

TOWN OF BROOKSVILLE HARBOR COMMITTEE

*Johnathan E. Buck and Buck's Harbor Marina, Inc.
Appeal of Harbormaster's July 29, 2021 Order*

NOTICE OF DECISION AND ORDER

I. INTRODUCTION

Jonathan E. Buck and Buck's Harbor Marina, Inc. (collectively "BHM" or "Appellants") challenged a notice of violation and corrective actions decision letter by the Brooksville Harbormaster issued on July 29, 2021 ("Decision"), advising BHM of an enforcement action regarding compliance with a September 29, 2020 Consent Agreement and the Brooksville Harbor Ordinance.

Following a previous Harbormaster enforcement action against BHM, on September 29, 2020, BHM and the Town of Brooksville ("the Town") entered into a Consent Agreement where BHM agreed to a number of conditions, including:

1. Label each mooring buoy and/or pennant with information clearly displaying the maximum vessel length that may use the mooring.
2. Between September 29, 2020, and July 1, 2021, with oversight by an approved third-party mooring inspector, BHM was to inspect each of BHM's rental moorings and include the third-party inspector's signature on each inspection report.
3. BHM's moorings were to be maintained in accordance with Hamilton Marine Mooring Standards and the Brooksville Harbor Ordinance.
4. BHM was to comply with the Harbor Ordinance Section 8.9 regarding moorings.

On July 29, 2021, following a series of communications with BHM regarding perceived Consent Agreement and Harbor Ordinance violations, the Harbormaster issued her Decision advising BHM of several violations, including:

1. Failure to properly inspect BHM mooring number 29.
2. Failure to appropriately label twenty-five (25) BHM moorings with approved maximum vessel sizes.

3. Repeated placement of oversized vessels on rental moorings, in violation of the maximum size standards and Harbor Ordinance Section 8.10.
4. Violation of Harbor Ordinance Sections 8.1, 8.4.1 and 8.8.1, by the unapproved relocation of BHM moorings numbered 11, 20 and 21, and subsequent failure to return moorings to permitted locations.
5. Unpermitted placement and commercial use of BHM mooring number 27, and subsequent refusal of demands to remove it.

BHM then filed an appeal of the Harbormaster's Decision.

II. SUBJECT MATTER JURISDICTION, STANDING, & STANDARD OF REVIEW

The Harbor Committee has subject matter jurisdiction to hear this appeal pursuant to Section 5.6.7 of the Brooksville Harbor Ordinance.

BHM timely filed this appeal pursuant to Section 13.5 of the Harbor Ordinance and has standing to file such an appeal as BHM received a notice of violation and corrective action decision letter from the Harbormaster regarding commercial moorings permitted by the Town to BHM.

The Harbor Committee conducted a duly noticed *de novo* hearing on BHM's appeal on October 21, 2021, rendering its vote on that date.¹

III. RECORD

The following evidence and written argument was submitted in advance of the October 21, 2021 hearing:

- BHM August 27, 2021 Notice of Appeal
- Harbormaster Written Argument
- Harbormaster Exhibit Binder, including:
 - Exhibit 1 (Correspondence)
 - Exhibit 2 (Consent Agreement)
 - Exhibit 3 (Photographs)
 - Exhibit 4 (Inspection Reports)
 - Exhibit 5 (Emails)

¹ Prior to addressing the merits of BHM's appeal, the Harbor Committee first addressed whether any member may have a potential conflict of interest or bias. Member Christopher Bates disclosed his personal relationship with the Harbormaster and abstained from participation and voting in the proceedings. Mr. Bates did provide brief comments to the Harbor Committee as a member of the public.

- Harbormaster Proposed Order
- BHM Written Argument
- BHM Exhibit Binder, including:
 - Exhibit A (Order)
 - Exhibit B (Consent Agreement)
 - Exhibit C (Hamilton Marine Mooring Standards)
 - Exhibit D (BHM Mooring Datasheet)
 - Exhibit E (Moorings Subject to Different Standards than BHM)
 - Exhibit F (Selected Inspection Reports)
 - Exhibit G (BHM Correspondence with Harbormaster)
 - Exhibit H (Photographs)
 - Exhibit I (FOAA Requests and Relevant Responses)
 - Exhibit J (Text Messages)
 - Exhibit K (Email to Customer)
- BHM Reply Argument
- BHM Proposed Order

At the *de novo* hearing held on October 21, 2021, Attorney Stephen Wager on behalf of BHM presented argument based on the pre-filed materials, referring to BHM Exhibits A through K.² Johnathan Buck also presented argument and testimony on behalf of himself and Buck's Harbor Marina, Inc. The Harbormaster and Harbor Committee were permitted to ask questions of Mr. Buck.

Attorney Daniel Pileggi on behalf of the Harbormaster presented argument based on the pre-filed materials, referring to Harbormaster Exhibits 1-5. Harbormaster Debrae Bishop presented both argument and testimony. BHM and the Harbor Committee were permitted to ask questions of the Harbormaster.

Members of the public in attendance were permitted to provide comments.

The Town Clerk, with support of the Town Attorney, has retained a copy of the documents previously submitted and presented at the hearing, as well as a recording of the hearing.

² At the hearing Attorney Wagner requested that he be able to provide a revised BHM Exhibit D. Attorney Pileggi objected to its submission, as it was not part of the pre-filed materials submitted by the deadlines set out in the Harbor Committee's public notice and a copy of the proposed exhibit was not shared with Attorney Pileggi or the Harbormaster prior to the hearing. The Harbor Committee chair sustained the objection and denied the admission of the revised BHM Exhibit D to the record.

IV. ARGUMENT OF PARTIES

A. BHM Arguments

BHM framed its appeal as two core issues: whether the Decision holds BHM to the same standards as every other mooring permit owner and whether the Harbormaster fairly brought the enforcement action against BHM.

BHM argued the Harbormaster held BHM to more stringent standards than other mooring permit holders, asserting her application of the Hamilton Marine Moorings Standards and “commonly accepted marine practices” under the Harbor Ordinance to certain BHM mooring tackle was more onerous and limiting than how mooring standards are applied to other permit holders. BHM noted that a number of the maximum size vessel requested for its moorings were denied due to the type of mooring tackle used by BHM while other mooring permit holders using similarly sized tackle were permitted larger vessels.

Related to this, BHM argued the Harbor Ordinance requirement of “commonly accepted marine practices” in Section 7.7.1 is an unconstitutionally vague delegation of legislative authority to the Harbormaster and is therefore unenforceable.

As for BHM mooring 27, BHM argued it would be inequitable for the Harbormaster to revoke the mooring permit because BHM received approval to purchase the permit from a previous harbormaster. BHM asserted any lack of paperwork documenting this approval was only a ministerial oversight and the current Harbormaster had constructive knowledge of the transaction. BHM argued that the Harbormaster was prevented from revoking the permit for mooring 27 under the legal doctrine of equitable estoppel, or in the alternative, because BHM acquired vested rights to the mooring.

Regarding BHM mooring 29, BHM argues its failure to inspect the mooring as required under the Consent Agreement was due to delays beyond BHM’s control and these delays were communicated to the Harbormaster, and further that because the mooring inspection by Mr. Buck himself was conducted after July 1, 2021, the oversight requirement of the Consent Agreement no longer applied to any inspection conducted by BHM.

For BHM moorings 11, 20, 21, BHM argued there is no evidence BHM intentionally moved the moorings from the location they are permitted for and that any change in location is minor.

BHM also raised arguments that the Harbormaster failed to bring enforcement actions against other mooring permit holders for committing the same

violations she alleged BHM committed. BHM also argued the Harbormaster made false and defamatory statements about BHM to third parties, showing her enforcement actions were motivated by animus toward BHM. BHM argued enforcement under such circumstances would be unfair, prejudicial, and would violate BHM's due process and equal protection rights.³

B. Harbormaster Arguments

Regarding the mooring inspection reports provided by BHM, the Harbormaster noted that no mooring report was provided for mooring 29, the mooring was not inspected with oversight from a third-party inspector as required under the Consent Agreement, no permit was issued by the Harbormaster for mooring 29, and that after July 1, 2021, the mooring was placed into commercial service by BHM with a pennant and has been rented out regularly ever since. The Harbormaster further provided evidence that the mooring was rented out between September 5 and 8 to a 75-foot motor yacht and the mooring has only a 3000-pound granite block, which is suitable for no larger than a 35-foot vessel.

As for mooring markings, the Harbormaster noted that only 9 of BHM's 34 moorings were labeled as required under the Consent Agreement. Additionally, the Harbormaster asserted a number of BHM's 2021 mooring inspection reports impermissibly "added weight" to a number of moorings and that BHM repeatedly allowed vessels in excess of the permitted size to remain on many of BHM's moorings.⁴

The Harbormaster provided that BHM moorings 11, 20, and 21 were moved by BHM to unpermitted locations in violation of Harbor Ordinance Section 8.1.1. Specifically, the Harbormaster testified that mooring 11 and 20 were approximately 100 feet from their permitted locations and caused obstructions to the navigational

³ The Harbor Committee was advised by its legal counsel – Patrick Lyons of Eaton Peabody – that its jurisdiction relates only to appeals of persons or entities aggrieved by the Harbormaster's actions in enforcing the Harbor Ordinance and that it does not have the authority to rule on alleged violations of the United States or Maine Constitution or other legal issues specifically reserved to the Courts. The Harbor Committee then determined it would not address those issues raised by BHM but that the record would reflect that BHM raised these arguments. The Harbor Committee's legal counsel did advise it that it could consider this arguments as to whether they have any bearing on whether the Harbormaster properly enforced the Harbor Ordinance or Consent Agreement.

⁴ Christopher Bates noted during the public comment period of the hearing that many of BHM's moorings were not adequate for the maximum size of vessel requested by BHM because the top chain of the mooring did not satisfy the Hamilton Marine Mooring Standards as required by the Consent Agreement.

channel in Buck's Harbor, while mooring 21 was approximately 150 feet from its designated location.⁵

The Harbormaster then argued BHM mooring 27 was never permitted for use by the Town, and specifically that BHM placed mooring 27 into commercial service without a permit from the Town and that BHM has never produced such a permit approved by a previous harbormaster. The Harbormaster noted that mooring 27 had been used by previous permit holders for private purposes and had never been approved as a commercial mooring, nor was the mooring ever permitted by the U.S. Army Corps of Engineers.

V. FINDINGS & CONCLUSIONS OF LAW

Following the arguments and presentation of evidence and testimony by BHM and the Harbormaster, the Brooksville Harbor Committee then deliberated. Following its deliberation, the Harbor Committee took up and adopted the following motions as its findings and conclusions:

MOTION: At all pertinent times, Appellants have placed and maintained moorings in waters regulated by the Town, subject to the Town's Harbor Ordinance.

VOTE: 6-0 (unanimously adopted)

MOTION: By agreement with the Town dated September 29, 2020 ("Consent Agreement"), Appellants and the Town agreed to certain express conditions relating to Appellants' use of moorings in municipally regulated coastal waters in supplement to Harbor Ordinance regulations, in exchange for a waiver of all pre-existing claims and defenses.

VOTE: 6-0 (unanimously adopted)

MOTION: As of July 29, 2021 and continuing, Appellants have produced no mooring inspection report for their mooring no. 29 that complies with the Consent Agreement. On August 15, 2021, that mooring was placed into commercial service and rented commercially since.

VOTE: 5-1 (adopted)

MOTION: Appellant's use of mooring no. 29 is in violation of Consent Agreement paragraphs 2 and 3, and Harbor Ordinance section 8.9.

VOTE: 6-0 (unanimously adopted)

⁵ BHM provided testimony at the hearing that BHM mooring 20 had been relocated to its permitted location.

MOTION: As of July 29, 2021 and continuing, Appellants had marked only 9 of their 34 moorings legibly and in accordance with the Consent Agreement requirements.

VOTE: 6-0 (unanimously adopted)

MOTION: As of July 29, 2021 and continuing, Appellants added weight to a number of moorings, and moorings 11, 20 and 21 were in unpermitted locations in the harbor, without Harbormaster permission.

VOTE: 6-0 (unanimously adopted)

MOTION: As of July 29, 2021 and continuing, Appellants have repeatedly allowed vessels in excess of the permitted size to remain on many of their 34 moorings.

VOTE: 5-1 (adopted)

MOTION: As of July 29, 2021 and continuing, Appellants mooring no. 27 was unpermitted by the Town.

VOTE: 6-0 (unanimously adopted)

MOTION: As of July 29, 2021 and continuing, Appellants have placed their mooring no. 27 into commercial service without a permit. Prior to Appellants' purchase of that mooring's tackle, it had been used privately, and had never been issued a commercial mooring permit. No mooring permit has ever been issued to Appellants for that mooring. Notably, mooring no. 27 is not included in the moorings permitted by the U.S. Army Corps of Engineers.

VOTE: 6-0 (unanimously adopted)

MOTION: Appellants' conduct described in the above paragraphs violates the Harbor Ordinance and Consent Agreement, paragraphs 1, 2, 3, and 4.

VOTE: 6-0 (unanimously adopted)

MOTION: Appellants and the Harbormaster have been in communication with one another since the Consent Agreement was executed, and Appellants have been aware of that Agreement's requirements.

VOTE: 6-0 (unanimously adopted)

MOTION: Appellants were notified on July 29, 2021 of their failure to comply with the Harbor Ordinance and Consent Agreement, and have not brought themselves into compliance.

VOTE: 6-0 (unanimously adopted)

MOTION: Based upon the above findings, the Committee DENIES the appeal, and upholds the Harbormaster's notice of violations and requested corrective action as stated in her July 29, 2021 correspondence, and refers the matter to the Harbormaster for enforcement action.

VOTE: 6-0 (unanimously adopted)

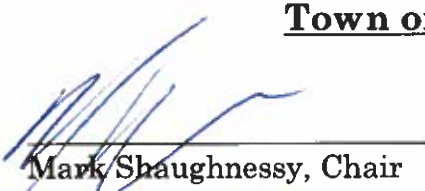
ORDER

BE IT ORDERED, that the Harbor Committee DENIES the appeal of Jonathan E. Buck and Bucks Harbor Marina, Inc., and upholds the Harbormaster's notice of violations and requested corrective action as stated in her July 29, 2021 correspondence, and refers the matter to the Harbormaster for enforcement action.

The Town Clerk shall record this Notice of Decision and Order and cause it to be sent to all necessary and appropriate parties.

Dated this 16 day of November, 2021, in Brooksville, Maine.

Town of Brooksville Harbor Committee



Mark Shaughnessy, Chair



Donald Condon



Robert Fisher



Frank Peasley



Patrick Ryan

Bob Vaughan

Right to Appeal

Any party may take an appeal, within 30 days of the date of the vote on the Brooksville Harbor Committee's decision, to Superior Court in accordance with Harbor Ordinance Section 13.5 and the Maine Rules of Civil Procedure, Rule 80B.