

**PROPOSED DECISION ON SOUTH SHORE COVE ASSOCIATION'S
APPEAL OF THE HARBOR MASTER'S MARCH 28, 2022, DECISION (AS
FINALIZED JUNE 8, 2022)**

DATED: _____

Introduction

On September 13, 2022, the Harbor Committee held a *de novo* hearing on the South Shore Cove Association's (the "Association") appeal of the Harbor Master's decision to award the Northeast Harbor Fleet and Clifton Dock Corporation (collectively, the "Fleet") permits for four moorings in the area known as South Shore Cove. The date of the decision appealed is June 8, 2022. The four moorings are designated as NEH Fleet 295, NEH Fleet 296, NEH Fleet 294, and NEH Fleet 293.

The evidence on appeal includes all briefs, public comments, and evidence submitted to the Harbor Committee; all testimony made at the hearing; and the prior comments and submissions made to the Harbor Committee in advance of the March 2022 meeting, which were incorporated by reference in the Association's prehearing brief.

Factual Background

In early 2021, the Harbor Master installed four test rental moorings in South Shore Cove for the benefit of the Fleet. The Harbor Master did not first create a harbor or traffic plan. In early 2022, the Fleet, in coordination with the Harbor Master, presented a proposal for 34, more or less, commercial rental moorings in South Shore Cove. While the Fleet has since withdrawn that proposal, it is apparent from the record that these four moorings remain part of an overall scheme of development for South Shore Cove that the Fleet intends to pursue.

At the March 8, 2022, meeting of this Committee, the Harbor Master stated that he

considered the four moorings to be fully authorized and permanent. However, upon the Association's March 17, 2022, request for clarification on this point, the Harbor Master stated in a letter dated March 25, 2022, that the moorings were only approved on a trial basis and that a final decision would be made sometime in May 2022. On April 7, 2022, the Association timely filed a Notice of Appeal and a request to stay the appeal until the Harbor Master issued his final decision.

By letter dated June 13, 2022 (the "Harbor Master's Decision"), the Harbor Master informed the Association he had awarded the Fleet full approval to locate NEH Fleet moorings numbered 293, 294, 295, and 296 in South Shore Cove, having concluded there were "no safety or navigation concerns" and the moorings "are not impeding use of South Shore Cove by commercial or recreational boaters and are not impeding ingress or egress of shore front property owners." Further, the Harbor Master stated, "[t]here is ample room in the cove to safely navigate to and from the moorings and around the moorings when vessels are moored." *Id.* While not explicitly stated, the Harbor Master's Decision also effectively denied the Association's request to relocate the four moorings.

On June 28, 2022, pursuant to Section 4.1 of the Town of Mount Desert Harbor Ordinance (the "Ordinance"), the Association filed a request to lift the stay of the Association's Appeal, which the Chair of this Committee granted.

Standard of Review and Governing Provisions

Pursuant to Section 4.1, the Harbor Committee held a *de novo* review of this appeal. Section 4.1 provides the Harbor Committee may affirm, modify, or set aside the Harbor Master's

decision if it is not supported by the facts or is clearly contrary to the intent and specific provisions of the Ordinance.

Section 7.4 is the standard that governs the placement of moorings. It provides in pertinent part: “The Harbor Master may deny any application the approval of which he or she determines would detract from the order in the tidal waters or harbors, or which would jeopardize the safety and use of the tidal waters and harbors of the general public.”

Concerning the relocation of moorings, Section 7.18 provides that moorings “shall be subject to change in location . . . when it is deemed by the Harbor Master to be in the best interests of the Town, the safety of the harbor or waterway, or required to comply with the provisions of this Ordinance.”

Section 2.3 provides the purpose of the Ordinance, which this Committee must uphold and administer:

The purpose of this Ordinance is to provide for the just and orderly operation and regulation of marine activities on and within the harbors and all other tidal waters of the Town of Mount Desert, Maine in order to insure safety to persons and property, to promote availability and use of a valuable public resource, and to create a fair and efficient framework for the administration of that resource.

Factual Findings

1. The Association and its members have standing to bring this appeal.
2. The appeal was timely filed.
3. South Shore Cove is a Cove that, but for these four moorings, is undeveloped and geographically distinct from Gilpatrick’s Cove.
4. South Shore Cove is not a protected harbor. Its orientation and exposure make it relatively unprotected and especially vulnerable to seasonal prevailing southerly winds,

rendering it an unsuitable and unsafe location for these four moorings or for a more expansive commercial mooring field.

5. The mooring field will increase boat traffic in an already congested area of tidal water, raising significant safety concerns, especially in the absence of a mooring plan for this area of tidal water.

6. The ledge habitat that dominates much of the seafloor of South Shore Cove is not suitable for moorings because mooring blocks are more likely to dislodge or move from such surfaces.

7. The use of these moorings by the Fleet is not safe because the Fleet lacks a direct line of sight to these moorings from its base of operations.

8. South Shore Cove is the site of two moderately healthy eelgrass fields, which are critical habitat for lobsters and other valuable marine flora and fauna.

9. The installation of moorings and the associated boat traffic with those moorings will likely damage this habitat, endangering the health of the fauna it supports, which would interfere with the current use of the tidal waters for fishing and recreation.

10. The hard substrate of the ledge habitat renders the ledge areas unsuitable for moorings due to safety concerns and potential impacts to the ledge habitat.

11. The use of conservation moorings may mitigate these impacts but further study must be done to determine the suitability of these moorings and the environmental impact.

12. The use of South Shore Cove for an extension of the Fleet's operations interferes with the present use and enjoyment of that Cove by the public, including members of the Association, because the Cove is valued for its unique habitats and wild character.

13. The use of South Shore Cove for an extension of the Fleet's operations interferes with lobster fishing, a traditional use for this Cove, because of the likely impact on the eelgrass fields and ledge habitat, and the effects that would likely have on the lobster populations.

14. The Harbor Master should have first created a harbor plan before considering whether any permits should be located in South Shore Cove.

Conclusions

15. Therefore, the Harbor Master's Decision to grant the above-identified moorings violates Section 7.4 because the moorings would detract from the order in the tidal waters or harbors and would jeopardize the safety and use of the tidal waters and harbors of the general public.

16. Therefore, the Harbor Master's Decision to deny the request to relocate the above-identified moorings violates Section 7.18 because the moorings are not in the best interests of the Town or the safety of the harbor or waterway. Moreover, the decision is inconsistent with the purposes of the Ordinance.

Order

For the foregoing reasons, the Harbor Committee vacates the Harbor Master's Decision and hereby rescinds the permits for NEH Fleet 295, NEH Fleet 296, NEH Fleet 294, and NEH Fleet 293. No later than June 1, 2023, the Harbor Master shall see to the removal of the moorings from South Shore Cove. Moreover, the Harbor Master shall not consider any further applications for moorings in South Shore Cove without first receiving this Committee's approval for a mooring plan for South Shore Cove.

So Ordered,

A Majority of the Town of Mount Desert Harbor Committee Present and Voting
