

David P. Silk, Esq.  
[dsilk@curtisthaxter.com](mailto:dsilk@curtisthaxter.com)

October 26, 2020

[WSimmons@yarmouth.me.us](mailto:WSimmons@yarmouth.me.us)

General Board of Appeals – Zoning  
c/o Wendy L. Simmons, SHRM-CP  
Administrative Assistant  
Town of Yarmouth  
Yarmouth Town Hall  
200 Main Street  
Yarmouth, ME 04096

RE: Board of Appeals Case # 20-BOA-0004 of Denise and Craig Benson,  
104 Spruce Point, Map 54, Lot 27

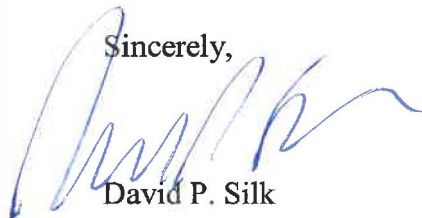
Dear Wendy:

For the hearing tonight on Denise and Craig Benson's appeal at 7:00 p.m. please find additional documents to be included in the record:

1. Supplemental Letter from Atlantic Environmental LLC (Tim Forrester) dated October 15, 2020, with map – Analysis of Existing Floats located in Yarmouth;
2. Town of Yarmouth November 17, 2016 float size waiver approval for James and Linda Donahue – Moshier Island;
3. Town of Yarmouth August 20, 2019 float size waiver approval for Peter and Lori Anastos;
4. Photo of Benson Property at 104 Spruce Point Ave.;
5. Video of Fetch at Benson Property;
6. State of Maine, Submerged Land Lease No. 2124-L-48; and

7. Letter from David P. Silk dated October 26, 2020 preserving issue for appeal.

Sincerely,

A handwritten signature in blue ink, appearing to read 'David P. Silk', is written over the typed name.

David P. Silk

Enclosures

cc: Denise and Craig Benson w/enclosures  
James N. Katsiaficas, Esq. w/enclosures



135 River Road • Woolwich, ME 04579  
207-837-2199 • [tim@atlanticenviromaine.com](mailto:tim@atlanticenviromaine.com)  
[www.atlanticenviromaine.com](http://www.atlanticenviromaine.com)

October 15, 2020

Board of Appeals  
Town of Yarmouth  
200 Main St.  
Yarmouth, ME 04096

**Re: Administrate Appeal of Denise and Craig Benson, 104 Spruce Point Road, Map 54, Lot 27.**

Dear Board Members,

Thank you for your consideration of this appeal. First, I would like to correct a typographic error in our application that was presented to the Planning Board. We inadvertently listed eelgrass (*Zostera marina*) under the phylum Algae. Eelgrass is a flowering plant and should be listed under the phylum Anthophyta. That change has no impact on the data we collected, just a nomenclature error.

In an effort to provide additional information to the Town concerning existing float sizes we have taken the time and effort to survey each dock found within the Town of Yarmouth. Atlantic Environmental (AE) staff boated along the shore in our 16 foot aluminum boat during high tide on October 3<sup>rd</sup>, 2020. At each dock a GPS point was recorded as was the length, width and number of floats. That data was used to calculate the float area at each dock. We located 110 docks within the Town. Of those, 15 are commercial docks, 7 are association docks and 88 are residential docks. We found that 60 of the 88 residential floats are below 320 square feet and 28 are over 320 square feet. We further looked at the location of the floats that are greater than 320 square feet. The vast majority of those floats are south facing into the prevailing winds and with a significant open fetch. More specifically, along the mainland from Drinking Water Point south to Princes Point there are 16 docks. Of those, 8 are greater than 320 square feet. On Cousin's Island and within Battle Cove (location of the Benson dock) 7 docks exist. Of those and including the proposed Benson dock 4 are greater than 320 square feet. This information demonstrates that 50% or greater of the floats with high expose areas are already greater than 320 sq.ft. Many of those floats are 40 feet or longer. While the Benson float will be on the larger side, we feel the data presented to the Town justifies the need for the proposed design.

Another important point of consideration is the design and orientation of the floats. As shown in the picture below, the end of the seaward float is discolored from constant wave action that strikes the float head on.



**Photograph One: View of the Benson floats as currently installed. Please note the discoloration on the end float indicative of constant wave action overtopping the float.**

**Photographer: Atlantic Environmental, LLC. Tim Forrester**

**Date: 10/3/2020**

The floats were designed to function as wave attenuators in that the first float takes the brunt of the wave action and permits the remaining floats to be more stable or in this case, more safe to not only access from the ramp, but also to approach and land a vessel regardless of the size of the vessel.

In other circumstances the prevailing winds come towards a float at an angle or at the side of the float. In those conditions achieving stability can be accomplished with a wider and not necessarily longer float. As observed along the shore most of those floats are 12-16 feet wide. However, they are 40 feet or less in length. The added width to those floats allows for a third row of flotation which affords additional stability without increased length. What this presents is that the size of a float is dictated by the wind direction, the area of open fetch, and the angle at which the waves strike the float.

For those reasons we feel the proposed float design is the shortest and narrowest float design that achieves safe and stable conditions given the location factors that apply to the site. Further, the third float is located in deeper water and has minimal impact on environmental conditions at the site, specifically eelgrass. The additional depth of water will also reduce prop scour on the eelgrass bed. Finally, this project was reviewed and approved by the Maine Department of Environmental Protection, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Maine Department of Inland Fisheries and Wildlife and the Maine Department of Marine Resource.

Thank you for your consideration of this appeal. If you require any additional information or clarifications, please feel free to contact me at (207) 837 - 2199 or by email at [tim@atlanticenviromaine.com](mailto:tim@atlanticenviromaine.com).

Sincerely,  
Atlantic Environmental LLC.

A handwritten signature in black ink that reads "Timothy A. Forrester". The signature is written in a cursive, flowing style.

Timothy A. Forrester, Owner

Cc: David Silk Esq.,  
Craig Benson  
Falls Point Marine





#### LEGEND

- FLOATS GREATER THAN 320 SQ. FT.
- COMMERCIAL OR ASSOCIATION FLOATS
- FLOATS 320 SQ. FT. AND BELOW

#### NOTES:

- 1) ATLANTIC ENVIRONMENTAL, LLC CONDUCTED A SURVEY ON OCTOBER 2, 2020
- 2) SURVEY WAS CONDUCTED AT HIGH TIDE
- 3) AT EACH DOCK, A GPS POINT WAS RECORDED AND THE LENGTH, WIDTH, AND NUMBER OF FLOATS
- 4) DATA WAS UTILIZED TO CALCULATE THE FLOAT AREA AT EACH DOCK



SCALE IN FEET



1 INCH = 2500 FEET



**ATLANTIC ENVIRONMENTAL LLC.**  
Environmental Consultants  
135 River Road, Woolwich, ME 04579  
(207) 837-2199  
tim@atlanticenviromaine.com

Date: 10/7/2020  
Revised:  
Project: Floats, Yarmouth  
Drafted By: TAF/LCV

**Analysis of Existing Floats located in the Town of Yarmouth, Maine.**

**Sheet  
1  
of  
1**



Alexander Jaegerman, FAICP  
Director of Planning & Development  
E-mail: [ajaegerman@yarmouth.me.us](mailto:ajaegerman@yarmouth.me.us)

Tel: 207-846-2401  
Fax: 207-846-2438

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**TOWN OF YARMOUTH**  
200 Main Street, Yarmouth, Maine 04096  
[www.yarmouth.me.us](http://www.yarmouth.me.us)

August 20, 2019

Peter and Lori Anastos  
56 Spruce Point  
Yarmouth, ME 04096

Tim Forrester  
Atlantic Environmental  
135 River Road  
Woolwich, ME 04579

Dear Mr. Anastos & Mr. Forrester

On August 14, 2019, the Yarmouth Planning Board voted to approve your request for a Shoreland permit to build a residential dock with the following motions and votes:

On the basis of the application, plans, reports and other information submitted by the applicant, findings and recommendations contained in Planning Board Report dated August 6, 2019 relevant to the Shoreland Zone Review Permit for Peter and Lori Anastos to extend the length of their residential pier system to reach deeper water and increase the size of the float to 448 sf to accommodate safer access to their boat at 56 Spruce Point Rd., Map 54 Lot 20, and the testimony presented at the Planning Board hearing, the Planning Board finds the following

Regarding Shoreland **Permit Review Chapter 701 Article II.R.**, that the plan is in conformance with the standards for review of this section, and is approved subject to the following condition of approval:

1. Town approval is contingent upon approval of MHPC and a letter of approval shall be provided to the Town upon receipt.
2. MEDEP erosion and sediment control best management practices shall be employed throughout the duration of the project.

*"Our Latchstring Always Out"*

Such motion moved by Michael Dubois, seconded by Andrew Bertocci, and voted 5 in favor, 0 opposed, Federle recused.

**Standard Conditions of Approval:**

Please note the following standard conditions of approval and requirements for all approved site plans:

1. **Develop Site According to Plan:** The site shall be developed and maintained as depicted on the site plan and in the written submission of the applicant. Modification of any approved site plan or alteration of a parcel shall require the prior approval of a revised site plan by the Planning Board or the Planning Authority.
2. **Site Plan Expiration:** The site plan approval will be deemed to have expired unless work has commenced within one year of the approval or within a time period up to two years from the approval date if approved by the Planning Board or Planning Director as applicable. Requests to extend approvals must be received before the one-year expiration date.

Please don't hesitate to contact me if you have any need to follow up on this approval.

Sincerely,



Alexander Jaegerman, FAICP  
Director of Planning & Development

CC:

Nathaniel J. Tupper, Town Manager  
Steven S. Johnson, Town Engineer  
Erik S. Street, Director of Public Works  
Nicholas Ciarimboli, Code Enforcement Officer  
Project File  
Planning Board





Alexander Jaegerman, FAICP  
Director of Planning & Development  
E-mail: [ajaegerman@yarmouth.me.us](mailto:ajaegerman@yarmouth.me.us)

Tel: 207-846-2401  
Fax: 207-846-2438

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**TOWN OF YARMOUTH**  
200 Main Street, Yarmouth, Maine 04096  
[www.yarmouth.me.us](http://www.yarmouth.me.us)

November 17, 2016

James and Linda Donahue  
22 Hedgerow Drive  
Cumberland, ME 04021

Carter Becker  
Falls Point Marine  
PO Box 61  
South Freeport, ME 04078

Dear Mr. & Mrs. Donahue and Carter Becker,

On November 9, 2016, the Yarmouth Planning Board voted to approve your request for a Shoreland permit to reconstruct the existing pier, gangway and float located on Moshier Island with the following motions and votes:

**SHORELAND OVERLAY DISTRICT (SOD) PERMIT**

On the basis of the application, plans, reports and other information submitted by the applicant, findings and recommendations contained in Planning Board Report dated November 3, 2016 relevant to the Shoreland Overlay District Permit for James & Linda Donahue Moshier Island Pier & Float Project, Shoreland Zone Review, Moshier Island, Yarmouth, ME, Map 64 Lot 6, and the testimony presented at the Planning Board hearing, the Planning Board finds the following:

**1. WAIVER**

- i. That based on the ease of service, distance to deeper water, and wind and tide conditions experienced at this site, the Planning Board **grants** the waiver of the 320 sf maximum float size and approves the proposed double float totaling 480 sf., as designed and configured in the application in order to achieve a useable depth of water.

**Such motion moved by Judy Colby-George, seconded by Matt Schumacher, and voted 4 in favor, 0 opposed, Kevin O'Rourke and Andrew Bertocci absent.**

**2. SHORELAND OVERLAY DISTRICT (SOD) PERMIT**

That the Planning Board finds that the plan is in conformance with the Shoreland Overlay District standards of the land use code, subject to the following condition of approval:

- i. *No building permit shall be issued until evidence and copies of DEP and ACOE approvals are submitted;*
- ii. *No building permit shall be issued until comments from MHPC are submitted for Planning Department review and approval;*

**Such motion moved by Judy Colby-George, seconded by Matt Schumacher, and voted 4 in favor, 0 opposed, Kevin O'Rourke and Andrew Bertocci absent.**

**Standard Conditions of Approval:**

Please note the following standard conditions of approval and requirements for all approved site plans:

1. **Develop Site According to Plan:** The site shall be developed and maintained as depicted on the site plan and in the written submission of the applicant. Modification of any approved site plan or alteration of a parcel shall require the prior approval of a revised site plan by the Planning Board or the Planning Authority.
2. **Site Plan Expiration:** The site plan approval will be deemed to have expired unless work has commenced within one year of the approval or within a time period up to two years from the approval date if approved by the Planning Board or Planning Director as applicable. Requests to extend approvals must be received before the one year expiration date.
3. **Construction Schedule and Preconstruction Meeting:** At least two weeks prior to the release of a building permit or start of site construction, a construction schedule shall be provided by the owner, agent, or contractor to the Town Engineer, Code Enforcement Officer, Public Works Director and Director of Planning and Development detailing the construction schedule and critical aspects of the site work. The Town representatives may require a preconstruction meeting with the contractor to review the approved plans and conditions of approval prior to start of construction.

We appreciate your investments to improve property in the Town of Yarmouth. Please don't hesitate to contact me if you have any need to follow up on this approval.

Sincerely,



Alexander Jaegerman, FAICP

Director of Planning & Development

CC:

Nathaniel J. Tupper, Town Manager  
Steven S. Johnson, Town Engineer  
Erik S. Street, Director of Public Works  
William "Bill" Longley, Code Enforcement Officer  
Project File

Attachment: Planning Report Dated November 3, 2016 (Applicant only)

Attachment 4



## Attachment 5

(See video attached to email)

**STATE OF MAINE**  
**SUBMERGED LANDS LEASE**

**No. 2124-L-48**

*This SUBMERGED LANDS LEASE (hereinafter Lease) conveys certain limited rights in the submerged lands held by the State of Maine in trust for the public. It is not an environmental permit for the use of these lands.*

This Lease is entered into by the Bureau of Parks and Lands (hereinafter Lessor), an agency of the State of Maine Department of Agriculture, Conservation and Forestry by its Director acting pursuant to the provisions of Title 12 M.R.S.A. Sections 1801 & 1862, and **CRAIG AND DENISE BENSON** (hereinafter Lessee) **3 MERRYMEETING LANE, RYE, NH 03870**. Lessor hereby leases to Lessee, on the terms and conditions hereinafter set forth, the following described submerged land (hereinafter leased premises) situated in Cumberland County, Maine, to wit:

A certain parcel of public submerged land located in Casco Bay, Town of Yarmouth, Maine, totaling 3,024 +/- square feet, abutting adjacent upland recorded in Cumberland County Registry of Deeds Book 34927 Page 144 now owned by Denise Benson as further described in Attachments A, B and C which are hereby incorporated into this Lease.

1. **TERM.** This lease shall commence on March 14, 2019 and continue to December 31, 2048.
2. **USE.** Lessee is hereby authorized to use leased premises for the purposes of a pier, ramp, three floats and associated berthing for private recreational use as described in Department of Environmental Protection NRPA Application Number L-28115-4P-A-N and for no other purposes.
3. **OTHER USES.** Lessor reserves the rights of the general public to transitory fishing, fowling, recreation, navigation, and other traditional uses of leased premises, and the right of Lessor to make such other uses of leased premises, including by way of example and without limitation, the right to permit pipes to be laid thereunder or telephone wires to be maintained thereover, as shall not unreasonably interfere with Lessee's use and enjoyment of leased premises for the purposes stated in Paragraph 2 above.
4. **REGULATORY PERMITS.** Lessee shall be responsible for obtaining any and all permits required by any agency of the United States, the State of Maine, or any political subdivision thereof, having jurisdiction over the activities on the submerged lands contemplated by this Lease. Lessee's compliance with such permits and conditions thereof shall be a requirement of this Lease for all purposes including, without limitation, for purposes of defining the extent and purpose of any alteration or use of in, on, under, or over leased premises. Unless all required permits authorizing the uses contemplated hereby are issued prior to the expiration of the calendar year next following the creation of this leasehold, this Lease shall be void. In the event that any agency of the United States, the State of Maine, or any political subdivision thereof, denies or disapproves any portion of any application by Lessee for the use of leased premises or any portion thereof, this Lease shall be void as to the denied or disapproved use as of the date of such denial or disapproval. Rental payments made by Lessee for such denied or disapproved use may, upon proper request, be refunded or equitably adjusted, subject to a service charge. Failure by Lessee to abide by, or conform to, the terms and conditions of any such permit shall be an event of default hereunder.
5. **ASSIGNMENT OR SUBLEASING.** All rights leased herein by Lessor may be assigned or sublet by Lessee with the prior written consent of Lessor. Such assignment shall not be unreasonably withheld under then applicable laws, regulations, and public trust principles. Notwithstanding any such assignment or sublease,

Lessee shall be and remain liable for compliance with the terms and conditions of this lease unless released by Lessor in writing.

6. **RENTAL.** Annual rental shall be payable hereunder throughout the term hereof as follows, except that rental shall be no less than the minimum amount established by law:

\$220.69 per year.

Rental is payable on or before the first day of February each year throughout the term hereof, except as may be adjusted from time to time in accordance with Paragraph 7 below. Payment is to be made to the Bureau of Parks and Lands, 22 State House Station, Augusta, Maine 04333. Checks are to be made payable to the Treasurer, State of Maine.

7. **RENTAL ADJUSTMENT.** Lessor may adjust the rental from time to time as necessary to conform with its regulations and laws as they may be amended, but Lessor may not adjust rental for five years from the commencement date of this Lease. Subsequent adjustments may not be made more frequently than once every five years. Lessor shall give Lessee at least 120 days notice of such adjustment. In the event Lessee is unwilling to accept such adjustment, Lessee may terminate the Lease and vacate the premises within 120 days of Lessor's notice of adjustment.

8. **TAXES.** Lessee shall pay when due all taxes, charges, assessments and other impositions levied by any governmental entity upon the structures and improvements on leased premises or any operations or activities thereon.

9. **INDEMNITY.** Lessee shall defend, or cause to be defended, and indemnify and hold Lessor, its employees and agents, harmless from and against any and all manner of claims, suits, expenses, damages or causes of action arising out of, in whole or in part, the use or occupancy of leased premises by Lessee, its agents, contractors, employees, guests, invitees, permittees and sublessees.

10. **MAINTENANCE.** Lessee, at Lessee's expense, shall keep leased premises free of garbage, refuse, and other discarded material and shall maintain all improvements upon leased premises in good condition and repair.

11. **GENERAL RESTRICTIONS.** No nuisance shall be permitted on leased premises. No minerals, including, without limitation, sand and gravel, shall be removed from leased premises, and no rock, earth, ballast or other material shall be deposited upon leased premises, without the prior written consent of Lessor.

12. **CASUALTY REPLACEMENT.** In the event that the improvements and structures placed on leased premises are substantially destroyed by fire or other casualty, and Lessee does not, within two years following such casualty, rebuild or replace the affected improvements and structures, Lessor may cancel this Lease upon thirty (30) days notice to Lessee. Such rebuilding or replacement shall not be undertaken by Lessee without the prior written approval of Lessor.

13. **DEFAULT.** The following shall be deemed to be events of default hereunder:

- A. Failure of Lessee to pay when due any rent payable hereunder;
- B. Failure of Lessee to comply with any other provision of this Lease.
- C. A transfer by Lessee in fraud of creditors, or petition initiated by Lessee or adjudgement of Lessee as bankrupt or insolvent in any proceedings;
- D. Appointment of a receiver or trustee for all, or substantially all, assets of Lessee; or



**E. Abandonment by Lessee of any portion of leased premises.**

Upon becoming aware of the occurrence of any such event of default, Lessor shall notify Lessee in writing. Except as otherwise provided in this paragraph, Lessee must cure any default within thirty (30) days of notice of same. Regarding section 13.B only, if a default occurs and Lessee has satisfied to Lessor that the nature of the default is such that it cannot be cured within thirty (30) days, Lessee shall promptly notify Lessor in writing of the circumstances that exist that require additional time to cure, and cause said default to be cured within the additional amount of time as determined by Lessor. If the default has not been cured within 30 days of Lessor's notice, or within the additional time period granted by Lessor when Lessee is unable to cure the default within 30 days, Lessor may, in addition to, and not instead of, any other remedies available at law or in equity, terminate this Lease without additional notice or demand to Lessee and enter onto and take possession of the leased premises. Lessee shall be liable to Lessor for all rent due hereunder and any loss and expenses incurred by Lessor by reason of any default or termination.

**14. ENTRY.** Lessor, its agents and representatives shall have access to leased premises and all improvements and structures thereon at all times for the purpose of inspecting and securing compliance with the terms and conditions of this Lease, and for all other lawful purposes.

**15. NOTICE.** Any notice required or permitted under this Lease shall be deemed to have been given when actually delivered, or when deposited in the United States mail, first class postage prepaid, addressed as follows: *To Lessor:* Bureau of Parks and Lands, 22 State House Station, Augusta, Maine 04333, ATTN: Submerged Lands Program. *To Lessee:* at the address given below by Lessee, or at such other address as Lessee may have theretofore specified by written notice actually received and placed of record with Lessor.

**16. ALTERATION.** Lessee shall make no alteration to leased premises, and shall place no improvements or structures in, on, or over leased premises except as specifically described in Paragraph 2 of this Lease, without Lessor's prior written consent.

**17. IMPROVEMENTS.** Upon the expiration, cancellation, or termination of this Lease, regardless of the reason therefore, Lessee shall have ninety (90) days to remove his property. Lessor, at its discretion, shall become owner of all improvements and structures upon leased premises not so removed. Lessor may, at its option, require Lessee to remove all such improvements and structures at Lessee's expense, and to restore leased premises to the condition in which they existed prior to the placement of any improvements or structures thereon.

**18. OTHER APPLICABLE LAWS AND RULES.** This Lease is subject to cancellation by an Act of the Legislature. This lease is issued in accordance with the Rules of the Bureau of Parks and Lands in effect on the effective date of this lease.

**19. ABANDONMENT.** Structures as described under section 2 of this Lease shall be placed on the leased premises within two (2) years of the issuance of this Lease. Once installed, such structures shall be used and maintained for their intended purpose. Failure of the Lessee to install the structures within this time frame or to use and maintain the leased premises shall be deemed an abandonment. Upon determining that the leased premises or a portion thereof have been abandoned, the Lessor at its option may terminate this lease as to the entire leased premises, or as to such portion as has not been so used or maintained, in accordance with the default provisions of Section 13.

**20. MISCELLANEOUS.** This Lease shall be binding upon, and shall inure to the benefit of, Lessor and Lessee and their respective successors, assigns and legal representatives. Failure of either party to complain of any act or omission on the part of the other, no matter how long the same may continue, shall not be deemed to be a waiver by said party of any of its rights hereunder. A waiver by either party at any time, express or implied, of any breach of any provision of this Lease shall not be deemed a waiver of, or consent to, any subsequent breach of the same or any other provision. Lessee may not file this Lease of record, or cause or permit the same, without

Lessor's prior written consent. Lessor makes no warranty of Lessee's leasehold estate, and in the event of any lawful ejectment of Lessee, Lessor shall refund to Lessee any rentals paid to Lessor for any period of Lease term then remaining. Lessee shall comply with all applicable laws, regulations and ordinances of governmental entities having jurisdiction over leased premises. This Lease contains the entire agreement of the parties and may not be modified except by a writing subscribed by both parties.

**21. GENERAL RIGHT TO TERMINATE.** Lessee shall have the right to terminate this Lease by notifying Lessor at least thirty (30) days prior to termination date. In terminating, Lessee agrees to vacate leased premises and remove all structures and personal property of Lessee located thereon, unless other arrangements have been made, with prior approval of Lessor, to transfer ownership or otherwise dispose of same. Rental payments made by Lessee for such terminated use may, upon proper request, be equitably adjusted, subject to a service charge.

**22. EXTINGUISHMENT OF CONSTRUCTIVE EASEMENT.** Lessee hereby relinquishes any and all rights to leased premises, or any portion thereof that may have been formerly held by constructive easement under Title 12 M.R.S.A. Sections 1801 & 1862, or otherwise.

*Accepted and agreed to on*

MARCH 25, 2019

*Denise Benson*  
(Lessee Signature)

Denise Benson  
(Print Name)

(Title)

3 Merry Meeting Ln  
(Address of Record)

Rye NH 03870

3-28, 2019

*Thomas A. Desjardin*  
(Lessor Signature)

Thomas A. Desjardin

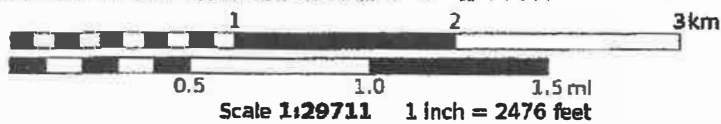
Director of Parks, Bureau of Parks & Lands

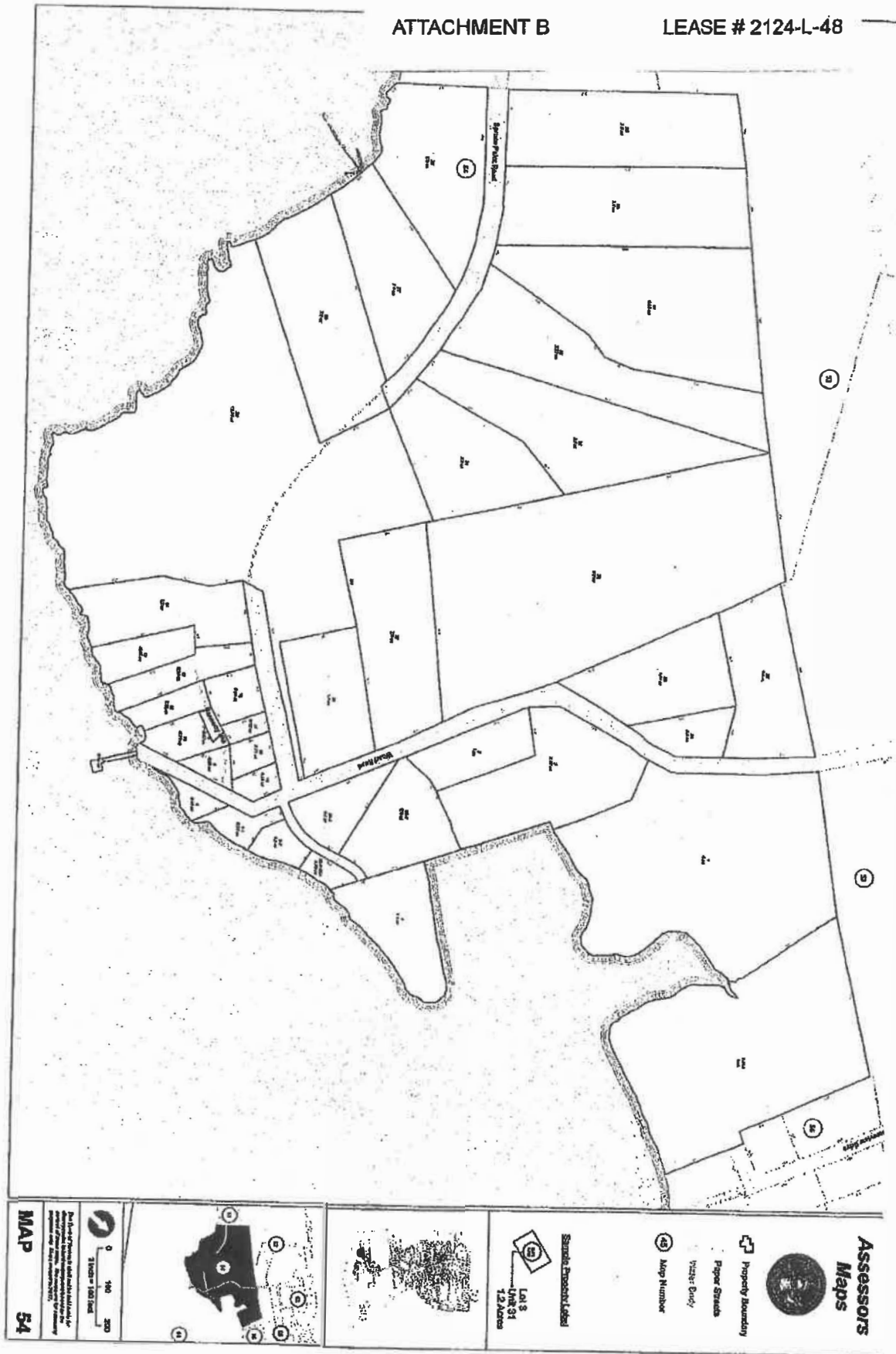
Department of Agriculture, Conservation & Forestry

State of Maine



Mercator Projection  
WGS84  
USNG Zone 19TDJ  
CalTopo





LEASE # 2124-L-48

ATTACHMENT C

MLW @ Existing Outer Bent

Benson 104 Spruce Pt Rd Yarmouth

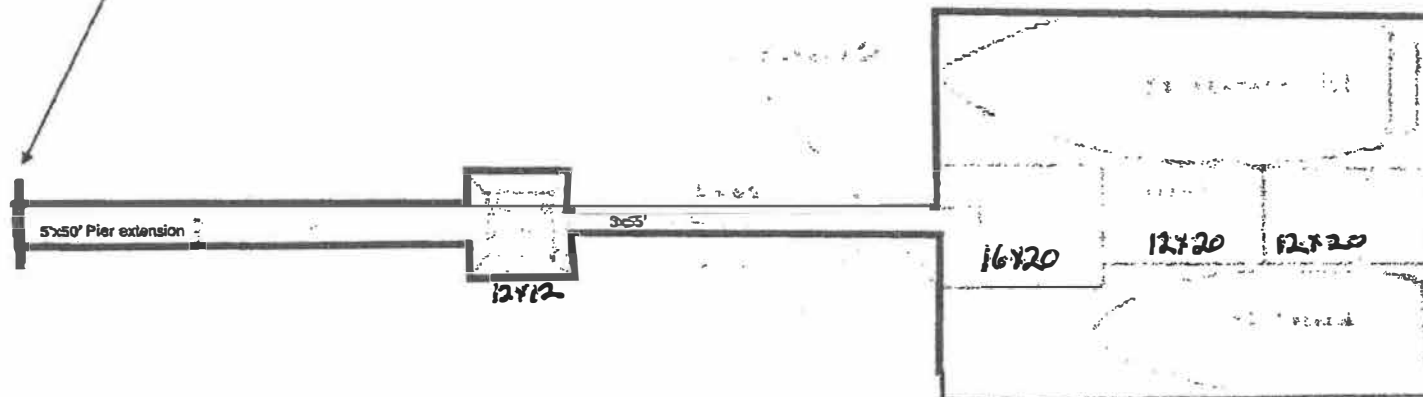
January 2019

20

Applicant's vessels:

1. 34' LOA 1'10" draft
2. 40' LOA 2'3" draft
3. 58' LOA 3' draft

34' Talaria on mooring



**CURTIS THAXTER**  
ATTORNEYS AT LAW

ONE CANAL PLAZA, SUITE 1000, P.O. BOX 7320, PORTLAND, ME 04112-7320  
TEL: 207.774.9600 • FAX 207.775.0612 • [www.curtisthaxter.com](http://www.curtisthaxter.com)

David P. Silk, Esq.  
[dsilk@curtisthaxter.com](mailto:dsilk@curtisthaxter.com)

October 26, 2020

[WSimmons@yarmouth.me.us](mailto:WSimmons@yarmouth.me.us)

General Board of Appeals – Zoning  
c/o Wendy L. Simmons, SHRM-CP  
Administrative Assistant  
Town of Yarmouth  
Yarmouth Town Hall  
200 Main Street  
Yarmouth, ME 04096

RE: General Board of Appeals case no.: 20-BOA-0004 - Denise and Craig Benson,  
104 Spruce Point, Map 54, Lot 27; Administrative Appeal of Planning Board  
decision, CH203F.3

**Issue to preserve for appeal**

Dear Wendy:

There are certain issues that in order to be raised in any court appeal, they must be raised before the Town of Yarmouth (“Town”) General Board of Appeals. This is true even if the General Board of Appeals lacks authority to address the issues. I have spoken with the General Board of Appeals’ legal counsel, James Katsiaficas, Esq., and explained to him that on behalf of the Bensons, there is an issue the Bensons intend to raise that is beyond the limited scope of the General Board of Appeals’ authority to consider. Attorney Katsiaficas suggested I write a letter to the Board setting forth the issue and ask you to include this letter in the record. He indicated that would be sufficient for preserving the issue.

The General Board of Appeals’ jurisdiction is limited by statute. 30-A M.R.S. § 2691. The General Board of Appeals does not have jurisdiction to decide whether the Town Ordinance Chapter 701, Art. II Section R, regulating float size and/or governing the waiver request is lawful.



The Town Ordinance regulating a float size waiver request, Chapter 701, Art. II Section R, applicable to piers, docks, wharves and floats, varies from the process, manner and standards set forth in the statute that delegates to municipalities, namely 38 M.R.S. § 1022, the ability to license piers, docks, wharves and floats. The Ordinance therefor is flawed, unconstitutional, void and illegal as the Town lacks the authority to regulate piers, docks, wharves and floats beyond the process, manner and standards set forth in Section 1022.

Under common law, the owners of property adjacent to navigable bodies of water hold special riparian property rights appurtenant to their estate in the land. *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996) (citing *Capune v. Robbins*, 160 S.E.2d 881, 886 (N.C. 1968)). These riparian rights traditionally included:

(1) [T]he right to have the water remain in place and retain, as nearly as possible, its natural character, (2) the right of access to the water, (3) subject to reasonable restrictions, the right to wharf out to the navigable portion of the body of water, and (4) the right of free use of the water immediately adjoining the property for the transaction of business associated with wharves. *Id.* (citing *Kalo, Coastal and Ocean Law* 119-20 (1991)).

The submerged land below the low-water mark is owned by the State, which has the authority, pursuant to 12 M.R.S. § 1862(2)(A)(6), to lease it.

As stated in *Britton v. Donnell*, 2011 ME 16, ¶¶ 10 and 11, involving a forty-eight foot extension of a pier with adjacent boat slips,

The Wharves and Weirs Act has existed in various forms since the mid-1800s. *See* R.S. ch. 17, § 21 (1857). In 1876, the Legislature granted municipal officers the authority to issue permits for wharves and weirs provided they “would not be an obstruction to navigation, or an injury to the rights of others,” and provided that no wharf could be “extended, erected or maintained” except in accordance with the statute. P.L. 1876, ch. 78, §§ 1, 4 (codified at R.S. ch. 3, §§ 60, 63 (1883)). In 1883, the statute was amended to require the consent of the adjacent landowner and to permit the adjacent landowner to recover a penalty of \$50 in an action of debt for violation of the statute. P.L. 1883, ch. 239, § 2 (codified at R.S. ch. 3, § 63 (1883)). In 1901, an amendment applied the consent and penalty provisions to wharves as well as weirs and provided that the statute would not affect any wharves that were already in existence on a particular date in 1901. P.L. 1901, ch. 220, §§ 1, 2 (codified at R.S. ch. 4, § 99 (1903)). The statute has remained substantially the same since then as to the issues addressed in this appeal. R.S. ch. 4, § 125 (1916); R.S. ch. 5, § 180 (1930); R.S. ch. 86, § 11 (1944); R.S. ch. 98, § 11 (1954); 38 M.R.S. § 1026.

The statute is intended to protect the owner of flats “in the full, practicable enjoyment” of his or her proprietary rights. *Donnell*, 85 Me. at 120, 26 A. at 1018. In *Sawyer v. Beal*, 97 Me. 356, 358, 54 A. 848, 848 (1903), the Court stated

that the purpose of the statute “was not to extend the ownership of the owner of the shore” or to provide any “new or additional rights,” but rather to protect the enjoyment of existing rights of owners of upland, shore, and flats.

Title 38 M.R.S. § 1022 establishes who the decision maker must be (municipal officers) and describes the process and standards the municipal officers must follow when acting on a license request to locate a pier, dock, wharf or float in tidal waters. As the cases show a wharf includes piers, docks and floats.<sup>1</sup>

As the State has been very specific in how it has delegated authority to a municipality regarding the licensing in tidal waters within town limits of any new wharf installation, *see* 38 M.R.S. § 1022, the Town of Yarmouth lacks the authority to modify or change the State-wide process and standards. 30-A M.R.S. § 3001; ME. Const. Art. VIII, pt. 2, § 1; *Schwanda v. Bonney*, 418 A.2d 163, 167 (Me. 1980) (holding that when licensing act is of statewide character and sets state-wide standards, then the State has preempted the field).

Section 1022 applies state-wide and provides the process and standards a municipality must follow in licensing a wharf.

It states:

Any person intending to build or extend any wharf, fish weir or trap in tidewaters, within the limits of any city or town, shall apply in writing to the municipal officers of the city or town, stating the location of the weir, the boundaries of the cove in which the weir will be constructed as identified on a map prepared by the Commissioner of Marine Resources, limits and boundaries, as nearly as may be, of the intended erection or extension, and asking license for the intended erection or extension. The applicant must notify all parties that may be directly affected by the proposed construction. Upon receiving an application, the officers shall give at least 3 days' public notice of the application in a newspaper, published in the town, or, if there is no newspaper published in the town, in a newspaper published within the county, and shall designate in the notice a day and time on which they or their designee will meet on or near the premises described, to examine the same and hear all parties interested. If, following such examination and hearing of all parties interested, the officers decide that such erection or extension would not be an obstruction to navigation or injury to the rights of others, and determine to allow the same, they shall issue a license under their hands to the applicant, authorizing the applicant to make such an erection or extension, and to maintain the same within the limits mentioned in such license. The applicant for license to build or extend a fish weir or trap shall first give bond to the town, with sureties, in the sum of \$5,000,

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<sup>1</sup> *Lauze v. Town of Harpswell*, 2006 WL 2959783 (Sup. Ct. Aug. 28, 2006) (ramp and float application governed by 38 M.R.S. § 1022); *Willis v. Town of York*, 2009 WL 6769835 (Sup. Ct. March 12, 2009); *Leonard v. Town of Kittery*, 2006 WL 522425 (Sup. Ct., Jan. 19, 2006).

conditioned that upon the termination of such license the applicant removes all stakes and brush from the location therein described. The municipal officers shall, within 10 days after the date of hearing, give written notice by mail of their decision to all parties interested. Any person aggrieved by the decision of the municipal officers, in either granting or refusing to grant a license as provided, may appeal to the Superior Court within 10 days after the mailing of such written notice. The court shall set a time and place for hearing and give notice thereof in the same manner as provided for a hearing before the municipal officers. The decision of the court must be communicated to the appellant and to the municipal officers of the town in which the proposed wharf, weir or trap is to be located. This decision is binding on the municipal officers, who shall issue a license, if so directed by the decision of the court, within 3 days after the decision has been communicated to them. If the appeal is sustained by the court in whole or in part, the appellant will have costs against the appellee. If the appeal is not so sustained, the appellee will have costs against the appellant. If any owner to whom a license has been issued or the owner's heirs or assigns fail to remove all stakes and brush within a period of one year after the termination of the license, as provided in section 1023, any person can remove the same without charge against the owner or the owner's heirs or assigns.

Since the Town's Ordinance, Chapter 701, Art. II Section R, applicable to piers, docks, wharves and floats, does not follow the process set forth in Section 1022, but applies a different standard, and process, and approving body, it beyond the scope of what the State has expressly delegated to the Town.

The standard in the statute is as follows:

If, following such examination and hearing of all parties interested, the officers decide that such erection or extension would not be an obstruction to navigation or injury to the rights of others, and determine to allow the same, they shall issue a license under their hands to the applicant, authorizing the applicant to make such an erection or extension, and to maintain the same within the limits mentioned in such license.

Here, the Town Harbormaster has stated the proposed float will not interfere with navigation.

There is nothing in the record that supports any finding that the proposed seasonal float will interfere with the rights of others. The State through the Bureau of Public Lands has already determined through the issuance of a Submerged Land Lease to the Bensons that the pier and seasonal float will not interfere with public trust rights. 12 M.R.S. § 1862(2) states:

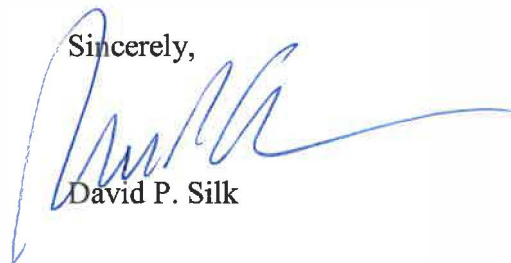
The director may grant the proposed lease if the director finds that, in addition to any other findings that the director may require, the proposed lease:

- (a) Will not unreasonably interfere with navigation;
- (b) Will not unreasonably interfere with fishing or other existing marine uses of the area;
- (c) Will not unreasonably diminish the availability of services and facilities necessary for commercial marine activities; and
- (d) Will not unreasonably interfere with ingress and egress of riparian owners.

And the MDEP in issuing a permit under the Natural Resources Protection Act, 38 M.R.S. §§ 480-A-480-JJ, for the pier and seasonal float made similar findings. The MDEP found that the pier and proposed floats “will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the coastal wetland.” *See* MDEP Permit issued May 13, 2019 at 2. The MDEP also stated that the “location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristic found within the viewshed of the scenic resource in the project area.”

In sum, here the Bensons’ seek approval from the Town to locate in tidewaters within the limits of the Town the seasonal floats. The Town’s Ordinance, Chapter 701, Art. II Section R, applicable to piers, docks, wharves and floats, exceeds the limited authority that the State has delegated in 38 M.R.S. § 1022 to the Town regarding the process, manner and standards applicable when licensing in such tidewaters piers, docks, wharves and/or floats. The Ordinance is therefore void, illegal and unconstitutional.

Sincerely,

A handwritten signature in blue ink, appearing to read "David P. Silk", with a long horizontal flourish extending to the right.

David P. Silk

cc: James N. Katsiaficas, Esq.