

STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.:

Docket No. D-13-51

**RHODE ISLAND FAST FERRY, INC.’S
REPLY TO THE TOWN OF NEW SHOREHAM AND
INTERSTATE NAVIGATION COMPANY D/B/A THE BLOCK
ISLAND FERRY’S OBJECTION TO ITS MOTION FOR EXTENSION**

Rhode Island Fast Ferry, Inc. (“RIFF”) hereby submits the following in response to the Town of New Shoreham (“the Town”) and Interstate Navigation Company d/b/a The Block Island Ferry’s (“Interstate’s”) objection to RIFF’s request to extend the compliance date for the conditions set forth in the Division of Public Utilities and Carriers’ (“Division’s”) September 22, 2016 Decision and Order granting RIFF a certificate of public convenience and necessity (“CPCN”) to operate a “fast ferry” service between Quonset Point, North Kingstown, Rhode Island and Old Harbor, Block Island, Rhode Island.

ARGUMENT

In the Town and Interstate’s objection to RIFF’s extension request, both parties make the following identical assertions: (1) The Division lacks jurisdiction to grant RIFF’s request and (2) RIFF has failed to establish “just cause” for the requisite extension. Because each contention raised is incorrect and unsupported, the Division should grant RIFF’s extension request.

1. The Division Has Jurisdiction To Grant RIFF’s Extension Request.

It is extremely puzzling that the Town and Interstate now contend that the Division lacks jurisdiction to grant RIFF’s extension request when approximately a year ago, both parties argued to the Superior Court that it was *only* the Division that had jurisdiction to grant an extension of the compliance period set forth in the Division’s September 22, 2016 Order granting

RIFF a CPCN. *See* Town and Interstate’s Objection, dated September 5, 2017, attached hereto as **Exhibit A**.

As the Division may remember, approximately a year ago, RIFF filed a motion to stay with the Superior Court, asking the Court to stay the conditions’ compliance period set forth in the Division’s September 22, 2016 Order. *See* RIFF’s Motion to Stay, dated August 28, 2017, attached hereto as **Exhibit B**. Predictably, both the Town and Interstate objected, arguing without exception that the “Superior Court does not have jurisdiction to grant a stay of the [Division’s] conditional order[.]” *See* **Exhibit A**. Now, a year later, the Town and Interstate, argue that the complete opposite is true, that the Superior Court, not the Division, has jurisdiction to determine whether an extension on the conditions’ compliance period should enter.¹

RIFF contends that the Division has retained jurisdiction to grant its extension request. After a hearing on whether the Superior Court and/or the Division had the authority to grant an extension and/or stay of the one (1) year compliance date set in the Division’s September 22,

¹ Additionally, Interstate asserts that to seek a continuance from the Division, RIFF should have first asked the Superior Court to remand this matter to the Division for the purposes of hearing and ruling on RIFF’s extension motion. It should be noted that Interstate cites to R.I. Gen. Laws § 42-35-15(e), to support this contention. *See* Interstate’s August 29, 2018 Objection (“Interstate’s Objection”), at 1. R.I. Gen. Laws § 42-35-15(e) provides:

If, before the date set for the hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

This statute does not apply to the matter presented by RIFF’s Motion. RIFF is not requesting the Division modify its findings and decision by reason of additional evidence. Moreover, the relevant statute ignored by the objectors expressly authorizes the Division to grant a stay of its compliance conditions, pending an appeal. *See* R.I. Gen. Laws § 42-35-15(c)(“*The agency may grant, or the reviewing court may order, a stay upon the appropriate terms*”) (emphasis added).

2016 Order, by agreement of the parties, the Superior Court ordered that such a request be remanded to the Division “for the purpose of deciding RIFF’s request for a continuance of the time period for RIFF to complete the requisite conditions precedent to the issuance of a CPCN pursuant to the [Division’s] order of September 22, 2016.” *See* Superior Court Order, dated September 12, 2017, attached hereto as **Exhibit C**. This Order was and remains the law of the case. Additionally, in the Division’s September 22, 2016 Order, the Division specifically stated that “[c]ontinuances may be granted *by the Division* for just cause.” *See* Division Order No. 22548, dated September 22, 2016, at 142. RIFF has precisely followed the Division’s guidance. Accordingly, pursuant to the Superior Court’s September 12, 2017 Order and the Division’s September 22, 2016 Order, RIFF correctly and appropriately filed its recent motion with the Division requesting an additional extension of the compliance date set in the Division’s September 22, 2016 Order.²

2. RIFF Has Established That Just Cause Exists For The Division To Grant Its Extension Request.

The Town asserts that RIFF has failed to establish “just cause” for the requested extension, and Interstate contends that no legal impediment exists to prevent RIFF from meeting the conditions set forth in the Division’s September 22, 2016 Order. *See* Town’s Objection, at 1 & Interstate’s Objection, at 2. Both parties are incorrect.

² Interstate’s Objection states “[s]hould RIFF wish to remedy this error, Interstate would not oppose a motion to remand this matter from the Superior Court to the Division for the limited purpose of hearing RIFF’s Motion to Extend.” Interstate’s Objection, at 2. There is no need to go back to the Superior Court when the Superior Court has already found that the Division can determine whether an extension of compliance conditions are warranted. *See* **Exhibit C**. However, out of an abundance of caution and so as to expedite this review, RIFF has concurrently filed a motion to stay the Division’s September 22, 2016 compliance date with the Superior Court, to ensure that all of RIFF’s rights are protected.

RIFF has done everything in its power to expedite the appeal. RIFF was prepared to move forward on the appeal a year ago; however, it was the actions of Interstate and the Town that effectively prevented the Superior Court from hearing the appeal. The Town and Interstate, it will be recalled, demanded that a remand hearing take place at the Division, to consider – yet again, whether RIFF had a reasonable likelihood of securing adequate dockage in the Old Harbor, Block Island.

As is obvious from the moment that the Town and Interstate appealed the Division's Order granting RIFF a CPCN, they have worked tirelessly toward delay. Citing myriad errors at the Division level, the Town and Interstate have successfully delayed the appeal process and have yet to even file their initial appellate briefs, despite the fact that the original appeals were filed in the Superior Court in October of 2016.

Indeed, since the Division granted its previous extension request, the Town and Interstate filed not one, but two, remand motions with the Superior Court, requesting that the Division again address the same dockage issue that the Division previously addressed during the underlying administrative hearing process. The Town and Interstate insisted that the Division conduct evidentiary hearings and present witness testimony regarding the dockage issue that the Division previously addressed in full.³ The Division's Order denying the Town and Interstate's remand request, after expending the time and resources required for a full review and evidentiary hearing related to dockage, only recently issued on July 16, 2018. *See* Division Order No. 23217, dated July 16, 2018, attached hereto as **Exhibit E**.

³ While the dockage issue was on remand, the Petitioners also filed a Motion to Vacate the Division's Final Order granting RIFF a CPCN. On January 25, 2018, the Division denied Petitioners' Motion to Vacate. *See* Division Order No. 23018, dated January 25, 2018, attached hereto as **Exhibit D**.

Therefore, due to delays in the appeal process, RIFF will be unable to satisfy certain conditions in Paragraph 2 of the Division's Order by the Division's one (1) year compliance deadline. In particular, the ability of RIFF to finalize its landing arrangements, secure its lease, purchase or otherwise secure a vessel, satisfy all Coast Guard requirements, fulfill any applicable municipal permitting requirements, secure liability insurance and secure a Division inspection of a vessel will all depend on RIFF securing a final non-appealable decision affirming the Division's Order granting a conditional license to RIFF. These are some of the obstacles preventing RIFF from meeting the conditions included in the Division's September 22, 2016 Order.

As this matter needs to go back before the Superior Court for the filing of appellate briefs, RIFF respectfully requests that the Division extend the deadline set in its September 18, 2017 Order by an additional one year – to September 22, 2019.

3. RIFF Has Not Made Misrepresentations To The Division.

RIFF has not mislead and/or made misrepresentations to the Division. All of the Town and Interstate's allegations that RIFF made alleged "misrepresentations" relate to RIFF's statements regarding the status of the docking facility permitting process. These are the exact identical arguments both the Town and Interstate recently made to the Division on remand, and the Division determined that the Town had failed to prove that RIFF will not be able to operate its proposed ferry service. *See Exhibit E.* Neither the Town's Objection nor Interstate's Objection raise any new issue that was not before the Division when it determined that "[t]here simply is no dispositive evidence on the record that reflects that Bluewater's permit application cases before the CRMC and the ACOE have reached final decisions." *Id.* at 37.

The Town, literally and expressly, relies upon its presentation at the recent hearings and presents nothing new. RIFF, through Bluewater, LLC (“Bluewater”), is still in the process of securing the necessary permits to construct a docking facility in Old Harbor. The Town and Interstate have failed to offer any evidence to prove otherwise.

RIFF acknowledges that it has taken longer than expected for Bluewater to obtain the necessary permits to establish a docking facility in Old Harbor, but that does not equate to Bluewater and RIFF not taking efforts to obtain the necessary permits. In that regard, RIFF incorporates by reference all of the evidence successfully presented to the Division during the March 30, 2018 and April 4, 2018 hearing dates, which evidences the amount of effort both RIFF and Bluewater have taken and are taking to obtain the necessary permits for the Old Harbor docking facility.

The Town and Interstate have far surpassed what would reasonably be required in “taking steps as required by Rhode Island law to protect their interests and ensure the important issues in this matter are fully heard.” This latest objection—and none of the other delay tactics used by the Town and Interstate—are in any way “required by Rhode Island law.” The Town and Interstate continue to unnecessarily delay final briefing on their appeals. The reasons why RIFF requires an additional extension on the compliance is entirely due to the failure of Interstate and the Town to prosecute their appeals of the Division’s CPCN Order with the Superior Court.

CONCLUSION

For the foregoing reasons, RIFF respectfully requests that Division grant its Motion to extend the deadline in its September 18, 2017 Order.

Respectfully submitted,

RHODE ISLAND FAST FERRY, INC.,
By its Attorneys,

/s/ Alan M. Shoer

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Dated: September 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018, I delivered a true copy of the foregoing document via electronic mail to the Parties in this proceeding.

/s/ Alan M. Shoer

EXHIBIT A

HEARING DATE: September 8, 2017

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM and
INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY,
Petitioners,

v.

C.A. No. PC-2016-4758
C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR
Respondents

C.A. No. PC-2017-3405
C.A. No. PC-2017-3409

**OBJECTION OF PETITIONERS TOWN OF NEW SHOREHAM AND
INTERSTATE NAVIGATION COMPANY d/b/a THE BLOCK ISLAND FERRY
TO RESPONDENT RHODE ISLAND FAST FERRY INC.'S MOTION FOR STAY
OF THE ORDER OF THE DIVISION OF PUBLIC UTILITIES AND CARRIERS**

Now come the Town of New Shoreham ("Town") and Interstate Navigation Company ("Interstate"), the petitioners in the above-referenced consolidated cases which are agency appeals, and object to respondent Rhode Island Fast Ferry, Inc.'s ("RIFF") motion for stay of the September 22, 2016 order of Division of Public Utilities and Carriers ("DPUC").

In support of this objection, the petitioners state the following:

The Superior Court does not have jurisdiction to grant a stay of the DPUC's conditional order which granted RIFF a Certificate of Public Convenience and Necessity ("CPCN") to operate a ferry service from Quonset to Old Harbor, Block Island to RIFF.

The Division's order of September 22, 2016 granted conditional approval of RIFF's application for a CPCN subject to the following conditions:

2. That the approval granted herein is subject to the following conditions: Before a CPCN is issued, RIFF must demonstrate to the Division that: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; (2) that it has leased, purchased or otherwise identified the vessel(s) it will use in providing its proposed ferry services consistent with the commitments and evidence presented during this case; (3) that it has satisfied all Coast Guard requirements associated with the provision of its proposed ferry services; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance. **DPUC Order 9-22-16** pp. 141-142.

The DPUC order further states that RIFF shall: "satisfy the conditions contained in "Ordered" paragraph "2," above within one (1) year from the issue date of this Report and Order. Failure to satisfy these conditions within the time specified shall result in the nullification and voiding of the authority granted herein. *Continuances may be granted by the Division for just cause.*" **DPUC Order 9-22-16** p. 142. (Emphasis added)

The jurisdiction to consider and grant a CPCN lies solely with the Division. See R.I.G.L. 39-3-3.1 "Petition for certificate by water carrier – Notice of pendency," and R.I.G.L. § 39-3-3 "Certificate requirement for water carriers." In this case, the Division has granted a one-year conditional order which is subject to being continued upon application to the Division. The Division, upon hearing the bases for the extension request, may grant a continuance; however, the Division does not grant open-ended extensions but rather determines the appropriate length of time for the continuance based upon the facts of the matter before it. The Division may grant additional continuances as it deems appropriate.

The Petitioner seeks a stay of the DPUC Order. As set forth above, the Town and Interstate respectfully submit that the Superior Court does not have jurisdiction to grant such a stay.

Article X, Section 2 of the Rhode Island Constitution provides that the Superior Court "shall have such jurisdiction as may, from time to time, be prescribed by law." As the Supreme Court stated in *State v. Dearmas*, 841 A.2d 659 (R.I.2004): "because our Constitution provides that the Superior Court's jurisdiction and authority is derived from statutes enacted by the Legislature, and that this authority cannot be extended by judicial interpretation, *see Boss v. Sprague*, 53 R.I. 1, 3, 162 A. 710, 711 (1932) (*per curiam*), or by the rules of procedure, *see, e.g., Super. R. Civ. P. 82* ("[t]hese rules shall not be construed to extend or limit the jurisdiction of the Superior Court or the venue of actions therein"), we must look to the statute, not the rule, in interpreting the breadth of the Superior Court's authority..." *Id* at p. 666.

In this case, not only is there no statute which permits the granting of a stay of the Division's order regarding the issuance of CPCN, but such a stay is specifically prohibited by law as provided in R.I.G.L. § 39-3-3 (c) which states: "(c) Notwithstanding any provision of §§ 39-5-1 and/or 42-35-15 or any other provision of the general or public laws to the contrary, no agency nor reviewing court, may order an interlocutory stay of any order of the division with respect to an application entered under § 39-3-3.1, and/or certificate under § 39-3-3.1." (emphasis added)

In addition, § 42-35-15, the statute which specifically gives the Superior Court jurisdiction to hear this case as an administrative appeal, only allows the Superior Court to modify the Division's decision, "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of

constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Affected by other error or law; (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The appropriate manner by which RIFF can seek a continuance from the Division's conditional order granting RIFF a CPCN is through R.I.G.L. 39-3-3.1 (g) which allows the Court to remand the case for further proceedings. Rather than follow the proper procedure, RIFF is improperly attempting to do an end-run around the Division and to obtain that which the Division would not grant, an indefinite continuance of its conditional order.

Although not pertinent to this motion and objection, the Town and Interstate are also compelled to respond to RIFF's repeated allegations to the effect that the Town and Interstate are responsible for delays in this case. This allegation is disingenuous as RIFF refuses to acknowledge its fault in failing to identify its docking facility as previously ordered by the Division. During the proceedings before the Division, the Town was particularly concerned about the docking facility that RIFF proposed to use in Old Harbor. Indeed, the Town filed a summary disposition motion with the Division on the basis that it is the Town's contention that there is no viable docking facility in Old Harbor for RIFF's ferries. On August 11, 2015, the Division issued an order in response to the Town's summary disposition motion and stated: "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." By subsequent order, the Division extended this deadline to September 11, 2015.

RIFF identified three proposed docking facilities by the deadline. These were the three proposed docking facilities which were the subject matter of the Town's investigations, analysis, discovery, review and arguments presented to the Division. Subsequent to the conclusion of the hearings before the Division and subsequent to the issuance of the Division's order, RIFF identified a different docking facility, thereby depriving the respondents of their right to conduct an investigation, discovery and analysis of this facility and of their right to present evidence to the Division regarding this newly proposed facility. Based on this newly identified docking facility the respondents filed a motion to remand which was granted by this Court.

For the foregoing reasons, the respondents respectfully submit that the petitioner's motion for a stay should be denied.

TOWN OF NEW SHOREHAM
By its solicitor

/s/ Katherine A. Merolla
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INTERSTATE NAVIGATION
COMPANY
By its attorneys

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/s/ Leah J. Donaldson, Esq. #7711
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2017
I filed and served this document through the electronic filing system on the following:

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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Katherine A. Merolla

EXHIBIT B

HEARING DATE: SEPTEMBER 8, 2017 AT 9:30AM

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM and
INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

Petitioners,

v.

RHODE ISLAND FAST FERRY, INC.
AND RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISRATOR

Respondents.

C.A. Nos. PC-2016-4758

PC-2016-4804

PC-2017-3405

PC-2017-3409

**RHODE ISLAND FAST FERRY, INC.'S MOTION FOR
THIS COURT TO STAY THE COMPLIANCE DATE SET
FORTH IN THE DIVISION OF PUBLIC UTILITIES' FINAL REPORT
AND ORDER PENDING FINAL JUDGMENT OF THESE CONSOLIDATED CASES**

Rhode Island Fast Ferry, Inc. ("RIFF") hereby moves for an order staying the compliance date set forth in the Rhode Island Division of Public Utilities' ("Division's") September 22, 2016 Report and Order ("Division's Order") granting RIFF a certificate of convenience and necessity ("CPCN") to operate a "fast ferry" service between Quonset Point, North Kingstown, Rhode Island and Old Harbor, Block Island pending final judgment of these consolidated cases.

ARGUMENT

On September 22, 2016, the Division granted RIFF a CPCN to operate a "fast ferry" water carrier of passengers between Quonset Point, North Kingstown, Rhode Island and Old Harbor, Block Island. *See* Division Order No. 22548, dated September 22, 2016, attached hereto as **Exhibit A**. The Division determined that RIFF had satisfied all the requisite requirements of R.I. Gen. Laws §§ 39-3-3 and 39-3-3.1. The Division's Order, however, established that RIFF

must meet certain conditions within one (1) year from the issue date of the Division’s Order. *Id.* at 142 (stating “RIFF shall satisfy the conditions contained in ‘Ordered’ paragraph ‘2,’ above within *one (1) year* from the issue date of this Report and Order. . . . Continuances may be granted by the Division for just cause.”).¹ As discussed below, just cause exists for this Court to grant RIFF’s request to stay the compliance date set forth in the Division’s Order.

On October 12, 2016, the Town of New Shoreham (“Town”) appealed the Division’s Order. On October 14, 2016, Interstate Navigation Company d/b/a the Block Island Ferry (“Interstate”) also appealed the Division’s Order. Therefore, due to the deadlines set in the Division’s Order, RIFF filed a motion requesting an accelerated briefing schedule. *See* RIFF’s Motion for Briefing and Case Management Schedule, dated October 25, 2016. The Town and Interstate (collectively “Petitioners”) objected to RIFF’s Motion for an accelerated briefing schedule, filed motions for additional appellate-level discovery (which were denied) and additionally filed two separate remand motions. Although Petitioners’ original appeals were filed in this Court in October of 2016, Petitioners have yet to file their appellate briefs.

Pursuant to R.I. Gen. Laws § 42-35-15, “[t]he filing of the complaint does not itself stay enforcement of the agency order. The agency may grant, *or the reviewing court may order, a stay upon the appropriate terms.*” R.I. Gen. Laws § 42-35-15(c)(emphasis added). According to Rule 31(e) of the Division’s Rules of Practice and Procedure (“Division’s Rules”), the “Division

¹ Paragraph 2 of the Division’s Order states: “Before a CPCN is issued, RIFF must demonstrate to the Division that: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; (2) that it has leased, purchased or otherwise identified the vessel(s) it will use in providing its proposed ferry services consistent with the commitments and evidence presented during this case; (3) that it has satisfied all Coast Guard requirements associated with the provision of its proposed ferry service; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance.” **Exhibit A**, at 141-42.

retains jurisdiction over all matters until an appeal is docketed in the Superior Court. Once an appeal has been docketed jurisdiction lies in the Superior Court and *any request for relief must be made to the Superior Court.*” Division Rule 31(e)(1)(emphasis added). This Court is therefore vested with the authority to grant the relief requested by this Motion.

Here, RIFF worked diligently to ensure that it would satisfy all the requisite conditions by the Division’s deadline. However, due to delays in the appeal process, RIFF will be unable to satisfy the conditions in Paragraph 2 of the Division’s Order by the Division’s one (1) year compliance deadline. In particular, the ability of RIFF to finalize its landing arrangements, secure its lease, purchase or otherwise secure a vessel, satisfy all Coast Guard requirements, fulfill any applicable municipal permitting requirements, secure liability insurance and secure a Division inspection of the vessel will all depend on RIFF securing a final non-appealable decision affirming the Division’s Order granting a conditional license to RIFF. Petitioners’ vigorously oppose the Division’s Order in this appeal and substantial further delay is anticipated before this appeal process concludes.

For all these reasons, due to the delays that are inevitable given the appellate process, RIFF will be unable to satisfy all the conditions in Paragraph 2 of the Division’s Order. *See Exhibit A*, at 141-42. RIFF did not cause the delays in this appellate process and has done everything in its power to expedite this appeal. RIFF should not be prejudiced by the Petitioners’ repeated motions that have served only to delay a final decision on this matter. Accordingly, just cause exists for the Court to grant this Motion, and given that jurisdiction over the Division’s Order is now with this Court, RIFF brings this Motion to the Court to stay the one (1) year compliance requirement.

CONCLUSION

Because the Court retains jurisdiction over this appeal, RIFF respectfully requests that this Court stay the one (1) year compliance date in the Division's Order until a final judgment enters on the appeal of these consolidated cases. RIFF requests the Court order that RIFF shall have one (1) year from the conclusion of this appeal to comply with the conditions set forth in Paragraph 2 of the Division's Order.

RHODE ISLAND FAST FERRY, INC.
By its Attorneys:

/s/ James A. Hall

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Dated: August 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on August 28, 2017:

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I mailed or hand-delivered this document to the attorney for the opposing party and/or the opposing party if self-represented, whose name and address are:

/s/ James A. Hall

EXHIBIT C

CONSOLIDATED CASES

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2017-3405

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2017-3409

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

ORDER

This matter came on for hearing in the above-referenced consolidated cases on September 8, 2017 before Judge Licht on the Motion of the Rhode Island Fast Ferry, Inc. ("RIFF") for a stay. By agreement of the parties, it is hereby ORDERED:

This case is remanded to the Division of Public Utilities and Carriers for the purpose of deciding RIFF's request for a continuance of the time period for RIFF to complete the requisite conditions precedent to the issuance of a CPCN pursuant to the DPUC order of September 22, 2016.

The parties may submit to the Division position papers on this issue by noon on Friday, September 15, 2017. The parties agree that the Division may decide this issue on the papers filed and need not conduct a formal hearing. The Division shall issue its determination as to any such extension, or denial thereof, by no later than 4:30 PM on Thursday, September 21, 2017.

ENTER:



PER ORDER:



Dated:

9/12/2017

Dated:

9/12/2017

Presented By:

/s/ Katherine A. Merolla
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CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of September, 2017, I filed and served this document through the electronic filing system on the following:

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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Katherine A. Merolla

EXHIBIT D

**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

**(Issued in response to a January 2¹, 2018 Motion to Vacate
Division Order No. 22877 from the Town of New Shoreham and
the Interstate Navigation Company)**

Whereas: On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island (“RIFF”), filed an application with the Rhode Island Division of Public Utilities and Carriers (“Division”) seeking authority to operate as a seasonal “fast ferry” water carrier of passengers between Quonset Point, North Kingstown and Old Harbor, New Shoreham (Block Island). RIFF’s application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a “certificate of public convenience and necessity” (CPCN) by the Division before “water carrier” services can be provided between points within the State.

Whereas: The Division previously issued fifteen (15) 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

¹ Date stamp reflects that the motion was received by the Division on January 8, 2018.

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; Order No. 22183, issued on October 26, 2015; Order No. 22254, issued on December 10, 2015; Order No. 22548, issued on September 22, 2016; Order No. 22823, issued on June 23, 2017; Order No. 22877, issued on September 18, 2017; Order No. 22980, issued on December 13, 2017; and Order No. 23001, issued on January 8, 2018. These fifteen 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 latest outstanding dispute matter, *infra*.

Whereas: In response to the remand order of the Superior Court (See Order Nos. 22823 and 22877, *supra*), the Division conducted a pre-hearing conference on October 20, 2017 for the purpose of defining the scope of the remanded issue before the Division and to adopt a procedural schedule for affording the parties an opportunity to proffer their respective positions and arguments. During that pre-hearing conference, the Division held that the scope of the instant proceeding would be limited to providing the Town with

an opportunity to prove that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the United States Army Corps of Engineers ("USACE") and the Rhode Island Coastal Resources Management Council ("CRMC").² The Division subsequently clarified the scope of the remand proceeding by informing the parties as follows:

[T]he Town shall be 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. Evidence of this prospect must be obvious and compelling, not ambiguous and speculative. The Division will not consider matters of design, environmental impacts or the terms in construction contracts.³

Whereas: After a brief discovery period, the aforementioned remand proceeding now awaits a hearing, whose scheduling is currently being addressed by the parties and the Division's Clerk.

Whereas: Contemporaneous with the instant remand proceeding, the Town of New Shoreham (the "Town") and the Interstate Navigation Company ("Interstate"), parties to the docket, on January 2, 2018, filed a motion to vacate Division Order No. 22877, which previously granted RIFF a one-year continuance, to September 22, 2018, to satisfy the conditions precedent that

² See Order No. 22980

³ Id., pp., 5-6.

were attached to the Division's approval of RIFF's July 2, 2013 CPCN application filing, *supra*.⁴

In their motion, the Town and Interstate argue that "despite repeated promises to do so, RIFF and Bluewater have admittedly failed to submit required permit applications for a docking facility in Old Harbor." The Town and Interstate maintain that "[i]t is disingenuous for RIFF to delay the permitting process before USACE, CRMC, RIDEM and the Town Building Inspector for an unknown period of time, while simultaneously representing to the Division and the Superior Court that the Town and Interstate have not yet proven RIFF's inability to secure a docking facility in Old Harbor."⁵

The Town and Interstate further argue that the "Division should place little or no weight on Bluewater's claims regarding the timing of the permitting and related applications." In support of this argument, the Town and Interstate cite to earlier claims by the consultant/attorney working on Bluewater's application filings, Joseph Corrigan of Kelley Drye & Warren LLP, whereby Mr. Corrigan had advised the Division in November of 2015, "that the permitting process would be complete in 12 to 18 months..."⁶

Whereas: RIFF filed an objection to the Town's and Interstate's motion on January 12, 2018. In its objection, RIFF argues that "[t]his motion is nothing more than a desperate attempt to undue the process and circumvent the remand proceeding that was requested by both Interstate

⁴ See Order No. 22877.

⁵ Motion, pp., 6-7.

⁶ Motion, pp., 7-8

and the Town and ordered by the Superior Court, as it has now been shown that not only does Bluewater have a realistic expectation of constructing a docking facility, but that Bluewater has also been moving forward with that process.”⁷

In further support of its objection, RIFF contends that it has not misled the Division or any other parties. RIFF argues that its “recent discovery responses clearly establish that Bluewater has (and is) working diligently to secure permits for a docking facility for RIFF in Old Harbor.” RIFF also argues that the Town’s and Interstate’s motion to vacate “completely ignores that RIFF’s request for a stay of the compliance period was not based solely on the fact that RIFF had yet to secure a suitable docking facility; rather, RIFF requested the stay because it was unable to satisfy *all* of the conditions listed in the CPCN Order within the original one-year compliance period.”⁸

FINDINGS

The Division has considered the arguments proffered the Town and Interstate in support of their motion to vacate Division Order No. 22877, and RIFF’s objection thereto, and finds insufficient justification to grant such an extreme prayer at this time. Order No. 22877 approved a one-year continuance, or until September 22, 2018 for RIFF to satisfy the conditions attached to the approval of the CPCN that was granted to RIFF in this

⁷ Objection, pp., 1-2.

⁸ Objection, pp., 3-8.

docket. The Division finds that the Town and Interstate have proffered inadequate support to take up this matter again at this time. The evidence and arguments presented by the Town and Interstate can be revisited in the event that RIFF seeks an additional continuance after September 22, 2018.

Accordingly, therefore, it is

(23018) ORDERED:

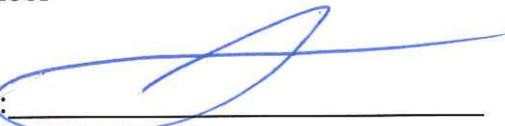
That the Town's and Interstate's January 2, 2018 motion to vacate Order No. 22877, is hereby denied.

Dated and Effective at Warwick, Rhode Island on January 25, 2018.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____



Macky McCleary
Administrator

EXHIBIT E

**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

REPORT AND ORDER

1. Introduction

On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island (“RIFF”), filed an application with the Rhode Island Division of Public Utilities and Carriers (“Division”) seeking authority to operate as a seasonal “fast ferry” water carrier of passengers between Quonset Point, North Kingstown and Old Harbor, New Shoreham (Block Island). RIFF’s application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a “certificate of public convenience and necessity” (CPCN) by the Division before “water carrier” services can be provided between points within the State.

The Division previously issued sixteen (16) 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; Order No. 22183, issued on October 26, 2015; Order No.

22254, issued on December 10, 2015; Order No. 22548, issued on September 22, 2016; Order No. 22823, issued on June 23, 2017; Order No. 22877, issued on September 18, 2017; Order No. 22980, issued on December 13, 2017; Order No. 23001, issued on January 8, 2018; and Order No. 23018, issued on January 25, 2018. These sixteen 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 latest outstanding dispute matter, *infra*.

In response to the remand order of the Superior Court (See Order Nos. 22823 and 22877, *supra*), the Division conducted a pre-hearing conference on October 20, 2017 for the purpose of defining the scope of the remanded issue before the Division and to adopt a procedural schedule for affording the parties an opportunity to proffer their respective positions and arguments. During that pre-hearing conference, the Division held that the scope of the instant proceeding would be limited to providing the Town with an opportunity to prove that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the United States Army Corps of Engineers ("USACE") and the Rhode Island Coastal Resources Management

Council (“CRMC”).¹ The Division subsequently clarified the scope of the remand proceeding by informing the parties as follows:

[T]he Town shall be 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. Evidence of this prospect must be obvious and compelling, not ambiguous and speculative. The Division will not consider matters of design, environmental impacts or the terms in construction contracts.²

2. Hearing and Appearances

After a brief discovery period, the Division conducted two public hearings on this remand matter. The hearings were conducted on March 30, and April 4, 2018 in the Division’s hearing room located at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances:

For RIFF:	Alan M. Shoer, Esq. James Hall, Esq. and Nicole M. Verdi, Esq.
For Interstate Navigation Company (“Interstate”):	Michael R. McElroy, Esq.
For the Town of New Shoreham (the “Town”):	Katherine A. Merolla, Esq.

3. The Town’s Direct Case

In support of its position on the remand issue, the Town proffered the pre-filed testimony of Mr. Marc Tillson, the Town’s Building Official; an affidavit from Mr. Grover Fugate, the Executive Director of the State of Rhode Island

¹ See Order No. 22980

² Id., pp., 5-6.

Coastal Resources Management Council (“CRMC”); and some documentary evidence, *infra*.

Mr. Tillson introduced himself as the Town’s Building Official. He related that he has held this position for 29 years. Mr. Tillson testified that his responsibilities include enforcement of the State Building Code and the Town’s zoning laws, and compliance inspections related to State (RIDEM) and local Town environmental protection laws.³

Mr. Tillson testified that based on the documents that he has reviewed regarding the East Breakwater docking facility that RIFF is planning to utilize, he contends that the construction and use of such docking facility would require approval from CRMC. He bases his opinion on the related plans he has examined, and specifically on the fact that the plans depict a concrete floating dock which connects to a fixed pier that uses a paver walkway to connect to Water Street. Mr. Tillson thereupon asserted that the CRMC will not approve this design without a Building Permit issued from the Town. Mr. Tillson added that the Town would not issue such a permit in this case because the property in issue “lies entirely within a Special Flood Hazard Area.” He contended that “[n]o Building Permit can issue because the Walkway is in violation of the State Building Code.”⁴

Mr. Tillson also testified that RIFF’s proposed docking facility would violate the Town’s zoning laws as well. He explained that “any walkway in that area would be located in the Town’s Coastal Zone,” which, under the Town’s

³ Town (Remand) Exhibit 4, p. 2.

⁴ *Id.*, pp. 3-4.

zoning laws, “does not allow a breach or other disturbance of dunes or dune vegetation...” He testified that the construction “of a two hundred twenty-one foot long walkway irrespective of design in the Coastal Zone is not permitted.”⁵ Mr. Tillson added that such construction would also violate the Town’s zoning laws by its planned location in a “Waterfront Overlay,” (a saltwater harbor).⁶

Mr. Tillson additionally argued that pursuant to the “Right of Entry Agreement” between the Town and the Federal Government, “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.” Due to the existence of this agreement, Mr. Tillson opined that RIFF’s proposed docking facility cannot be constructed without the consent of the Town.⁷

Mr. Fugate’s two-page affidavit, with attachment, reflects that there exists a property lease (“Lease”) between the CRMC and the Town for the breakwater/jetty known as the ‘Red Breakwater’ or the ‘Northern Ell’ within Old Harbor, Block Island.⁸ The affidavit states that “the Red Breakwater is now the property of the State of Rhode Island managed and controlled by the Town pursuant to the Lease.” Mr. Fugate notes that the term of the Lease is from

⁵ Id., p. 4.

⁶ Id., pp. 4-5.

⁷ Id., p. 5.

⁸ Town (Remand) Exhibit 7. The Lease Agreement addressed in Mr. Fugate’s affidavit is attached to the affidavit as an exhibit.

May 2012 through April 2062 and that the Town is responsible for maintaining the Red Breakwater during the Lease term. Mr. Fugate's affidavit also contains the following opinion: "[p]ursuant to State law and CRMC Regulations, any alteration to the Red Breakwater, including constructing a dock attached to it, or anchoring a dock to it, would require an Assent from the CRMC" and that "[t]he Town, as holder of the Lease, would have to consent to any such dock and would have to be a party to any request for such an Assent."⁹

The documentary evidence proffered by the Town as part of its direct case included a January 16, 2018 letter from attorney Jeffrey Gladstone, Esq. to the Town's attorney in this docket, Katherine Merolla, Esq., wherein Attorney Gladstone opines that Paul Filippi is not authorized to sign or act for Ballard's Inn Realty, LLC's real estate and therefore unable to advance Bluewater's planned construction of the docking facility in Old Harbor.¹⁰

Attorney Gladstone also proffered testimony during the April 4, 2018 hearing. He explained that he represents two of the owners of Ballard's Inn Realty. Attorney Gladstone expressed concern with Mr. Filippi's assertion that none of the property associated with Bluewater's planned docking facility crosses onto property owned by Ballard's Inn Realty.¹¹ Attorney Gladstone opined that the land involved is "above the high mark," and accordingly not within the ownership purview of the ACOE.¹²

⁹ Id.

¹⁰ Town (Remand) Exhibit 11.

¹¹ 4/4/18, Tr. 221-223.

¹² Id., Tr. 223.

The documentary evidence also included a September 18, 2015 letter from the manager of Ballard's Wharf Realty, LLC ("BWR"), the owner of the property on which Bluewater plans to develop a docking facility, that states that BWR "has not agreed to allow Bluewater, LLC to utilize BWR's riparian/littoral rights, nor has BWR agreed to allow Bluewater, LLC's proposed pier to connect to BWR's existing marine facility."¹³

4. RIFF's Direct Case

Before it proffered its only witness in this matter, *infra*, RIFF submitted a copy of an April 3, 2018 letter from Bluewater's attorney, Mary Shekarchi, Esq., addressed to the CRMC, which indicated that Bluewater would be "addressing those deficiencies" that the CRMC identified in the application that Bluewater had previously filed with the CRMC.¹⁴

In support of its position in this matter, RIFF proffered the pre-filed testimony of Mr. Paul Filippi, President of Bluewater, Inc. ("Bluewater"). Mr. Filippi testified that the Town's direct case "offers nothing new and is yet another attempt to add costs and create delay by rehashing previously considered matters and/or an attempt to supplant the authority of the ...[ACOE] and ...[CRMC] by asking the Division to make ultimate decisions as to docking facilities in a Federal Navigation Project know [sic] as Old Harbor."¹⁵

¹³ Town (Remand) Exhibit 10.

¹⁴ RIFF (Remand) Exhibit 3.

¹⁵ RIFF (Remand) Exhibit 1.

Mr. Filippi called the Town's arguments "redundant, incorrect, [and] irrelevant" and asserted that the Town's case "far exceeds the scope of this remand proceeding." He cited the following reasons for his opinion:

1. Bluewater's ACOE process is progressing and Bluewater's CRMC application filing is imminent.
2. The assent of the Town is unnecessary and not a requirement to receive a permit from CRMC because the CRMC has State jurisdiction over dock permitting. Similarly, the affidavit of Grover Fugate is irrelevant because Bluewater is not proposing to attach nor anchor a dock to the dock known as the "Red Breakwater."
3. The approval of the Town (via a building permit) is neither necessary nor required for Bluewater to build its docking facility because the ACOE, through Navigational Servitude, has control over the property on which the docking facility will be built.
4. The correspondence of attorney Jeffrey H. Gladstone, dated January 16, 2018 and submitted as a filing with the Town's testimony, is irrelevant to this remand proceeding and does not present facts that would prevent the permitting process for Bluewater's docking facility which is progressing.
5. It is my understanding that aspects of the proposed docking facility related to design is beyond the scope of this remand proceeding and all of the issues raised in the Town's pre-filed testimony and additional filings relate and center around the impact of different design options for the docking facility walkway. The ACOE, however, has design expertise and the ACOE has accepted and is presently reviewing Bluewater's permit filings. Similarly, CRMC will soon undertake design review.¹⁶

In response to Mr. Tillson's testimony, Mr. Filippi testified that Bluewater's ACOE process "is progressing well." He related that Bluewater's engineers and consultants are currently working with the ACOE and its Agency

¹⁶ Id., pp. 1-2

Technical Review (“ATR”) Committee in the context of the ACOE’s “Section 408” application review process. Mr. Filippi also added that Bluewater is “now working on completing its permit application under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, which is planned to be filed imminently and concurrently with Bluewater’s CRMC application.”¹⁷

Mr. Filippi also disagreed with Mr. Tillson’s assertion that a building permit from the Town will be required to gain approval from CRMC. He related that Mr. Tillson took a similar position in 2005 when the Town opposed a dock proposal from Ballard’s Wharf Really, before the CRMC, which turned out to not make a difference in the CRMC’s ultimate approval of the proposed dock.¹⁸

Mr. Filippi similarly rejected Mr. Tillson’s claim that the building permit is required due to the docking facility’s planned walkway’s location in an upland and special flood hazard area. Mr. Filippi contends that the ACOE, through Navigational Servitude, “has supreme authority over this area.” He maintained that the Town does not have veto power over the ACOE.¹⁹ Mr. Filippi also argues that the walkway issue constitutes a “design” matter and is beyond the scope of this remand proceeding.²⁰

Mr. Filippi next criticized Mr. Tillson’s claim that the planned walkway would violate the State’s Building Code. Mr. Filippi related that because the proposed docking facility is on ACOE controlled property, a building permit is

¹⁷ Id., p. 3.

¹⁸ Id., pp. 3-4.

¹⁹ Id., p. 4.

²⁰ Id.

not required. He explained that the Town does not have any jurisdiction over ACOE property. Mr. Filippi also argued that because “any building code issue inherently and inescapably relates to design,” such matter would be outside the scope of the instant proceeding.²¹ Mr. Filippi buttressed his argument by citing to a case of the recently built Ballard’s Wharf Marina, another project where the Town refused to grant an electrical permit; he related that the State’s Electrical Inspector’s Office ultimately issued the appropriate permits over the Town’s objections.²²

In response to the Town’s objection to the walkway on zoning grounds, Mr. Filippi, again, contended that because this property is under the control of ACOE the Town’s Zoning Ordinance does not apply. He again asserted that this is a “design” issue, which is beyond the scope of the Division’s remand proceeding.²³

Mr. Filippi also addressed the Town’s “Right of Entry Agreement” argument by reiterating his opinion that the Town has no jurisdiction over the property in issue. He also described this issue as another matter related to “design,” which is off-base in this proceeding.²⁴

With respect to Mr. Fugate’s affidavit, Mr. Filippi emphasized that Bluewater is not proposing to build or anchor its docking facility at the “Red Breakwater” or the “Northern Ell,” which is location addressed by Mr. Fugate.

²¹ Id.

²² Id., p. 5.

²³ Id., pp. 5-6.

²⁴ Id., p. 6.

Mr. Filippi also noted that the “validity” of the property lease between the Town and CRMC “is disputed.”²⁵

Mr. Filippi next addressed the letter from Attorney Jeffrey Gladstone, regarding the appointment of a special master. Mr. Filippi stressed that Attorney Gladstone is not the Special Master in the “complex trust litigation” involving him and members of his family. Although he argues that the Special Master issue “is entirely irrelevant to this proceeding,” Mr. Filippi related that he has been and continues to be “a manager in Ballard’s Inn Realty, LLC and Bluewater has been keeping the Special Master up to date regarding dockage proceedings to which there has been no notice of objection.” Mr. Filippi insists that Bluewater has the authority to proceed with the dockage permitting process.²⁶

As a final matter, Mr. Filippi called the September 18, 2015 letter from his brother Blake Filippi, which the Town has reintroduced in this remand proceeding, no longer accurate and outdated. Mr. Filippi points out that when Blake Filippi wrote that letter he was the manager of Ballard’s Wharf Realty, LLC, which is not the case today. Mr. Filippi also observes that the 2015 letter was offered at the time in reference “to ingress egress design aspects of the project and does not offer any obvious and compelling material information which proves RIFF will be unable to operate its proposed ferry service from a Bluewater docking facility in Old Harbor.”²⁷

²⁵ Id., p. 7.

²⁶ Id., p. 8.

²⁷ Id., pp. 8-9.

In his concluding remarks, Mr. Filippi described the Town's case as "old arguments," offered "with the goal of protecting, it seems to me, the 85-year-old monopoly ferry service... to the detriment of the public and inconsistent with the Division's grant of a license to RIFF." Mr. Filippi asserted that Bluewater "has moved diligently forward on all fronts, despite unyielding futile attempts by the Town and Interstate Navigation Company to slow our progress."²⁸

Under cross-examination by the Town, Mr. Filippi was asked to explain the meaning of a letter that ACOE sent Bluewater on November 28, 2016. The Town maintains that the letter reflects that ACOE will not approve Bluewater's planned docking facility without the Town's consent.²⁹ However, Mr. Filippi took exception to the Town's characterization of the ACOE letter. He explained that the ACOE letter only relates to the "east wharf and bulkhead" and not the "entire federal navigation project."³⁰ Mr. Filippi opined that for the Town's consent to apply to the entire federal navigation project three requirements must be present. Specifically, he related that the Town's consent would only be necessary if the "project was authorized after November 17, 1986... involved certain flood protection projects... and that the project... be located in inland or intercoastal waterways...." Mr. Filippi proclaimed that none of those conditions are present here.³¹

The Town next questioned Mr. Filippi on the response letter that Bluewater's attorney sent ACOE on May 15, 2017. The Town was particularly

²⁸ Id., pp. 9-10.

²⁹ 4/4/18, Tr. 130; and Town (Remand) Exhibit 12.

³⁰ Id., Tr. 130-134.

³¹ Id., Tr. 134-136.

interested in Bluewater's claim that "[n]either the docks nor the path cross any real estate other than that owned by the applicant's family...."³² Mr. Filippi responded that this assertion is true with respect to the Mount Hope (East Breakwater) dock and the property owned by Ballard's Wharf Realty, not Ballard's Inn Realty.³³

The Town and Mr. Filippi also disagreed on the issue of whether the "federal navigational servitude" in this matter lies below or above the mean high-water mark. Mr. Filippi maintained that the entirety of Old Harbor "is a federal navigation project that was created by the Army Corps." He testified that the "ordinary high-water mark is the historical natural high-water mark." He added: "so the pedestrian pathway that you're so concerned about lies below, even though it is dry land, it lies below the ordinary high-water mark and is subject to navigational servitude."³⁴

The Town also questioned Mr. Filippi about a representation contained in Bluewater's May 15, 2017 letter to the ACOE that stated that Paul Filippi was authorized to sign documents on behalf of both Ballard's Inn Realty and Ballard's Wharf, LLC. Mr. Filippi responded that he did not have permission from the Ballard's Inn Realty's Special Master to make that representation and has since instructed his "consultants" to correct the error.³⁵

The Town next cross-examined Mr. Filippi regarding a June 22, 2017 reply letter from ACOE that was sent to Bluewater in response to Bluewater's

³² Id., Tr. 137-138; and Town (Remand) Exhibit 13.

³³ Id., Tr. 138-142.

³⁴ Id., Tr. 141-142.

³⁵ Id., Tr. 146-153; and Town (Remand) Exhibit 8.

May 15, 2017 letter. The Town called Mr. Filippi's attention to a part in the letter that provides that "the proposed alterations will require evaluation and separate permitting by the Corps Regulatory Division pursuant to... Section 10 of the Rivers and Harbors Act of 1889 and Section 404 of the Clean Water Act... [and that] [t]he subject Section 404 evaluation cannot be completed without the required NEPA coordination which must also be completed by the district's Regulatory Division."³⁶ In response to the Town's request for a status report regarding this necessary filing with ACOE, Mr. Filippi related that Bluewater is preparing the filing and will file it with the ACOE when it files its related "complete application" with the CRMC. Mr. Filippi reasoned that "it's the policies of both agencies that the applications be filed concurrently."³⁷

The Town also sought clarification from Mr. Filippi on whether Bluewater's CRMC filing was a "preliminary determination" or "full application." Mr. Filippi responded that Bluewater had filed a preliminary determination on March 2, 2018 based upon CRMC's suggestion that applicants file for a preliminary determination before filing a full application. Mr. Filippi also confirmed that Bluewater has not filed its full application yet.³⁸ Mr. Filippi additionally acknowledged that a representation contained in Bluewater's preliminary determination filing with the CRMC concerning dredging materials is not accurate and needs to be corrected.³⁹

³⁶ Id., Tr. 153-155; and Town (Remand) Exhibit 14.

³⁷ Id., Tr. 155-157.

³⁸ Id., Tr. 164-165.

³⁹ Id., Tr. 166-174.

Mr. Filippi was also questioned by the Town with respect to the “Notice of Deficient Application” that Bluewater received from the CRMC on March 29, 2018.⁴⁰ The Town focused on the observation that Bluewater had failed to provide proof of ownership or proof of access rights to the “upland” property where the proposed docking facility is to be constructed. However, Mr. Filippi asserted that Bluewater does have access rights to the property through a lease agreement “for the riparian rights that coincide with Lot 158” that he acquired from his mother and Ballard’s Wharf Realty. Mr. Filippi also noted that he is the current manager of Ballard’s Wharf Realty.⁴¹ In further explanation of what Bluewater is doing to advance its cases before the CRMC and ACOE, Mr. Filippi offered the following:

There is a lease from Marion Filippi to Bluewater, LLC for the riparian rights to Lot 158 for the purpose of wharfing out Old Harbor. Furthermore, under the 408 application that we’ve made to the... [ACOE], we’ve applied as a private entity to use certain portions of the federal navigation project that the... [ACOE] owns and that’s where Bluewater believes that we will have the rights to wharf out per the 408 request to the... [ACOE], and I believe that that’s one of the things that we will need to address with the CRMC at an early time because I don’t think that they’re aware of the... esoteric 408 process and what it entails.

The federal government has asked us in order to proceed with their NEPA analysis to file the Section 10/404 concurrently with the CRMC and that’s what we have been preparing since last fall.⁴²

⁴⁰ Town (Remand) Exhibit 2.

⁴¹ Id., Tr. 175-179.

⁴² Id., Tr. 179-180.

[B]ack in June of '18 [sic], the project manager for Block Island Old Harbor, Mike Elliott, went on extended sick leave until the end of August. So that held us back a few months. Then there was a new guy, Mr. Bell, who was appointed to be the project manager, and at the end of August he asked us to file the Section 10/404 and the CRMC permit. So since that time, we've done a lot of work. We did a bathymetric survey of Old Harbor, we spent tens of thousands of hours on engineering documents that were drawn up by St. Jean Engineering in preparation for the Section 10/404. So even though the Army Corps asked us to submit the Section 10/404 so they could proceed with the 408, it's taken time to get that material together so we can file a viable concrete application with the Army Corps and the CRMC at the same time.⁴³

Also, with respect to the March 29, 2018 "Notice of Deficient Application," the Town asked Mr. Filippi how he plans to continue with his plans if the "CRMC requires the Town approval to move forward with the east breakwater docking facility." On this point, Mr. Filippi contended that "the CRMC's biologist got that wrong" and that Bluewater does not need the Town's approval to move forward with its plans.⁴⁴

On redirect examination, Mr. Filippi testified that Bluewater will be submitting additional information to the CRMC in response to its notice of deficiency.⁴⁵ He added that Bluewater also plans to "educate them on the process... with the Army Corps..."⁴⁶

He also explained that Bluewater does not believe that the Town's consent is required since "the entire area of this project is under the

⁴³ Id., Tr. 181-182.

⁴⁴ Id., Tr. 184-185.

⁴⁵ Id., Tr. 187, 189-191.

⁴⁶ Id., Tr. 187-188.

navigational servitude which is controlled by the... [ACOE] and we've applied to the... [ACOE] under the 408 process to use those portions of the federal navigation project, the portions that are beyond the ordinary high tide mark, all of them, to fulfill the goals of this project."⁴⁷

Mr. Filippi also clarified why he believes the CRMC staff person has interpreted the Right of Entry Agreement improperly. He testified that the Right of Entry agreement "was for the Army Corps to be able to repair the jetty after Hurricane Sandy." Mr. Filippi also argued that the Bluewater's proposed docks and pedestrian pathway "will not be interfering with any of the use of the east dock, the bait dock, the beach or the jetty itself."⁴⁸

Mr. Filippi also testified that Bluewater has no plans to "touch" the red stone breakwater. He related that there is no plan to wharf "off of it." He explained that Bluewater's plans to build its dock adjacent to the breakwater "on portions of the federal navigation project that are owned and controlled by the... [ACOE]." He testified that this proposal is part of "the 408 process."⁴⁹

Mr. Filippi added that he has had experience with obtaining authority from the CRMC for construction activities without the Town's consent. He described a 2005 project, which was also adjacent to the red stone breakwater, wherein he rebuilt a bulkhead and put in a recreational marina over objections

⁴⁷ Id., Tr. 189.

⁴⁸ Id., Tr. 191.

⁴⁹ Id., Tr. 192.

from the Town. He testified that he expects the same result in the instant matter.⁵⁰

Mr. Filippi also addressed the Special Master's concerns in this case. He related that the Special Master mastership is over the operations of Ballard's Inn Realty, LLC. Mr. Filippi opined that Bluewater does not need permission from the Special Master to complete its plans because the real estate involved in this project "does not involve the real estate owned by Ballard's Inn Realty."⁵¹

5. The Town's Rebuttal Case

In response to RIFF's direct case, the Town proffered a rebuttal filing on February 21, 2018. The filing consisted of pre-filed rebuttal testimony from Edward L. Roberge, the Town's current Town Manager; pre-filed rebuttal testimony from Nancy Dodge, the Town's former Town Manager; pre-filed rebuttal testimony from Marc Tillson, the Town's Building Official; an affidavit from Stephen F. Del Sesto, identified as the Court-appointed Special Master of Ballard's Inn Realty, LLC; and the affidavit of Steven Filippi, a member of Ballard's Wharf Realty, LLC.

Town Manager Edward Roberge, testified that he disagrees with Mr. Filippi's claim that because Bluewater does not plan on attaching or anchoring its proposed docking facility to the Red Breakwater, that the consent of the Town is not required. Mr. Roberge observes that Article V, Paragraph A of the Lease Agreement between the Town and CRMC "specifically gives the Town the

⁵⁰ Id., Tr. 193-195.

⁵¹ Id., Tr. 202-203.

right to erect such docks and other structures on or near the Red Breakwater...” He explained that Bluewater’s planned “Red Jetty Dock” will be less than 15 feet from the Red Breakwater and parallel to it. Mr. Roberge contends that because Bluewater’s dock “would block any dock which the Town has the right to erect and use at that location,” the Town’s consent must be required.⁵²

Mr. Roberge also testified that Article IV, Paragraph A of the Lease Agreement requires that the Town maintain the Red Breakwater in good order and repair. He maintained that because the proposed dock “would block and limit the Town’s ability to maintain the Red Breakwater,” the Town consent would be required.⁵³

Mr. Roberge noted, while under cross-examination, that the Lease Agreement does not contain a definition for the word “near” or reflect that the Town has an “exclusive right to erect a sign, dock or other structure on or near the red breakwater.”⁵⁴ He also admitted that he does not have specific experience in maintaining docks “on an ocean.”⁵⁵ Mr. Roberge also acknowledged that the CRMC will have an opportunity to consider the Town’s concerns during its review of Bluewater’s application.⁵⁶

Former Town Administrator, Nancy Dodge, testified regarding the “Right of Entry Agreement” that exists between the Town and the federal

⁵² Town (Remand) Exhibit 1, p. 2.

⁵³ Id., p. 3.

⁵⁴ 3/30/18, Tr. 37-39.

⁵⁵ 3/30/18, Tr. 36-37.

⁵⁶ 3/30/18, Tr. 40-42.

government.⁵⁷ She began her testimony by criticizing Mr. Filippi's assertion that this agreement has already been considered by the Division in a previous proceeding. She characterized his claim as "pure fiction," based on the fact that this agreement only came into existence on September 16, 2016, which she points out was "long after the hearing before the Division concluded."⁵⁸

Ms. Dodge related that she was involved in the negotiations that took place between the Town and the federal government regarding the Right of Entry Agreement. She maintains that during those negotiations the federal government agreed with the Town's proposal to prohibit "any person or entity to construct any structure which would 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." She testified that this support from the federal government is memorialized in the Right of Entry Agreement.⁵⁹ Therefore, Ms. Dodge asserts that the Town's consent would be required for the construction of Bluewater's proposed East Breakwater docking facility. She opined that the proposed docking facility "would clearly and obviously impede and restrict the Town and the public's access" to the areas in issue around the proposed docking facility.⁶⁰

Ms. Dodge next discussed the Town's ability to issue building permits for the construction of the proposed dock. On this matter, Ms. Dodge contends that Mr. Filippi "clearly does not understand the law as it pertains to state and

⁵⁷ Attached to Town (Remand) Exhibit 4.

⁵⁸ Town (Remand) Exhibit 3, p. 2.

⁵⁹ Id., p. 3.

⁶⁰ Id., p. 4.

local ability to regulate federal land.” Ms. Dodge testified that as an attorney who has practiced in the area of real estate law, she can say that there is no federal preemption in this case that would bar the Town from enforcing its zoning laws.⁶¹

Ms. Dodge also testified that Bluewater’s reliance on the River and Harbors Act of 1870 is misplaced. She testified that the “Act does not express any congressional intent regarding the use of the breakwater...”⁶²

During cross-examination, Ms. Dodge conceded that she was not testifying in this docket as an expert witness. She related that her testimony was based on her former position as the Town’s Administrator as well as her legal opinion in her capacity as an attorney.⁶³ She also admitted to not having reviewed the amendments that have been made to the Rivers and Harbors Act since its original enactment in 1870.⁶⁴

Mr. Marc Tillson also submitted rebuttal testimony. His testimony was proffered in response to Mr. Filippi’s claim that the Town is prohibited from regulating “the upland” (areas of land above the mean high-water mark) in this matter. Echoing Mr. Roberge’s and Ms. Dodge’s testimony, Mr. Tillson argued that the Town is not prohibited from enforcing its zoning laws with respect to the upland area adjacent to the proposed dock facility.⁶⁵

⁶¹ Id., p. 5.

⁶² Id.

⁶³ 3/30/18, Tr. 68-69.

⁶⁴ 3/30/18, Tr. 54-57.

⁶⁵ Town (Remand) Exhibit 5, pp. 2-3.

Mr. Tillson also disagreed with Mr. Filippi's characterization of what transpired during the CRMC assent process for the Ballard's Wharf Realty, LLC eight boat slip marina. Mr. Tillson testified that contrary to Mr. Filippi's recollection, the Town did not intervene or object to that project.⁶⁶

Mr. Tillson also took exception to Mr. Filippi's assertion that the Town's objections regarding the proposed docking facility are all limited to design. Mr. Tillson related that the proposed walkway of the East Breakwater docking facility does not qualify for permitting for construction "irrespective of design."⁶⁷

The affidavit of Steven Filippi was proffered by the Town to refute Paul Filippi's claim that he is the current manager of Ballard's Wharf Realty, LLC. Mr. Steven Filippi related that he is a member of Ballard's Wharf Realty, LLC and that it is his understanding that the current manager of Ballard's Wharf Realty, LLC is Blake Filippi, not Paul Filippi.⁶⁸

The affidavit of Attorney Stephen Del Sesto was proffered by the Town to refute Mr. Filippi's testimony that the Special Master appointed by the Superior Court is aware of plans to construct a docking facility and is not opposed to the project. Attorney Del Sesto identified himself as the Special Master of Ballard's Inn Realty, LLC. He related that as Special Master, Ballard's Inn Realty must obtain his permission to "engage in any transaction that is outside of the ordinary course of business or enter into any agreement regardless of whether

⁶⁶ Id., p. 3.

⁶⁷ Id.

⁶⁸ Town (Remand) Exhibit 9.

such agreement is within the ordinary course of business.”⁶⁹ Attorney Del Sesto related that he has had a few “general conversations with Mr. Paul Filippi regarding the proposed dock project” and has “not taken any substantive position regarding this project and I have not come to terms with Bluewater or Mr. Paul Filippi on even a preliminary basis as to whether or not Ballard’s Inn Realty would provide any of the consents required for the docking facility to be constructed.”⁷⁰ Attorney Del Sesto also opined that formal Court approval would be required in order for him to grant such authority.⁷¹

6. The Town’s Final Position

The Town submitted a post-hearing memorandum in this matter on May 21, 2018. In its memorandum, the Town maintains that it has proffered sufficient evidence to show that RIFF “does not have a reasonable expectation of obtaining a docking facility in Old Harbor and, consequently, the Division should vacate its previous decision granting RIFF a CPCN. The bases for the Town’s assertion rests in the testimony of several witnesses and documentary evidence from the CRMC and the ACOE. The Town offered a summary of this evidence in its memorandum.

Starting with the testimony of Edward Roberge, Town Manager, the Town contends that Mr. Roberge’s testimony demonstrates that Bluewater’s proposed Red Breakwater dock lies less than 15 feet from the Red Breakwater and parallel to it. This proximity is important in that the Town asserts that the

⁶⁹ Town (Remand) Exhibit 8.

⁷⁰ Id., p. 1.

⁷¹ Id., pp. 1-2.

Lease Agreement between the CRMC and the Town, *supra*, specifically gives the Town the right to erect such docks and other structures “**on or near** (emphasis in original) the Red Breakwater as the Town shall deem desirable.” The Town stresses that the Lease also requires the Town to maintain the Red Breakwater. The Town argues that because the proposed dock would block any dock which the Town has the right to erect and use in that location and impede the Town’s ability to maintain the Red Breakwater, the CRMC will not approve the construction of Bluewater’s proposed dock without the Town’s consent. In support of this argument, the Town further relies on the “CRMC Notice of Deficient Application” and the Affidavit that was offered by the CRMC’s Executive Director.⁷²

The Town also relies on the testimony of Nancy Dodge, the Town’s former Town Manager. Ms. Dodge explained that the September 16, 2016 Right of Entry Agreement between the Town and the ACOE prevents any person or entity from constructing any structure which would restrict 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. Ms. Dodge asserted that due to this Right of Entry Agreement, Bluewater needs the Town’s consent to construct its planned docking facility near the East Breakwater.⁷³

Ms. Dodge also weighed in on the what the CRMC’s March 29, 2018 Notice of Deficient Application means to the Town. She maintains that this

⁷² Town Memorandum, pp. 6-9 and Town (Remand) Exhibits 2 and 7.

⁷³ *Id.*, pp. 9-11.

Notice 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.⁷⁴

The Town additionally points to the testimony of its Building Official, Mark Tilson. Mr. Tilson testified that the Town's consent is required before Bluewater can build its planned East Breakwater docking facility. He based his opinion on his belief 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 explained that the Town would not issue a building permit in this case "because the proposed walkway is in violation of the State Building Code."⁷⁵

Mr. Tilson also agreed with Nancy Dodge regarding the Right of Entry Agreement between the Town and the Federal Government. He agreed that the construction of the proposed docking facility would impede 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.⁷⁶

Finally, the Town calls into question the seriousness and efficacy of Bluewater's efforts to get permission from the CRMC and the ACOE to build its docking facilities. The Town relies, in part, on the following observations and

⁷⁴ Id., pp. 11-12.

⁷⁵ Id., pp. 12-13.

⁷⁶ Id., pp. 13-14.

beliefs derived from Mr. Filippi's testimony and certain specific documentary evidence:

- That other than the November 28, 2016 filing, which the ACOE rejected, Bluewater's has made only one other filing with the ACOE (a May 15, 2017 letter);
- That Bluewater's May 15, 2017 filing with the ACOE and its March 2018 Preliminary Determination filing with the CRMC contained several false representations regarding his authority to provide the necessary consents of Ballard's Inn Realty, LLC;
- That representations made by Paul Filippi in the ACOE and CRMC filings were in direct violation of the Special Master's authority to oversee the activities of Ballard's Inn Realty, LLC;
- That the June 22, 2017 letter from ACOE states that the ACOE will not continue with the Section 408 review unless Bluewater obtains separate evaluation and permitting from the Corps' Regulatory Division pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, which Bluewater has not made;
- That 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; and

- That other than the March 2018 Preliminary Determination filing, which the CRMC rejected, Bluewater has made no other filings with the CRMC.

The Town subsequently submitted a Reply Memorandum to the Division on June 5, 2018. Through this pleading, the Town reiterated its vehement opposition to RIFF's and Bluewater's assertions that Bluewater will be able to construct docking facilities in Old Harbor without the Town's consent. The Town insists that the evidence presented in the instant remand proceeding demonstrates that Bluewater's applications "have been derailed."⁷⁷

7. RIFF's Final Position

RIFF submitted a post-hearing memorandum in this matter on May 21, 2018. After providing a summary of the travel of RIFF's efforts to secure a CPCN, starting with its 2013 filing with the Division, through the instant remand matter, RIFF stressed that the instant remand matter has a very narrow scope. Specifically, RIFF emphasizes that the Division has ordered that the scope of the instant remand proceeding "would be limited to providing the Town with an opportunity to prove that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the... [ACOE] and the... [CRMC]".⁷⁸ RIFF also points out that the Division further clarified this narrow scope by informing the parties that: "the Town shall be required to prove to the Division that RIFF will not be able to operate

⁷⁷ Town Post-Hearing Reply Memorandum.

⁷⁸ RIFF Memorandum, pp. 3-4, citing Division Order 23018, issued on January 25, 2018, 2-3.

its proposed ferry service from a Bluewater docking facility in Old Harbor” and that “[e]vidence of this prospect must be obvious and compelling, not ambiguous and speculative.” RIFF also notes that the Division further ordered that it would “not consider matters of design, environmental impacts or the terms of construction contracts” as part of this review.⁷⁹

RIFF argues that the Town has failed to satisfy its burden in this remand matter before the Division as it did not provide obvious and compelling evidence that RIFF will be unable to operate its proposed ferry service from a Bluewater docking facility in Old Harbor. RIFF argues that the “ACOE and CRMC process have inarguably moved forward” and that the Division should recognize the arguments of the Town “as dilatory and end this attempt... to circumvent the appeal process and to inappropriately use the Division as a means to block further ACOE and CRMC process.”⁸⁰

RIFF argues that the Town has failed to establish that Bluewater’s proposals before the CRMC and the ACOE have been “derailed.” RIFF contends after Bluewater received notice from ACOE on November 28, 2016 that an endorsement from the Town would be required if its proposed docking facility “touches upon the east wharf and bulkhead,” Bluewater elected to propose to use an ‘alternative access’ (an alternative walkway) to the proposed Mount Hope docking facility, “which avoids the need to use the east wharf and bulkhead.”⁸¹ RIFF explains that as a consequence of Bluewater’s decision to

⁷⁹ Id., p. 4, citing Division Order No. 22980, issued on December 13, 2017, 5.

⁸⁰ Id., p. 4.

⁸¹ Id., p. 5 and RIFF Remand Exhibit 1.

use an alternative walkway, the ACOE has now required Bluewater to seek additional review by the Corps' Regulatory Division (pursuant to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act and the National Environmental Protection Act (NEPA)). RIFF argues that Mr. Filippi has testified that Bluewater is now in the process of satisfying this ACOE requirement.⁸² RIFF points to testimony from Mr. Filippi who explained that the Section 10/404 application must be submitted concurrently with its finalized CRMC application; "after CRMC's preliminary review (which is currently in progress)."⁸³ RIFF argues that although "the ACOE permitting process may be taking longer than expected, nothing put forth during the remand hearings demonstrates that Bluewater's ACOE permitting process has been derailed. In fact, the ACOE has not yet issued a decision on Bluewater's Section 408 Application."⁸⁴

RIFF makes a similar argument regarding Bluewater's CRMC permitting process. RIFF notes that Bluewater filed its Preliminary Determination Application with the CRMC on March 2, 2018. RIFF argues that the CRMC's March 29, 2018 "notice of deficient application" "clearly contemplates further CRMC proceedings." As evidence of the contemplated additional proceedings, RIFF points to the two sections contained in the Notice, which, requires Bluewater to submit additional information (regarding ownership rights). RIFF also emphasizes that the Notice also states: "[n]ot supplying it at this time will

⁸² Id., p. 6.

⁸³ Id.

⁸⁴ Id., pp. 7-8.

not prevent your application from being accepted by the CRMC.” Further, RIFF observes that “contrary to the Town’s testimony,” the Notice does not request the “Town Building Official sign-off.”⁸⁵ RIFF also observes that the statements contained in the Notice are requests not requirements, and that the requests were made by a staff member of CRMC, not the full Council of the CRMC.⁸⁶

RIFF contends that the Town is requesting that the Division usurp the authority of the CRMC Council by declaring that Bluewater does not have a realistic expectation of success based on a very preliminary CRMC phase.⁸⁷ RIFF argues that the Town has mischaracterized the substance of the CRMC staff Notice throughout the remand proceedings, when in actuality, “this notice does nothing more than confirm that Bluewater’s CRMC permit process is being reviewed (preliminarily) and is moving forward.” RIFF argues that the record before the Division reflects that Bluewater “intends to submit the required additional information requested by staff.”⁸⁸

RIFF next addresses “a few falsehoods the Town continues to fruitlessly argue.” RIFF starts with the Town’s claim that its consent is required to rebuild the Mount Hope Dock. On this claim, RIFF maintains that the ACOE has jurisdiction over this property, not the Town, and that the viability of the proposal will be determined through the ongoing ACOE process. RIFF argues that because the proposed Mount Hope docking facility is not an application for a new facility, but rather a proposal to re-build the old ACOE dock formally

⁸⁵ Id., pp. 8-10.

⁸⁶ Id., p. 10.

⁸⁷ Id.

⁸⁸ Id., pp. 11-13.

known as the Mount Hope Dock, Bluewater is confident that its proposal has a realistic expectation of approval before the ACOE.⁸⁹

RIFF next argues that notwithstanding the Town's claim to the contrary, neither the Right of Entry Agreement nor the Town's zoning laws negatively impact Bluewater's proposed Mount Hope docking facility. In short, RIFF contends that the Right of Entry Agreement and the Town's zoning ordinance does not give the Town "veto power" over the ACOE's jurisdiction over this docking facility.⁹⁰

RIFF also addresses the Town's claims regarding Ballard's Inn Realty's control over Bluewater's proposed docking facility. RIFF argues that neither Ballard's Inn Realty, LLC nor that company's Special Master has anything to do with Bluewater's proposed docking facility. Relying on Mr. Filippi's testimony, RIFF contends that "the path proposed for the east breakwater dock does not cross land owned by Ballard's Inn Realty."⁹¹

RIFF similarly argues against the Town's claim that its consent is required to extend the proposed Red Breakwater docking facility. Regarding this claim, RIFF notes that the proposed Red Breakwater docking facility "simply extends what is currently in place today in the same proximity to the Red Breakwater as previously permitted by CRMC."⁹² RIFF argues that the lease between CRMC and the Town limits its discussion to the Town's rights over the Red Breakwater. RIFF observes that this lease "specifically defines

⁸⁹ Id., p. 14.

⁹⁰ Id., pp. 14-19.

⁹¹ Id., pp. 19-20.

⁹² Id., p. 20.

what it considers to be the 'Red Breakwater' by detailing the coordinates of the property." RIFF argues that neither Bluewater's current dockage directly adjacent to the Red Breakwater nor its proposed extension of this facility are within the property defined by the lease agreement as the "Red Breakwater."⁹³ RIFF also rejects the Town's argument that its consent is required because the proposed docking facility is "near" the Red Breakwater. In response to this argument from the Town, RIFF contends that the Town has failed to support its assertion that 15 feet falls within the definition of "near," especially considering that "the current facility permitted by CRMC, also within the same proximity, is not 'near' the Red Breakwater."⁹⁴ RIFF also rejects the Town's argument that the proposed dock would block and limit the Town's ability to maintain the Red Breakwater in good order and repair. RIFF argues that the Town has offered no support for such a claim.⁹⁵

Finally, RIFF argues that the Town's objections are purely parochial and incompatible with the public interest. RIFF contends that Rhode Law makes the CRMC responsible for regulating the construction of docks, not local cities and towns. Citing Rhode Island Supreme Court precedent, RIFF observes that the Court "warns that 'some cities and towns, acting out of parochial interest, might make it more difficult to get approval to construct docks, thereby

⁹³ Id., p. 20-21.

⁹⁴ Id., p. 21.

⁹⁵ Id., pp. 21-22.

resulting in unreasonable concentrations of docks in some places and too few docks in others.”⁹⁶

RIFF also filed a Post-Hearing Reply Memorandum in this remand matter, which was submitted on June 5, 2018. In this pleading, RIFF takes exception to the Town’s characterization of the details surrounding the Superior Court’s remand decision. RIFF points out that the Superior Court did not order the remand based on the Court’s finding that Bluewater had proposed a “new” docking facility that deprived the Town of an opportunity of its right to be heard. Rather, RIFF contends that the Court has remanded that question back to the Division for evaluation and decision.⁹⁷

RIFF also reiterates its contention that the plans now before the ACOE do not depict a new docking facility, but the originally planned docking facility with an ‘alternative access’ design component. Moreover, RIFF stresses that this “alternative access” option “was specifically and clearly identified in the plan submitted to the Division during the 2015-2016 CPCN proceeding.” RIFF therefore argues that it “did not ‘add new facilities later on’ and RIFF did not use a ‘tactic of switching docking facilities[,] as alleged in the Town’s memorandum and as alleged by the Town to support its remand request.”⁹⁸

RIFF contends that the Town’s efforts in the instant remand matter are designed to steer the Division into making “substantive decisions based upon a preview of the arguments the Town plans to make before the ACOE and CRMC

⁹⁶ Id., pp. 22-23.

⁹⁷ RIFF Post -Hearing Reply Memorandum, pp. 2-4.

⁹⁸ Id., pp. 4-5.

so as to avoid the process before those agencies.” Instead, RIFF argues that the Division must decide if Bluewater’s cases before the ACOE and CRMC have been “derailed,” which, RIFF maintains is clearly not supported in the record.⁹⁹

FINDINGS

In a previously issued 2013 decision in the instant docket, the Division made it clear that it would be impractical to spend any significant time addressing matters related to boat docks. Indeed, this finding was a basis on which the Division limited Interstate’s intervention status in this case and denied Block Island Ferry Services LLC, d/b/a Block Island Express and Intrastate Nav. Company from participating as parties in this docket. The Division made it abundantly clear that it would be deferring totally to the CRMC on such issues.¹⁰⁰

When the Division later considered the Town’s motion for summary disposition in 2015, the focus again was on the issue of docking facilities in Old Harbor. Specifically, the Town questioned whether RIFF had *de facto* access to any docking facility in Old Harbor. The Town argued and insisted that no such docking would be available to RIFF and, therefore, the Division should deny RIFF’s application for a CPCN. When RIFF later identified docking opportunities at planned Bluewater facilities at the Northerly Ell of the stone jetty at the Inner Basin and the former location of the Mount Hope Pier adjacent to the Easterly Breakwater, the Town asserted that the relationship

⁹⁹ Id., pp. 5-9.

¹⁰⁰ See Order No. 21170, pp. 17-18.

between RIFF and Bluewater was a “sham” and should be disregarded by the Division.

From that point in time, the Town went all in on endeavoring to convince the Division that Bluewater (and RIFF) had zero chance of ever developing and constructing a new docking facility in Old Harbor. The Town then, as it does now, argued that its approval and consent would be required in the context of any case before the ACOE and CRMC before Bluewater could legally move forward with its planned docking facilities. In support of its motion for summary disposition, the Town relied then, as it does now, on its 50-year Lease Agreement with the State; an opinion from CRMC’s Grover Fugate (and CRMC staff); CRMC regulations; a competing opinion from another member of the Filippi family; a license agreement with ACOE and ACOE policies; and a claim that Bluewater does not have legal permission to construct a dock from the relevant riparian landowners.

In response to the above-mentioned arguments from the Town, RIFF and Bluewater argued then, as they do now, that Bluewater does not need the Town’s approval to initiate, navigate, or complete either the ACOE or CRMC application process. While Bluewater acknowledges that it has suffered some recent setbacks, Bluewater and RIFF contend that the processes before the CRMC and ACOE remain active and viable. They are confident that Bluewater will prevail.

When the Division denied the Town’s motion for summary disposition in 2015, the Division predicated its decision on a finding that Bluewater’s claims

of interest and ability to construct a docking facility in Old Harbor were “credible.” The Division accepted at the time that the Town would aggressively oppose Bluewater’s permitting applications before the ACOE and CRMC, but rejected that fact alone as sufficient cause to deny RIFF’s application for a CPCN. The Division concluded “that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor....”¹⁰¹ However, if the Town’s opposition to Bluewater’s CRMC and ACOE permitting applications resulted in the “derailing” of Bluewater’s plans, the Division expected the Town to request the Division to revisit the issue of RIFF’s ability to provide its proposed ferry services.¹⁰²

The Town now maintains that it has successfully “derailed” Bluewater’s CRMC and ACOE applications. The Town bases its contention on the grounds previously proffered in its motion for summary disposition, *supra*, and, also, on new arguments regarding Ballard’s Inn Realty, LLC; the need for Town building permits; the Town’s zoning laws; a *Right of Entry Agreement* between the Town and the Federal Government; a March 29, 2018 *Notice of Deficient Application* from the CRMC; and two letters from the ACOE, dated November 28, 2016 and June 22, 2017, regarding Bluewater’s quest to construct a dock on ACOE-controlled property.

Per the Superior Court’s remand order, the Division must decide whether it wishes to revisit the issue of whether RIFF will have access to a docking facility in Old Harbor based on evidence from the Town that

¹⁰¹ See Order No. 22254, p. 22.

¹⁰² *Id.*, pp. 22-23.

Bluewater's efforts to gain permission from the CRMC and the ACOE has been categorically prevented, or "derailed." In clarifying the scope of this remand proceeding, the Division mandated that "the Town shall be 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" and that "[e]vidence of this prospect must be obvious and compelling, not ambiguous and speculative." The Division further ordered that it would "not consider matters of design, environmental impacts or the terms of construction contracts" as part of this review.

The Division has carefully considered the evidence presented by the Town in the instant remand proceeding and finds that the Town has insufficiently demonstrated that Bluewater's pursuit of permission from the CRMC and the ACOE to construct docking facilities in Old Harbor is over - has been "derailed." There simply is no dispositive evidence on the record that reflects that Bluewater's permit application cases before the CRMC and the ACOE have reached final decisions. Instead, what the evidence does show is a Herculean effort by the Town to persuade the Division to accept the Town's position as prophetic and inviolate on the merits of the remaining legal processes before the CRMC and ACOE, which is not the standard that must be applied on this remand matter.

RIFF has presented a copious rebuttal to the many old and new opposition arguments expressed by the Town. The record is replete with this back-and-forth between the two parties. In the final analysis, however, the

Town has failed to demonstrate through “obvious” and “compelling” evidence that Bluewater’s plans to construct a docking facility in Old Harbor have been exhausted. Indeed, even if Bluewater were to be denied a permit by the CRMC and/or the ACOE, the matter would not be irrefutably concluded until after Bluewater’s appellate rights have been exhausted.

As an ancillary issue in this remand proceeding, the Town has argued that the modified docking facility plans now being considered by Bluewater constitute a totally new design that warrants a fresh review by the Division. The Division disagrees. The latest designs being considered by Bluewater are connected to the originally proposed and identified docking facilities. These are not new docking facilities.

Moreover, as emphasized in previous Division decisions, the Division has established a precedent for approving CPCN applications without proof that an applicant already possesses suitable docks. The CPCN approved in this docket will not be issued until after RIFF demonstrates that it has access to suitable docking/landing facilities on Block Island.¹⁰³ It is unreasonable for the Town to continue to urge the Division to revisit the licensing aspect of this docket based on a present lack of demonstrable docking access. The proper time for the Town to raise this issue would be during the Division’s consideration of any further requests from RIFF to extend the deadline for effectuating the start of its proposed ferry services.

¹⁰³ See Order No. 22548, p. 141.

Accordingly, therefore, it is

(23217) ORDERED:

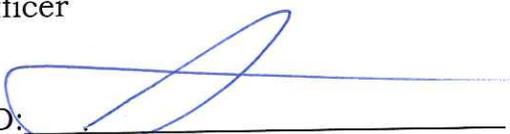
1. That in response to the May 2, 2017 remand order of the Superior Court, and predicated on the findings contained herein, the Division finds insufficient cause to revisit the issues discussed and addressed in the Division's previous decision denying the Town's Motion for Summary Disposition (Order No. 22254, issued on December 10, 2015).
2. That the latest designs being considered by Bluewater do not reflect new docking facilities that warrant additional review by the Division.

Dated and Effective at Warwick, Rhode Island on July 16, 2018.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____


Macky McCleary
Administrator