

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

ORDER

(In Response to the Town's Motion for Summary Disposition)

Whereas: The Rhode Island Division of Public Utilities and Carriers ("Division") previously issued nine Orders ("Orders") in the instant docket, specifically, Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; and Order No. 22183, issued on October 26, 2015. These nine previously issued Orders are inextricably linked with this Order, and accordingly shall be adopted as the introduction to this Order and, by necessity, incorporated by reference. As the travel of this docket is long and complicated, the Division will skip all discussion of this travel in the instant Order, relying instead on the incorporation of the above-identified Orders as a comprehensive prologue, thereby permitting the Division to limit its focus to the outstanding motions.

Whereas: On July 21, 2015, the Town of New Shoreham (the "Town"), a party to the instant case, filed a motion for summary disposition, in accordance with Rule 19(e) of the Division's Rules of Practice and Procedure,

wherein it argued that Rhode Island Fast Ferry, Inc.'s ("RIFF") application must be dismissed for RIFF's failure to identify the dock it plans to use in Old Harbor. After considering the arguments made by the Town in support of its motion, as well as the objection and response proffered by RIFF, the Division ordered RIFF to "submit a written declaration to the Division identifying the dock it is proposing to use on Block Island (in furtherance of its proposed ferry services) and offer proof of the dock's availability." (See Order No. 22030, *supra*). RIFF was initially directed to file its "declaration" by August 28, 2015. However, after RIFF requested additional time, the Division extended this deadline to September 11, 2015. (See Order Nos. 22030 and 22045, *supra*). The Division also held that it would reserve final decision on the Town's motion for summary disposition until it received and considered RIFF's declaration. (See Order Nos. 22030 and 22045, *supra*).

Whereas: On September 11, 2015, RIFF submitted affidavits from its principal, Mr. Charles A. Donadio and from Mr. Paul Filippi, the principal member of Bluewater LLC ("Bluewater"), through which these individuals state that their respective companies have reached an agreement relative to the planned construction and use of a docking facility in Old Harbor. It was asserted in the affidavits that Bluewater had acquired rights to construct a wharf at either of two locations in Old Harbor and that RIFF planned to lease dock space from Bluewater once the wharf is constructed. RIFF also attached a copy of the relevant Lease Option Agreement ("Lease Agreement") with Mr. Donadio's affidavit. The affidavits and Lease Agreement also reflect that before

construction can start, Bluewater must seek and receive the necessary permits from the Rhode Island Coastal Management Council and the U.S. Army Corps of Engineers, which it planned to file by November 1, 2015 and also a water quality certificate from the Rhode Island Department of Environmental Management. (See Order No. 22103, *supra*).

Additionally, Mr. Donadio's affidavit stressed that RIFF planned to utilize the South Pier, so-called (a.k.a. South Wharf), in Old Harbor "only as an alternative docking facility in the event that the Bluewater facility is not constructed for whatever reason." (See Order No. 22103, *supra*).

Whereas: In response to RIFF's September 11, 2015 written declaration, the Town filed a response, on September 16, 2015, wherein the Town described the Lease Agreement between RIFF and Bluewater as a "sham." In support of this claim, the Town argued, *inter alia*, that Bluewater had failed to demonstrate that it had acquired the necessary legal rights to wharf out at the Northerly Ell of the stone jetty at the Inner Basin ("Northerly Ell Facility") or at the former location of the Mount Hope Pier adjacent to the Easterly Breakwater ("East Breakwater Facility"), the two dock locations identified earlier by Bluewater and RIFF. The Town thereupon urged the Division to cancel the public hearings that had been scheduled for October 7 and 8, 2015 and grant the Town some time to propound additional discovery and depose Mr. Filippi. (See Order No. 22103, *supra*).

Whereas: Though RIFF and Bluewater subsequently proffered documentary evidence, on September 17, 2015, that suggested that Bluewater had acquired rights to build a dock on Lot 158, plat 6 in Old Harbor (the location of the planned

Northerly Ell Facility), the Division concluded that there was sufficient ambiguity in the matter to warrant a delay in the hearings and to permit the Town to conduct additional discovery. The Division directed the Town to file a response to RIFF's September 11, 2015 declaration by November 16, 2015. Additionally, the Division directed RIFF to submit, by November 16, 2015, "a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor... and also provide the Division with an anticipated start-date for its proposed services." The Division also held that it would reserve final decision on the Town's motion for summary disposition until after November 16, 2015. (See Order Nos. 22103 and 22166, *supra*).

Whereas: Subsequently, based on objections by Bluewater to the scope and relevancy of the discovery proposed by the Town, the Division reconsidered and vacated its earlier decision to permit the Town to conduct further discovery. The Division additionally denied a motion from RIFF to conduct related discovery in this matter. (See Order Nos. 22141 and 22166, *supra*). Notwithstanding its decision to suspend all requests to conduct additional discovery in this docket, the Division approved the Town's request for an opportunity to submit a written response to Bluewater's assertions of having the legal rights to wharf out at the Northerly Ell Facility or East Breakwater Facility without the Town's approval. The Town's response was due on November 5, 2015. Bluewater was also offered an opportunity to rebut the Town's response by November 16, 2015. (See Order Nos. 22183 and 22166, *supra*).

Whereas: On November 5 and 16, 2015, the Town filed its responses to Bluewater's dock construction claims and RIFF's September 11, 2015 declaration, respectively. On November 16, 2015, RIFF filed its response to the Division's request for a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor; and its anticipated start-date for its proposed services. Also on November 16, 2015, Bluewater filed a response to the Town's November 5, 2015 filing, *supra*.

The Town's Argument that RIFF and Bluewater lack the legal ability to construct and utilize a dock in Old Harbor

Bluewater has asserted that it has the legal right to construct a dock in either of two locations in Old Harbor. The two locations have been described as being located at: (1) the Northerly Ell of the inner harbor along the Red Breakwater ("Northerly Ell Facility"), and (2) along the East Breakwater of the Old Harbor which connects to the Town's Bait Dock ("East Breakwater Facility"). The Town addresses these proposed docking facilities in its November 5, 2015 response memorandum.

With respect to the Northerly Ell Facility, the Town argues that it is uncontroverted that pursuant to Rhode Island law the construction of any docking facility at this location requires the approval of the State of Rhode Island Coastal Resources Management Council ("CRMC"). The Town also points out that the Northerly Ell Facility was "deauthorized" by the United States Army Corps of Engineers ("USACE") and is now owned by the State; and that the State has leased the Northerly Ell Facility to the Town for a term of

fifty (50) years, beginning on April 1, 2012 and ending on April 1, 2062. The Town also asserts that the CRMC will not approve construction of this docking facility without the Town's approval and consent.¹

In support of this argument, the Town offers a written statement from Mr. Grover Fugate, the CRMC's Executive Director. In his statement, Mr. Fugate confirms that the Northerly Ell Facility is the property of the State, and that the Northerly Ell Facility is 'managed and controlled' by the Town pursuant to the Lease.² The Town adds that Mr. Fugate's statement "clearly" reflects that the construction of a dock at the Northerly Ell Facility "requires the consent of the Town and, furthermore, that the Town would have to be a party to any request for such an assent."³

The Town next addresses Bluewater's plans to bypass the Town's assent by using the existing floating dock at the Northerly Ell Facility to move passengers from RIFF's ferry to the land, and the proposed alternative access extension of the dock. The Town argues that both plans require the consent of Ballard's Wharf Realty, LLC. ("BWR"), which the Town shows has already denied consent. As proof, the Town offers documents to show that Plat 6, Lot 159, the location of Bluewater's proposed bypass connections, is owned by BWR and that BWR is on record opposing Bluewater's plan. A statement from Blake Filippi, BWR's manager, was proffered as additional proof.⁴

¹ See Town's November 5, 2015 Response, pp. 2-3.

² Id., p. 3 and Schedule B, Exhibits A and B.

³ Id.

⁴ Id., pp. 4-5 and Schedule F.

In its closing on the Northerly Ell Facility, the Town emphasizes that without a method of moving private passenger ferry customers to and from the land, the construction of such a docking facility “is nonsensical.” The Town argues that Bluewater has not proven that it has a “realistic expectation” of being able to develop a docking facility at the Northerly Ell Facility.⁵

Like with the Northerly Ell Facility, the Town argues that constructing a dock at the East Breakwater Facility similarly requires a CRMC permit and the Town’s consent. The Town argues that the East Breakwater Facility can only be used through a connection or attachment to the Town’s Bait Dock and that the CRMC, under such circumstances, will not authorize the construction of a dock at the East Breakwater Facility without the Town’s consent.⁶ The Town included a statement from “the CRMC employee assigned to Block Island who would be part of the permitting process” to buttress this position.⁷

The Town next addressed Bluewater’s plans to utilize an “Alternative Access” docking facility, located behind the Town’s Bait Dock, which connects with a dock known as the East Dock. Again, the Town asserts that it is uncontroverted that the construction of any alternative access docking facility requires a CRMC permit. Regarding East Dock, the Town states that it “operates, manages, repairs and controls the East Dock through a license agreement with the USACE.⁸ Once again relying on “the CRMC employee assigned to Block Island who would be part of the permitting process,” the

⁵ Id., p. 5.

⁶ Id., p. 6.

⁷ Id., pp. 6-7 and Schedules G and H.

⁸ Id., p. 7 and Schedule H.

Town asserts that “any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the East Dock must be accompanied by the written approval of the owner of the East Dock and also by the written approval of the Town as the licensee of the East Dock.”⁹

Specifically, the Town maintains that the construction of the “Alternative Access” docking facility behind its Bait Dock “requires the prior consent of the Town through the Town’s issuance of a special use permit prior to CRMC’s consideration of an application for a permit to construct the docking facility.” Citing from Section 4.2(5) of the regulations associated with the CRMC’s Management Procedures and Section 300.1 of the CRMC’s Management Procedures, the Town observes that all “Applicants shall be required to obtain and certify that they have in their possession current approvals from municipal bodies which are otherwise required for the proposed action. Municipal approval shall be construed to mean compliance and conformity with all applicable comprehensive plans and zoning ordinances and/or the necessary variance, exception and other special relief therefrom....”¹⁰ Predicated on these CRMC requirements, the Town reiterates that Bluewater cannot move forward with the CRMC application process without the Town’s consent.¹¹

The Town further argues that construction of the “Alternative Access” docking facility is not permitted by the USACE “because it would involve

⁹ Id. and Schedule G.

¹⁰ Id., pp. 7-8.

¹¹ Id., p. 8.

building on or attaching to a federal navigation structure.”¹² Despite the opinion letter of Bluewater’s attorney that the proposed facility would not have “any physical contact with Corps’ structure (breakwater) which is often a concern for the Corp,” the Town argues that it would. The Town identifies a USACE breakwater that the Town’s Bait Dock partially rests on as “a federal navigation structure” that the USACE would need to consider in a permitting application case. The Town stresses that “it is not disputed that the USACE does not and would not permit the ‘Alternative Access’ docking facility structure to be built on or attached to a federal navigation structure.”¹³

The Town reinforces its claim that its consent is required if Bluewater is to construct a dock in Old Harbor by citing to the “USACE Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Civil Engineers Civil Works Projects pursuant to 33 USC 408 (‘USACE Project Alteration Guide’).” Specifically, the Town argues that “Section 408 authorizes the Secretary of the Army to grant permission for the alteration or occupation or use of the project if the Secretary determines that the activity will not impair the usefulness of the project.” The Town observes that under the USACE Project Alteration Guide, the use of the term “alteration” or “alter” refers to any action by any entity other than USACE that builds upon, alters or improves, moves, occupies, or otherwise affects the usefulness, or structural or ecological integrity, of a USACE project. The Town further observes that alterations also include actions approved as “encroachments’ pursuant to 33 CFR 208.10.

¹² Id., p. 9.

¹³ Id., pp. 9-10.

The Town next applies Section 6.d and 6.e.(2) of the USACE Project Alteration Guide, which reads as follows:

A request for Section 408 permission can originate from a non-federal sponsor or an independent requester. For USACE projects with a non-federal sponsor as described in paragraph 6.e, the requester must either be the non-federal sponsor or have the endorsement of the non-federal sponsor prior to a written request, reference paragraph 7.c.(2), being submitted to USACE. (Section 6.d.).

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 the 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. (Section 6.e.(2)).¹⁴

Based on the aforementioned provisions, the Town, who describes itself as a non-federal sponsor of the Project, contends that it must provide its written consent for the proposed alteration and that its written consent must be attached to Bluewater's application in order to initiate the USACE Section 408 approval process.¹⁵

In its November 16, 2015 response to RIFF's September 11, 2015 declaration, the Town divided its rejoinder into four sections, one for each of the three documents included in RIFF's declaration: the Filippi Affidavit, the Donadio Affidavit and the Lease Option Agreement, and one to address RIFF's continued interest in Old Harbor's South Pier.

¹⁴ Id., p. 11 and Schedule L.

¹⁵ Id., and Schedule H.

Starting with the Filippi Affidavit, the Town points out that although Mr. 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... the right to wharf out at two locations...,’ it was demonstrated by the Town that “the statements by Paul Filippi as to Lot 159 in Plat 6 and Lot 23 in Plat 7 were not accurate.”¹⁶ The Town also points out that in his affidavit, Mr. Filippi asserts that Bluewater would be filing “the applications for the necessary permits with the CRMC and the Army Corps no later than November 1st, 2015.” However, the Town states that to its knowledge no such applications have been filed. Consequently, the Town argues that “any further representations as to time tables and dates must be viewed with skepticism.”¹⁷

In reply to the Donadio Affidavit, the Town integrates the arguments contained in its November 5, 2015 response to Bluewater’s dock construction claims, *supra*; essentially, that RIFF has not offered adequate proof of the availability of a docking facility in Old Harbor.

The Lease Option Agreement is labeled as “a nebulous, non-specific document” by the Town. The Town argues that the Lease Option Agreement should be rejected by the Division as it neither references the dock that is the subject matter of the lease nor specifies the date that the docking facility will be available.¹⁸

¹⁶ The Town’s November 16, 2015 Response, p. 2.

¹⁷ *Id.*, pp. 2-3.

¹⁸ *Id.*, p. 3.

Finally, the Town discusses RIFF's intentions to use the Town's South Pier (a.k.a. South Wharf or South Dock) in Old Harbor in the event that a Bluewater facility is not constructed. Initially, the Town relies on language contained in the Lease Option Agreement, which "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 and recreational boats and local commercial interests, as well as the Town of New Shoreham, which operates the South Wharf.'" The Town observes that the Lease Option Agreement further 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 in original). In view of this language contained in the Lease Option Agreement itself, the Town argues that it is clear that the "public convenience and necessity" would not be served by the use of this dock and that the Division's issuance of a CPCN on this docking facility would not be appropriate.¹⁹

The Town next reiterates its earlier argument that RIFF does not have a right to use the South Pier. The Town argues that RIFF's reliance on the United States 1890 Rivers and Harbors Act is misplaced. The Town contends that this federal legislation "merely states that the Town may not implement tolls or charges for the use of the wharf by 'public vessels of the United States.'" As RIFF's private passenger ferry is not a public vessel owned by the United

¹⁹ Id., pp. 4-5.

States, the Town asserts that RIFF would have no right to use the Town's South Pier.²⁰

**Bluewater's Opposition to and Arguments Against the
Town of New Shoreham's Assertions**

On November 16, 2015, Bluewater submitted a legal memorandum designed to address the legal claims that have been embraced by the Town in this case. In short, Bluewater asserts that "...the permission of the Town is not required to initiate, navigate, or complete either the USACE or CRMC process."²¹

Bluewater argues that the Town's claims have no basis in law, as evidenced by its failure to offer any supporting case law. Bluewater points out that in every ferry application case that has come before the Division, other than Interstate's, the Town "has vowed 'vehement opposition' based on illusory legal authority."²² Bluewater notes that "each time, the Superior Court has found the Town's arguments to be legally meritless."

Bluewater stresses that the Town has already been proven wrong with respect to its claims that Bluewater is not a "real company," and that Mr. Filippi had not acquired any riparian rights in Old Harbor. Bluewater argues that the Town's newest claim, that the Town controls "all possibilities of ingress and egress" at the Northerly Ell Facility (a.k.a. "Lot 158/Red Breakwater") and the Easterly Breakwater Facility (a.k.a. "Mount Hope Dock") is also without merit.

²⁰ Id., pp. 5-6.

²¹ November 16, 2015 Bluewater Opposition Memorandum, p. 1.

²² Id., pp. 1-2.

Starting with the East Breakwater Facility and the USACE 408 process, Bluewater argues that the Town “has erroneously claimed they are the non-federal sponsor of both sites.” Rejecting the authority relied upon by the Town, Bluewater asserts that the “actual law governing the matter” reflects that the Town is not a non-federal sponsor of the USACE’s Block Island project as the term is used in the 408 process. To buttress its assertion, Bluewater provided an opinion letter from a Washington D.C. law firm that specializes in USACE 408 application cases. A summary of the key points in the opinion letter are provided below:

...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.²³

By its plain terms, Section 408 does not require the written consent of the Town, even if the Town were a non-federal 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:

²³ *Id.*, pp. 3-4 and Exhibit A.

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.

Nothing in the statute's terms requires the approval of a non-federal sponsor for a Section 408 permit.

Federal regulations governing the Corp's 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.

Contrary to the Town's assertion, the EC²⁴ 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.... The flood control statutes 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 alteration of this project.

²⁴ "EC" is an abbreviation for the USACE's Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects (July 31, 2014).

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....’ 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....

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.... Bluewater’s proposed docks are not located in inland or intracoastal waterways.’²⁵

Bluewater adds that it has “already initiated the 408 process at a meeting with the USACE on Sept 8th attended by New England Division USACE Chief Ed O’Donnell, Project Engineer Mike Elliott, and Mike Walsh P.E.” Bluewater asserts that it will continue with the process of developing the East Breakwater Facility “as it is fully within its legal rights to do so.”²⁶

Bluewater next addresses the CRMC permitting process connected to the East Breakwater Facility. Relying on the fact that it does not intend to utilize any attachments to the Town’s Bait Dock, Bluewater maintains that it does not need the Town’s permission to move forward with its permitting case before the CRMC. Bluewater also rejects the Town’s claim that any connections to the

²⁵ Id., pp. 4-5; and November 12, 2015 letter from Messrs. Joseph Corrigan and David Frulla at Kelley, Drye & Warren, LLP., 3050 K Street, Washington, DC.

²⁶ Id., p. 6.

East Dock would similarly require Town permission before the CRMC. Bluewater observes that the Town is relying on the opinion of a CRMC employee who is “a biologist assigned to Block Island.” Bluewater notes that the biologist “cites no CRMC regulation or specific portion of the license agreement, which supports this legal assertion.”²⁷ However, Bluewater relies instead on Section 18D in the actual licensing agreement that provides: “...the grantee shall manage the Timber wharf in the interest of the general public and the facilities shall be available to all members of the general public on equal terms.”²⁸

Moving next to the issue of the CRMC Lease associated with the Northerly Ell Facility, Bluewater takes exception to the Town’s and Grover Fugate’s claims that the Town must approve any dock construction at this location. Bluewater thereupon offers several case citations, which Bluewater asserts clearly define the Town’s rights in this matter.

While not challenging CRMC or Mr. Fugate’s authority, Bluewater argues instead that Mr. Fugate’s opinion is based on a false belief that Bluewater plans to seek alterations to the Red Breakwater at the Northerly Ell Facility, which Bluewater says is not the plan. Bluewater insists that it is not planning to “attach or anchor” a dock to the Red Breakwater.²⁹ Relatedly, Bluewater asserts that the “property” the Town controls under its lease from the State “refers to the Red Breakwater” and that the Town’s control under the lease, and

²⁷ Id., p. 16.

²⁸ Id., p. 17.

²⁹ Id., pp. 6-7.

case law, does not extend past that point. Bluewater argues that pursuant to the lease, “the Town has ostensibly been ‘given the right to construct and operate a dock on or near the Northerly Ell/Red Breakwater for the next fifty years, and ‘to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the Town shall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair.’ Yet no express provision of the lease by Mr. Fugate has conveyed upon the Town the power to block any other riparian rights holder from doing the same.... [T]he great weight of case law, much directly against the Town, supports the opposite.”³⁰ Bluewater next offered a summary of several Rhode Island Court decisions that involved the Town as a party to demonstrate that the Town has frequently attempted, without success, to overstep its municipal authority in cases related to wharfing and development along its shores.³¹ Bluewater also offered an opinion letter from a Rhode Island attorney who specializes in CRMC permitting matters that reflects that Mr. Filippi’s right to wharf out at this location is superior to any interests the Town possesses. This opinion also reflects that 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.”³²

³⁰ Id., p. 7.

³¹ Id., p. 7-10.

³² Id., pp. 9-11; and November 16, 2015 letter from Attorney Sean O. Coffey.

Bluewater next addresses the Town's claim of ingress and egress control over the Northerly Ell Facility. Bluewater contends that because its "alternative plan" connects "to the space behind the timber pier leased by the Town and will not connect or have physical contact with the USACE breakwater," a location outside the control of the Town under its licensing agreement with the USACE, the Town's assertion of ingress/egress control is baseless. Bluewater also provides case law that reflects that the Town may not restrict access through zoning requirements.³³

Bluewater concluded its memorandum/response with a discussion concerning the "public good" and its anticipated timetable for completing this project. On the public good, Bluewater argues that the Town has shown a propensity for "blocking public access and providing preferential treatment." Bluewater contends that the Town "is not protecting public interests, only its own pecuniary and parochial interests." Bluewater contends that the Town "operates for-profit docks, with the Town picking and choosing which local residents do and don't have to pay wharfage." Bluewater also criticizes the Town for its "unwavering defense of the for-profit intrastate monopoly held by... [Interstate] for nearly sixty years."³⁴

Regarding the timetable associated with this dock project, Bluewater notes that "the Division granted the CPCN in *A&R Marine* giving A&R 180 days to have a dock built." Though Bluewater recognizes that the A&R dock and the Bluewater dock sites are located in CRMC Type 2 and 5 waters, respectively,

³³ Id., p. 12-14.

³⁴ Id., pp. 17-20.

Bluewater anticipates that the USACE permitting process will take between 12 and 18 months and that 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."³⁵

RIFF'S Permitting and Service Start-up Timeline Declaration

On November 16, 2015, RIFF timely complied with the Division's directive for "a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor" and directive to "provide the Division with an anticipated start-date for its proposed services."

In its response, RIFF principally relies on the timetable provided by Bluewater. RIFF relates that once the USACE process is complete, within 12 to 18 months, "Bluewater's dock could be constructed and operational within an additional 80 to 100 days according to its dock construction contractor, Anaconda, after dredging is complete."³⁶ Regarding dredging, RIFF notes that the East Breakwater Facility will require some dredging; and that after dredging it would take about 75 days to construct a dock. However, the Northerly Ell Facility requires no dredging and that a dock could be completed within 15 days.³⁷ All told, RIFF anticipates that the permitting and construction process will take about 22 months.

³⁵ Id., pp. 20-21.

³⁶ See RIFF's November 16, 2015 Memorandum, p. 1.

³⁷ Id., pp. 1-2.

RIFF explains: “[a]ssuming that the Bluewater Pier is fully permitted by April 1, 2017, it would be reasonable and prudent at that point in time for Bluewater to start its pier construction process and for RIFF to start its vessel construction process (assuming that it does not use one of its existing vessels to provide the service). If RIFF uses an existing vessel and the... [Northerly Ell Facility], then giving Bluewater 15 days to construct that pier, RIFF could be in service on May 31, 2017. If RIFF constructs a purpose-built vessel or the... [East Breakwater Facility] is constructed instead of the... [Northerly Ell Facility], service start-up would be by May 31, 2018.”³⁸

Finally, RIFF likens the above timeline to the timeline that Island Hi-Speed Ferry (“IHSF”) required to begin its ferry service after the Division granted its CPCN application. RIFF notes that IHSF applied for its CPCN in February 1998 and began service in July 2001.³⁹

FINDINGS

After a careful examination of the arguments and supporting documents offered by the parties, RIFF and the Town, and also the arguments and documents offered by Bluewater, the Division is satisfied that Bluewater’s claims of interest and ability to construct a docking facility in Old Harbor are credible and that RIFF’s access to Bluewater’s planned docking facility is satisfactorily demonstrated on the record. Though the Division is mindful that the Town plans to aggressively oppose Bluewater’s permitting applications before the USACE and the CRMC, the Division finds insufficient justification to

³⁸ Id., p. 2.

³⁹ Id.

deny RIFF an opportunity to pursue its current filing before the Division based on that anticipated opposition from the Town. The Town would have the Division accept the Town's opposition as a *fait accompli* on the question of Bluewater's ability to construct a new docking facility in Old Harbor. However, neither the prevailing law nor the facts associated with this matter provide that level of clarity. Consequently, the Division must conclude that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.

The Division further finds that the expected timeline for completing the construction of a new docking facility in Old Harbor is not unreasonably long so as to necessitate additional delays in adjudicating RIFF's pending CPCN application.

It is expected that the Town will seek to intervene in the compulsory USACE or CRMC permitting application cases in order to express its opposition to the construction of a new dock in Old Harbor. The Town will undoubtedly inform the Division if it is successful in derailing Bluewater's plans in the preliminary stages of the proceedings scheduled before the CRMC and the USACE. The Division reserves the right to revisit this matter upon such a showing by the Town.

Predicated on these findings, the Division must deny the Town's July 21, 2015 Motion for Summary Disposition.

Now, therefore, it is

(22254) ORDERED:


1. That Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015, and Order No. 22183, issued on October 26, 2015 are hereby adopted as the introduction to this Order and, by necessity, incorporated by reference.
2. That the Town's July 21, 2015 Motion for Summary Disposition is denied.
3. That the Division's Clerk is instructed to place the instant docket back on the Division's hearing calendar and to schedule a public hearing on RIFF's application as soon as practicable.
4. That the Division reserves the right to revisit this matter upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater's planned dock before the USACE or CRMC.

Dated and Effective at Warwick, Rhode Island on December 10, 2015.

Division of Public Utilities and Carriers



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: 

Thomas F. Ahern
Administrator