

**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. POST-HEARING MEMORANDUM

Now comes Rhode Island Fast Ferry, Inc. (“RIFF”) and hereby submits its Post-Hearing (Remand) Memorandum in support of its request for the Rhode Island Division of Public Utilities and Carriers (“Division”) to determine that the Town of New Shoreham (“the Town”) has failed to meet its burden of proving, as it must, that RIFF (through Bluewater, Inc. (“Bluewater”)) does not have a realistic expectation of construction of planned docking facilities in Old Harbor, irrespective of design, through Bluewater’s permit filings with the United States Army Corps of Engineers (“ACOE”) and the Rhode Island Coastal Resource Management Council (“CRMC”).¹

I. BACKGROUND

In 2013, RIFF applied for a Certificate of Public Convenience and Necessity (“CPCN”) with the Division. The Town and a competitor ferry service, Interstate Navigation d/b/a The Block Island Ferry (“Interstate”) intervened, objected and opposed RIFF’s application throughout the licensing process.

During the licensing process, the Town initially moved for “summary disposition,” arguing that RIFF was then unable to establish that it was “fit, willing and able” to perform the services requested because it did not have access to a docking facility. *See* Memorandum in

¹ The Division previously determined 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’).” Division Order, No. 23018, dated Jan. 25, 2018, 2-3.

Support of Motion of the Town for Summary Disposition, dated June 20, 2015, at 2, 5-6. RIFF objected to the Town's summary disposition motion, asserting that it did (and does) have access to a docking facility in Old Harbor, via Bluewater's proposed docking facilities. *See* Opposition of RIFF to Town's Motion for Summary Disposition, dated July 31, 2015.²

Subsequently, the Division denied the Town's summary disposition motion on December 10, 2015. *See* Division Order, No. 22254, dated Dec. 10, 2015. The Division determined that it was "satisfied that Bluewater's claims of interest and ability to construct a docking facility in Old Harbor are credible and that RIFF's access to Bluewater's planned docking facility is satisfactorily demonstrated on the record." *Id.* at 21. Specifically, the Division also noted that:

Though the Division is mindful that the Town plans to aggressively oppose Bluewater's permitting applications before the USACE and the CRMC, the Division finds insufficient justification to deny RIFF an opportunity to pursue its current filing before the Division based on the anticipated opposition from the Town. . . . It is expected that the Town will seek to intervene in the compulsory USACE or CRMC permitting application cases in order to express its opposition to the construction of a new dock in Old Harbor. The Town will undoubtedly inform the Division if it is successful in derailing Bluewater's plans in the preliminary stages of the proceedings scheduled before the CRMC and the USACE. The Division reserves the right to revisit this matter upon such a showing by the Town.

Id. at 21-22. The Division "reserve[d] the right to revisit this matter upon a showing by the Town that it has been *successful* in its efforts to prevent the construction of Bluewater's planned dock before the USACE or CRMC." *Id.* at 23 (emphasis added).

On September 22, 2016, after the conclusion of discovery and final hearings, the Division issued RIFF a CPCN, finding that the proposed service was in the best interest of the

² Attached please find a docking facility plan presented to the Division during the 2015-2016 CPCN proceeding. *See* **Exhibit A**.

state/public. *See* Division Order, No. 22548, dated Sept. 22, 2016. The Town and Interstate appealed the Division’s decision to the Superior Court over a year and a half ago. *See* Superior Court Case Nos. PC-2016-4758 & PC-2016-4804. While the matter was on appeal, the Town moved to remand the matter back to the Division, asserting that because RIFF (through Bluewater) allegedly submitted an alternative docking proposal to the ACOE which was allegedly not approved by the Division, it should be allowed to present “additional evidence which was [allegedly] unavailable to the petitioners during the proceedings before the Division.” Town’s Remand Motion, dated Mar. 10, 2017, 4. RIFF vehemently objected, arguing that nothing of any material consequence had changed with regard to Bluewater’s docking proposal and that because the permitting process was continuing, remanding the matter to the Division was not appropriate, and in fact futile. *See* RFF’s Objection, dated Mar. 17, 2017.

The Superior Court determined, however, that the Division was better suited to make such a determination and that the case was to be “remanded to the Division for the purpose of determining whether the Division will exercise its [reserved] right to revisit this matter pursuant to paragraph four of the Division’s Order of December 10, 2015.” Judge Licht Superior Court Order, dated April 17, 2017. Paragraph four (4) in the Division’s December 10, 2015 Order states: “That the Division reserves the right to revisit this matter upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater’s planned dock before the USACE or CRMC.” *See* Division Order, No. 22254, dated Dec. 10, 2015, 24.

Accordingly, this matter is back before the Division on a very discrete issue. The scope of this remand is limited and narrow. As the Division noted in a recent Order denying the Town and Interstate’s request to vacate RIFF’s license, “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 United States Army Corps of Engineers ('USACE') and the Rhode Island Coastal Resources Management Council ('CRMC')." Division Order, No. 23018, dated Jan. 25, 2018, 2-3.

The Division further clarified the scope of the remand proceeding by informing the parties 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. *Evidence of this prospect must be obvious and compelling, not ambiguous and speculative.*" Division Order No. 22980, dated Dec. 13, 2017, 5 (emphasis added). The Division went on to note that it "will not consider matters of design, environmental impacts or the terms in construction contracts." *Id.* at 6.³

A remand hearing on this limited issue was held on March 30, 2018 and on April 4, 2018. The Town was provided ample opportunity to present evidence. As discussed further below, the Town failed to satisfy its burden as it did not provide obvious and compelling evidence that RIFF will be unable to operate a proposed ferry service from a Bluewater docking facility in Old Harbor. The ACOE and CRMC process have inarguably moved forward. Accordingly, the Division should again recognize the arguments of the Town (and Interstate) as dilatory and end this attempt on behalf of the Town (and Interstate) to circumvent the appeal process and to inappropriately use the Division as a means to block further ACOE and CRMC process. For the benefit of all parties, including the public for who's benefit the CPCN was granted, this matter must be returned to the Superior Court so that briefing can commence and a final decision

³ The Division also specifically stated that it "must make it abundantly clear - in this docket, the Division will not be presiding over a proceeding designed to duplicate the anticipated contested and esoteric proceedings to be adjudicated before the USACE and CRMC." *Id.*

rendered.

II. ARGUMENT

A. The Town Failed to Establish that Bluewater's Proposals Before the CRMC and/or the ACOE have been Derailed.

1. Bluewater's ACOE Permitting Process Continues to Move Forward.

Because Bluewater's ACOE permitting process is inarguably moving forward, the Town has failed to derail Bluewater's planned docking facilities.

Bluewater initially filed a required Section 408 permission request with the ACOE to construct/reconstruct and use two (2) docks in Old Harbor.⁴ On November 28, 2016, the ACOE informed Bluewater that unless the depicted "alternative access" was utilized, to the extent the proposal touches upon the "east wharf and bulkhead," the Town would be a "non-federal sponsor" as to *that portion* of the proposed project and, accordingly, an endorsement from the Town would be needed. See **Town Remand Exhibit 12** (Nov. 28, 2016 ACOE Letter to Bluewater). Although Bluewater disagreed with the ACOE's determination that the Town would be a non-federal sponsor, it elected to propose to only use the "alterative access" in its ACOE application (an alternative walk-way) to the proposed Mount Hope docking facility, which avoids the need to use the east wharf and bulkhead.⁵ See **RIFB Remand Exhibit 1**, May 15,

⁴ Attached as **Exhibit B** is a plan that was attached to RIFF Responses to the Town's Remand Data Request, No. D-1 and incorporated into the record during the remand hearing as **RIFB Remand Exhibit 1**. For consistency purposes, when RIFF refers to the "proposed Mount Hope docking facility," it is referring to the proposal to reconstruct the dock closest to the East Breakwater. When RIFF refers to the "proposed Red Breakwater docking facility," it is referring to the proposed dock that will be built in place of the present and permitted floating dock/fixed pier system and traverse out beyond the Red Jetty. For ease of understanding, counsel for RIFF has labeled **Exhibit B** accordingly.

⁵ It is important to note that Bluewater's supplement of its 408 application to note exclusive use of the alternative access/alternative walkway by no means constitutes Bluewater submitting a "new" docking facility, which is what the Town alleged to a Superior Court Justice in order to

2017 Letter to ACOE from Kelley Drye & Warren LLP.

After satisfying the ACOE initial concern regarding access, by supplementing its proposal so as to depict the use of the alternative access/walkway, the ACOE then reviewed the filing and informed Bluewater that the scope of the proposal (presented in the May 15, 2017 Letter) would require an in-depth evaluation by the “Corps’ Regulatory Division pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.” *See Town Remand Exhibit 14* (June 22, 2017 ACOE Letter to Bluewater). The ACOE further informed that the “subject Section 408 evaluation cannot be *completed* without the required NEPA [National Environmental Protection Act] coordination, which must also be conducted by the District’s Regulatory Division.” *Id.* (emphasis added). Therefore, “in order for [the ACOE] to *continue* evaluating [Bluewater’s] Section 408 request, [the ACOE] require[s] that an [additional] application be submitted to the Corps’ Regulatory Division.” *Id.* (emphasis added).

During the remand hearing, the President of Bluewater, Paul Filippi, testified that the Section 408 process is multi-step, and this request by the ACOE is the next step in the ACOE’s continuing multi-step process. *See* Apr. 4, 2018 Tr. at 181:1-14; *see also* November 20, 2017 Letter from Kelley Drye & Warren LLP, attached in **RIFF Remand Exhibit 1**. Mr. Filippi explained that the Section 10/404 Application must be submitted concurrently with its finalized CRMC application; after CRMC’s preliminary review (which review is currently in progress). *See* Apr. 4, 2018 Tr. at 180:17-21.

initiate this remand. *See* Town and Interstate’s Joint Remand Motion, dated Mar. 10, 2017, 4. In fact, Bluewater merely elected to utilize the same “alternative access” point as presented to the Division in 2015 during the CPCN proceeding. *See Exhibits A & B*.

Although the ACOE permitting process may be taking longer than expected⁶, 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.

To the contrary, the ACOE has requested additional information and clarification so that review could move forward. The ACOE has certainly *not* told Bluewater that it will be unable to build its proposed docking facilities. The only evidence in the record is that Bluewater's ACOE Application is indeed moving forward through the required permitting process. The Section 408 Application was filed. The ACOE reviewed it and subsequently requested that Bluewater submit even more information in the form of both a Section 10 and Section 404 Application, which Bluewater is in the process of preparing and finalizing, concurrently with its finalized CRMC Application. And, as the Town's own witness conceded, there will be several more steps in the ACOE permit process (i.e., public notice, opportunity for public comment, written decision, etc.). *See* Apr. 4, 2017 Tr. at 104:4-12.

Accordingly, Bluewater's ACOE permitting process is moving forward, and the Town

⁶ RIFF does not dispute that the ACOE and CRMC permitting process for Bluewater's proposed docking facilities has taken longer than anticipated. However, delays in the federal navigation permitting process does not equate to derailment. Additionally, and importantly, these delays have been explained. *See* Apr. 4, 2018 Tr. at 181:20-182:20. Specifically, Mr. Filippi stated that in June of 2017, the designated ACOE Project Manager went on an extended sick leave and not until he returned was a new gentleman appointed Project Manager and that this new Project Manager requested Bluewater supplement its application by submitting a Section 10 and Section 404 Application. *Id.* at 181:21-182:4. He also described the work conducted since the ACOE informed Bluewater of these additional steps in the ACOE application process, indicating that Bluewater had its consultants perform a full bathymetric survey of Old Harbor and spent tens of thousands of dollars on engineering documents that were drawn up by St. Jean Engineering in preparation for the Section 10 and Section 404 Application. *Id.* at 182:4-9. Indeed, Mr. Filippi stated "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." *Id.* at 182:9-14.

failed to present any “obvious and compelling” evidence to the contrary.

2. Bluewater’s CRMC Permitting Process Continues to Move Forward.

Because Bluewater’s CRMC permitting process is also moving forward, the Town has failed to establish that Bluewater’s proposal for planned docking facilities has been derailed.

Pursuant to CRMC’s Rules and Regulations, once an application is filed, there are two available review procedures: (1) administrative review or (2) full Council review. *See* CRMC Rule 1.1.6 (B & C). An application that does not receive any objections, *inter alia*, will be reviewed and acted upon administratively by the executive director or his designee. *Id.*

Applications that do not meet this threshold, i.e. have an objector, must be reviewed by the full Council only after preliminary review and subsequent finalization of an application. *Id.*

In Bluewater’s case, on March 2, 2018, Bluewater filed its Preliminary Determination Application (“PD”) with CRMC. *See* **RIFF Remand Exhibit 1**, Mar. 2, 2018 Letter from Attorney Shekarchi, Bluewater’s CRMC Attorney. The PD cover letter states: “[t]he purpose of the PD is to officially present the plan to the CRMC and receive feedback from the agency as to the elements of the Coastal Resources Management Program (CRMP) which must be addressed in the assent submission.” *Id.*

Subsequently, in response to receiving and reviewing Bluewater’s PD, CRMC issued its preliminary comments/concerns as a “notice of deficient application,” dated March 29, 2018, which was presented to RIFF on the first day of this remand proceeding, during the re-direct testimony of its current Town Manager, Mr. Edward Roberge. *See* **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice). This notice, which clearly contemplates further CRMC proceedings, is divided into two (2) sections. *Id.* The first section states: “For the application to be deemed Complete, and to begin processing your request, please PICK UP your deficient

application and RE-SUBMIT with the following MINIMUM ADDITIONAL INFORMATION[.] *Id.* at 2 (emphasis in original). The second section states: “The following informational needs have been identified by staff to help with a more efficient review of your request. Supplying it along with the above minimum information requirements will ensure a timely processing of your application. Not supplying it at this time will not prevent your application from being accepted by the CRMC.” *Id.* at 3 (emphasis in original). These two section headers are extremely important and were mischaracterized by the Town during the remand hearings.

Importantly, the only information requested under the first section (the section that requires certain information to be submitted before re-submittal) merely seeks proof of property ownership. *Id.* at 2. And, contrary to the Town’s testimony, CRMC did not request the Town Building Official sign-off. Indeed, on page two (2) of the notice there is a box that CRMC staff did *not* check, which requests: “A completed Building Official Form.” *Id.* CRMC could have requested the Town Building Official complete this form, if it believed that Building Official sign-off was required to review Bluewater’s PD. *Id.* However, CRMC did not check that item, and of course, the Town ignores this fact. The only information requested under this first section—which is required for further review—is proof of ownership. *Id.*

Contrary to the Town’s suggestion, none of the other information on this notice regarding the East Breakwater or Red Breakwater is necessary for CRMC to review Bluewater’s application. All other information and/or notes discussed in this notice is unnecessary for CRMC to review Bluewater’s application, pursuant to the instruction that states “[n]ot supplying it at this time will not prevent your application from being accepted by the CRMC.” *Id.* at 3 (emphasis in original). Specifically, the notes that are requested—*but not required*—discuss

whether Town consent is needed for the proposed docking facilities. Because this information is under the second section header, not the first, clarification regarding this information is *not* required for CRMC to begin reviewing Bluewater’s application. *Id.*

It is important to note that the statements made regarding information that was requested, but not required, were made by a staff member of CRMC, not the full Council of the CRMC. Until Bluewater is afforded a hearing and *final* CRMC *Council* decision, pursuant to CRMC Rule 1.1.6(C), any notice prepared by staff does not by itself constitute a CRMC denial.

Here, it appears the Town requests that the Division usurp the authority of the Council (CRMC) and determine instead, now, at the very preliminary CRMC phase, that Bluewater’s CRMC application does not have a realistic expectation of receiving approval based merely on preliminary staff comments. However, this request of the Town directly contradicts the Division’s statements in Order No. 21170, that “. . . concerning matters related to boat docks and ferry congestion in Old Harbor, it would be impractical for the Division to spend any significant time addressing these issues in the context of the instant CPCN (licensing) proceeding.” Division Order No. 21170, dated Sept. 24, 2013, at 17. The Division went on to state that “*the Division is ill-equipped to meaningfully evaluate harbor congestion and dock adequacy issues as a condition-precedent to the issuance of a CPCN.*” *Id.* at 18 (emphasis added).

Moreover, the preliminary staff notes are inaccurate.⁷ By example, the note that discusses the “East Breakwater area,” cites to a “right-of-entry [(“ROE”)] agreement between the Federal Government and the Town of New Shoreham” and states “[u]ntil demonstrated otherwise, the CRMC believes any work affecting the East Breakwater and access thereto, at a

⁷ It should be noted that the particulars of the application are beyond the scope of the remand proceeding and would require the Division improperly step into the role of the CRMC.

minimum, requires the consent of the Federal Government and the Town of New Shoreham.”

Town Remand Exhibit 2 (CRMC Mar. 29, 2018 Notice), at 3.

Importantly, this staff note specifically states, “until demonstrated otherwise[.]” RIFF interprets that phrase to invite Bluewater to demonstrate otherwise, i.e. to demonstrate that the Town’s consent is not required. The fact that Bluewater can demonstrate otherwise, or at a minimum is invited to do so, means that this staff note does not equate to CRMC denying Bluewater’s proposed docking facility, as the Town would like to suggest. *See* Apr. 4, 2018 Tr. at 207:21-208:12. Additionally, as was discussed during the remand hearings, Bluewater will be able to “demonstrate otherwise” because, *inter alia*, the ROE period within the ROE agreement has now expired and federal (not Town) ownership will be partially established by virtue of the fact that the property where the proposed docking facility will be is within long standing United States and ACOE jurisdiction and control. *See* Mar. 30, 2018 Tr. at 67:2-21 (the Town’s witness, Ms. Dodge, admits that there is “no [ROE] period [in place] at this particular time”); Apr. 4, 2018 Tr. at 189:14-22 (Mr. Filippi states that “the entire area of the project is under the navigational servitude which is controlled by the [ACOE]”).

Another staff note discusses the “Red Stone Breakwater” and refers to and relies upon a lease between CRMC and the Town when concluding “the applicant does not have riparian (littoral) rights to the tidal water area north of the Town leased breakwater and therefore would require the consent of the Town for structures or activities in this area.” **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice), at 3. As argued by Bluewater in relation to the Town’s denied motion for summary disposition, “the Town has ostensibly been ‘given the right to construct and operate a dock on or near the Northerly Ell/Red Breakwater for the next fifty years, and ‘to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the

Town [s]hall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair.’ Yet no express provision of the lease by Mr. Fugate has conveyed upon the Town the power to block any other riparian rights holder from doing the same.... [T]he great weight of case law, much directly against the Town, supports the opposite.” *See* Bluewater Opposition to Town’s Motion to Reconsider, at 7.

As discussed during the remand hearing, the lease between CRMC and the Town does not prohibit Bluewater from extending its current docks into the area north of the Red Stone Breakwater. *See* Mar. 30, 2018 Tr. at 39:9-22 (the Town’s witness, Mr. Roberge, acknowledged that the lease agreement does not give the Town the exclusive right to erect a dock or other structure on or near the Red Breakwater). The lease merely requires the Town maintain the Red Stone Breakwater and allows the Town to erect signs, docks and other structures on or near the Red Breakwater. *See* **Town Remand Exhibit 7** (Grover Fugate Affidavit, attaching the lease agreement). However, as acknowledged by the Town Manager, Mr. Roberge, nothing in this lease defines the term “near” and nothing in this lease states that others cannot also build a docking facility in the vicinity of the Red Stone Breakwater. *See* Mar. 30, 2018 Tr. at 38:22-39:8 (stating “I don’t believe [the term ‘near’] is defined in the agreement”).

Moreover, CRMC’s rules expressly authorize the Council to waive any CRMC requirement when a project promotes *a compelling state/public interest*. *See* CRMC Rule 1.1.8, attached as **Exhibit C** (RIFF Remand Exhibit 2 for identification purposes). Bluewater provided the Division with the undisputed evidence (to be presented to CRMC) that its project, if necessary, will qualify for the special exemption as it supports and furthers a compelling state interest. Among public interests served by Bluewater’s proposal, *inter alia*, are: (1) supporting the CPCN RIFF received in this docket; and (2) providing access to support offshore wind crew

transport vessels (“CTVs”). *See* Division Order, No. 22548, dated Sept. 22, 2016; **RIFF Remand Exhibit 1**, May 15, 2017 Kelley Drye & Warren Letter.

In sum, although the Town tried to mischaracterize the substance of this staff notice throughout the remand hearings, this notice does nothing more than confirm that Bluewater’s CRMC permit process is being reviewed (preliminarily) and is moving forward. By providing Bluewater with feedback from staff, and requesting certain information CRMC believes would be helpful during the review process, CRMC is moving Bluewater’s permitting process forward. Providing feedback by staff to an applicant is part and parcel of administrative processing at the CRMC. As stated during the remand hearing, Bluewater intends to submit the required additional information requested by staff. *See* **RIFF Remand Exhibit 3** (Attorney Shekarchi Apr. 3, 2018 Letter to CRMC).

Therefore, everything presented during the remand hearings establishes that Bluewater’s CRMC application is also progressing through the preliminary process and that the Council *has not yet heard nor in any way denied* Bluewater’s application. To the contrary, CRMC has requested additional information regarding ownership from Bluewater, which Bluewater testified that it will provide, as well as presenting further information to “demonstrate otherwise” any errors in the staff comments. All other notations and comments in the CRMC notice are optional. Once the clarifying ownership information is provided, CRMC will continue to review Bluewater’s PD application. Accordingly, the Town failed to present any evidence, let alone “obvious and compelling” evidence, to establish that Bluewater’s CRMC application has been derailed.

RIFF will next turn to a few falsehoods the Town continues to fruitlessly argue.

B. Bluewater has a Realistic Expectation of Constructing its Planned Docking Facilities in Old Harbor.

1. The Town's Consent is Not Required to Rebuild the Mount Hope Docking Facility.

Bluewater has a realistic expectation of reconstructing the Mount Hope Dock because, simply stated, the ACOE has jurisdiction over this property, not the Town, and the viability of the proposal will be determined through the ongoing ACOE process.

As discussed during the remand hearings, Bluewater's proposed Mount Hope docking facility is not an application for a new facility; it is a proposal to re-build the old ACOE dock formally known as the Mount Hope Dock. *See* Apr. 4, 2018 Tr. at 190:13-191:1. The old Mount Hope Dock was constructed by the ACOE pursuant to the United States Rivers and Harbors Act and destroyed in the New England Hurricane of 1938. *See* **RIFF Remand Exhibit 1**, at May 15, 2017 Kelley Drye & Warren Letter. Bluewater's proposed Mount Hope docking facility will connect to Block Island via an ACOE controlled walkway adjacent to the East Dock. Although the ACOE has determined that the public has a right to access the East Dock, due to concerns raised by the Town's Harbormaster, Bluewater's proposed Mount Hope docking facility will connect to Block Island via a walkway to the side of the East Dock (the "alternative access" point). *See id.*

i. The ROE Agreement does not impact Bluewater's Proposed Mount Hope Docking Facility.

The Town does not dispute that the ACOE has jurisdiction over the proposed Mount Hope docking facility, but has attempted to establish that the Town has some sort of veto power and that its consent is needed in order for the ACOE to allow Bluewater to rebuild the Mount Hope Dock. The Town relies on a temporary ROE agreement between the Town and the ACOE. *See* **Town Remand Exhibit 3** (N. Dodge Rebuttal Testimony), at 3-4. There are, however, fatal

issues associated with the Town's reliance on the ROE agreement. Specifically, this agreement is a short term agreement that expressly specifies a specific ROE period. *See Town Remand Exhibit 4* (Mr. Tillson Direct Testimony, which attaches the ROE agreement). As stated in the agreement, the ROE period began on October 1, 2016 and expired over one year ago, on April 30, 2017. *Id.* The ROE agreement states that “[t]he ROE Period may be extended by the parties’ agreement from time to time in writing as required and all such ROE Period extensions will be governed by the terms and conditions of the [ROE] Agreement.” *Id.* The Town admitted that the ROE period has not been extended by the ACOE. *See* Mar. 30, 2018 Tr. at 67:1-21 (Ms. Dodge stating “[i]n this document for this particular Right of Entry period that is defined, it would expire April 30, 2017” and admitting that there is “no [active ROE] period at this particular time”). Accordingly, the ROE period expired and any alleged restrictions included in the ROE agreement are no longer valid and reliance upon the ROE agreement constitutes nothing more than *speculation* as to some future ROE period.

Additionally, even if it is determined that the ROE period has not expired, the Town relies improperly on the section in the ROE agreement that states:

[t]he Government shall not allow or permit any temporary or permanent structure to be constructed by the Government, its contractors, or any person or entity which will impede or restrict the Owner and the public's access to the town bait dock, to the ROE Land, to the East Breakwater or to the beach located along the west side of the East Breakwater, which is not removed by the end of each ROE period.

See Town Remand Exhibit 4. Reliance on this clause to support the Town's assertion that its consent is required for Bluewater to rebuild the proposed Mount Hope docking facility is improper because not only is it speculative as it relates to design but the Town failed to present any substantiated evidence that Bluewater's proposed rebuilding of the Mount Hope Dock (well

into the harbor) will either impede or restrict the Town or the public's access to the bait dock, ROE Land, East Breakwater or the beach located along the west side of the East Breakwater.⁸

Accordingly, any assertion that the language in the ROE agreement prevents Bluewater from building its proposed docking facility, or provides the Town with a veto over the ACOE permitting Bluewater's proposed Mount Hope docking facility as currently under review, is patently false. The only entity that has the ability to veto Bluewater's Mount Hope docking facility proposal is the ACOE. At this time, as noted *supra*, the ACOE has not vetoed this proposal and, instead, has instructed Bluewater to submit additional information to continue proceeding with the ACOE permitting process.

ii. *The Town's Zoning Ordinance does not impact Bluewater's Proposed Mount Hope Docking Facility.*

The Town contends that Bluewater does not have a realistic expectation of rebuilding the Mount Hope Dock by asserting (improperly) that the Town has zoning jurisdiction over this proposal. *See RIFF Remand Exhibit 4* (Mr. Tillson Direct Testimony). However, as explained, only the ACOE has jurisdiction over the proposed Mount Hope docking facility because the proposed docking facilities are entirely within a federal project and the doctrine of navigational servitude governs and preempts local ordinance. Apr. 4, 2018 Tr. at 140:1-141:23. Under the doctrine of navigational servitude, everything below the *historical high water mark* (also known as the ordinary high water mark and to be distinguished from "mean high-tide

⁸ The only evidence offered by the Town that Bluewater's proposed Mount Hope docking facility will either impede or restrict the Town or the public's access to the bait dock, ROE Land, East Breakwater or the beach located along the west side of the East Breakwater is an unsupported lay opinion of Ms. Dodge regarding dock design and configuration. *See* Mar. 30, 2018 Tr. at 74:14-75:2. Ms. Dodge's bald opinion is insufficient to constitute substantiated evidence that Bluewater's proposal to rebuild the Mount Hope Dock will violate the ROE agreement.

mark”), is within the jurisdiction of the federal government and neither CRMC nor the Town has the authority to regulate.⁹ *Id.* The entire Mount Hope docking facility is below the historical high water mark. *See id.* at 141:15-23 (stating “[i]n the case of Old Harbor, the entire harbor is a federal navigation project that was created by the Army Corps. The ordinary high water mark is the historical natural high water mark. So the pedestrian pathway that you’re so concerned about lies below, even though it is dry land, it lies below [seaward of] the ordinary high water mark and is subject to navigational servitude.”). Accordingly, the Town’s Zoning Ordinances are inapplicable.¹⁰

Additionally, even if this docking facility were not solely within federal jurisdiction, it is within the state’s jurisdiction, not the Town’s. Rhode Island courts have consistently determined that CRMC—not the local cities or towns—has “exclusive jurisdiction” to regulate the use of wharves in tidal waters. *See Champlain’s Realty Associates, L.P. et al. v. Tillson*, No. CIV.A.01-0330, 2001 WL 770810, *5 (R.I. Super. July 10, 2001). In *Champlain’s*, the Superior Court analyzed whether CRMC had jurisdiction over the commercial use of Champlain’s Marina and Payne’s Wharf. *Id.* The court determined that “CRMC jurisdiction extends to those activities below the mean high-water mark regardless of whether the dock is used for commercial or residential purposes.” *Id.* at *7. Importantly, the court found that “insofar as the New Shoreham ordinances purport to regulate tidal waters, they are a nullity.” *Id.* at *9. The Rhode Island

⁹ The applicable historical high water mark is not the same as the mean high tide mark, notwithstanding the Town’s efforts to conflate these two standards.

¹⁰ As the Division previously noted, the ACOE—not the Division—has the authority to determine issues such as whether or not the proposed Mount Hope docking facility is below the historical high water mark. *See* Division Order No. 21170, dated Sept. 24, 2013, at 17-18. If both the Division and the ACOE could determine these types of questions, it could lead to inconsistent rulings. The Town’s request during this remand proceeding attempts to inappropriately drag the Division (once again) into territory that is within the sole jurisdiction of the ACOE.

Supreme Court upheld the decision of the Superior Court, finding that “municipal attempt to prohibit commercial ferries from docking at a particular location is an invasion of CRMC’s exclusive jurisdiction over ‘development, operation, and dredging’ activities and is preempted.” *See Champlain’s Realty Associates, L.P. et al. v. Tillson*, 823 A.2d 1162, 1170 (R.I. 2003).

Accordingly, even if Bluewater’s proposed docking facilities are not deemed to be under federal jurisdiction, CRMC will have exclusive jurisdiction. Because CRMC—not the Town—would have exclusive jurisdiction, the Town’s Zoning Ordinances are a nullity as a matter of law and cannot be used as part of municipal attempt to prevent Bluewater’s proposed docking facilities from moving forward.

With that said, if it is somehow determined that the Town has jurisdiction over this proposal and that the Town’s Zoning Ordinances somehow govern some portion of the project, there is a local process for applying for relief from the Town Zoning Board, which process allows appeal to the Town Zoning Board of Review and then the Rhode Island Superior Court. That process has not been initiated.

In an obvious effort to confuse, the Town relies on the Building Official’s pre-application speculation that Bluewater will be unable to meet the Town’s Zoning Ordinances. The Building Official makes these prejudgments without having an actual application to review. Additionally, and importantly, the Building Official is not a member of the Zoning Board, as the Town’s own witness conceded. *See* Apr. 4, 2018 Tr. at 99:8-24. An independent volunteer Zoning Board, comprised of members of the benefited public, not the Building Official, will make any local zoning determinations, if that is deemed necessary, which Bluewater strongly refutes. Therefore, the Town failed to put forward any evidence during the remand hearings to establish that Bluewater does not have a realistic expectation of rebuilding the Mount Hope Dock, even if it is

determined that zoning relief is necessary.

iii. The Town's Claims Regarding Ballard's Inn Realty do not impact Bluewater's Proposed Mount Hope Docking Facility.

The Town also argues that because a special master was appointed for Ballard's Inn Realty, Bluewater does not have a realistic expectation of obtaining the ACOE permitting. This, again, is a knowingly confusing assertion seizing upon a similarity in independent entities' names (Ballard's *Inn* Realty versus Ballard's *Wharf* Realty). Bluewater stated on the record that Ballard's Inn Realty is not involved in Bluewater's proposed docking facilities. *See* Apr. 4, 2018 Tr. at 142:13-17 ("Q. . . . So is it your testimony that the path proposed for the east breakwater dock does not cross land owned by Ballard's Inn Realty? A. That is my testimony and I brought surveys today if you'd like to see them to show that."). Bluewater indicated that the *only* aspect that Ballard's Inn Realty *could* be involved with was if Ballard's Inn Realty elected to receive the sand from the dredging that is necessary to rebuild the Mount Hope Dock. *See id.* at 142:18-24 ("Q. And is it your testimony that none of the real estate of Ballard's Inn Realty would be involved with the east breakwater docking facility. A. Correct. We proposed to put the dredged sand on Ballard's Beach, but that has nothing to do with the pedestrian pathway."); 202:19-21 (" . . . we are not relying on any of the upland property that is part of Ballard's Inn Realty, LLC that is under mastership."). Bluewater also indicated that if the special master did not want Ballard's Inn Realty to receive the benefit of additional sand to help with protecting the beach from erosion, there were other places where Bluewater could move the sand. *Id.* at 173:20-174:17; 197:8-198:15. This entire issue regarding Ballard's Inn Realty is therefore nothing more than a red herring and an unnecessary side show that is not relevant to the issues before the Division.

Accordingly, none of the contentions raised by the Town support its assertion that Bluewater does not have a realistic expectation to rebuild the Mount Hope Dock. To the

contrary, all of the evidence put forth confirms that the process continues to move forward.

2. *The Town's Consent is Not Required to Extend the Proposed Red Breakwater Docking Facility.*

Bluewater has a realistic expectation of constructing the proposed Red Breakwater docking facility. Nothing presented by the Town during the remand hearings indicated otherwise.

The proposed Red Breakwater docking facility will replace Bluewater's existing and permitted fixed piling/floating docks and proposes to merely extend the dock further to the east; to a currently unoccupied area. The proposed Red Breakwater docking facility is not *on* the Red Breakwater, but currently lies to the west and, as proposed, will extend seaward beyond the Red Breakwater. Indeed, Bluewater has already constructed permanent piers and a floating dock system in the exact location it proposes to build a portion of the Red Breakwater docking facility.¹¹ 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.

But for the lease between the Town and CRMC, the Town does not have any interest in the Red Breakwater. Because the lease does not prohibit Bluewater from constructing the proposed Red Breakwater docking facility, which is already partially in place, the Town does not have any authority or veto related to the Red Breakwater docking facility. As discussed briefly above, the lease relied upon by the Town is a lease between CRMC and the Town and discusses the Town rights over the Red Breakwater. *See Town Remand Exhibit 7* (Grover Fugate

¹¹It is RIFF's understanding that the Town also objected to the current floating docks but CRMC, with ultimate authority, allowed Bluewater to construct the floating dock/fixed piling system. *See* Apr. 4, 2018 Tr. at 193:18-195:1.

Affidavit, which attaches April 1, 2012 Lease Agreement).¹² The lease between CRMC and the Town specifically defines what it considers to be the “Red Breakwater” by detailing the coordinates of the property. *Id.* 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”.

The lease agreement does not define the term “near”. It is the Town’s speculation that constructing a dock facility fifteen (15) feet from the Red Breakwater is near; however, the Town has not provided any support for this contention nor explained why the current facility permitted by CRMC, also within similar proximity, is not “near” the Red Breakwater. As the lease agreement is silent as to what constitutes near, and because Bluewater currently has a docking facility that is less than fifteen (15) feet from the Red Breakwater, the Town’s contention that extending the dock to remain fifteen (15) feet from the Red Breakwater violates the terms of the lease agreement is entirely unfounded. The Division simply cannot find that Bluewater does not have a realistic expectation of extending the Red Breakwater docking facility based on the Town’s unsupported conjecture.

The Town also argues that “[t]he proposed dock would block and limit the Town’s ability to maintain the Red Breakwater in good order and repair.” *See Town Remand Exhibit 1* (Mr. Roberge Rebuttal Testimony), at 3. Again, however, the Town failed to present any support that Bluewater’s proposed docking facility will prevent the Town from maintaining the Red Breakwater in good order and repair. In fact, when the present Town Manager, Mr. Roberge, testified during the remand proceeding, he acknowledged that although this was his lay opinion,

¹² It should be noted that the proposed Red Breakwater docking facility is not on top of the Red Breakwater, rather it is located amply to the west and as proposed would extend seaward of the Red Breakwater.

he does not have experience building or maintaining a dock and could not say with any direct knowledge or expertise that Bluewater's proposal would prevent the Town from maintaining the Red Breakwater. *See* Mar. 30, 2018 Tr. at 36:1-37:3. Moreover, the Town did not provide any evidence that it has been prevented from maintaining the Red Breakwater due to the current facility (permanent piers and floats) located within fifteen (15) feet of the west side of the Red Breakwater. The Town failed to present any actual evidence that replacing and expanding a dock that presently exists will prevent the Town from maintaining the Red Breakwater.

Because the Town failed to present any evidence that Bluewater's proposed Red Breakwater docking facility would actually force the Town to violate its lease agreement with CRMC, citing to this lease agreement as a means to establish the Town has some sort of authority over Bluewater's ability to construct this proposed docking facility is absurd.¹³

Accordingly, none of the contentions raised by the Town support their assertion that Bluewater does not have a realistic expectation to build the proposed Red Breakwater docking facility.

C. The Town's Objections are Purely Parochial and Incompatible with the Public Interest.

The Rhode Island Supreme Court has stated that allowing local cities and town to regulate docking could undermine the policy consideration and legislative goals for the CRMC

¹³ The Town also appears to believe that Bluewater will be unable to build the proposed Red Breakwater docking facility under the assumption that Ballard's Inn Realty is involved in the ownership. However, nothing could be further from the truth. Ballard's Inn Realty is not involved in either proposed docking facility. The Town purposely confuses Ballard's *Inn* Realty with Ballard's *Wharf* Realty—separate and distinct entities. Ballard's Wharf Realty, not Ballard's Inn Realty, has ownership rights regarding the proposed Red Breakwater docking facility, and Ballard's Wharf Realty is not under supervision of a special master and has provided Bluewater with the authority it needs to extend the proposed Red Breakwater docking facility. *See Exhibit E.*

enabling act. *See Warren v. Thornton-Whitehouse*, 740 A. 2d 1255, 1261-62 (R.I. 1999).

Specifically, the Court warns that “[s]ome cities or towns, acting out of parochial interest, might make it more difficult to get approval to construct docks, thereby resulting in unreasonable concentrations of docks in some places and too few docks in others.” *Id.* at 1262. This entire remand proceeding exemplifies exactly what the legislature tried to legislate against when it passed the CRMC enabling legislation.

Bluewater’s ACOE application clearly explains the compelling public interests served by its proposed docking facilities. The Town failed to present any evidence to the contrary. For example, the ACOE long ago established that there is a need for more wharfing in this area. *See Letter from Secretary of War Report*, dated Jan. 8, 1885, attached as **Exhibit D**. Additional docks in Old Harbor, Block Island are needed to support a growing number of commercial and recreational vessels using Old Harbor—a dynamic which persists today and which is alleviated by additional ferry transit. *See RIFF Remand Exhibit 1*, May 15, 2017 Kelley Drye & Warren Letter. As noted in Bluewater’s ACOE application, those vessels include a CTV operating between Block Island and Quonset, North Kingstown used to service nearby power-generating offshore wind turbines. *Id.* There is a compelling public interest in ensuring safe and convenient docking facilities for the crews working on the wind turbines. *Id.* The Town has predictably placed restrictions on the CTVs presently using the Town dock. *Id.* Similarly, additional docks are needed in Old Harbor to address harbor congestion issues and to provide the docking facility for RIFF (allowing for more travelers via fewer vessels). *Id.*

Further, and not inconsequential, the Division itself has already determined that it is in the public interest to have a ferry service embarking from Quonset to Old Harbor. *See Division Order No. 22548*, dated Sept. 22, 2016. Indeed, the Division determined that there is a

compelling public interest in allowing a new high-speed ferry service, RIFF, to operate between Quonset and Old Harbor. *Id.*

Oddly, the Town's objection to Bluewater's proposed docking facilities directly contradict what would seem to be in the best interest of the Town and its infrastructure. It is in the Town's best interest to facilitate (not impede) a docking facility to support a ferry service that serves the public good—embarking and landing at dockage controlled by governmental entities furthers the public good. It is in the Town's best interest to facilitate (not impede) access to crews to support the highly touted and first of its kind local wind farm. It is in the Town's interest to support the efforts of Bluewater to give the Town free sand to protect its sensitive and threatened coastline from erosion. However, the Town is inexplicably doing everything in its power—including creating specious and speculative arguments—to force the Division to make an obvious determination, that it already made several times, in order to further delay the appeal of RIFF's CPCN license.¹⁴ The resistance of the Town to Bluewater's application is simply baffling.

III. CONCLUSION

Accordingly, the Town failed to meet its burden and this matter should return to the Rhode Island Superior Court so that, in the interest of the public, the issues on appeal can be expeditiously decided.

¹⁴ These objections are also inexplicitly directly aligned with protecting the outdated current monopoly, Interstate.

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

/s/ James A. Hall

Alan M. Shoer, Esq. (#3248)

James A. Hall, Esq. (#6167)

Nicole M. Verdi, Esq. (#9370)

ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th Floor

Providence, RI 02903-1345

Tel: 401-274-7200

Fax: 401-351-4607

Dated: May 21, 2018

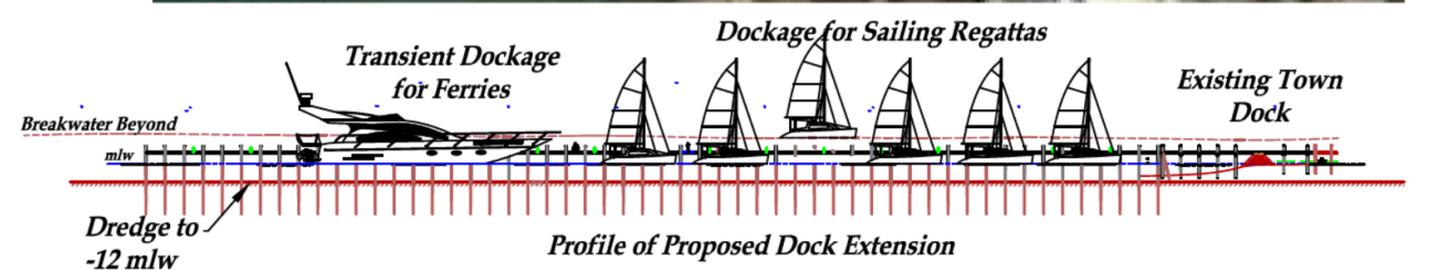
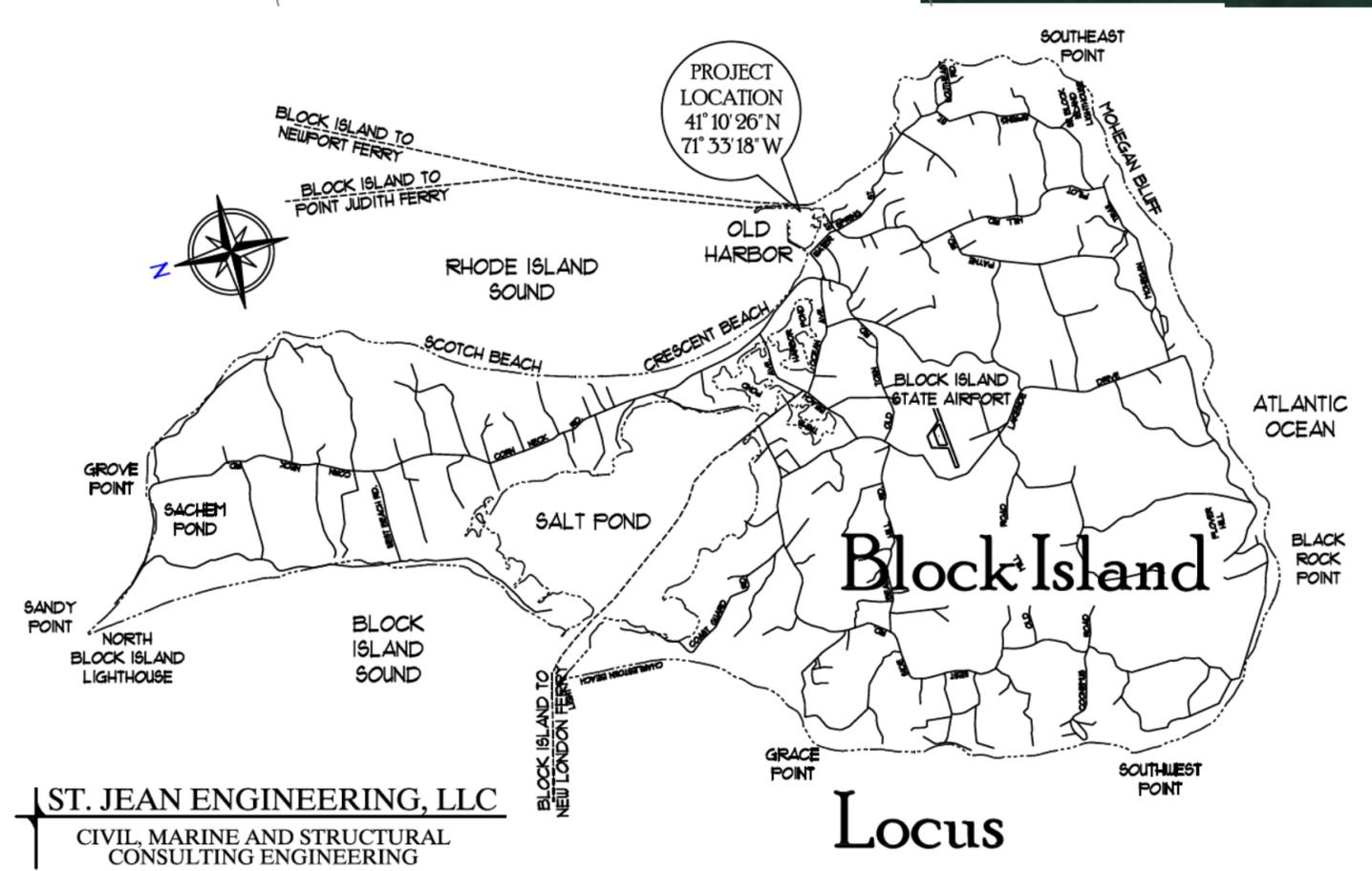
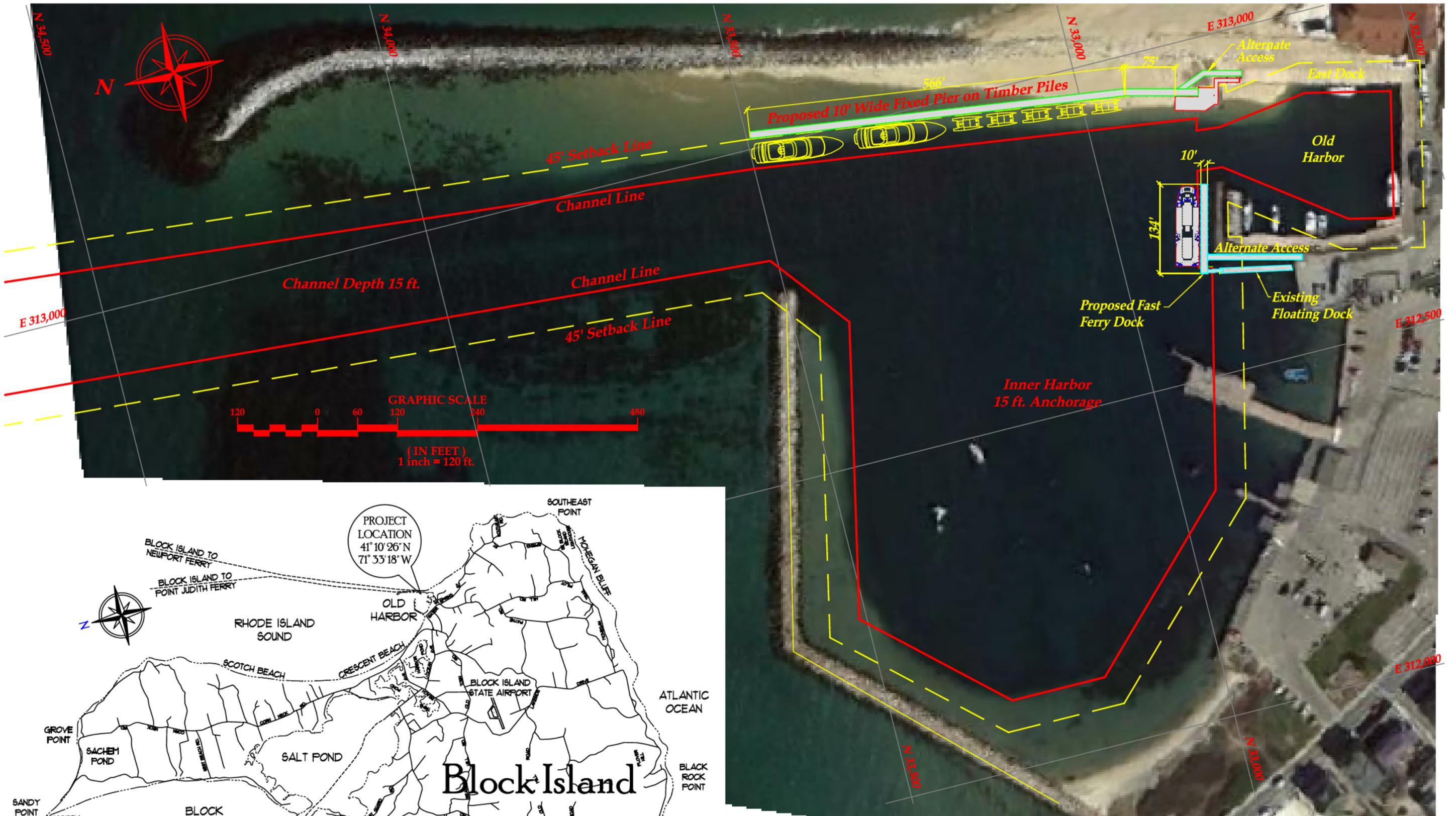
CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.

/s/ James A. Hall

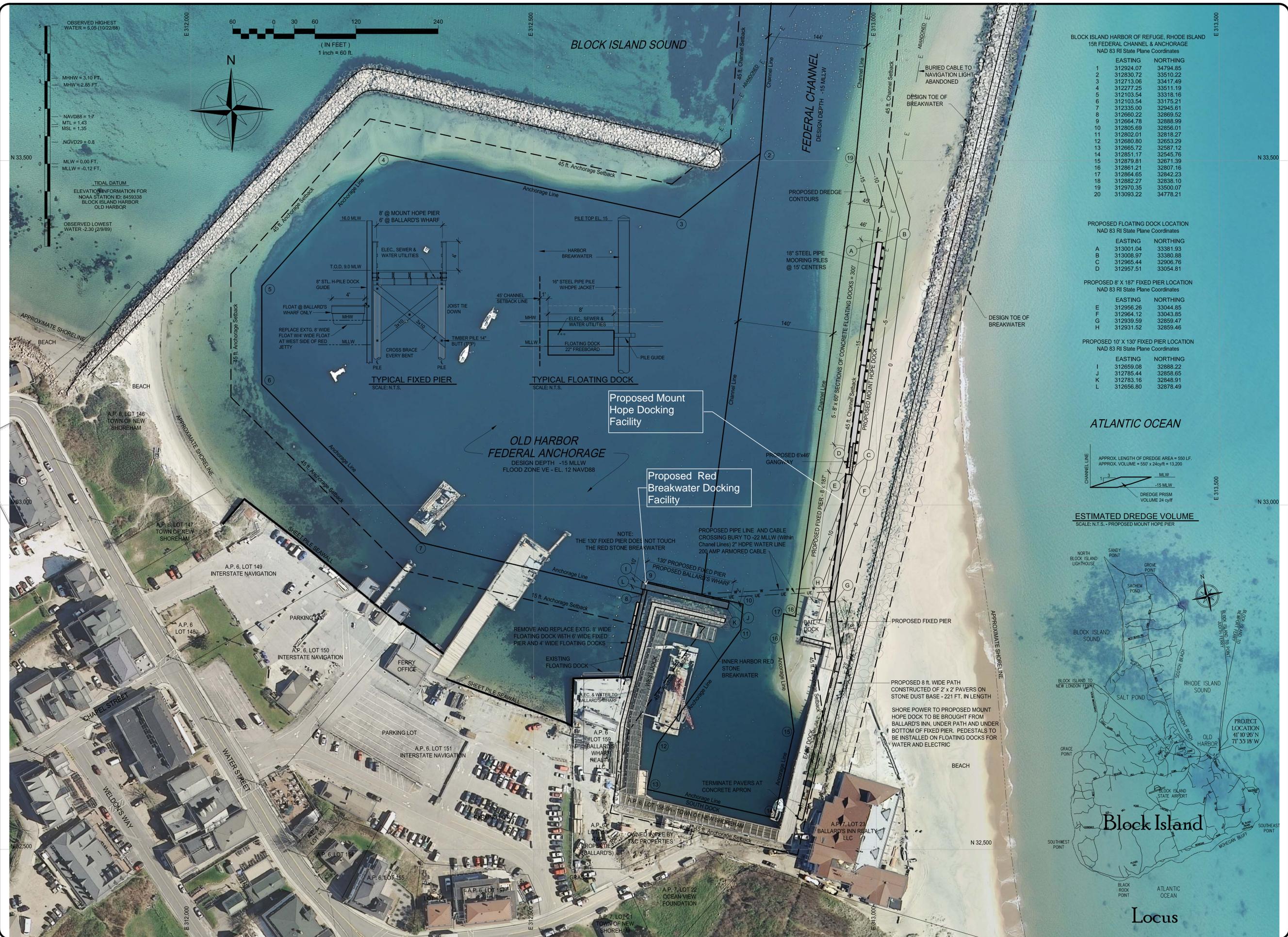
EXHIBIT A

SCHEDULE A



ST. JEAN ENGINEERING, LLC
 CIVIL, MARINE AND STRUCTURAL
 CONSULTING ENGINEERING
 1145 Middle Road
 East Greenwich, RI 02818
 Phone: 401.398.0999
 st.jean.engineering@verizon.net

EXHIBIT B



BLOCK ISLAND HARBOR OF REFUGE, RHODE ISLAND
15th FEDERAL CHANNEL & ANCHORAGE
NAD 83 RI State Plane Coordinates

	EASTING	NORTHING
1	312924.07	34794.85
2	312830.72	33510.22
3	312713.06	33417.49
4	312277.25	33511.19
5	312103.54	33318.16
6	312103.54	33175.21
7	312335.00	32945.61
8	312865.22	32869.52
9	312664.78	32888.99
10	312805.69	32856.01
11	312802.01	32818.27
12	312680.80	32653.29
13	312665.72	32587.12
14	312851.17	32945.76
15	312879.81	32671.39
16	312861.21	32807.16
17	312864.65	32842.23
18	312882.27	32838.10
19	312970.35	33500.07
20	313093.22	34778.21

PROPOSED FLOATING DOCK LOCATION
NAD 83 RI State Plane Coordinates

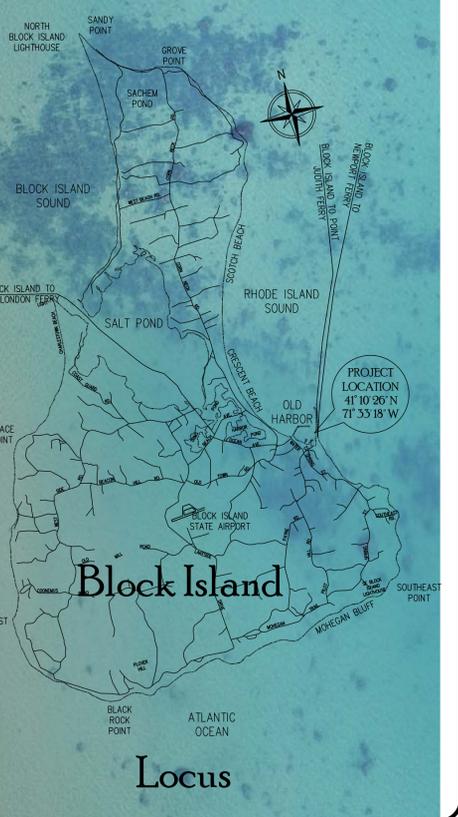
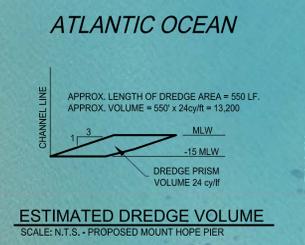
	EASTING	NORTHING
A	313001.04	33381.93
B	313008.97	33380.88
C	312965.44	32906.76
D	312957.51	33054.81

PROPOSED 8' X 187' FIXED PIER LOCATION
NAD 83 RI State Plane Coordinates

	EASTING	NORTHING
E	312956.26	33044.85
F	312964.12	33043.85
G	312939.59	32859.47
H	312931.52	32859.46

PROPOSED 10' X 130' FIXED PIER LOCATION
NAD 83 RI State Plane Coordinates

	EASTING	NORTHING
I	312659.08	32888.22
J	312785.44	32858.65
K	312783.16	32848.91
L	312656.80	32878.49



2. EXTEND FIXED PIER @ MOUNT HOPE DOCK TO LAND DOCK UTILITY NOTES, APPROX. DREDGE VOLUME (32277) TO BE REMOVED. REMOVE 6' WIDE FLOORS @ RED JETTY & REPLACE WITH 6' WIDE DOCK AND 4' FLOORS. (3417)

Revisors:



PREPARED BY:
ST. JEAN ENGINEERING, LLC
Structural, Marine & Civil Engineering
1145 MIDDLE ROAD
EAST GREENWICH, RI 02818
Phone: (401) 398-0999 email: st.jean.engineering@verizon.net

Drawn: R. ST. JEAN
Checked:
Scale:
DATE: 5/12/2017

Proposed Dockage @ Old Harbor New Shoreham, Rhode Island
PREPARED FOR: BlueWater, LLC
P.O. Drawer --, Block Island, Rhode Island
SOUTH & WEST DOCKS PROPOSED REPAIRS

DWG. NO.
C1
SHT. 1 OF 1

EXHIBIT C

2. The proposed alteration will not result in significant adverse environmental impacts or use conflicts, including but not limited to, taking into account cumulative impacts.
 3. Due to conditions at the site in question, the applicable standard(s) cannot be met.
 4. The modification requested by the applicant is the minimum variance to the applicable standard(s) necessary to allow a reasonable alteration or use of the site.
 5. The requested variance to the applicable standard(s) is not due to any prior action of the applicant or the applicant's predecessors in title. With respect to subdivisions, the Council will consider the factors as set forth in § 1.1.7(B) of this Part below in determining the prior action of the applicant.
 6. Due to the conditions of the site in question, the standard(s) will cause the applicant an undue hardship. In order to receive relief from an undue hardship an applicant must demonstrate *inter alia* the nature of the hardship and that the hardship is shown to be unique or particular to the site. Mere economic diminution, economic advantage, or inconvenience does not constitute a showing of undue hardship that will support the granting of a variance.
- B. In reviewing requests for buffer zone variances for subdivisions of five (5) lots or less, the Council will review on a case-by-case basis the extent to which the prior action of the applicant or its predecessor in title created or caused the need for a variance, whether the applicant has created the need for a variance by the subdivision and whether the subdivision complies with local zoning requirements.
- C. Relief from a standard does not remove the applicant's responsibility to comply with all other Program requirements.
- D. Prior to requesting approval for a CRMC variance, in those instances where a variance would be obviated if a variance for a setback were acquired from the local municipality, the applicant must first exhaust his remedies before the local municipality.

1.1.8 Special Exceptions (formerly § 130)

- A. Special exceptions may be granted to prohibited activities to permit alterations and activities that do not conform to a Council goal for the areas affected or which would otherwise be prohibited by the requirements of this document only if and when the applicant has demonstrated that:

1. The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following:
 - a. an activity associated with public infrastructure such as utility, energy, communications, transportation facilities, however, this exception shall not apply to activities proposed on all classes of barriers, barrier islands or spits except as provided in § 1.2.2(C)(4)(i) of this Part;
 - b. a water-dependent activity that generates substantial economic gain to the state; and/or
 - c. an activity that provides access to the shore for broad segments of the public.
 2. All reasonable steps shall be taken to minimize environmental impacts and/or use conflict.
 3. There is no reasonable alternative means of, or location for, serving the compelling public purpose cited.
- B. Special exceptions may be granted only after proper notice in accordance with R.I. Gen. Laws Chapter 42-35, the Administrative Procedures Act, a public hearing has been held, and the record of that hearing has been considered by the full Council. The Council shall make public the findings and conclusions upon which a decision to issue a Special Exception are based.
- C. In granting a special exception, the Council shall apply conditions as necessary to promote the objectives of the Program. Such conditions may include, but are not limited to, provisions for:
1. Minimizing adverse impacts of the alteration upon other areas and activities by stipulating the type, intensity, and performance of activities, and the hours of use and operation;
 2. Controlling the sequence of development, including when it must be commenced and completed;
 3. Controlling the duration of use or development and the time within which any temporary structure must be removed;
 4. Assuring satisfactory installation and maintenance of required public improvements;
 5. Designating the exact location and nature of development; and

6. Establishing detailed records by submission of drawings, maps, plots, or specifications.

1.1.9 Setbacks (formerly § 140)

- A. A setback is the minimum distance from the inland boundary of a coastal feature at which an approved activity or alteration may take place.
- B. Setbacks shall be maintained in areas contiguous to coastal beaches, coastal wetlands, coastal cliffs and banks, rocky shores, and existing manmade shorelines, and apply to the following categories of activities and alterations:
 1. Filling, removal, or grading, except when part of an approved alteration involving a water dependent activity or structure (see §1.3.1(B) of this Part);
 2. Residential buildings and garages excluding associated structures (see § 1.1.6(H) of this Part);
 3. New individual sewage disposal systems, sewage treatment plants, and associated sewer facilities excluding outfalls (See § 1.3.1(F) of this Part). Repairs and replacements of existing (permitted) individual sewage disposal systems shall be exempt from the Council's setback requirements;
 4. Industrial structures, commercial structures, and public recreation structures that are not water dependent (See § 1.3.1(C) of this Part); and
 5. Transportation facilities that are not water dependent (see § 1.3.1(M) of this Part).
- C. Setbacks will be determined using the rates of change as found on the accompanying Shoreline Change Maps for Watch Hill to the Easternmost Point of Quicksand Beach (Little Compton) abutting Massachusetts. The minimum distance of a setback shall be not less than 30 times the calculated average annual erosion rate for less than four dwelling units and not less than 60 times the calculated average annual erosion rate for commercial, industrial or dwellings of more than 4 units. At a minimum however, setbacks shall extend either fifty (50) feet from the inland boundary of the coastal feature or twenty-five (25) feet inland of the edge of a Coastal Buffer Zone, whichever is further landward. Due to site conditions over time, field verification of a coastal feature or coastal buffer zone may result in a setback determination different than that calculated using a shoreline change rate.
- D. Applicants for alterations and activities who cannot meet the minimum setback standards may apply to the Council for a variance (see § 1.1.7 of this Part).

EXHIBIT D

LETTER
FROM
THE SECRETARY OF WAR,
TRANSMITTING,

In answer to Senate resolution of December 8, 1884, report of Engineers, showing the necessity for the enlargement of the basin at Block Island, Rhode Island.

JANUARY 9, 1885.—Referred to the Committee on Commerce and ordered to be printed.

WAR DEPARTMENT,
Washington City, January 8, 1885.

The Secretary of War has the honor to transmit to the United States Senate a letter from the Chief Engineers, dated the 6th instant, and its accompanying copy of a report of Lieut. Col. George H. Elliot, Corps of Engineers, the same being transmitted in response to the resolution of the Senate of December 8, 1884, as follows :

Resolved, That the Secretary of War be, and he hereby is, directed to communicate to the Senate, without unnecessary delay, whether there exists a public necessity for the enlargement of the basin or harbor inside the breakwater at Block Island, R. I., for the proper accommodation of the shipping seeking refuge at that place, and if so, to what extent should such enlargement be made, and what would be the probable cost thereof.

ROBERT T. LINCOLN,
Secretary of War.

THE PRESIDENT PRO TEMPORE UNITED STATES SENATE.

OFFICE OF CHIEF OF ENGINEERS,
UNITED STATES ARMY,
Washington, D. C., January 6, 1885.

SIR: In answer to a resolution of the Senate of December 8, 1884, calling for information as to the necessity for the enlargement of the basin at Block Island, R. I., and, if so, to what extent, and its probable cost, I have the honor to submit herewith a copy of a report to this office from Lieut. Col. George H. Elliot, Corps of Engineers, in charge of the improvement of that harbor, containing the information desired.

The resolution of the Senate is herewith returned.

Very respectfully, your obedient servant,

JOHN NEWTON,
Chief of Engineers, Brig. and Bvt. Maj. Gen.

Hon. ROBERT T. LINCOLN,
Secretary of War.

ENLARGEMENT OF THE BASIN OR HARBOR INSIDE THE BREAKWATER,
AT BLOCK ISLAND, RHODE ISLAND.

ENGINEER OFFICE, UNITED STATES ARMY,
Newport, R. I., December 30, 1884.

GENERAL: I have the honor to acknowledge the receipt of a copy of the following resolution of the Senate of the United States:

IN THE SENATE OF THE UNITED STATES,
December 8, 1884.

Resolved, That the Secretary of War be, and he hereby is, directed to communicate to the Senate, without unnecessary delay, whether there exists a public necessity for the enlargement of the basin or harbor inside the breakwater at Block Island, R. I., for the proper accommodation of the shipping seeking refuge at that place, and, if so, to what extent should such enlargement be made, and what would be the probable cost thereof.

Attest:

ANSON G. MCCOOK,
Secretary.

In compliance with the directions contained in an indorsement on the above resolution, I beg leave to submit the following report:

The harbor of refuge at Block Island, which is entirely an artificial harbor, is at the southern end of the curve which forms the eastern side of the island. Before its construction Block Island had no harbor. The only vessels used were open boats, which on the approach of storms were hauled up on the beach by oxen. The largest of these boats were of about ten tons burden.

The works consisted of a main breakwater, which extends northerly from the shore, a distance of about 1,900 feet, forming the outer harbor, and the inner harbor or basin referred to in the resolution of the Senate.

The inner harbor lies in the western angle between the breakwater and the shore. It is about 300 feet by 250 feet in area and has an opening about 80 feet wide (60 feet in the clear), on the north side, through which vessels pass to and from the outer harbor.

It was at first dredged to a depth of 7 feet at mean low water. Afterwards it was dredged to a depth of 9 feet, and the bottom of a large part of the outer harbor was cleared of bowlders.

The main breakwater, except for a distance of about 300 feet from the shore, where it forms the eastern side of the inner harbor, is constructed of riprap granite. It is 35 feet wide at the top, which is 6 feet above mean high water. The inner slope is 1 on 1 and the outer slope is 1 on 2.

The eastern, northern, and western sides of the inner harbor are of crib-work constructed (in 1871-'72) of spruce timber, resting at about the level of low water, on a riprap foundation, and filled with stones gathered on the island.

The crib-work on the eastern side, which is most exposed to the force of the waves, became so much decayed that an interior wall of masonry was constructed during the last year to protect the inner harbor when the crib-work on that side is carried away by the sea.

The crib-work on the two other water sides of the inner harbor is also very much decayed, and will soon be liable to destruction in heavy storms.

A plat exhibiting the bottom of the outer harbor as it was found by the survey of 1878, and also by the survey which I caused to be made last August, shows that there was much shoaling—3 feet in some places—between the times of the two surveys.

The material for this shoaling comes from the high cliffs at the southward and eastward of the harbor, which are constantly being undermined by the sea, and also from the shore, which extends from the harbor to the northward and westward.

The former material is carried along outside the main breakwater, a part of it passing through the interstices of the riprap forming a parallel bank inside, which does not encroach much upon the anchorage.

Another portion passes through the gap in the main breakwater, and is doubtless afterwards brought farther into the outer harbor in northerly storms, causing a general shoaling of the harbor.

After the closing of the gap, which is to be done by means of the appropriation of July 5, 1884, some material will probably pass around the outer end of the main breakwater and be carried into the outer harbor as before.

The quantity of material which comes from the shore to the northward and westward of the harbor is very large, as is shown by the great amount of filling in the angle between this shore and the harbor works.

UTILITY OF THE INNER HARBOR.

The eastern shore of Block Island, on which the harbor of refuge is situated, is exposed to the full force of the waves of the Atlantic. In northerly storms especially, small vessels cannot lie with safety in the outer harbor, and even in northeasterly and easterly storms the swell which makes round the extremity of the main breakwater is so heavy that none except large vessels will remain outside, unless for want of room they cannot get into the inner harbor, which, although made for the temporary purpose of sheltering the vessels that carried stone from the main land for the main breakwater in the earlier periods of its construction, has proved one of the most beneficial works in my district. At night, especially in bad weather, it is always filled to its full capacity.

On a recent visit to Block Island I counted fifty-nine fishing and other vessels crowded into this little area, and larger numbers would have availed themselves of the complete shelter which it affords, except for the want of room.

Appended to this report, I send a copy of a letter containing the statistics of the use of the inner harbor during the last year, which have kindly been furnished by the Hon. Nicholas Ball, a prominent citizen of Block Island, at my request.

These statistics confirm the judgment derived from my own observation, that the size of this excellent refuge is entirely inadequate to the requirements of local and coasting vessels, and that it would not be good policy to replace by masonry walls the decayed crib-work, retaining the present size of the inner harbor.

I intended to submit these views to the Chief of Engineers in my next annual report, and I am gratified at this earlier opportunity, furnished by the Senate resolution, of stating that, in my judgment, the enlargement of the inner harbor is a public necessity, and of submitting the following plan for it:

PROPOSED ENLARGEMENT OF THE INNER HARBOR.

From the shore west of the inner harbor, and at a distance of about 1,000 feet from it (1,300 feet from the prolongation of the line of the main breakwater), there is an old jetty which was constructed upon a

bowlder reef which projected from the shore at this point and extends out to about 300 feet from the high-water line. This jetty, which was built of rounded bowlders found on the island, had not much stability, and has become much flattened down by the sea.

I propose to build up on this jetty, and to extend it about 200 feet on a line parallel to and distant about 950 feet from the main breakwater; thence the western part of the proposed inner breakwater follows an arc of 90 degrees, with a radius of 150 feet, and connects with the northern part, which is on a line running at right angles with the main breakwater, and intersecting it at a point about 650 feet from the outside of the crib-work forming the north side of the present inner harbor, or about 950 feet from the Government wharf on the south side of this harbor.

The inner breakwater is to be constructed of granite riprap 4 feet wide on the top, which is to be 5 feet above mean high water. The western part to have side slopes of 1 on 1, the northern part to have a slope of 1 on 1 on the inside, and a slope 1 on $1\frac{1}{2}$ on the outside. The shore end of the western part above the low-water line is to be constructed of crib-work filled with stone.

At a distance of about 150 feet from the main breakwater, or, more exactly, 150 feet from the 6-foot curve of the submerged bank on the inside of this breakwater, I propose to leave in the inner breakwater an opening, on each side of which there is to be constructed a pier-head of dry masonry, protected by fender-piles in the usual manner, leaving the opening 100 feet wide in the clear.

The northern part of the inner breakwater, which is on the most exposed side, should be built first. This would allow us to remove the crib-work which forms the northern side and a part of the western side of the present inner harbor, and to use the stone filling and foundation—say 4,000 tons—on the western side of the enlarged harbor.

The area of the present inner harbor is about $1\frac{3}{4}$ acres. The area of the proposed harbor, inclosed between the low-water line on the shore and the inner breakwater, is about $18\frac{3}{4}$ acres. About 5 acres are inclosed within the curve of 9 feet at mean low water, $9\frac{1}{2}$ acres within the 6-foot curve, and 15 acres within the 3-foot curve.

Experience has shown that the depth gained by dredging in the present inner harbor is permanent, and it will doubtless be found that the shoaling of that part of the outer harbor which it is proposed to include within the new works will be stopped, since the littoral sands now brought in by the waves from the westward, and the sands which are now brought in through the gap in the main breakwater, and which, when it is closed, may be brought in around its extremity, will be arrested; the former by the western part and the latter by the northern part of the proposed inner breakwater.

It is probable that, for the purpose of sheltering the larger class of vessels in the outer harbor in northerly and northeasterly storms, and of quieting the water in that harbor in all storms from the eastward, it may be found necessary at some time in the future to extend the main breakwater in a westerly direction 1,000 or 1,200 feet, or to such distance as may be desired, leaving an opening between it and the present head of the breakwater.

The area of the enlarged inner harbor for small vessels (nearly all of the vessels which now use the harbor of refuge at Block Island are of this class) is not as large as I would have proposed, except that I do not wish to encroach so much on the area of the outer harbor as to impair its usefulness for large vessels, the number of which seeking refuge at

Block Island is likely to increase, especially in case the main breakwater is extended as above mentioned.

If deemed desirable, however, when we come to the construction we can make the northern part of the inner breakwater on a line 100 or 200 feet further north with but little increase of expense.

The Government wharf, which occupies the land side of the present inner harbor, is the only wharf at Block Island, except a private wharf which was built some years since outside the inner harbor and on the inside of the main breakwater, by permission of the Secretary of War. The latter wharf is used only in summer, and by steamers which carry visitors and excursionists from and to the mainland. The Government wharf is always overcrowded with the traffic of the island. All the freight carried to and from the island is brought here, and at it are landed the United States mails and the supplies for the four light-houses, which are on the island, and the steam fog-signal.

The enlargement of the inner harbor will allow additional private wharves to be built within it, and thus relieve the Government wharf, but the building of such wharves should only be by authority of the Secretary of War and under such conditions as may be prescribed by him.

In the following estimate of the cost of the proposed enlargement I have not included any dredging of the area proposed to be included within the inner harbor. None will be necessary in the first instance, and when it becomes so it can be done gradually and as the wants of the harbor may require. As before suggested, any additional depth which may be gained by dredging in the enlarged inner harbor will be permanent.

ESTIMATED COST OF THE PROPOSED ENLARGEMENT.

21,120 tons of riprap granite, at \$1.65 per ton	\$34,848
Removing 4,000 tons of stone from the cribs which form the sides of the present inner harbor to the proposed inner breakwater, at 50 cents per ton	2,000
Breaking up and removing the old cribs	200
Building new crib-work above the low-water line at the inner end of the western part of the proposed inner breakwater.....	520
334 cubic yards of dry stone masonry in the pier-heads at entrance to the new harbor, at \$11 per cubic yard.....	3,674
Fenders and dolphins at entrance.....	748
	41,990
Add 10 per cent. for contingencies	4,199
Total estimated cost	46,189

Very respectfully, your obedient servant,
GEORGE H. ELLIOT,
Lieutenant-Colonel of Engineers.

Brig. Gen. JOHN NEWTON,
Chief of Engineers, U. S. A.

LETTER OF THE HON. NICHOLAS BALL.

BLOCK ISLAND, R. I., December 16, 1884.

MY DEAR SIR: Yours of the 13th, in which you ask for the statistics of the use by vessels of the inner harbor or basin during the last few years, and especially during the last year, was received on Saturday.

In reply would inform you that on its receipt I at once sought an interview with Mr. Uriah Dodge, who keeps the range-lights here, and also with my son, C. C. Ball,

who keeps the store here, both of whom have more or less to do with the boats and vessels which frequent the harbor.

There is no record kept by any one of the arrival and departure of vessels, hence I could gather nothing authentic, more than I have got together in a report which I inclose, which, in my opinion, is not far out of the way, and which I hope and trust will answer your purposes. The report may be considered as that of the past year; the three previous years on an average, say, 20 per cent. less.

Mr. Dodge, the light-house keeper, says that 35 boats and small vessels fill the basin full enough, especially in bad weather. He further says:

The general stock of swordfish here last season, at a rough estimate is about.	\$12,000
Stock of mackerel.....	10,000
Stock of codfish.....	18,000
Stock of bluefish.....	8,000
Stock of flounders.....	800
Stock of lobsters.....	5,000
Fish caught in two "pounds".....	11,500
Total.....	65,300

I think the estimate is too small by about 12½ per cent. Should you want any information further please let me know and I will do the best I can for you.

Yours, respectfully,

NICHOLAS BALL.

Lieut. Col. GEO. H. ELLIOT, U. S. A.

P. S.—The mackerel fleet of 200 sail, which is spoken of in the report, I should say would average the past six years 100 sail that came into the outer bay for a harbor, the crews coming on shore in their boats to obtain water and supplies. Several years ago the fleet fished in these waters for two months and harbored around the island, one side or the other, nearly every night.

N. B.

STATISTICS OF THE USE BY VESSELS OF THE INNER HARBOR AT BLOCK ISLAND,
RHODE ISLAND.

Names of home vessels engaged in the fishing and freighting business.—*Steamers*: Geo. W. Danielson and Ocean View. *Schooners*: N. F. Dixon, Rose Brothers, Hattie Rebecca, Annie Godfrey, Laura Louise, Mystery, Laura E. Garnago, and about fifty others, including sloops, &c.

Vessels from New London, Conn.—*Schooners*: Emma, Chapel Brothers, Maria, White Cloud, Hattie Douglass, Robert Gray, Nelson, Woolsey, Alnoma, C. M. Harris, Laurel, Conquest, Horizon, James Woolsey, Kate Church, Belle of the Bay, Scotia. *Sloops*: Thorn, S. R. Packer, Favorite, Nettie Foote, Superior, Fashion, J. G. Freeman, Sharon, and about fifteen or twenty others whose names are not at hand.

Vessels from Noank, Conn.—*Schooners*: Mary Hoxie, Emma, Jas. Potter, Mary Potter, Redwing, Phebe, Annie Fowler, Ada, Belle, Ira and Abby, Willey; steamer Eva. *Sloops*: S. B. Miller, Wildwood, Eagle, Millie, Isabella, Ella May, Tiny B., and about ten or fifteen others whose names are not at hand.

Vessels from New Bedford, Mass.—*Schooners*: Quilp, Gracie Phillips, Bella, Emma Clifton, Wasp, J. W. Flanders, Maria, Black Swan, Spy, Yankee Bride, Village Belle, Peneke. *Sloops*: Transit, Frank Clarke, Carrie, Ida, Wm. Young, and about ten to fifteen others whose names are not at hand.

In addition to the above there are about 225 mackerel and other fishing vessels from Cape Cod and the east; 50 menhaden steamers from different places, about 20 vessels from Newport, R. I., during the winter, quite a number from New York, and there are annually probably thirty cargoes from larger vessels, with coal, wood, lumber, bricks, &c., besides the numerous yachts and other craft which frequent here in the summer months. Government vessels with supplies, &c. The greater part of them are compelled to anchor in the outer harbor in consequence of the overcrowded basin. Vessels with cargoes are greatly inconvenienced, and often are compelled to wait for vacancies, and even then collisions are imminent to the great disadvantage of all concerned.

EXHIBIT E

This agreement is between Bluewater LLC and T+C holdings LLC.
In exchange for valuable consideration, T&C Holdings LLC
assigns Bluewater LLC the riparian rights of lot 158 plat 6 in the Town of New
Shoreham to build docks and wharf out into Old Harbor.

This agreement is effective as of:

9/16/2015.


Marion Filippi T+C Enterprises


Paul Filippi Bluewater LLC