

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

POST-HEARING MEMORANDUM OF THE TOWN OF NEW SHOREHAM

The Town of New Shoreham ("Town") submits this Post-Hearing Memorandum with regard to the issues raised in the hearing held before the Rhode Island Division of Public Utilities and Carriers ("Division") on March 30, 2018 and April 4, 2018.

The Town respectfully submits that the evidence presented at the remand hearing clearly demonstrates that the Rhode Island Fast Ferry ("RIFF") does not have a reasonable expectation of obtaining a docking facility in Old Harbor, Block Island, and that the Division should revisit and withdraw its conditional CPCN approval Order of September 22, 2016.

CASE BACKGROUND AND PROCEDURAL POSTURE

Rhode Island law provides that the Town is to be notified whenever a ferry service files an application with the Division to operate to Block Island. The purpose of this notice is to give the Town an opportunity to participate and to provide input into the application process before the Division. Specifically, R.I.G.L. § 39-3-3 states that: "(a) No common carrier of persons and/or property operating upon water between termini within this state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate from the division certifying that public convenience and necessity required the services ("CPCN")..." and that "(b) *A copy of any application filed with either the commission*

or the division by a water common carrier which includes a New Shoreham terminus shall be provided by the water common carrier to the New Shoreham town clerk by certified mail."

(emphasis added). In addition, R.I.G.L. § 39-3-3.1 requires that the Division notify an affected city or town of a petition for issuance of a certificate under § 39-3-3, and states: "Upon receipt of the petition, the division shall fix a time and place of hearing thereon and shall give notice as it may prescribe of the pendency of the petition and of the time and place of a hearing thereon to the petitioner, to the mayor and also any city manager of each city, and to the president of the town council and also any town manager for each town, in which the petitioner desires to pick up or discharge passengers."

In the prior proceedings before the Division, the Town and Interstate Navigation Company ("Interstate") opposed the application of RIFF for a CPCN for several reasons including, *inter alia*, that: public convenience and necessity does not require the issuance of a CPCN; the service provided by Interstate is adequate and meets the public need for ferry service to Block Island; the hardship and inconvenience to the Town and its residents require that the application be denied; RIFF is not fit, willing or able to provide the proposed service because it cannot legally obtain a docking facility in Old Harbor; and the Town and its residents will suffer severe economic harm because Interstate will be forced to increase rates and/or reduce lifeline service to make up for the loss of revenue resulting from the diversion of Interstate's customers to Quonset Point.

One important consideration in the proceedings before the Division was the docking facility that RIFF proposed to use in Old Harbor. Discovery was conducted in the form of data requests and deposition in order to obtain information regarding the proposed docking facility. Not having received RIFF's proposed docking facility, the Town, on July 21, 2015, filed a

motion for summary disposition regarding RIFF's failure to identify the proposed docking facility. On August 11, 2015, the Division issued an order in response to the Town's summary disposition motion and stated:

In further support of its motion, the Town argues that there are only four docks in Old Harbor where a ferry could land and that RIFF has not been able to demonstrate that it has acquired rights to use any none (sic) of them. The Town relies on the discovery it conducted in this case, including a deposition of RIFF's owner, to verify that RIFF has been unable to establish a legal connection to any of the four docks. The Town adds that because RIFF has not identified its docking location in Old Harbor, the Town has been prevented from conducting discovery or performing an evaluation with respect to the proposed site.

August 11, 2015 Division Order pp. 2-3

The Division observes that RIFF filed its application in this case on July 2, 2013, over two years ago. The Division also acknowledges that during our last status conference in this docket, conducted on May 15, 2015, this hearing officer informed RIFF that *it would be required to identify the dock it planned to utilize in Old Harbor as a requisite element in its burden of proof in this case. Id.* p.5. (emphasis added).

The Division went on to order that: "On or before August 28, 2015, RIFF shall 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.*" *Id.* pp. 7-8. (emphasis added). By subsequent order, the Division extended this deadline to September 11, 2015.

RIFF notified the Division that the docking facility which it planned to use would be built by a company known as Bluewater LLC ("Bluewater"), and that RIFF would lease the docking facility from Bluewater. In response to the Division's orders, RIFF submitted a proposed docking facilities diagram which depicted proposed docking facilities in Old Harbor.

The Division's Order of December 10, 2015 states that the Division reserves the right to revisit this matter and that the Town will inform the Division if it is successful in derailing

Bluewater's plans to build a docking facility.

On September 22, 2016, the Division approved a conditional CPCN for RIFF, and Bluewater subsequently made a Section 408 filing with the Army Corps of Engineers (“Army Corps”) pertaining to the proposed docking facilities; however, by letter dated November 28, 2016, the Army Corps notified Bluewater that it would not initiate review of the proposal because the Town had not consented. The Town’s consent is required as a Non-Federal Sponsor of the east wharf and bulkhead. (See Town Remand Exhibit 12-Army Corps letter dated November 28, 2016.)

In 2017, Bluewater submitted an alternate proposed docking facility. This newly proposed docking facility violated the Division's order of August 11, 2015 which required RIFF to identify the dock it is proposing to use on Block Island along with an offer of proof of the dock’s availability on or before August 29, 2015 (extended to September 11, 2015). Indeed, the purpose of requiring that RIFF identify the docking facility was so that the Town could conduct its investigation and provide its input.

The Division’s Order of August 11, 2015 did not state that RIFF could simply add new facilities later on. This tactic of switching docking facilities after the hearings had closed and after the Report and Order of the Division had issued, deprived the Town of its right to be heard on this important issue. The Town was unable to present arguments to the Division regarding the many issues presented by the newly proposed docking facility. Based on the foregoing, the Town and Interstate filed a Motion to Remand which was granted by the Superior Court.

At the commencement of the March 30, 2018 hearing, the Hearing Officer stated that the scope of the proceeding would be limited to providing the Town with an opportunity to prove that RIFF does not have a realistic expectation of constructing Bluewater's planned docking

facilities in Old Harbor irrespective of design through its permit applications before the Army Corps and the Rhode Island Coastal Resources Management Council (“CRMC”) and that the Town is required to prove to the Division that RIFF will not be able to operate its proposed ferry service from a Bluewater docking facility in Old Harbor.

Hearings were held on March 30, 2018 and April 4, 2018 and a post-hearing memorandum briefing schedule was established.

WITNESSES AND EVIDENCE SUBMITTED

Bluewater has proposed two docking facilities which were depicted in diagrams submitted at the hearing: one docking facility along the northerly ell of the red breakwater in the inner harbor of Old Harbor (“the proposed Red Breakwater Docking Facility”); and another docking facility along the east breakwater in the inner harbor of Old Harbor (“the proposed East Breakwater Docking Facility”). The witness testimony and evidence submitted demonstrate that Bluewater does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor irrespective of design through its permit applications before the Army Corps and the CRMC and that RIFF will not be able to operate its proposed ferry service from a Bluewater docking facility in Old Harbor.

Edward L. Roberge

Mr. Roberge is the Town Manager. He testified that he had reviewed RIFF's Exhibit D-1 which was prepared in response to the Town's Data Requests and which consists of diagrams labeled "Proposed Dockage @ Old Harbor, New Shoreham, Rhode Island," as well as the Pre-Filed Rebuttal Testimony of Paul Filippi of Bluewater; and the Lease Agreement ("Lease Agreement") between the CRMC and the Town pertaining to the Red Breakwater. A copy of that Lease Agreement is attached to Mr. Roberge's Pre-Filed Rebuttal Testimony. (See Town Remand Exhibit 1.) The term of the Lease Agreement does not expire until April 1, 2062.

The Lease Agreement, Article V, paragraph A specifically gives the Town the right to erect such docks and other structures **on or near** the Red Breakwater as the Town shall deem desirable. As the Town Manager, a licensed professional engineer (Tr. Vol. I, p.36) testified,

Bluewater's proposed Red Breakwater dock as depicted lies less than 15 feet from the Red Breakwater and parallel to it. The proposed dock would block any dock which the Town has the right to erect and use in that location. Moreover, the Lease Agreement, Article IV, paragraph A requires that the Town maintain the Red Breakwater in good order and repair. The Town Manager stated in his Pre-Filed Rebuttal Testimony that it is the Town that determines the manner, time and method of such maintenance and repair and that the proposed dock would block and limit the Town's ability to maintain the Red Breakwater in good order and repair. In so testifying, the Town Manager stated:

That would be a hindrance to maintaining it. What you're looking [at] right there is you're looking at the surface top of the stone. You can imagine that this breakwater is a revetment and that revetment is on some sort of cross spoke so its base could be as much as two and a half or three times as wide as the top of it. So that's the concern that we have. If there's a failure at the base and you need to maintain that, that will be a block. (Tr. Vol. I, p. 34)

In addition, the Town Manager testified that whether Bluewater plans on attaching its proposed docking facility to the Red Breakwater or anchoring next to it, does not change the fact that the consent of the Town is required. The right to wharf out at the Red Breakwater belongs to the Town under the Lease Agreement as does the obligation to maintain and repair the Red Breakwater. The Town intends to enforce its rights under the Lease Agreement and to carry out its obligations.

All parties acknowledge that the CRMC must give its assent to the construction of either proposed docking facility. The documentary evidence presented at the hearing unequivocally establishes that the CRMC agrees with the Town's position that the consent of the Town is

required for Bluewater to construct the proposed Red Breakwater Docking Facility. The CRMC will not accept an application nor even a Request for Preliminary Determination without the Town's Consent as referenced in the CRMC deficiency notice. The required consent has nothing to do with design. (Town Remand Exhibit 2)

Town Remand Exhibit 7, which is the Affidavit of the Executive Director of the CRMC, clearly states that the consent of the Town is required in order to obtain the assent of the CRMC to construct a dock at the Red Breakwater and that the Town would have to be a party to any such request for assent. In response to this Affidavit, Bluewater attempted to distinguish the testimony of the Executive Director by proposing that the docking facility would not actually touch the Red Breakwater but would only lie alongside it. This alleged distinction of a dock which lies only a few feet from the Red Breakwater, as the Town Manager testified, still blocks the Town's right to wharf out as well as the Town's ability to maintain the Red Breakwater.

In the proposal which Bluewater submitted to the CRMC, the proposed Red Breakwater Docking Facility lies alongside the Red Breakwater and allegedly does not touch it. The CRMC Notice of Deficient Application dated March 29, 2018 (Town Remand Exhibit 2) makes it absolutely clear that this is a distinction without a difference as the notice states:

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 the Town has established, Bluewater cannot provide the CRMC with proof of ownership of the Red Breakwater since the breakwater is owned by the State of Rhode Island and the property rights to it are leased to the Town. In addition, Bluewater cannot provide the CRMC with the consent of the Town for the construction of the proposed Red Breakwater docking facility.

Nancy Dodge

Nancy Dodge is the former Town Manager and served as Town Manager for approximately sixteen years prior to November 11, 2016. She testified that she had reviewed RIFF's Exhibit D-1 which was prepared in response to the Town's Data Requests and which consists of diagrams labeled "Proposed Dockage @ Old Harbor, New Shoreham, Rhode Island," as well as the Pre-Filed Rebuttal Testimony of Paul Filippi of Bluewater, and the Right of Entry Agreement which is attached to the Pre-Filed Testimony of the New Shoreham Building Official ("Right of Entry Agreement"). Please refer to Town Remand Exhibit 3-Pre-Filed Rebuttal Testimony of Nancy Dodge and Town Remand Exhibit 4-Pre-Filed Direct Testimony of the New Shoreham Building Official.

Through the Right of Entry Agreement which does not expire until September 16, 2021, the Federal Government has agreed not to allow any person or entity to construct any structure which would restrict or impede the Town and the public's access to the Town's Bait Dock, to the East Breakwater, to the beach located on the west side of the East Breakwater or to the Right of Entry land.

Mrs. Dodge explained that Mr. Filippi's testimony to the effect that the Right of Entry Agreement was previously raised to the Division is simply not true as the Right of Entry

Agreement did not even come into existence until September 16, 2016, long after the hearing before the Division had concluded.

The term of the Right of Entry Agreement is five years as stated in the document. Mrs. Dodge further explained that the agreement contemplates that each time that the government needs to get its contractor into the Right of Entry land for a certain period of time to make repairs, a separate amendment specifying that period will be completed by the parties.

In this regard, please refer to the following testimony:

Q. Now, with respect to, just to clarify, this business about Right of Entry periods expiring. I just want to clarify what you said. It was contemplated that every time the federal government needs to get in there, a single amendment would be added for purposes of repair that would define the period; is that right?

A. Yes.

Q. And to date, we haven't had any necessary repairs to your knowledge?

A. Correct.

Q. So the next time the east breakwater gets destroyed or damaged by a hurricane, is it your understanding that another amendment would be issued defining another period of entry within that five year period?

A. That was the intention of the parties in executing this, yes. (Tr. Vol I, p. 75)

As Town Manager, Nancy Dodge was involved in the negotiations between the Town and the Federal Government pertaining to this agreement. She testified that the Town had made the proposal to enter into that agreement because the Town did not want the Federal Government to allow any person or entity to construct any structure which would restrict or impede the Town and the public's access to the Town's Bait Dock, to the East Breakwater, to the beach located on the west side of the East Breakwater or to the Right of Entry land. The Town requested that this language be included in the Right of Entry Agreement and the Federal Government agreed. The former Town Manager further testified that the consent of the Town is required for the construction of the Proposed East Breakwater Docking Facility because the proposed East Breakwater Docking Facility, if constructed, would impede or restrict the Town and the public's

access to these areas.

The Town intends to enforce its rights under the Right of Entry Agreement.

The CRMC Notice of Deficient Application dated March 29, 2018 (Town Remand Exhibit 2) clearly establishes that the consent of the Town is required to construct the proposed East Breakwater Docking Facility and that Bluewater has not established the requisite proof of ownership or Town or federal consent. In this regard, the Notice of Deficient Application states:

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.

As the Town has established, Bluewater cannot provide the CRMC with proof of ownership of the East Breakwater. In addition, Bluewater cannot provide the CRMC with the consent of the Town for the construction of the proposed East Breakwater docking facility.

Mark Tilson

Mark Tilson has served as the Town's Building Official for twenty-nine years. In preparation for his testimony, Mr. Tilson reviewed RIFF's Exhibit D-1 which was prepared in response to the Town's Data Requests and which consists of diagrams labeled "Proposed Dockage @ Old Harbor, New Shoreham, Rhode Island," a letter addressed to the Army Corps dated May 15, 2017 from the Kelley Drye & Warren LLP law firm, the Town's Zoning Ordinance, the State Building Code and the other documentation referenced in his testimony. (Town Remand Exhibit 4.)

The Building Official testified that the construction of the proposed East Breakwater Docking Facility requires the assent of the CRMC and the Town. He also explained that the CRMC Application requires that the Town's Building Official sign off on the CRMC Building Official Letter and that the construction of the proposed walkway which is on the upland, above the mean high-water mark, requires a Building Permit. Mr. Tilson testified that he could not sign off on the CRMC application because the proposed walkway, regardless of design, does not meet the criteria for issuance of a Building Permit. The Walkway is located entirely within a VE-12 Flood Zone, a Coastal Zone with Velocity Hazard (wave action) with the base flood elevation of 12 feet determined. Since this property where Bluewater proposes to construct a walkway lies entirely within a Special Flood Hazard Area (SFHA), the Town's Flood Ordinance, Section 11-3, requires that "all proposed construction or other development within a SFHA shall require a permit." Although a Building Permit from the Town is required, no Building Permit can issue because the proposed walkway is in violation of the State Building Code.

Mr. Tilson further testified that any walkway in that area would be located in the Town's Coastal Zone. Zoning Section 314 (B) does not allow a breach or other disturbance of dunes or

dune vegetation, cutting of existing vegetation or alteration of wildlife habitats. Construction of a two hundred twenty-one-foot-long walkway irrespective of design in the Coastal Zone is not permitted. Moreover, Zoning Section 318, Waterfront Overlay, comprises Block Island's saltwater harbors and establishes uses for the harbors based on the water district as established by the CRMC. The walkway for the proposed East Breakwater Docking Facility, irrespective of design, is not a Permitted Use in the Waterfront Overlay where the Walkway would be located.

In summary, the walkway would not be allowed to be permitted or constructed irrespective of design. Accordingly, the CRMC application for assent to build a dock (which Bluewater has not even filed despite the Division's granting of the conditional CPCN on September 22, 2016, some twenty months ago) would be deficient and Bluewater could not move forward with the CRMC assent process for the construction of the proposed East Breakwater Docking Facility because Mr. Tilson would not legally be permitted to sign off on the CRMC Building Official Letter. As discussed above, Bluewater's proposal does not even get it through the Preliminary Determination step (which does not require the CRMC Building Official Letter), let alone the actual CRMC application as its Preliminary Determination request has been deemed deficient. In addition, for the reasons set forth in the CRMC deficiency notice, a Bluewater application for assent to construct a docking facility would also be deemed deficient.

During his testimony, the Building Official also discussed the Right of Entry Agreement between the Town and the Federal Government. He testified that the Federal Government has agreed that it will not permit any temporary or permanent structure to be constructed by any person or entity which will impede or restrict the Town and the public's access to the Town bait dock, to the Right of Entry Land, to the East Breakwater or to the beach located along the west side of the East Breakwater. Mr. Tilson further stated that the proposed East Breakwater Docking

Facility, if constructed, would impede or restrict the Town and the public's access to the Town bait dock, to the East Breakwater and to the beach located along the west side of the East Breakwater. Accordingly, the consent of the Town is required as determined by the CRMC and stated in the CRMC Notice of Deficient Application (Town Remand Exhibit 2.)

Paul Filippi

Paul Filippi is the owner and operator of Bluewater. Bluewater and the parties all acknowledge that the consents of the Army Corps and the CRMC are required in order for Bluewater to construct a docking facility in Old Harbor.

With regard to the Army Corps, Mr. Filippi's testimony at the hearing as well as the exhibits submitted establish the following:

- (i) Other than the November 28, 2016 filing, which the Army Corps rejected because Bluewater did not have the consent of the Town as a Non-Federal Sponsor, Bluewater's sole filing with the Army Corps was the May 15, 2017 letter. (Town Remand Exhibits 12 & 13)
- (ii) Bluewater's May 15, 2017 filing with the Army Corps contained several false representations regarding his authority to provide the necessary consents of Ballard's Inn Realty LLC. (Tr. Vol. II, pp. 150-152) (Town Remand Exhibits 6, 8 & 10)
- (iii) The representations which Paul Filippi made in the May 15, 2017 filing were in direct violation of the Order of the Rhode Island Superior Court appointing a Special Master over the activities of Ballard's Inn Realty, LLC. (Town Remand

Exhibits 6 & 8)

- (iv) The Special Master has never consented to the activities proposed in the May 15, 2017 Army Corps filing. (Town Remand Exhibits 6, 8 & 11); (Tr. Vol. II, p. 146)
- (v) Bluewater has not withdrawn the May 15, 2017 Army Corps filing containing the false representations. (Tr. Vol. II, pp. 150-153)
- (vi) Bluewater has issued no amendments to the May 15, 2017 filing correcting the false representations. (Tr. Vol. II, pp. 150-153)
- (vii) The June 22, 2017 Army Corps letter which was issued in response to the May 15, 2017 filing states that the Army Corps will not continue with the Section 408 review unless 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)
- (viii) Bluewater has never made any Army Corps filing for permitting under Section 10 of the Rivers and Harbors Act (Tr. Vol. II, p. 155) despite the fact that the Army Corps instructed Bluewater to do so almost a year ago.
- (ix) Bluewater has never made any Army Corps filing for permitting under Section 404 of the Clean Water Act (Tr. Vol. II, p. 155) despite the fact that the Army Corps instructed Bluewater to do so almost a year ago.
- (x) Bluewater has made no filings with the Army Corps pertaining to its proposed docking facilities since the May 15, 2017 Army Corps filing, over a year ago. (Tr. Vol. II, pp. 155-156, 181)
- (xi) Bluewater does not own any of the real estate associated with either of the proposed docking facilities and has not obtained the approval of any owner

regarding the May 15, 2017 Army Corps filing. (Tr. Vol. II, p. 175)

With regard to the CRMC, as discussed below, Mr. Filippi's testimony at the hearing as well as the exhibits submitted establish the following:

- (i) Other than the March 2018 Preliminary Determination filing which the CRMC rejected as being deficient by notice dated March 29, 2018, Bluewater has made no filings with the CRMC. The Preliminary Determination filing included a document entitled: "Project Narrative for Preliminary Determination." (Town Remand Exhibits 2, 15 & 16)
- (ii) The Preliminary Determination filing is no longer active with the CRMC. (Town Remand Exhibit 2)
- (iii) Bluewater's Preliminary Determination filing contained several false representations regarding his authority to provide the necessary consents of Ballard's Inn Realty LLC as set forth in the Project Narrative for Preliminary Determination. (Town Remand Exhibits 6, 8 & 10)
- (iv) The representations which Paul Filippi made in the Preliminary Determination filing were in direct violation of the Order of the Rhode Island Superior Court appointing a Special Master over the activities of Ballard's Inn Realty, LLC. (Town Remand Exhibits 6, 8 & 10)
- (v) Bluewater has not notified the CRMC of the misrepresentations contained in the CRMC filing. (No such notification(s) were provided in discovery or supplemented)
- (vi) Bluewater has not made any additional filings with the CRMC subsequent to the

rejected Preliminary Determination filing. (No such filing(s) were provided in discovery or supplemented)

(vii) Bluewater has never made any filing with the CRMC relating to dredging permit(s). (Tr. Vol. II, p. 205)

(viii) Bluewater does not own any of the real estate associated with either of the proposed docking facilities and has not obtained the approval of any owner regarding the CRMC Preliminary Determination filing. (Tr. Vol. II, p. 175)

To further elaborate on the points set forth above, Mr. Filippi's testimony demonstrated that the May 15th Army Corps filing contains several false representations which are also contained in the CRMC Preliminary Determination filing. For example, on page two of the May 15th letter, it is represented that dredged material will be placed on Ballard's Beach, that the dredged material will be removed with a hydraulic dredge and that the sand will be pumped through a pipe onto the beach adjacent to the restaurant. The filing also represents that as to the proposed Red Breakwater Docking Facility that dredging will likely be required in the future and that the sand will be disposed of by the same manner as outlined for the other dock. (Tr. Vol. II, p. 143). Under cross-examination, Mr. Filippi admitted that there is litigation pending involving the Filippi family and that at a hearing at which he was present on April 26, 2017, Justice Stern appointed a Special Master for Ballard's Inn Realty, LLC. Mr. Filippi acknowledged that the Special Master never provided him with authority to represent to the Army Corps that the Special Master had authorized dredged material to be dumped on Ballard's Beach or that the property owned by Ballard's Inn Realty LLC could be used in connection with the construction of either of the proposed docking facilities. Despite this, Bluewater represented to the Army

Corps: "Ballard's Inn Realty owns Plat 7 Lot 23. Ballard's Wharf, LLC owns Plat 6 Lot 159. Both entities are owned by the Filippi family. Paul Filippi is authorized to sign for both entities listed above." Bluewater has never withdrawn the May 15, 2017 Army Corps filing nor was any documentation submitted to notify the Army Corps of Bluewater's false representations. These same misrepresentations were contained in Bluewater's CRMC filing.

Further issues regarding credibility arise from a review of Mr. Filippi's Pre-Filed Rebuttal Testimony dated February 5, 2018. In that testimony, he stated: "Bluewater is now working on completing its permit application under Section 10 of the Rivers and Harbors Act of 1889 and Section 404 of the Clean Water Act which is planned to be filed imminently and concurrently with Bluewater's CRMC application." Despite these statements which were made under oath, no Army Corps filings related to Section 10 of the Rivers and Harbors Act of 1889 and Section 404 of the Clean Water Act were filed "imminently" nor were they even filed concurrently with the CRMC filing. Indeed, these filings have never been made.

Similarly, Mr. Filippi's Pre-Filed Rebuttal Testimony contains statements which are directly contradicted by the Special Master of the Ballard's Inn Realty, LLC property and which Mr. Filippi admitted under cross-examination are false. The applicable excerpts quoted below appear at page 8, lines 16-14 of his Pre-Filed Rebuttal Testimony:

Q. IS THE SPECIAL MASTER AWARE THAT BLUEWATER IS GOING THROUGH THE PERMITTING PROCESS TO BUILD A DOCK IN OLD HARBOR?

A. Yes

Q. DOES BLUEWATER HAVE THE AUTHORITY TO PROCEED WITH THE DOCKAGE PERMITTING PROCESS?

A. Yes.

Near the conclusion of the hearing, the Hearing Officer inquired of Mr. Filippi regarding

his intentions on filing with the CRMC and with the Army Corps.

HEARING OFFICER SPIRITO:

Mr. Filippi, when do you plan on supplementing your filings with the CRMC and the Army Corps of Engineers?

THE WITNESS: As soon as possible.

HEARING OFFICER SPIRITO: What does that mean?

THE WITNESS: Within the next ten days to two weeks. (Tr. Vol. II, p. 211)

At the conclusion of the hearing, the Hearing Officer instructed Mr. Filippi to forward copies of any additional CRMC or Army Corps filings to the parties. To-date, neither the Town nor Interstate's counsel has received any such subsequent filings. Two weeks from the date of the hearing of April 4th expired on April 18th and there have been no such filings.

CONCLUSION

The evidence presented at the remand hearing is obvious and compelling and demonstrates that RIFF does not have a reasonable expectation of obtaining a docking facility in Old Harbor for the reasons set forth below as to each proposed docking facility.

As to the Proposed East Breakwater Docking Facility:

- (i) Bluewater cannot demonstrate proof of ownership as required by the CRMC.
- (ii) Bluewater cannot demonstrate Town approval as required by the CRMC.
- (iii) Bluewater cannot demonstrate Federal Government approval as required by the CRMC.
- (iv) Bluewater's proposed docking facility would violate the Right of Entry Agreement. The Town will enforce its rights under that agreement.

- (v) Bluewater cannot submit an application for assent to the CRMC because the Town's Building Official cannot legally sign off on the CRMC Building Official letter.
- (vi) Bluewater cannot submit dredging applications to the CRMC as only the owner of the property can submit/sign a dredging application.
- (vii) Bluewater cannot meet the requirements set forth in the CRMC deficiency notice.
- (viii) Bluewater's failure to make a filing with the CRMC as represented to the Hearing Officer also demonstrates that Bluewater is unable to comply with the CRMC deficiency notice.
- (ix) The only filing that Bluewater has made with the Army Corps is a May 15, 2017 letter which violates the Superior Court Order appointing the Special Master, which contains material misrepresentations and which should be withdrawn.

As to the Proposed Northerly Ell Docking Facility:

- (i) Bluewater cannot demonstrate proof of ownership as required by the CRMC-the State of Rhode Island has leased its ownership rights to the Northerly Ell including its right to wharf out to the Town pursuant to the Lease Agreement which does not expire until April 1, 2062.
- (ii) The Town will enforce its rights under the Lease Agreement.
- (iii) Bluewater cannot demonstrate Town approval as required by the CRMC.
- (iv) Bluewater cannot demonstrate Federal Government approval as required by the CRMC.

- (v) Bluewater cannot submit dredging applications to the CRMC as only the owner of the property can submit/sign a dredging application.
- (vi) Bluewater cannot meet the requirements set forth in the CRMC deficiency notice.
- (vii) Bluewater's failure to make a filing with the CRMC as represented to the Hearing Officer also demonstrates that Bluewater is unable to comply with the CRMC deficiency notice.
- (viii) The only filing that Bluewater has made with the Army Corps is a May 15, 2017 letter which violates the Superior Court Order appointing the Special Master, which contains material misrepresentations and which should be withdrawn.

Based on the foregoing, the Town respectfully submits that the Division should revisit and withdraw its conditional CPCN approval Order of September 22, 2016.

TOWN OF NEW SHOREHAM
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CERTIFICATION

I hereby certify that, on May 21, 2018, I served this document via e-mail on the individuals listed on the service list for this docket.

/s/ Katherine A. Merolla