

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

POST-HEARING REPLY MEMORANDUM OF THE TOWN OF NEW SHOREHAM

The Town of New Shoreham (“Town”) submits this Post-Hearing Reply Memorandum in response to the Post-Hearing Memorandum filed by the Rhode Island Fast Ferry (“RIFF”) 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.

In its Post-Hearing Memorandum, the Town demonstrated that the evidence presented at the remand hearing clearly establishes that 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. The Town submits that RIFF’s Post-Hearing Memorandum contains nothing of substance to refute the Town’s position.

I. Bluewater’s applications have been derailed.

RIFF’s Post-Hearing Memorandum argues that the Town’s request to the Division to revisit and withdraw its conditional CPCN approval order should be denied owing to proceedings before the Army Corps of Engineers (“ACOE”) and the Rhode Island Coastal Resources Management Council (“CRMC”). See page 4 of RIFF’s memo wherein RIFF states: “The ACOE and CRMC process have inarguably moved forward,” and page 8, “Because Bluewater’s CRMC permitting process is also moving forward...” These statements simply do

not comport with the facts presented at the hearing and with what has transpired, or failed to transpire, since the hearing concluded on April 4, 2018.

Initially, it must be noted that what Bluewater filed with the CRMC was only a CRMC preliminary determination request. Despite the fact that the CPCN was issued in September of 2016 and despite prior representations made by Bluewater to the Division as to when filings would be made¹, this request was not filed until March of 2018. Moreover, a 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 (copy attached): “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.”

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 (copy attached), 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 states: “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. These materials will be held for thirty (30) days during which time they may be picked up by you or

¹ 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 2017.

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.” On April 4, 2018, two months ago, the Hearing Officer asked about Bluewater’s planned filings with the CRMC and ACOE, to which Mr. Filippi responded that these 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 June 4, 2018, neither the Town nor Interstate’s counsel has received any such subsequent filings. Moreover, 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.

The Town has demonstrated through the testimony and exhibits presented at the hearing that Bluewater cannot comply with the CRMC requirements.

It should also be noted that RIFF asserts in its memorandum that the approval letter of the New Shoreham Building Official is not required for Bluewater to build a dock because on the Notice of Deficient Application, the boxed is not checked which requires the completed Building Official Form. This argument is nonsensical because a CRMC Preliminary Determination Request does not require the Building Official letter; however, the Application for State Assent to actually build the dock (see attached form) absolutely does require the Building Official letter stating that a building permit will be issued upon receipt of a CRMC permit. As discussed at length at the hearing, the New Shoreham Building Official cannot legally issue such a letter.

As to RIFF's claims that the ACOE process is moving forward, this assertion also does not reflect the state of the ACOE filing. Almost a year ago, 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.

II. Consent of Ballard's Inn Realty

As discussed at length in the Town's Post-Hearing Memorandum, Bluewater misrepresented to both the CRMC and the ACOE that Mr. Filippi had the ability to provide the necessary consents of Ballard's Inn Realty, LLC to proceed with the proposed docking facilities. Neither the CRMC nor the ACOE has been informed that these assertions by Bluewater were simply not true. In order to diffuse this situation, RIFF argues in its Post-Hearing Memorandum that this is not a problem because the approval of Ballard's Inn Realty, LLC is not required to construct either docking facility. This argument ignores the facts that:

(i) In its CRMC request and ACOE letter, the dredging plan as submitted specifically represents 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. Both the restaurant and beach are owned by Ballard's Inn Realty which is why Mr. Filippi represented that he had the ability to provide the necessary consents.

(ii) The diagram submitted with regard to the proposed East Breakwater Docking Facility

specifically shows electricity being conveyed to the proposed dock from Ballard's Inn.

III. The Lease Agreement and Right of Entry Agreement prevent the construction of both proposed docking facilities.

During these proceedings, RIFF has attacked and purported to interpret the language of both the Lease Agreement between the CRMC and the Town pertaining to the Red Breakwater ("Lease Agreement") and the Right of Entry Agreement ("Right of Entry Agreement") between the Town and the Federal Government. By its express terms, the Right of Entry Agreement does not expire until September 16, 2021. Despite this, RIFF has asserted that the Right of Entry Agreement already expired. What RIFF fails to recognize is that the parties to the Right of Entry Agreement believe, as expressly stated therein, that the agreement does not expire until September 16, 2021, and that RIFF has no standing whatsoever to contest the validity and/or terms of either agreement.

In *1112 Charles, L.P. v. Fornel Entertainment, Inc.* 153 A.3d 619 (2017), the Rhode Island Supreme Court reiterated the well-established rule of law that a party must be in privity of contract with another party to challenge its validity. Since neither RIFF nor Bluewater are a party to either the Right of Entry Agreement or the Lease Agreement, neither has standing to challenge the validity of either contract or to make arguments regarding the interpretation of such contracts.

IV. Ownership of the Red Breakwater

RIFF asserts that Ballard's Wharf Realty has ownership rights regarding the Red Breakwater. RIFF has never produced any evidence in support of this assertion. Moreover, this

allegation directly contradicts the Affidavit of the Executive Director of the CRMC (Town Remand Exhibit 7). The Executive Director states at paragraph 3: “Originally constructed at the direction of the Army Corps of Engineers in the waters of the State of Rhode Island, the Red Breakwater is now the property of the State of Rhode Island managed and controlled by the Town pursuant to the Lease.” In addition, the Notice of Deficiency 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.”

Bluewater cannot provide the CRMC with proof of ownership of the Red Breakwater because this 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.

V. No special exception is available.

RIFF asserts that a proposed docking facility may yet be constructed because the CRMC may grant special exceptions pursuant to CRMC Rule 1.1.8. This argument ignores the fact that the rule only permits the CRMC to grant special exceptions to prohibited activities when the applicant demonstrates a series of requirements. The special exception applies only to prohibited activities. The rule does not nor could it ever legally permit the CRMC to infringe on another’s property rights or to waive the requirement that CRMC applications be signed by or consented to by the owner of the property involved and by those having a property interest, whether by lease

or other agreement, in the property to be used for the construction of a docking facility. A special exception cannot defeat ownership rights.

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 in the Town's evidence and memoranda.

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, contains material misrepresentations, and 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, contains material misrepresentations, and 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
By its solicitor

/s/ Katherine A. Merolla
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CERTIFICATION

I hereby certify that, on June 4, 2018, I served this document via e-mail on the individuals listed on the service list for this docket.

/s/ Katherine A. Merolla

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COASTAL RESOURCES MANAGEMENT COUNCIL
4808 TOWER HILL ROAD; SUITE 3; WAKEFIELD, RI 02879
(401)783-3370

File Number: _____

CRMC PRELIMINARY DETERMINATION REQUEST FORM

PROPERTY INFORMATION:

Owner(s) of Property: _____

Mailing Address of Owner(s): _____

City/Town of Property: _____

Street Location of Property: _____

Plat: _____ Lot: _____ Utility Pole No.(s): _____

Does site have access to: Municipal sewer service: _____ Public Water service _____

Is information available regarding riparian boundaries, channel lines, etc?

(Piers, docks, etc. only) _____

Waterway: _____ (Staff Use): _____

REQUEST FOR INFORMATION:

Name of Requestor: _____

Mailing Address: _____

Phone (9:30 a.m. – 3:30 p.m.): _____

Designer or other contact person(s) include name, address, phone: _____

Check Activity Box and Describe in Detail for which CRMC staff level feasibility assessment is requested:

- | | |
|--|---|
| <input type="checkbox"/> Residential Development – Single Family | <input type="checkbox"/> New Construction |
| <input type="checkbox"/> Addition/Alteration | <input type="checkbox"/> Demolition/Alteration |
| <input type="checkbox"/> Residential Development - _____ Units | <input type="checkbox"/> Coastal Feature Verification |
| <input type="checkbox"/> Pier/Dock: _____ Residential: _____ Commercial/Other: _____ | |
| <input type="checkbox"/> Shoreline Protection: Type: _____ | |
| <input type="checkbox"/> Other, Describe: _____ | |

Have you knowledge of any previous permits and/or violations (Local, State, and/or Federal) on this property?

If so, describe and include pertinent information: _____

Please include a general vicinity location map (street guide sheet, USGS topography sheet) and a lot map (portion of Tax Assessor's map), map with topography is helpful.

Signature of Owner: _____ Date: _____

SEE REVERSE SIDE FOR INSTRUCTIONS

INSTRUCTIONS

**** FILING FEE:**

Preliminary Determination Application Fee Schedule

- a. Those involving projects of the individual residential homeowner/potential homeowner: **\$150.00 Determination request fee.**
- b. All other projects (development of subdivisions, condominiums, commercial, industrial waterfront business, etc.) **\$1,000.00 Determination Request Fee.**
- c. Jurisdictional determinations: **\$100.00**
- d. Coastal feature verification: **\$300** (Note: requires surveyed plan prepared by Rhode Island registered P.E or R.L.S.)

Note: Filing fees are not refundable.

Special Note: Determination Request fees may be applied against the filing fee of applications for Council Assent when such application is made within one (1) year of the issuance of the Preliminary Determination Request report.

- **** Four (4) copies of the application, plans and location map must be submitted.
- **** A letter from the local tax assessor stating ownership of the property must be submitted.
- **** The current owner must sign this request, although a potential purchaser may sign if copy of a valid sales agreement is included with the tax assessors' letter.
- **** Note: 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.

Mail the above information to:

**Attn: Applications Coordinator
Coastal Resources Management Council
Oliver Stedman Government Center
4808 Tower Hill Road; Suite 3
Wakefield, RI 02879**

STATEMENT OF DISCLOSURE AND APPLICANT AGREEMENT AS TO FEES

The fees which must be submitted to the Coastal Resources Management Council are based upon representations made to the Coastal Resources Management Council by the applicant. If after submission of this fee the Coastal Resources Management Council determines that an error has been made either in the applicant's submission or in determining the fee to be paid, the applicant understands that additional fees may be assessed by the Coastal Resources Management Council. These fees must be paid prior to the issuance of any assent by the Coastal Resources Management Council.

The applicant understands the above conditions and agrees to comply with them.

Signature

Date

Print Name and Mailing Address

TO: **Coastal Resources Management Council**
4808 Tower Hill Road Suite 3
Wakefield, RI 02879
Phone: (401) 783-3370



FROM: Building Official DATE: _____

SUBJ: Application of: _____

Location: _____

Address: _____ Plat No. _____ Lot No. _____

To Construct: _____

I hereby certify that I have reviewed _____ foundation plan(s).
_____ plan(s) for entire structure
_____ site plans

Titled: _____

Date of Plan (last revision): _____

_____ and find that the issuance of a local building permit is not required as in accordance with Section _____ of the Rhode Island State Building Code.

_____ and find that the issuance of a local building permit is required. I hereby certify that this permit shall be issued once the applicant demonstrates that the proposed construction/activity fully conforms to the applicable requirements of the RISBC.

_____ and find that a Septic System Suitability Determination (SSD) must be obtained from the RI Dept. of Environmental Management.

_____ and find that a Septic System Suitability Determination (SSD) need not be obtained from the RI Dept. of Environmental Management.

_____ and find that said plans conform with all elements of the zoning ordinance, and that if said plans require zoning board approval, that the applicant has secured such approval and that the requisite appeal period has passed with no appeal filed or appeal is final. The Zoning Board approval shall expire on _____.

Building Official's Signature Date

_____ and find that said plans conform with all elements of the zoning ordinance, and that if said plans require zoning board approval, that the applicant has secured such approval and that the requisite appeal period has passed with no appeal filed or appeal is final.

Zoning Officer's Signature Date

NOTICE TO APPLICANTS

The Coastal Resources Management Council regulations require that the following must accompany every application otherwise these applicants will be deemed incomplete and returned.

ALL OF THE FOLLOWING REQUIRED APPLICATION DOCUMENTS **MUST BE ORGANIZED INTO FOUR (4) ASSEMBLED PACKETS** WHEN SUBMITTED TO BE CONSIDERED A COMPLETE APPLICATION

1. **Four copies** of completed application form including plans, are required. If the project requires a type "B" or involves work in the waterway, plans must be 8 1/2" x 11". If the project is type "P" or Prohibited, a Special Exception form will be required, staff will provide you with the necessary forms.

For Formal Applications (Category B): **Site Plans must also be submitted in PDF format and if possible, application materials as well in PDF format.**

2. **Application fee – Please have a currently dated check. Checks older than 2 weeks will not be accepted. (see attached CRMC Fee Schedule for Application fee amount).**
3. **Proof of Ownership.** The CRMC requires a letter from the local tax assessor stating ownership of the property.
4. A completed and signed **CRMC Building Official letter** stating that a building permit will be issued upon receipt of a CRMC permit, with the exception of recreational boating facilities.
5. Supply **photos of coastal feature construction site.**

In addition, where these additional items are applicable, they are also required:

- a. Affirmation that the proposed structure will be serviced by municipal sewers. (For large projects, local community approval and construction details of the tie-in are required).
- b. An approved Onsite Wastewater Treatment System (OWTS) permit from DEM/OWTS, 291 Promenade Street, Providence, RI, 02908; phone (401) 222-2306.
- c. An approved "Change of Use" permit from DEM/OWTS is required in un-sewered areas when an increase in the number of bedrooms, an increase in "flow units", or a change from season to year-round use is proposed.

Your application receives a thorough review by our staff biologists and engineers during which they may require additional information to complete their review. If this becomes necessary you will receive a separate information request form.

You are urged during this process to be as complete as you can in fulfilling all informational requirements. In addition, you are also urged to adhere as closely as you can to all the Coastal Resources Program requirements. Failure to do so could cause delays in processing your application.

We thank you for your cooperation in this matter and look forward to working with you in protecting our coastal environment.