

**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 REPLY MEMORANDUM

Now comes Rhode Island Fast Ferry, Inc. (“RIFF”) and hereby submits its Post-Hearing (Remand) Reply Memorandum in further 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 Resources Management Council (“CRMC”).¹

I. INTRODUCTION

On May 21, 2017, RIFF and the Town filed post-hearing memoranda with the Division. Nothing articulated in the Town’s memorandum—or presented during the remand hearings—establishes that Bluewater “does not have a realistic expectation of constructing Bluewater’s planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the United States Army Corps of Engineers (‘USACE’) and the Rhode Island Coastal Resources Management Council (‘CRMC’).” *See* Division Order, No. 23018, dated Jan. 25, 2018, 2-3. The Town failed to present obvious or compelling evidence that RIFF will be unable

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.

to operate its approved ferry service via a Bluewater docking facility in Old Harbor. *See* Division Order No. 22980, dated Dec. 13, 2017, 5. Accordingly, this matter must be returned to the Superior Court so that briefing can commence and a final decision rendered.

II. ARGUMENT

A. **Because Bluewater Did Not Submit An Alternate or “New” Proposed Docking Facility to the ACOE, the Division Must Return this Matter to the Superior Court.**

The Town’s memorandum begins by summarizing its characterization of the events that led this matter to be returned to the Division, after the Division had issued a certificate of public convenience and need (“CPCN”) to RIFF in September of 2016. *See* Town’s May 21, 2018 Post-Hearing Memorandum (“Town Mem.”), at 4. Specifically, the Town states that “[i]n 2017, Bluewater submitted an alternate proposed docking facility. This newly proposed docking facility violated the Division’s order of August 11, 2015 which required RIFF to identify the dock it is proposing to use on Block Island ...” *Id.* The Town contends that RIFF allegedly “add[ed] new facilities later on” and that this purported “tactic of switching docking facilities after the hearings had closed and after the Report and Order of the Division had issued, deprived the Town of its right to be heard on this important issue.” *Id.* The Town asserts that the Superior Court, therefore, granted its remand request because the Town was allegedly deprived an opportunity to be heard on this allegedly “new” docking facility. *Id.* The Town’s characterization of the “case background” is inaccurate.

As discussed in RIFF’s post-hearing memorandum, the Town did move to remand this matter back before 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, 4.² However, that is where the truth in the Town’s “case background” section ends.

Contrary to the Town’s representation, the Superior Court did not agree with the Town’s contention that RIFF submitted an alleged “new” docking proposal to the ACOE. Instead, the Superior Court determined that it was the Division, not the Court, that was in a position to make a determination as to whether Bluewater’s ACOE proposal had materially changed and thus constituted a new docking facility. Specifically, during oral argument, the Superior Court stated “you’re telling me it is the same dock. She’s telling me it’s a different dock. I have no clue which one of you are right. . . . I don’t think it is in the purview of this Court to make that determination. Whether I think it is significant or not significant, I think the Division reserves the right to revisit this matter.” *See* Apr. 4, 2017 Tr. 30:15-17, 32:23-33:1, attached hereto as **Exhibit A**.

Accordingly, the Superior Court remanded this matter to the Division to determine whether Bluewater submitted a new docking proposal to the ACOE; the Superior Court did *not* find that Bluewater submitted a new docking proposal. The Superior Court “remanded to the Division for the [limited] 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, 2017.³ Therefore, it is

² 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.

³ 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.

up to the Division to determine whether the docking proposal submitted to the ACOE is “new.” If the Division determines that the docking proposal submitted to the ACOE is not “new,” such a finding constructively ends this remand proceeding as the entire foundation upon which the Town requested the remand no longer exists.

Everything presented to the Division during the remand proceeding supports RIFF’s contention that Bluewater’s ACOE proposal is the same docking proposal presented to the Division during the 2015-2016 CPCN proceeding. RIFF requests the Division take the two plans attached to RIFF’s post-hearing memorandum as **Exhibits A and B** and review them side-by-side. Reviewing those plans, side-by-side, it will be apparent that the plan submitted to the ACOE simply uses the “alternate access” that was specifically and clearly identified in the plan submitted to the Division during the 2015-2016 CPCN proceeding. The “alternate access” was, in fact, previously presented to the Division, and the Division determined “that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.” *See* Division Order No. 22254, Dec. 10, 2015 at 22. Bluewater’s proposal to the ACOE to use that “alternate access” was in no way a proposal for a “new” docking facility, as the Town contends. The docking facilities submitted to the ACOE are the same docking facilities that were presented to the Division.⁴ Therefore, RIFF 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.

The docking facilities proposed to the ACOE are clearly the same facilities that were

⁴ The only difference between the plans is that the plan submitted to the ACOE includes additional design details, which are beyond the scope of this remand proceeding. *See* Division Order, No. 23018, dated Jan. 25, 2018, 2-3.

presented to the Division during the CPCN proceeding, and, therefore, this matter must be returned to the Superior Court so that briefing can commence and a final decision rendered. The Town cannot be allowed a second and third attempt to raise similar arguments that were raised in its unsuccessful motion for summary disposition. *See Silva v. Silva*, 122 R.I. 178, 183, 404 A.2d 829, 832 (1979) (stating that the “underlying basis of the doctrine of res judicata, as well as collateral estoppel, is that an issue need, and should be judicially determined only once” and noting that “[a] judgment may be given res judicata effect even though that judgment is subject to an appeal”).

B. Assuming for Argument that Everything Stated in the Town’s Post-Hearing Memorandum to be True, the Town Still Failed to Establish that Bluewater’s Docking Proposals Before the ACOE and/or CRMC Have Been Derailed.

Even if everything stated in the Town’s post-hearing memorandum is true, the Town merely established that Bluewater’s proposals are pending and, accordingly, failed to meet its burden of proving that Bluewater’s proposed docking facilities have been derailed before the ACOE and/or CRMC. The Town’s memorandum is nothing more than a preview of the objections and arguments it plans on making during the ACOE and/or CRMC processes in the hopes of derailing Bluewater. However, simply foreshadowing the arguments the Town intends to make before these two (2) agencies does not constitute obvious or compelling evidence of derailing Bluewater’s permitting processes. To the contrary, such foreshadowing is an admission that the process will continue in the future.

The Division 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.” *See* Division Order No. 22980, dated Dec. 13, 2017, 5. Nonetheless, through its memorandum, the Town asks the

Division to now make substantive decisions based upon a preview of the arguments it plans to make before the ACOE and CRMC so as to avoid the process before those agencies.

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

As described in more detail in RIFF's post-hearing memorandum, because Bluewater's ACOE permitting process is inarguably moving forward, the Town has failed to derail Bluewater's planned docking facilities. *See* RIFF May 21, 2018 Post-Hearing Memorandum ("RIFF Mem."), Section II(A)(1).

Bluewater submitted a required Section 408 permission request with the ACOE to construct/reconstruct and use two (2) docks in Old Harbor. *See* **RIFF Remand Exhibit 1**, at RIFF's Response to Town Data Request D-1.⁵ Subsequently, Bluewater supplemented its proposal to simply indicate that it would use the previously depicted "alternate access"/walkway. (As discussed *supra*, the "alternate access"/walkway was shown on the plan presented to the Division.) After Bluewater clarified its proposal, the ACOE ordered evaluation by its regulatory division pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. *See* **Town Remand Exhibit 14** (June 22, 2017 ACOE Letter to Bluewater). The President of Bluewater, Paul Filippi, testified during the remand hearing 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.

⁵ It should be noted that throughout the Town's post-hearing memorandum, it refers to RIFF Exhibit D-1 and states "RIFF's Exhibit D-1 which was prepared in response to the Town's Data Requests . . ." *See* Town Mem., 6, 9 & 12. It is unclear if the Town is asserting that the documents included in RIFF's Exhibit D-1 were prepared in response to the Town's data request or simply compiled in response to the Town's data request. To clarify, Exhibit D-1 is a compilation of different documents that were previously prepared, not in response to Exhibit D-1. However, because these documents are responsive to the Town's Data Request, No. D-1, they were compiled together as Exhibit D-1.

Although the ACOE permitting process may be taking longer than expected⁶, nothing put forth during the remand hearings or in the Town's post-hearing memorandum demonstrates that Bluewater's ACOE permitting process has been derailed. The ACOE has not yet issued a decision on Bluewater's Section 408 Application.

Instead, the ACOE 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.

⁶ As stated in RIFF's post-hearing memorandum, RIFF does not dispute that the ACOE and CRMC permitting processes for Bluewater's proposed docking facilities has taken longer than anticipated. However, delays in the federal navigation permitting process do 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 submit 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.

Accordingly, Bluewater's ACOE permitting process is moving forward, and the Town failed to present any "obvious and compelling" evidence to the contrary.

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

Similarly, as discussed in detail in RIFF's post-hearing memorandum, 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. *See* RIFF Mem., Section II(A)(2).

The Town's entire argument that Bluewater's CRMC process is not moving forward is based on CRMC's "notice of deficient application," dated March 29, 2018. *See* Town Post-Hearing Mem. at 7-11 (citing to **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice)). Specifically, the Town states that "[t]he documentary evidence presented at the hearing unequivocally establishes that the CRMC agrees with the Town's position that the consent of the Town is required for Bluewater to construct the proposed Red Breakwater Docking Facility." *Id.* at 7-8. Similarly, the Town states that "[t]he CRMC [n]otice . . . clearly establishes that the consent of the Town is required to construct the proposed East Breakwater Docking Facility." *Id.* at 11. *The Town has inappropriately mischaracterized this notice.*

As discussed in RIFF's post-hearing memorandum, the CRMC notice is divided up into two sections: (1) information that is required for CRMC to review Bluewater's Preliminary Determination application ("PD") and (2) information that is requested—*but not required*—for CRMC to review Bluewater's PD. *See* **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice). All of the information cited to by the Town as allegedly requiring the Town's consent is in the section of information that *is requested but not required*. *Id.* The Town completely ignores that the notice *does not require* Bluewater to supply further information regarding the

consent issues.

In fact, the staff comment regarding the proposed East Breakwater (Mount Hope) docking facility specifically states that “[u]ntil demonstrated otherwise, the CRMC [staff biologist] believes any work affecting the East Breakwater and access thereto, at a minimum, requires the consent of the Federal Government and the Town of New Shoreham.” **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice), at 3. As noted in RIFF’s post-hearing memorandum, RIFF interprets the phrase “until demonstrated otherwise” to invite Bluewater to demonstrate otherwise, i.e. to demonstrate that the Town’s consent is not required. *See* RIFF Mem. at 11. 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, and importantly, this notice was drafted by a CRMC staff biologist. *See* **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice). It is not the opinion of the full Council. It is not the opinion of CRMC’s legal counsel. The comments that the Town relies upon to assert that the Town’s consent is required—and because the Town will not give its consent, to assert that Bluewater’s application is derailed—are staff comments that inappropriately make legal conclusions and request information regarding legal issues involving federal waterways in Old Harbor and rights related thereto. Reliance on the staff comments in this notice—that are not required to be addressed in order for Bluewater to move forward with its PD—to contend that Bluewater’s CRMC process has been derailed is absurd and certainly not “obvious and compelling.”

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 to RIFF's post-hearing memorandum 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; *see also* Alex Kuffner, *Deepwater Wind to invest \$250 million in Rhode Island to build utility-scale offshore wind farm*, PROV. J. (May 30, 2018) <http://www.providencejournal.com/news/20180530/deepwater-wind-to-invest-250-million-in-rhode-island-to-build-utility-scale-offshore-wind-farm>.

Accordingly, as discussed above and in RIFF's post-hearing memorandum, the Town failed to present any evidence, let alone "obvious and compelling" evidence, to establish that Bluewater's ACOE or CRMC applications have been derailed.

C. The Town's Memorandum Includes Clearly Erroneous Statements.

The Town's memorandum is filled with false statements, material misrepresentations and unsubstantiated assertions. RIFF will use this section of its reply memorandum to address, clarify, identify, and refute the most egregious of these statements, misrepresentations and assertions:

1. *"In 2017, Bluewater submitted an alternate proposed docking facility." Town Mem. at 4.*

This statement is false. As discussed above in Section II(A), Bluewater did not submit an alternate proposed docking facility to the ACOE; but simply highlighted the "alternate access"

previously presented to the Division.

2. *“This tactic of switching docking facilities after the hearings had closed and after the Report and Order of the Division had issued, deprived the Town of its right to be heard on this important issue.” Id.*

This statement is false. As discussed above in Section II(A), Bluewater did not switch docking facilities after the Division issued RIFF a CPCN. Bluewater clarified its ACOE proposal to use the “alternate access” that was depicted in the plan submitted to the Division during the 2015-2016 CPCN proceeding. Accordingly, the Town was not deprived of any alleged right it may (or may not have) to be heard on the docking facilities proposed.

3. *“The proposed [Red Breakwater docking facility] would block any dock which the Town has the right to erect and use in that location.” Id. at 7.*

The Town failed to present any evidence to support this assertion. As discussed during the remand hearing and in RIFF’s post-hearing memorandum, the lease agreement between CRMC and the Town does not prohibit Bluewater from extending its current docks into the area north of the Red Breakwater. *See* RIFF Mem., Section II(A)(2) (citing Mar. 30, 2018 Tr. at 39:9-22). The lease merely requires the Town maintain the Red 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, the lease agreement does not give the Town the exclusive right to erect a dock or other structure on or near the Red Breakwater. *See* Mar. 30, 2018 Tr. at 39:9-22. Bluewater’s proposed Red Breakwater docking facility is not on the Red Breakwater. Rather, Bluewater’s proposed Red Breakwater docking facility rebuilds the presently existing fixed piling/floating docks and extends the dock further east, to a currently

unoccupied area. The assertion that the Town has the right to prevent Bluewater from replacing and extending its existing piling/floating docks is entirely unsubstantiated.

4. *“The right to wharf out at the Red Breakwater belongs to the Town under the Lease Agreement” Id.*

This statement mischaracterizes Bluewater’s proposal for its proposed Red Breakwater docking facility. Bluewater is not attempting to “wharf out” from the Red Breakwater. The proposed Red Breakwater docking facility is *not on nor does it touch* the Red Breakwater, but currently lies to the west and, as proposed, will extend seaward beyond the Red Breakwater. *See also* response to previous Town statement above.

5. *“The documentary evidence presented at the hearing unequivocally establishes that the CRMC agrees with the Town’s position that the consent of the Town is required for Bluewater to construct the proposed Red Breakwater Docking Facility.” Id at 7-8.*

This statement is false. The “documentary evidence” is the CRMC’s notice dated March 29, 2018. As discussed above and in RIFF’s post-hearing memorandum, this notice does not state that the Town’s consent is required for Bluewater to construct the proposed Red Breakwater docking facility. *See* RIFF Mem., Section II(A)(2) & (B)(2). In the section of the notice discussing information that CRMC requests—*but does not require*—to review Bluewater’s PD, it discusses Bluewater’s proposed Red Breakwater docking facility and cites to the Town’s lease agreement with CRMC. *See Town Remand Exhibit 2* (CRMC Mar. 29, 2018 Notice).

However, as discussed above and in RIFF’s post-hearing memorandum, the statement that this lease agreement will not allow Bluewater to extend its existing and permitted fixed piling/floating docks further seaward and to the east was a staff comment and is in no way a final opinion of the full CRMC. CRMC has not determined that the Town’s consent is required for

Bluewater to build the proposed Red Breakwater docking facility.

6. *“The CRMC will not accept an application nor even a Request for Preliminary Determination without the Town’s Consent as referenced in the CRMC deficiency notice.” Id. at 8.*

This statement is false. All CRMC staff comments regarding the Town’s alleged consent are in the section of the notice requesting information, *but not requiring it*, in order for CRMC to continue reviewing Bluewater’s PD. See **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice). Specifically, the header of the section regarding the requested, but not required, information states: “Not supplying it at this time will not prevent your application from being accepted by the CRMC.” *Id.* at 3. (emphasis in original). The Town’s entire memorandum completely ignores this language in the notice.

7. *“Bluewater cannot provide the CRMC with proof of ownership of the Red Breakwater since the breakwater is owned by the State of Rhode Island and the property rights to it are leased to the Town.” Id. at 9.*

This statement is intentionally misleading. As discussed above and in RIFF’s post-hearing memorandum, Bluewater’s proposed Red Breakwater docking facility extends the existing and permitted fixed piling/floating dock seaward beyond the Red Breakwater. See RIFF Mem., Section II(A)(2) & (B)(2). Accordingly, Bluewater does not need to establish proof of ownership of the Red Breakwater, because it is not building a docking facility on the Red Breakwater. Similarly, Bluewater has ownership rights to the proposed Red Breakwater docking facility (which currently exists adjacent to the Red Breakwater) via a lease that was attached to RIFF’s post-hearing memorandum as **Exhibit E**.

8. *“[T]he Right of Entry Agreement which does not expire until September 16, 2021[.]”*

Id. at 9.

This statement is intentionally misleading. As discussed in RIFF’s post-hearing memorandum, the right-of-entry (“ROE”) agreement is a short term agreement that expressly specifies a specific ROE period. *See* RIFF Mem., Section II(A)(2) (citing **Town Remand Exhibit 4** (Mr. Tillson Direct Testimony, which attaches the ROE agreement)). 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.

9. “[T]he consent of the Town is required for the construction[/rebuilding] of the [proposed Mount Hope docking facility] because the proposed [Mount Hope docking facility], if constructed, would impede or restrict the Town and the public’s access to these areas.” *Id. at 10-11.*

This statement is unsubstantiated. None of the pre-filed testimony nor any of the testimony provided during the remand hearing establish that the design aspects of Bluewater’s proposed rebuilding of the Mount Hope Dock, if constructed, would impede or restrict the Town or the public’s access. As noted in RIFF’s post-hearing memorandum, the only testimony offered to support this assertion is an unsupported lay opinion of Ms. Dodge regarding speculation as to dock design and configuration. *See* RIFF Mem., Section II(B)(1)(i) (citing 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 expired ROE agreement.⁷

10. *“Bluewater cannot provide the CRMC with the consent of the Town for the construction of the proposed East Breakwater docking facility.” Id. at 11.*

As discussed above and in RIFF’s post-hearing memorandum, the Town’s consent is not required to rebuild the Mount Hope Dock. *See* RIFF Mem., Section II(B)(1). The proposed Mount Hope docking facility is fully under ACOE jurisdiction, not the Town’s and any rights alleged in the purported ROE agreement are invalid as the ROE period expressed in that agreement has expired. Because the Town’s consent is not required for Bluewater to rebuild the Mount Hope Dock, this statement is erroneous.

11. *“Although a Building Permit from the Town is required, no Building Permit can issue because the proposed walkway is in violation of the State Building Code.” Id. at 12.*

This statement is false and unsupported. The Town does not cite to any law or rule that states that a Building Permit is required for Bluewater to construct its proposed docking facilities. As discussed in RIFF’s post-hearing memorandum, even if a Building Permit was required, the Building Official’s unsupported speculation that the proposed walkway is in violation of the State Building Code is premature, as an application has not been submitted to him. *See* RIFF Mem., Section II(B)(1)(ii). Accordingly, this assertion is erroneous.

12. *“[T]he walkway would not be allowed to be permitted or constructed irrespective of design.” Id. at 13.*

⁷ It should be stressed that the design details of the docking facilities are beyond the scope of this remand proceeding. *See* Division Order, No. 23018, dated Jan. 25, 2018, 2-3. Ms. Dodge’s lay opinion regarding whether rebuilding the Mount Hope Dock will impact the Town’s access relates solely to design, i.e., whether the proposed docking facility could be designed in a manner not to restrict the Town’s access. Accordingly, not only is her opinion unsupported, but it is not within the scope of this remand proceeding.

This statement is unsupported and premature. As discussed in RIFF’s post-hearing memorandum, the Town does not have zoning jurisdiction over this proposal. *See* RIFF Mem., Section II(B)(1)(ii). 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 allows for appeal to the Town Zoning Board of Review and then the Rhode Island Superior Court. That process has not been initiated. To state that the walkway would not be allowed is completely speculative.

13. *“Bluewater could not move forward with the CRMC assent process for the [re]construction of the proposed [Mount Hope docking facility] because Mr. Tilson would not legally be permitted to sign off on the CRMC Building Official Letter.” Id.*

This statement is false and contradicted by CRMC’s March 29, 2018 notice. *See* **Town Remand Exhibit 2** (CRMC Mar. 29, 2018 Notice). 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 predictably, the Town ignores this fact. The only information requested under this first section—which is required for further review—is proof of ownership. *Id.*

14. *“Bluewater’s May 15, 2017 filing with the Army Corps contained several false representations regarding his authority to provide the necessary consents of Ballard’s Inn Realty LLC.” Id. at 14.*

This is a gross mischaracterization. During the remand hearing, 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. 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; 202:19-21. All of the alleged "false representations" were statements Bluewater made that it was proposing to give sand to Ballard's Inn Realty. With that said, Bluewater indicated during the remand hearings 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. Accordingly, as stated in RIFF's post-hearing memorandum, 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. *See* RIFF Mem., Section II(B)(1)(iii).

15. *"Bluewater's Preliminary Determination filing contained several false representations regarding his authority to provide the necessary consents of Ballard's Inn Realty LLC as set forth in the Project Narrative for Preliminary Determination."* *Id.* at 16.

See response above.

16. *"Bluewater does not own any of the real estate associated with either of the proposed docking facilities and has not obtained the approval of any owner regarding the May 15, 2017 Army Corps filing."* *Id.* at 15-16.

This statement is false. Bluewater has the requisite rights in the real estate associated with the proposed Red Breakwater docking facility via the lease agreement attached to RIFF's post-hearing memorandum as **Exhibit E**. The ownership rights for the proposed Mount Hope docking facility are held by the federal government and Bluewater is presently in the process of

obtaining the appropriate and necessary approvals from the ACOE.

17. “Bluewater does not own any of the real estate associated with either of the proposed docking facilities and has not obtained the approval of any owner regarding the CRMC Preliminary Determination filing.” Id. at 17.

See response above.

In the conclusion section of the Town’s post-hearing memorandum, it repeats and/or restates the above statements as purported “reasons” to support its contention that it met its burden. Because RIFF addressed the statements above, it will not duplicate its response. With that said, it should be reiterated that all of the Town’s alleged “reasons” stated in its conclusion section are either not true or fail to demonstrate that Bluewater does not have a realistic expectation of constructing its planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the ACOE and the CRMC. *See* Division Order, No. 23018, dated Jan. 25, 2018, 2-3.

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.

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Dated: June 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.

/s/ Nicole M. Verdi

EXHIBIT A

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION
CO.

VS.

RI FAST FERRY, INC.,
and et al

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:
:
:
:

CASE NO: PC-16-4804

H E A R D B E F O R E:

THE HONORABLE MR. JUSTICE

RICHARD A. LICHT

ON APRIL 4TH, 2017

IN THE PROVIDENCE SUPERIOR COURT

APPEARANCES:

NICOLE VERDI, ESQUIRE.....FOR RI FAST FERRY

CASEY LEE, ESQUIRE.....RI PUC

KATHERINE MEROLLA, ESQUIRE.....TOWN SOLICITOR FOR TOWN
OF NEW SHOREHAM

MICHAEL MCELROY, ESQUIRE.....INTERSTATE NAVIGATION

WENDY J. OLIVO
CERTIFIED PROFESSIONAL REPORTER

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C E R T I F I C A T I O N

I, Wendy J. Olivo, hereby certify that the succeeding pages, 1 through 32 inclusive, are a true and accurate transcription of my stenographic notes.

Wendy J. Olivo
Certified Professional Reporter

1 they were not, when I saw you, your client, and the Town
2 made a representation that it was. The hearing officer
3 may have bought your argument, and maybe that's why he's
4 talking about Blue Water's plan. I don't know what he
5 was talking about. Their plans have changed.

6 MS. VERDI: Respectfully, your Honor, we cannot make
7 it more clear that the plans have not changed. They
8 added a sidewalk, that is, again, more detail. But in
9 the Division's order regarding: "The Division reserves
10 the right to revisit this matter upon a showing by the
11 Town that it had been successful in efforts to prevent
12 the construction of Blue Water's planned dock before the
13 Army Corps, or CRMC, successful in efforts to prevent the
14 construction."

15 THE COURT: The existing dock, you're telling me it
16 is the same dock. She's telling me it's a different
17 dock. I have no clue which one of you are right. Do I
18 have some evidence from the Army Corps Engineer that the
19 plan has changed? Now, it may be immaterial, or
20 unimportant, or inconsequential, any other word you want
21 to choose to make the terminus -- I keep thinking it may
22 be significant that I'm hearing that it is halfway down
23 the beach, I'm hearing that I don't have the ability to
24 decide that, and you may be absolutely right. The
25 hearing officer may say: I don't care, as long as there

1 is a dock there. I don't care where it is or how it is,
2 that is the CRMC's problem. That is what your argument
3 is, and that may be what it is. All I'm saying is they
4 haven't said anything yet. Do you want to add anything?

5 MS. MEROLLA: No, your Honor.

6 MR. LEE: May I make a brief point, quickly, Judge?
7 One of the things in the final order, the Division has
8 held that requiring applicant possessed the docks and
9 vessels at the time of application filing is economically
10 improbable and contrary to the Division precedent. The
11 critical element for regulatory purposes is that the
12 applicants whose application had been granted is subject
13 to various conditions subsequent, such as availability of
14 docks as a prerequisite, before the Division actually
15 issues a certificate of public convenience and necessity,
16 before services may actually legally begin. And in this
17 case, the Division issued an order which would allow the
18 certain immaterial changes to the docking facility.
19 There was no specific dock plan that they were adhered
20 to. This case doesn't need to go down for remand, if it
21 needs to go up in briefing, that was error in the
22 decision. That was error. Remands would simply
23 duplicate the proceedings going forward and create
24 additional time and expense for the parties.

25 THE COURT: The Court is faced with a motion to

1 remand this matter to the Division of Public Utilities.
2 I think what's important is to quote, not so much the
3 text of the decision which uses the term "derail," I'm
4 going to go to the specific order which is paragraph four
5 of the last paragraph of the Division's order, it says:
6 The Division reserved rights to revisit this matter on a
7 showing by the Town that had been successful in its
8 efforts to prevent the construction, Blue Water's plan
9 dock before the USACE, which is United States Army Corps
10 of Engineers, or Coastal Resources Management Council.
11 Now, all I have before me is acknowledgment by the
12 Department of the US Army Corps that there is a new
13 conceptual plan, that the original plan of the Town was
14 not considered a 408 non-federal sponsor, which gave the
15 Town certain rights which I am not overly familiar, in
16 fact, not familiar at all, but gave certain rights, but
17 the plan was changed so that they no longer have those
18 plans. Now, those, on the one hand, I'm hearing from the
19 applicant before the DPU that this is an inconsequential
20 change, it doesn't mean anything. It is really the same
21 thing. And therefore, this paragraph four doesn't kick
22 in. On the other hand, I'm hearing from the Town that it
23 is significant. I don't think it is the purview of this
24 Court to make that determination. Whether I think it is
25 significant or not significant, I think the Division

1 reserves the right to revisit this matter. I'm remanding
2 this case to the Division of Public Utilities for the
3 sole purpose of determining whether or not it wants to
4 exercise its right that it reserved in paragraph four of
5 its order. However, it will afford each side, whatever
6 form the Division chooses, the right to at least make
7 their respective arguments on why it should or should not
8 revisit the matter.

9 Ms. Merolla, you'll prepare the appropriate order
10 and send it to your sister.

11 MS. MEROLLA: Yes, your Honor.

12 THE COURT: And I will urge, I am not going to put
13 this in the order, I'm going to urge the Division to act
14 swiftly on this and make it a priority because, and here
15 is where I'm treading in uncharted waters, I don't want
16 there to have to be a whole re-filing and everything
17 else. So I know if that because I technically, it has to
18 be remanded, but if they, whether after they decide does
19 it need, can the appeal still be just stayed? What's the
20 procedure for that here? I'm asking both sides, so that
21 you don't have to re-file the petition and all of that.

22 MS. VERDI: I believe you can stay this pending
23 remand.

24 THE COURT: Fine. So make the order say that, the
25 Superior Court will retain jurisdiction of this matter