

# RUDMAN • WINCHELL

**TO:** Town of Mount Desert Harbor Committee  
**FROM:** Stephen Wagner, Esq. o/b/o South Shore Cove Association  
**DATE:** August 26, 2022  
**RE:** South Shore Cove Association’s Appeal of the Harbor Master’s March 28, 2022, Decision (as finalized June 8, 2022)

---

## **SOUTH SHORE COVE ASSOCIATION’S REPLY BRIEF**

The South Shore Cove Association (the “Association”), by and through its counsel, Rudman Winchell, respectfully submits the following reply brief in response to comments made by the Northeast Harbor Fleet (the “Fleet”).

As a preliminary matter, the Fleet’s response makes clear that both the Fleet and the Association understand that these four moorings on appeal are the scouting party for a broader plan to locate dozens of moorings throughout the entirety of South Shore Cove, all for the benefit of a membership-based yacht club. Therefore, it is critical that this Committee consider the impacts of placing an entire field of moorings throughout the Cove, not just the four moorings on appeal. As for the remainder of its responses, the Fleet offers little more than conclusory and self-serving statements and non-binding promises and platitudes to refute the Association’s compelling concerns about safety, environmental impacts, and interference with existing uses. In contrast, the Association’s concerns are supported by the anticipated testimony of subject-matter experts and the experiences of residents that have known and observed the Cove and its conditions for decades. The disparity in the credibility and substance of the evidence will be addressed at the hearing. Responses to the Fleet’s legal arguments are as follows:

### **Response to Fleet Point #1**

The Fleet misconstrues Section 4.1 and suggests that anything other than accepting without question the Harbor Master’s decision would “defy reason and logic.” While the Harbor Committee may of course consider the Harbor Master’s opinion, Section 4.1 states it must hold a

*de novo* hearing. Therefore, it must accept all relevant evidence, independently assess the credibility of that evidence, and apply that evidence to the Ordinance standards to make factual findings and conclusions, without giving any special deference to the Harbor Master’s opinion.

The language the Fleet argues tempers this *de novo* review does no such thing. While the terms they identify do have the flavor of a typical appellate review standard, which generally imposes a higher burden on appellants, the Maine Supreme Court (sitting as the “Law Court”) has made clear that an appellate body (such as a harbor committee) must conduct a *de novo* review unless an ordinance explicitly states that the review shall be appellate. This is especially the case when the Harbor Master’s decision was not made with the benefit of notice or a hearing at which all interested parties had an opportunity to present evidence before a decision was made. To impose an appellate or hybrid standard of review would violate the Association’s due process rights.<sup>1</sup>

### **Response to Fleet Point #2**

The Fleet asserts that the Harbor Master’s decision is sound and consistent with the purposes of the Ordinance and duties of the Harbor Master because it creates more moorings for public use. Of course, that is only true if those members of the public happen to pay dues to the Fleet, enroll in the Fleet’s limited classes, or rent one of the Fleet’s commercial rental moorings. Furthermore, the mooring permits place no restrictions as to whom may rent the moorings and for what purpose, so the Fleet’s altruistic claims of serving the public simply cannot be accepted at face value.

This argument also reveals a veiled truth of this dispute. Namely, the Fleet’s membership model freely admits members even though it apparently lacks the resources (moorings) to

---

<sup>1</sup> See note 3 of the Association’s prehearing brief.

provide the services these members expect. This is the Fleet's problem, not the Town's. When faced with a high demand for membership and limited resources, private clubs can cap memberships or create clear conditions under which membership will be granted (e.g. only when an existing member resigns or dies). Rather than make the admittedly difficult choices necessary to resolve this mismatch of expectations and resources, the Fleet asks the Town to solve its problem by gifting away a shared public resource.

The Fleet also repeatedly points out that many of the Association members are members of the Fleet, one of which rents one of the moorings located in South Shore Cove. Far from being "ironic," this is compelling evidence that the concerns about these moorings are so great that even members of the Fleet directly benefiting from these moorings are willing to give up convenience and privilege for the benefit of the broader public interest. Further to that point, the entire Association has proposed to give up their rights as shoreland owners to moorings in order to preserve this uniquely undeveloped Cove and protect its fragile and vital eelgrass and ledge habitat.

The Ordinance is clear: the Harbor Committee is responsible for creating a fair and efficient framework for the allocation of a limited and shared public resource based on the interests of *all* community members. It is not responsible for resolving the resource problems of one private membership club.

### **Response to Fleet Point #3**

The Fleet acknowledges that Association members never received notice of the placement of the four moorings in South Shore Cove, and takes refuge in the fact the Ordinance does not require such notice. This is true. But it is also true that the Ordinance does not authorize the placement of "test" moorings. Moreover, the lack of notice and Association members'

immediate and forceful response to this proposal once they had actual notice highlights the severity of their concerns and the necessity of creating mooring plans before awarding mooring spaces in undeveloped tidal waters.<sup>2</sup>

#### **Response to Fleet Point #4**

The Fleet argues that no mooring or traffic plan was required because a mooring and traffic plan is only required for Northeast Harbor and Somesville. This overly narrow reading of the Ordinance is contrary to the plain language read as a whole, inconsistent with the overall purposes of the Ordinance, and leads to absurd results.

Specifically, the Fleet hones in on language in Section 7.15 that states that the Harbor Master shall designate a mooring and traffic plan “for Northeast Harbor and Somesville” and “may create mooring and traffic plans for other harbors or any other area in the tidal waters of Mount Desert as needed.” Read in isolation, this language does support the Fleet’s position that the Harbor Master could have but was not required to designate a mooring plan for South Shore Cove.

However, the Law Court has made clear that ordinance sections cannot be read in isolation like this. Each section of an ordinance must be read together in harmony with the overall scheme envisioned when the ordinance was enacted. *Cumberland Farms, Inc. v. Town of Scarborough*, 1997 ME 11, 688 A.2d 914. As the Court put it in *Olson v. Town of Yarmouth*, 2018 ME 27, 179 A.3d 920, the singular goal in interpreting an ordinance is to give effect to the Town’s overall intent in enacting the ordinance. *Id.* This involves "taking into account the subject matter and purposes of the [ordinance], and the consequences of a particular interpretation." *Id.* Further, the

---

<sup>2</sup> The Fleet also attempts to have it both ways by acknowledging there was no notice at the same time it emphasizes that it heard no complaints about these moorings until January 2022. Of course complaints will be delayed when decisions are made without consulting interested stakeholders and installing moorings without any notice or public review process.

terms of a particular section must be construed reasonably, by considering the purposes and structure of the Ordinance to avoid absurd or illogical results. *Id.*

Here, as detailed in section II of the Association's prehearing brief, many other sections of the Ordinance are written with the assumption that a mooring plan exists for every mooring space. Further, as a practical matter, it is not possible to allocate moorings in accordance with the priority scale of Section 7.7 without first determining the maximum number of moorings that can be accommodated in a given area. Therefore, the proper interpretation is that Section 7.15 provides an immediate mandate to create mooring plans for harbors with mooring fields existing at the time the Ordinance was adopted but also requires a mooring plan be created for other tidal waters in the event there is a desire to place moorings there. Under the Fleet's contrary interpretation, the Harbor Master could unilaterally create a mooring field anywhere outside of the two designated harbors, even if that field has more moorings than either of the harbors. The Ordinance can and must be interpreted to avoid this absurd result.

However, even if the Ordinance does allow the Harbor Master to install singular moorings in tidal waters without creating a plan, it would be absurd to conclude there is not a need for a mooring and traffic plan in response to a proposal to install 30-plus moorings in an undeveloped cove—effectively turning South Shore Cove into an area with a similar intensity of use as designated harbors.<sup>3</sup> The intensity of this use is even greater if the proposal is viewed as a further expansion of Gilpatrick's Cove, as the Fleet characterizes it.<sup>4</sup> Such laissez faire planning is bound to lead to unintended consequences and is inconsistent with the just and orderly operation of tidal waters and

---

<sup>3</sup> Again, while this appeal pertains to four moorings, the Fleet's responses make it abundantly clear that they also view these four moorings as the first step in an overall plan for ever-evolving configurations of dozens of moorings in South Shore Cove.

<sup>4</sup> Of course, as demonstrated by the Longsworth Report, South Shore Cove is geographically distinct from Gilpatrick's cove and, as the Fleet concedes, one cannot even view it from the Fleet's base of operations in Gilpatrick's cove.

the promotion of a fair and efficient framework for the use of a valuable and limited public resource. Ordinance § 2.3 (Purpose of the Ordinance).

### **Response to Fleet Point #5**

The Fleet perplexingly asserts that Section 7.3 is irrelevant to the Harbor Committee's jurisdiction. Of course it is relevant. Section 7.3 establishes that no mooring may be placed without express permission and written approval of the Harbor Master. Read in context with Section 7.4, the Ordinance establishes an application and review procedure for awarding mooring spaces. What that application and review process does not anticipate is what happened here: the unilateral installation of four "test" moorings for the benefit of a third party without a permit being granted or denied on the basis of the mooring standards articulated in the second paragraph of Section 7.4.

The Fleet then goes on to create out of thin air a procedure that is found nowhere in the Ordinance, stating: "[i]f the 'test' period between express permission and final written approval shows that the moorings are in order and safe, as is the case with the four (4) moorings, the Harbor Committee should not disturb the decision of the Harbor Master." Again, this Ordinance provides for no such thing as a test or probationary mooring. For any party to receive a mooring space and install a mooring, it must submit an application and then within 30 days the Harbor Master must grant or deny it based on Section 7.4. In reality, it appears from the correspondence between the Association and the Harbor Master, and a review of the prior proceedings of this Committee, that the "test" mooring process was articulated clearly for the first time only in a defensive response to the Association arguing the proper procedures were not followed to establish these moorings.

And as previously stated, this Harbor Committee must consider all evidence at a *de novo* hearing and determine without any deference to the Harbor Master whether the standards of 7.4 and/or 7.18 are met. Further, those standards require the Committee consider far more than whether the moorings moved from their original placement or physically interfere with shore

access or activities. In short, there is no legal support for the Fleet's claim that the Harbor Master's decision may not be disturbed.

### **Response to Fleet Point #6**

The Fleet admits there are existing traffic problems in the area and does not deny that providing the Fleet more moorings will increase traffic. This demonstrates the need to create a traffic plan. Platitudes about being good neighbors does not fix this urgent public safety concern or remedy the fundamental failure to go through a public and comprehensive planning process before installing the first phase of a new field of moorings into an undeveloped cove in a congested area.

Dated: September 9, 2022

/s/ Stephen W. Wagner

---

Stephen W. Wagner, Esq., Bar No. 5621  
Rudman Winchell  
Attorneys for South Shore Cove Assoc.  
P.O. Box 1401  
Bangor, ME 04402-1401  
(207) 992-4414  
[swagner@rudmanwinchell.com](mailto:swagner@rudmanwinchell.com)