locations. Bluewater has twice submitted opinion letters from Mr. Corrigan as evidence in this docket. Mr. Corrigan’s November, 2015 letter assured the Division that the permitting process would be completed in 12 to 18 months, which would have resulted in permits being secured by April of 2017 at the latest.

these statements of RIFF did not comport with the facts presented at the hearing and with what had transpired, or what had failed to transpire, since the hearing concluded on April 4, 2018.<sup>2</sup>

At the hearing and in its post-hearing memorandum, the Town established that what Bluewater had actually filed with the CRMC was nothing more than a CRMC preliminary determination request. Despite the fact that the conditional CPCN was issued in September of 2016 and, despite prior representations made by Bluewater to the Division with regard to the permitting process, this request *was not filed until March of 2018*. The Town further demonstrated that a CRMC preliminary determination request is not even an application for assent to build a dock; rather, the CRMC specifically states on its Preliminary Determination Request form: “This request does not constitute an application for permission to perform any activity. A CRMC Preliminary Determination Request is a determination of jurisdiction and a synopsis of which sections of the Rhode Island Coastal Resources Management Program apply to the project under consideration as presented herein.”

The Town further established that despite the fact that what was filed by Bluewater was only a preliminary determination request which does not have all of the additional, stringent requirements of the CRMC’s Application for State Assent such as the Building Official’s letter, Bluewater could not even get by the preliminary determination stage. The CRMC deficiency notice with regard to the preliminary determination application (Town Remand Exhibit 2) clearly and unequivocally stated: “a preliminary review of your application indicates that it is deficient and processing cannot be initiated as submitted. On this basis, your application fee is being returned to you. Due to the cost of postage, your application materials will not be returned.

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<sup>2</sup> The Town incorporates herein by reference the evidence, exhibits and memoranda which were submitted at the hearing on the Town’s request that the Division withdraw its conditional CPCN approval.

These materials will be held for thirty (30) days during which time they may be picked up by you or your authorized agent at our Wakefield office. If they are not picked up within this time frame, they will be disposed of.” *Bluewater has nothing pending before the CRMC.*

The CRMC Notice of Deficiency also states: “In order to process your application, you must retrieve your application to replace the information submitted with the newly requested information along with the appropriate application fee.” This has never been done.

On April 4, 2018, the Hearing Officer asked about Bluewater’s planned filings with the CRMC and ACOE, to which Paul Filippi, Bluewater’s representative, responded that those filings would be made “Within the next ten days to two weeks.” (Tr. Vol. II, p. 211) The Hearing Officer instructed Mr. Filippi to forward copies of any additional CRMC and ACOE filings to the parties. As of the date of this memorandum, almost five months later, neither the Town nor Interstate’s counsel has received any such subsequent filings. Counsel to the Town and Interstate have made inquiries of the CRMC and the ACOE and have been advised that no additional filings were ever made.

Bluewater cannot comply with the CRMC Notice of Deficient Application dated March 29, 2018 (Town Remand Exhibit 2) which requires that Bluewater provide the consent of the Town, the consent of the ACOE, and proof of ownership as to both proposed docking facilities.

These requirements are clearly set forth in the Notice of Deficient Application as follows:

With regard to the East Breakwater area, the proposed 10' wide paver pathway is proposed on an upland area associated with the Old Harbor East Breakwater constructed by the Army Corps of Engineers. Although this area is not a platted lot within the Town of New Shoreham, the CRMC believes this area is "controlled" by the Army Corps of Engineers and requires their approval. Furthermore, the East Breakwater area is subject to a right-of-entry agreement between the Federal Government and the Town of New Shoreham. Until demonstrated otherwise, the CRMC believes any work affecting the East Breakwater and access thereto, at a minimum, requires the consent of the Federal Government and the Town of New Shoreham... Based on the above, the CRMC

concludes that the submitted Preliminary Determination application form signed by Paul Filippi for Ballard's Wharf Realty and Blue Water LLC does not provide the necessary proof of ownership for upland work (above MHW) nor the necessary consent from the Federal Government and the Town of New Shoreham for tidal waters affected by the submitted proposal.

With regard to the Red Stone Breakwater, the CRMC granted the Town of New Shoreham a 50 year lease for the breakwater structure on April 1, 2012 (ref. CRMC File No. 2012-09-062). Considering the CRMC lease granted to the Town, the applicant does not have riparian (littoral) rights to the tidal water area north of the Town leased breakwater and therefore would require the consent of the Town for structures or activities in this area. Based on the above, the CRMC concludes that the submitted Preliminary Determination application form signed by Paul Filippi for Ballard's Wharf Realty and Blue Water LLC does not provide the necessary proof of ownership for upland work (above MHW) nor the necessary consent from the Federal Government and the Town of New Shoreham for tidal waters affected by the submitted proposal.

As to RIFF's claims that the ACOE process is moving forward, this assertion also does not reflect the state of the ACOE filing. The ACOE letter which was issued in response to Bluewater's May 15, 2017 letter, clearly states that the Section 408 review will not continue until such time as Bluewater obtains separate evaluation and permitting by the Corps' Regulatory Division pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. (Town Remand Exhibit 14). Despite this, Bluewater has never made any Army Corps filing for permitting under Section 10 of the Rivers and Harbors Act (Tr. Vol. II, p. 155), and Bluewater has never made any Army Corps filing for permitting under Section 404 of the Clean Water Act (Tr. Vol. II, p. 155). Moreover, Bluewater has made no filings whatsoever with the ACOE regarding either of the proposed docking facilities since the May 15, 2017 Army Corps letter, over a year ago (Tr. Vol. II, pp. 155-156, 181). There is no question that the Section 408 Application is not moving forward or even continuing.

In Division Order 23217 dated July 16, 2018, the Division stated that the proper time for

the Town to raise the issue of the licensing aspect of this docket based on a present lack of demonstrable docking access would be “during the Division’s consideration of any further requests from RIFF to extend the deadline for effectuating the start of its proposed ferry services.” Division Order at p. 39. The Town has appropriately raised these issues and, based on the foregoing, the Town respectfully submits that the motion for continuance should be denied.

TOWN OF NEW SHOREHAM  
By its solicitor

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CERTIFICATION

I hereby certify that, on August 28, 2018, I served this document via e-mail on the individuals listed on the service list for this docket.

*/s/ Katherine A. Merolla*