



BARNSTABLE  
TOWN CLERK

20 MAY -8 P3:10

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MAY 11 2020

**Town of Barnstable**  
**Zoning Board of Appeals**  
**Application for Other Powers**

ZONING BOARD OF APPEALS

Date Received  
Town Clerk's Office:

For office use only:  
Appeal # 2020-022  
Hearing Date 06-10-20  
Decision Due 08-

The undersigned Appellant hereby files an appeal to the Zoning Board of Appeals under M.G. L. Chapter 40A, Sections 8 & 15 for the reasons indicated:

Appellant's Name:<sup>1</sup> Charlene and Charles Nickson, Phone: \_\_\_\_\_

Appellant's Address: 695 Old Post Road, Cotuit c/o Paul Revere, Esq.

Address of Property that is the subject of this application: \_\_\_\_\_

Mooring in Cotuit Bay

Assessor's Map/Parcel Number: N/A Zoning District: RF

Groundwater Overlay District: N/A

Property Owner: Beacon Marine Const., LLC, Phone: \_\_\_\_\_  
*If different from Appellant*

Address of Owner: 37 Bowdoin Rd., Mashpee, MA 02649  
*If different from Appellant*

**This is a request for:**

- Enforcement Action
- Appeal of Administrative Official's Decision
- Other General Powers - Please Specify: \_\_\_\_\_

Which Section(s) of the Zoning Ordinance and/or MGL Chapter 40A are you appealing to the Zoning Board of Appeals? GL ch. 40A, Sec. 8, 13, 15

<sup>1</sup> The Appellant is the person making the appeal.

Application for Other Powers - Page 2

Nature of Appeal & Description of Request: \_\_\_\_\_

See attached

\_\_\_\_\_

\_\_\_\_\_

Attach Additional Sheet if Necessary

Is the property subject to an existing Variance or Special Permit .....No  Yes [ ] - #. \_\_\_\_\_

Existing Level of Development of the Property - Number of Buildings: Commercial Barge

Present Use(s): Commercial

Existing Gross Floor Area: \_\_\_\_\_ sq. ft. Proposed New Gross Floor Area: \_\_\_\_\_ sq. ft.

Is the property located in a designated Historic District?..... Yes [ ] No

Is this proposal subject to the jurisdiction of the Conservation Commission ..... Yes [ ] No

Is this proposal subject to approval by the Board of Health ..... Yes [ ] No

Is the building a designated Historic Landmark?..... Yes [ ] No

Has a building permit been issued?..... Yes [ ] No

Has a building permit been refused?..... Yes [ ] No

The following information, as applicable, should be submitted with the application at the time of filing.

- Three (3) copies of the completed application form, each with original signatures accompanied by all supporting documentation related to the appeal
- Three (3) copies of a certified property survey (plot plan) and one (1) reduced copy (8 1/2" x 11" or 11" x 17") showing the dimensions of the land, all wetlands, water bodies, surrounding roadways and the location of the existing improvements on the land.
- Three (3) copies of a site improvement plan and one (1) reduced copy (8 1/2" x 11" or 11" x 17").
- The applicant may submit any additional supporting documents to assist the Board in making its determination.

Signature:  \_\_\_\_\_  
*Appellant's or Representative's Signature*<sup>2</sup>

Date: 5/8/20

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Print Name Paul Revere, III

MAY 11 2020

Address: 226 River View Lane  
Centerville, MA 02632

Phone: 508-232-0162

Fax No.: n/A

e-mail Address: revereiii@aol.com

<sup>2</sup> All correspondence on this application will be processed through the Representative named at that address and phone number provided. Except for Attorneys, if the Representative differs from the Appellant, a letter authorizing the Representative to act on behalf of the Appellant shall be required.



**Town of Barnstable  
Zoning Board of Appeals**

**Agreement to Extend Time Limits  
For Holding of a Public Hearing and Filing of a Decision on an  
Appeal of an Administrative Official and  
Enforcement Action**

Date Application was Time Stamped w/Town Clerk:	5/8/20	ZBA Appeal #:	
Original Hearing Date:		Applicant:	
Original Decision Due:		Address:	
Number of Days Extended:		Map/Parcel:	
New Decision Due Date:			

In the Matter of Nickson, ( the Appellant(s) and the Zoning Board of Appeals (the Appellant(s)), pursuant to Mass. General Laws, Chapter 40A, Section 15, agree to extend the required time limits for holding of a public hearing and for filing a decision on this appeal of an Administrative Official for a period of \_\_\_\_\_ days beyond that date the hearing was required to be held and the decision was to be filed. This extension requires that the decision be filed 14 days after the decision is rendered by the Zoning Board of Appeals and that the decision be filed no later than \_\_\_\_\_.

In executing this Agreement, the Appellant hereto specifically waive any claim for a constructive grant of relief based upon time limits applicable prior to the execution of this Agreement.

Appellant(s):

Zoning Board of Appeals:

Signature: \_\_\_\_\_

Appellant(s) or Appellant(s) Representative

Signature: \_\_\_\_\_

Chairman or Acting Chairman

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Zoning Board of Appeals**  
Growth Management Department  
200 Main Street, Hyannis, MA 02601  
Phone: 508-862-4785 Fax: 508-862-4784

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**ZONING BOARD OF APPEALS**

cc: Town Clerk  
Petitioner(s)  
File

**ATTACHMENT TO APPEAL OF DENIAL OF REQUEST FOR ENFORCEMENT**

**LAW OFFICES OF PAUL REVERE, III**  
226 River View Lane  
Centerville, Massachusetts 02632  
(508) 237-1620  
revereiii@aol.com

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**Introduction**

ZONING BOARD OF APPEALS

This matter involves an appeal of the denial of a request for enforcement filed with the Barnstable Building Commissioner in January, 2020, on behalf of Charlene and Charles Nickson (the “Nickson’s”). The Nickson’s requested that the Building Commissioner require Beacon Marine Construction, LLC (“Beacon”) to stop the storage of a commercial barge and crane on a mooring off Cordwood Landing in a residentially zoned district. The Building Commissioner denied the request. The Nickson’s have appealed that denial pursuant to G.L. ch. 40A. The Nickson’s request the Barnstable Zoning Board of Appeals reverse the Building Commissioner’s April decision as the area is residentially zoned and no provision of state or local law allows Beacon to store or maintain a commercial barge in a residential district.

**Procedural Background**

On January 17, 2020, the Nickson’s filed a request for enforcement regarding the barge stored by Beacon with the Barnstable Building Commissioner. (Copy attached as Exhibit One). In response to requests from the Building Commissioner, the Nickson’s submitted clarifying information on March 5, 2020 (Exhibit Two), and April 10, 2020 (Exhibit Three). Later, on April 10, 2020, the Building Commissioner sent his denial of the request for enforcement with a letter from the Town attorney’s office accompanying it which provided a legal basis for a portion of the Commissioner’s decision.<sup>1</sup> (Exhibit Four).

**Request for Enforcement**

The Nickson’s own a property located at 695 Old Post Road, Cotuit, and immediately adjacent to Cordwood Landing. Cordwood Landing is located at the foot of Cordwood Road in the northern portions of Cotuit Bay and includes a mooring field. A copy of the Town of Barnstable’s Zoning Map for the village of Cotuit was included with the request for enforcement and a copy showing the location of the Nickson’s property, Cordwood Landing, and the approximate location of the Beacon’s barge mooring is attached as Exhibit Five. The request for enforcement explained that Beacon stored a commercial barge and crane off Cordwood Landing on a mooring located in a RF residentially zoned district (Exhibit One, at p. 1) and attached photographs of the barge and crane (Exhibit One, at pp. 4-5) and the Town’s zoning map showing that the RF District and the Town’s regulatory authority extended into the waters of North Bay. (Exhibit One, at p. 7). The request pointed out that the storage of commercial vehicles is not an allowed use within the RF district and, on that basis, requested pursuant to G.L. ch. 40A, Sec. 7, that the Building Commissioner enforce the Barnstable Zoning Ordinance and prohibit Beacon from storing the

<sup>1</sup> While the denial of the request for enforcement is dated April 9, 2020, it was sent by email on May 10, 2020, and, in response to the Nickson’s April 10, 2020, clarifying submittal. See Exhibit Four, at p. 1 (clarification document sent at 10:42 a.m., and denial sent at 12:06 p.m.).

barge at this or any other residentially zoned location.

More specifically, the zoning ordinance of Barnstable regulates uses within the Town. Zoning regulations of towns extend to the marine waters within their jurisdiction. G.L. ch. 40A (codification of 1975 Acts Ch. 808); *and* 1975 Acts Ch. 808 Sec. 2A (zoning extends to “uses of bodies of water (copy attached as Exhibit Three)). The Barnstable Zoning Map shows that the RF zoning district extends southerly from the Cotuit shoreline into Cotuit Bay at Cordwood Landing until it reaches the RF-1 District which covers Great Island/Oyster Harbors.<sup>2</sup> Thus, the barge and crane are being stored in the RF zoning district.

The only principal permitted uses in the RF District are single family residences. Barnstable Code Sec. 240-14A. No provision allows for the full-time storage of any commercial vehicle such as a barge and crane in the district as is being done by Beacon off Cordwood Landing.<sup>3</sup> Even when a home occupation is allowed in a residential district, the homeowner can only keep one truck and a trailer on the premises. Barnstable Code Sec. 240-46(B)(12). If commercial uses like Beacon are allowed by lack of enforcement, then an individual could open up a floating restaurant, bed and breakfast, ~~or lumber storage~~ and in any mooring field.<sup>4</sup>

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### Clarifications

ZONING BOARD OF APPEALS

On March 4, 2020, the Building Commissioner requested that the Nickson's "include a specific citation of the zoning ordinance that you would like enforced." On March 5, 2020, the Nickson's responded that:

Sec. 240-7.A prohibits uses not in conformity with the use regulations of the Barnstable Zoning ordinance.

Sec. 240-14.A states that single family dwelling detached is the only allowed principle use in the RF zoning district.

On April 2, 2020, the Building Commissioner again requested that the Nickson's rephrase their request which they did explaining that a fundamental principle of zoning is that, to be lawful, a use must conform with the allowed uses in the zoning district. Consistent with this principle, Sec. 240-7A of Barnstable Zoning Ordinance expressly provides: "**No building shall be erected or altered and no building or premises shall be used for any purpose except in conformity** with all of the regulations herein specified for the district in which it is located." Sec. 240-14.A(1) of the Barnstable Zoning Ordinance provides that the only "Principal permitted uses . . . in the RC-1 and RF Districts [are] Single-family

<sup>2</sup> The Town of Barnstable also extends the "Recreational Shellfish Area and Shellfish Relay Area Dock and Pier Overlay District" into these same waters which demonstrates that the Town Council knows that the waters of Cotuit Bay are regulated under the Town's zoning Ordinance.

<sup>3</sup> Obviously, temporary storage is allowed at construction sites while construction is ongoing, but, in this case, Beacon is simply storing its barge and crane on a mooring when it is not being used on dock construction projects in Barnstable.

<sup>4</sup> The Town might be concerned as to how to distinguish between this enforcement request and various other commercial ventures on the Town waterways which happen regularly such as sportfishing, tour boats, and ferries. The primary difference is that the barge is fixed in a single location for months off Cordwood Landing. In contrast, the other commercial ventures previously set forth are mobile and are navigating the waterway similar to a taxi cab or tour bus on a roadway within the Town. As such, these mobile operations are not the subject of zoning. Furthermore, the storage location where such boats and ferries are kept are limited to areas which are properly zoned such the Hyannis Harbor District, Barnstable Code Sec. 240-24.1.7A(1)(f) (allowing "charter fishing, marine sightseeing, and excursion facilities" as principal permitted uses) and the Marine Business Districts, Barnstable Code Sec. 240-23 (allowing "commercial fishing" and "whale-watching").



residential dwellings.” Because the zoning regulations of towns extend to the marine waters within their jurisdiction and the Barnstable Zoning Map shows that the RF zoning district extends southerly from the Cotuit shoreline into Cotuit Bay at Cordwood Landing until it reaches the RF-1 District which covers Great Island/Oyster Harbors. Thus, the barge and crane are located in the RF zoning district.

The barge and crane are commercial construction devices that Beacon uses to construct piers and locate docks within the waters of the Town of Barnstable. No construction operations (excepting perhaps preparatory/staging activities) are performed at Cordwood Landing. Rather, the barge is moved from location to location throughout the Fall and Spring to perform construction at various locations. In the summer, it is simply stored on a mooring off Cordwood Landing near the Nickson’s home in the RF District.

No provision of the Barnstable Zoning Ordinance allows for the full-time storage of any commercial vehicle such as a barge and crane in the RF district as is being done by Beacon off Cordwood Landing. The only exemption from conforming with use requirements is when a use existed prior to the zoning change and that use continued through the present. The storage of the barge cannot meet those requirements for two reasons. First, the area has been zoned residential since at least 1970 and the barge and crane have not been stored of Cordwood Landing continuously since that time. In particular, the barge was not stored on that mooring when the Nickson’s purchase their home in 2000. The barge first appeared on the mooring circa 2012-2013. The Nickson’s complained to Harbormaster Horn and the barge was removed for a number of years only to return in 2019. Thus, the barge was not stored for over three years at the Cordwood Landing mooring during the last ten years and cannot qualify as a pre-existing nonconforming use even if it predated zoning.<sup>5</sup> Finally, the burden of proof is not on the Nickson’s to demonstrate an exemption, *Hall v. Zoning Board of Appeals of Edgartown*, 28 Mass. App. Ct. 249 (1990), and there is no statute of limitations preventing enforcement against a nonconforming use which did not receive a building permit. *Lord v. Board of Appeals of Somerset*, 30 Mass. App. Ct. 226 (1991). As such, there is no exception that would allow the barge to be stored in the RF district.

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### Denial of Request

ZONING BOARD OF APPEALS

Within a short time of receiving, the Nickson’s clarification, the Building Commissioner issued the denial which is attached as Exhibit Four. The denial stated:

1. Your request is not enforceable as the claim being made is without merit.
  - a. The land below the mean low water mark belongs to the Commonwealth and is beyond the jurisdiction of the building commissioner.
  - b. The waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.
2. Your clients lack standing to request enforcement

Exhibit Four at p. 2.

The denial also attached a “legal opinion” of the Town Attorney’s Office to Support the assertions of the Building Commissioner.

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<sup>5</sup> My understanding is that the barge was stored in the Little River area of Cotuit Bay and generated complaints from property owners in that area.

## Response to Denial

### 1. Courts Have Already Held That Zoning in Cotuit Extends to the Waters of the Commonwealth in Cotuit Bay

Rather than explain how the storage of a barge complies with the Barnstable Zoning Ordinance, the Building Commissioner simply states that the Ordinance does not extend to the waters of Cotuit Bay. This is patently wrong and the issue has previously been decided by the Massachusetts Supreme Judicial Court.

In particular, in *Crawford v. Building Inspector of Barnstable*, 356 Mass. 174 (1969) (copy attached as Exhibit Six)<sup>6</sup>, the Massachusetts Supreme Judicial Court specifically addressed the issue of whether Barnstable's zoning requirements applied to Cotuit Bay and found that they did. The *Crawford* matter involved a request for enforcement involving the expansion of a nonconforming "hotel" in a residential district in Cotuit. *Id.* at pp. 2-3 (356 Mass. 175-176). Among the changes to the hotel which the Court reviewed was "the construction of a timber pier and float which 'extends into the bay some 280 feet' from the beach or water side of the premises." *Id.* at p. 3 (356 Mass. 176). In addressing the pier, the Court explained:

The pier, on the beach or water side of the premises, presents a different situation. . . . The pier is 285 feet long and eight feet wide. The deck forming the "T" at the end of the pier is forty-eight feet by fifteen feet. On one side of the pier there are seven bays, each about ten feet wide and defined by piles driven twenty feet from the pier, for the mooring or berthing of boats. On the same side of the pier there is a float, sixteen by twenty feet, which is reached from the pier by a ramp ten feet long. On the other side of the pier there are thirteen bays or berths each about twelve feet wide and defined by mooring piles driven twenty feet from the side of the pier.

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\* \* \*

The facts show much more than expansion within nonconforming premises of the nonconforming business of a small hotel or club. See *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 523. The pier is a wholly new and permanent structure where none had existed before. It makes a use of the water side of the premises which is different in quality, character and kind as well as degree from that which was made of it before. See *Bridgewater v. Chuckran*, 351 Mass. 20, 23, and cases cited. Indeed, to quote the judge, "the efficiency and utility of that portion of the harbor has been enhanced, *as a site for sport boating* , by the installation of the pier" (emphasis supplied). The effect on the neighborhood which the new use will produce consequent upon the inevitable advertising needs no elaboration. In our judgment the pier is not, as Harbor View contends, a "reasonable substitution of facilities" for reaching the hotel from the bay, but is the creation of a wholly new facility designed especially to attract and accommodate the boating public on a large scale. **It is a new enterprise on the beach side of a residence D area. In bold contravention of the provisions of G. L. c. 40A, Section 5, and the zoning by-law, Harbor View has literally staked out an area in excess of 14,000**

<sup>6</sup> Due to the Covid 19 restrictions, the official published version of the decision was unavailable. Exhibit Six is from the state law library website and citations include page references to both the published and attached versions.

square feet on the water side of the premises for an impermissible use. It is a use which may be prevented on a petition for a writ of mandamus. *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 517-522.

\* \* \*

No special rights accrue to Harbor View because the pier was constructed under a license granted by the Commonwealth's Department of Public Works. The license was "subject to all applicable Federal, State, County, and Municipal laws, ordinances and regulations." Such licenses may not be used contrary to the terms of zoning by-laws. *Rose v. Board of Appeals of Wrentham*, 352 Mass. 301, 303.

The entire area of the town of Barnstable has been zoned.

The seaward boundary of the town coincides with the marine boundary of the Commonwealth. G. L. c. 42, Section 1. Cf. *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 524. The whole pier is within the area subject to the zoning regulation.

\* \* \*

The order for judgment dismissing the petition is reversed. An order is to be entered for issuance of the writ forbidding forthwith the use of the pier for the mooring of boats or as a means of access to or egress from the intervenor's premises, and directing the building inspector to have the pier dismantled by the intervenor. The case is to be retained by the Superior Court with power to enter such additional orders, consistent with this opinion, as may be necessary to insure the enforcement of the zoning by-law by the building inspector.

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*Id.* at 6-8 (356 Mass. 179-181) (emphasis supplied and footnotes omitted).

In summary, the Supreme Judicial Court was faced with the issue of whether Barnstable's zoning requirements in Cotuit applied to pier that required a "license" from the state because it extended into lands of the commonwealth (*i.e.*, below mean low water) and concluded that Barnstable zoning applied. The Court specifically noted that the boundaries of the Town coincide with the marine boundaries of commonwealth meaning that the Town of Barnstable can regulate offshore until the state's boundary with federal waters. This conclusion is somewhat self-evident as the Barnstable Police Department and Department of Marine and Environmental Affairs regularly enforce Town requirements on lands of the commonwealth below mean low water. Additionally, the "Recreational Shellfish Area and Shellfish Relay Area Dock and Pier Overlay District extends into Cotuit Bay in this same area. *See* Exhibit Five. Finally, and as mentioned in the request for enforcement, the Town's position that zoning regulation is prohibited would essentially allow any business (hotel, bar, casino, strip club) to be located within a few feet from the edge of any beach in any district and be completely immune from town regulation. The absurdity of this result is self-evident.

In support of its position, the Town cites primarily the *Fafard* decision and also to a statement of the Massachusetts Appeals Court in a decision on a matter in Mashpee. Contrary, to the Town's argument, the *Fafard* decision upholds the ability of Town's to regulate in commonwealth waters. Specifically, the *Fafard* decision holds that the Town may regulate piers in commonwealth lands to protect recreational



interests. *Fafard v. Cons. Comm'n of Barnstable*, 432 Mass. 205-207 (2000) (municipal conservation commission acted within its authority under the local bylaw to deny a permit to build a pier on the basis that the pier would have a significant adverse impact on recreation). Additionally, the Appeals Court decision does not hold that Mashpee cannot regulate commonwealth waters under zoning, but, simply, that “[r]easonably construed” the Mashpee zoning bylaw and map do not apply to an aquaculture in Popponessett Bay. This result is unsurprising as the Mashpee Zoning map shows that its zoning district does not extend to the water sheet. *See* Exhibit Seven (portion of Mashpee zoning showing Popponessett Bay). In contrast, Barnstable has regulated some harbors (Cotuit) and not others (Barnstable) under zoning. *Compare* Exhibit Five (Cotuit Village Zoning Map) *with* Exhibit Eight (Barnstable Village Zoning Map).

## 2. Standing is Not a Legal Reason to Deny an Enforcement Request

The request for enforcement was made pursuant to M.G.L. ch. 40A, Sec. 7 which provides:

If the officer or board charged with enforcement of zoning ordinances or by-laws is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request.

The term “aggrieved” is nowhere found within Section 7 and no reported decision has grafted such a requirement onto Section 7. The reason is simple. First, the word “aggrieved” is not used in Section 7 in contrast to other provisions of G.L. ch. 40A which can only be invoked by a person “aggrieved.” *See* G.L. ch. 40A, Secs. 8, 13, and 17. Second, importing an “aggrieved” standard onto zoning enforcement would require the Building Commissioner to engage in a determination of the impact of a zoning violation on the requester – an inquiry that a Building Commissioner would be ill suited to engage in – rather than simply focusing on the merits of the request.

Regardless, the Nickson’s agree that to successfully attain review of the Building Commissioner’s denial before the Zoning Board of Appeals, they will be required to demonstrate aggrievement to the Board before it closes the public hearing. *Green v. Bd. of Appeals of Provincetown*, 404 Mass. 571 (1989). The Nickson’s will be submitting additional information to demonstrate their aggrievement, but, note, that the matter involves a business operating in a residential only RF zoning district and, as such, the Nickson’s are “aggrieved” and have standing to preserve the integrity of the district.

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Paul Revere, III

ZONING BOARD OF APPEALS

EXHIBIT ONE

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ZONING BOARD OF APPEALS

**LAW OFFICES OF PAUL REVERE, III**  
226 River View Lane  
Centerville, Massachusetts 02632  
(508) 237-1620  
revereiii@aol.com

January 17, 2020

Brian Florence  
Barnstable Building Commissioner  
200 Main Street  
Hyannis, Massachusetts 02601

Via Hand Delivery

RE: Request for Enforcement  
Beacon Marine Construction Barge

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Mr. Florence:

ZONING BOARD OF APPEALS

This letter is written on behalf of Charlene and Charles Nickson of 695 Old Post Road, Cotuit, and is in regards to the storage of a commercial barge and crane by Beacon Marine Construction, LLC ("Beacon") off Cordwood Landing on a mooring located in a residentially zoned district. Attached as Exhibit One is a photograph showing the barge and crane. Based upon my review of the Barnstable Zoning Ordinance and maps, the waters off of Cordwood Landing are located in the RF Zoning District (copy of portion of zoning map attached as Exhibit Two) and that district does not allow the storage of commercial vehicles. As such and on behalf of the Nickson's, I hereby request pursuant to G.L. ch. 40A, Sec. 7, that you enforce the Ordinance and prohibit Beacon from storing the barge at this or any other residentially zoned location.

**Zoning Jurisdiction of Barnstable**

The zoning ordinance of Barnstable regulates uses within the Town. Zoning regulations of towns extend to the marine waters within their jurisdiction. G.L. ch. 40A (codification of 1975 Acts Ch. 808); *see also* 1975 Acts Ch. 808 Sec. 2A (zoning extends to "uses of bodies of water (copy attached as Exhibit Three)).

The Barnstable Zoning Map shows that the RF zoning district extends southerly from the Cotuit shoreline into Cotuit Bay at Cordwood Landing until it reaches the RF-1 District which covers Great Island/Oyster Harbors.<sup>1</sup> Thus, the barge and crane are being stored in the RF zoning district.

**Allowed Uses in the RF Zoning District and Beacon's Use of the Mooring**

The only principal permitted uses in the RF District are single family residences. Barnstable Code Sec. 240-14A. No provision allows for the full-time storage of any commercial vehicle such as a barge and crane in the district as is being done by Beacon off Cordwood Landing.<sup>2</sup> Even when a home occupation is allowed in a residential district, the homeowner can only keep one truck and a trailer on the premises.

<sup>1</sup> The Town of Barnstable also extends the "Recreational Shellfish Area and Shellfish Relay Area Dock and Pier Overlay District" into these same waters which demonstrates that the Town Council knows that the waters of Cotuit Bay are regulated under the Town's zoning Ordinance.

<sup>2</sup> Obviously, temporary storage is allowed at construction sites while construction is ongoing, but, in this case, Beacon is simply storing its barge and crane on a mooring when it is not being used on dock construction projects in Barnstable.

Barnstable Code Sec. 240-46(B)(12). Frankly, if commercial uses like Beacon are allowed by lack of enforcement, then an individual could open up a floating restaurant, bed and breakfast, or lumber storage yard in any mooring field.<sup>3</sup>

In summary, the use of a mooring for the storage of a commercial barge in the RF District as Beacon is doing is a violation of the Barnstable Zoning Ordinance. As such, the Nickson's hereby demand that the Barnstable Building Department inform Beacon that it cannot store its barge in a residential district in the Town of Barnstable.

In accordance with G.L. ch. 40A, Sec. 7, please "notify [me], in writing, . . . of any action [which you have taken] or [your] refusal to act, and the reasons therefor, within fourteen days of receipt of this request."

If you have any questions, please feel free to contact me.

Very truly yours,

Paul Revere, III

cc: Nickson, Horn

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ZONING BOARD OF APPEALS

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<sup>3</sup> The Town might be concerned as to how to distinguish between this enforcement request and various other commercial ventures on the Town waterways which happen regularly such as sportfishing, tour boats, and ferries. The primary difference is that the barge is fixed in a single location for months off Cordwood Landing. In contrast, the other commercial ventures previously set forth are mobile and are navigating the waterway similar to a taxi cab or tour bus on a roadway within the Town. As such, these mobile operations are not the subject of zoning. Furthermore, the storage location where such boats and ferries are kept are limited to areas which are properly zoned such the Hyannis Harbor District, Barnstable Code Sec. 240-24.1.7A(1)(f) (allowing "charter fishing, marine sightseeing, and excursion facilities" as principal permitted uses) and the Marine Business Districts, Barnstable Code Sec. 240-23 (allowing "commercial fishing" and "whale-watching").



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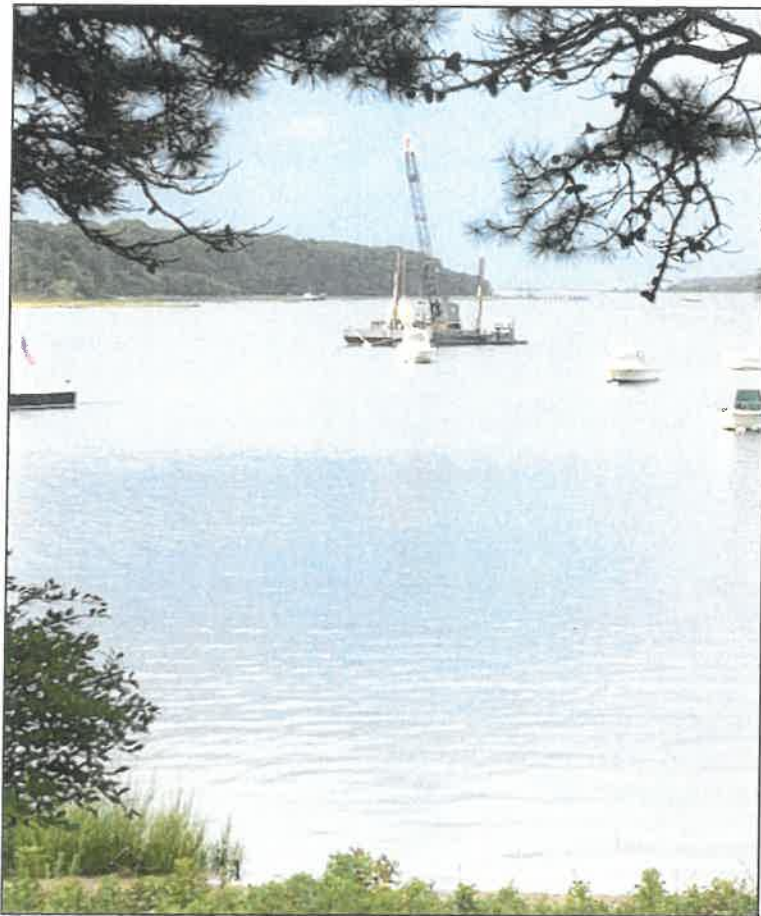
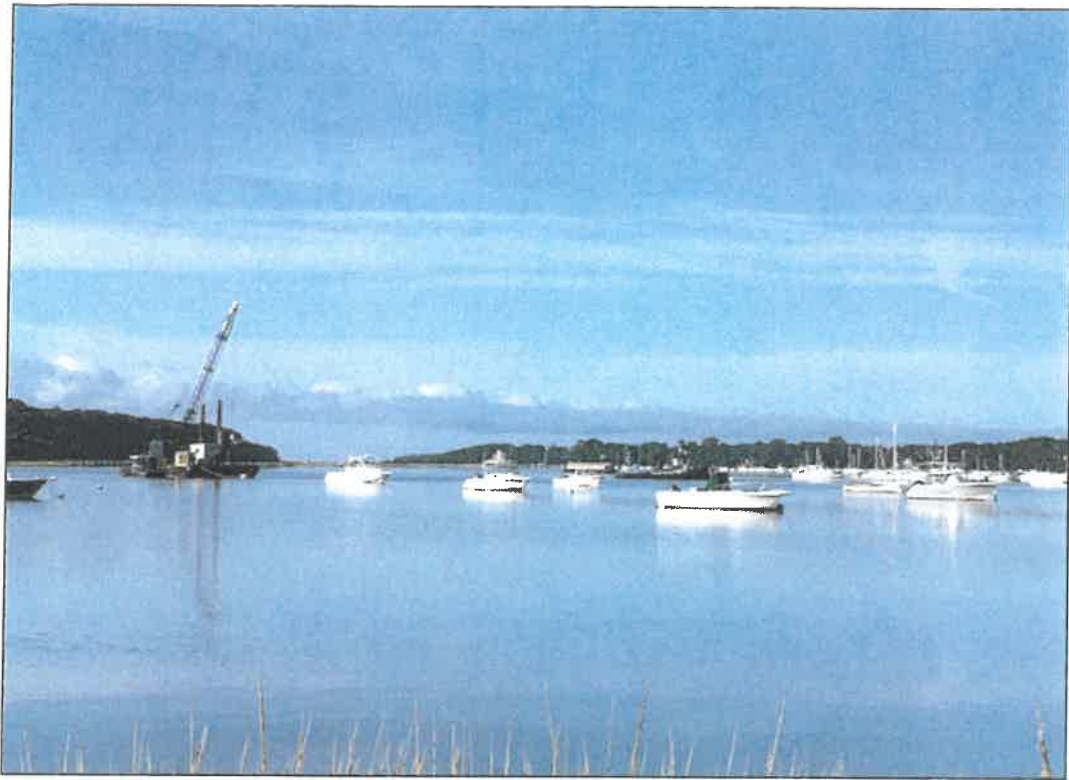
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EXHIBIT TWO

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# ZONING MAP of the TOWN OF BARNSTABLE, MASSACHUSETTS

LAST AMENDED OCTOBER 7, 2010

## COTUIT - SHEET 7 OF 7

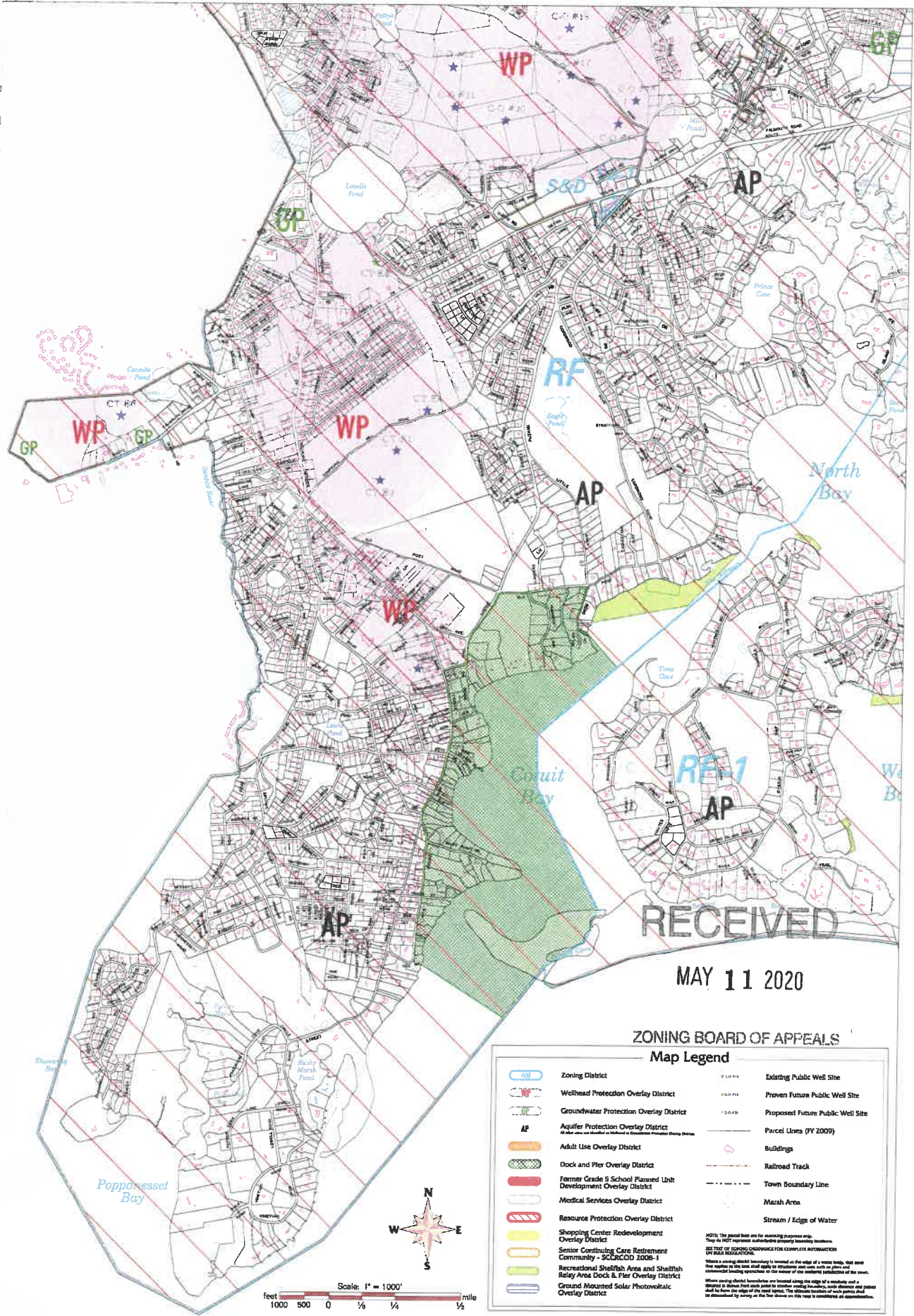


EXHIBIT THREE

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I further declare that in my opinion said law is an emergency law and the facts constituting the emergency are as follows:

In order to immediately begin the process of preparing local growth policy statements.

Sincerely,  
MICHAEL S. DUKAKIS,  
*Governor of the Commonwealth.*

OFFICE OF THE SECRETARY, BOSTON, December 22, 1975.

I, Paul Guzzi, Secretary of the Commonwealth, hereby certify that the accompanying statement was filed in this office by His Excellency the Governor of the Commonwealth of Massachusetts at two o'clock and twenty minutes, P.M., on the above date, and in accordance with Article Forty-eight of the Amendments to the Constitution said chapter takes effect forthwith, being chapter eight hundred and seven of the acts of nineteen hundred and seventy-five.

PAUL GUZZI,  
*Secretary of the Commonwealth.*

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ZONING BOARD OF APPEALS

**Chap. 808. AN ACT FURTHER REGULATING THE ZONING ENABLING ACT.**

*Be it enacted, etc., as follows:*

SECTION 1. Chapter 40 of the General Laws is hereby amended by striking out section 32, as most recently amended by chapter 308 of the acts of 1967, and inserting in place thereof the following section:—

*Section 32.* Except to the extent that a zoning by-law may take effect as provided in section five of chapter forty A, before a by-law takes effect it shall be approved by the attorney general or ninety days shall have elapsed without action by the attorney general after the clerk of the town in which a by-law has been adopted has submitted to the attorney general a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with. Such request and proof shall be submitted by the town clerk within fifteen days after final adjournment of the town meeting at which such by-law was adopted. If the attorney general does not, within said ninety days, request of such town clerk in writing further proof of such compliance stating specifically wherein such proof is inadequate, it shall be presumed that the proof submitted was adequate. If the attorney



general disapproves a by-law he shall give notice to the town clerk of the town in which the by-law was adopted of his disapproval, with his reasons therefor. If a by-law of a town takes effect by reason of the failure of the attorney general to seasonably act upon a request for its approval, the clerk of such town shall enter in his records a statement that the by-law has become effective by reason of such failure of the attorney general to act. Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town. The publication of a zoning by-law shall include a statement that claims of invalidity by reason of any defect in the procedure of adoption or amendment may only be made within ninety days of such posting or of the second publication and a statement indicating where copies of such by-law may be examined and obtained. The requirements of publishing in a town bulletin or pamphlet and posting, or publishing in one or more newspapers, as above, may be dispensed with if notice of the by-laws is given by delivering a copy thereof at every occupied dwelling or apartment in the town, and affidavits of the persons delivering the said copies, filed with the town clerk, shall be conclusive evidence of proper notice hereunder. This section shall not apply to cities.

SECTION 2. Said chapter 40, as appearing in the Tercentenary Edition, is hereby amended by striking out section 32A, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:—

*Section 32A.* The provisions in the charter of a city which accepts this section by vote of its city council, requiring newspaper advertising of certain ordinances and proposed ordinances shall, in case of any ordinance or proposed ordinance, or codification thereof, exceeding in length eight octavo pages of ordinary book print, be deemed to be complied with if the same is published by the city council in a municipal bulletin or printed pamphlet, but otherwise in conformity with said provisions, except for zoning ordinances or amendments thereto, a summary of which shall be published at least two times in a newspaper of general circulation in the city. The publication of such zoning summaries shall include a statement indicating where copies of the ordinance may be examined and obtained and a statement that claims of invalidity by reason of any defect in the procedure of adoption may only be made within ninety days after the posting or the second publication.

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SECTION 2A. The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder.

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: — to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives. Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating:

1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;
2. size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;
- \* 3. uses of bodies of water, including water courses;
4. noxious uses;
5. areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards, open spaces;
6. density of population and intensity of use;
7. accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and
8. the development of the natural, scenic and aesthetic qualities of the community.

SECTION 3. The General Laws are hereby amended by striking out chapter 40A and inserting in place thereof the following chapter: —

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ZONING BOARD OF APPEALS

CHAPTER 40A.  
ZONING.

*Section 1.* This chapter shall be known and may be cited as "The Zoning Act".

As used in this chapter the following words shall have the following meanings:—

"Permit granting authority", shall mean the board of appeals or zoning administrator.

"Special permit granting authority", shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrator as designated by zoning ordinance or by-law for the issuance of special permits.

"Zoning", as used in this chapter, shall mean ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.

"Zoning administrator", shall mean a person designated by the board of appeals pursuant to section thirteen to assume certain of the duties of said board.

*Section 2.* Special permits authorizing cluster development shall provide that open land for cluster development shall be conveyed to the city or town and accepted by it for park or open space use, or be conveyed to a nonprofit organization, the principal purpose of which is the conservation of open space, or be conveyed to a corporation or trust owned or to be owned by the owners of lots or residential units within the land.

*Section 3.* No zoning ordinance or by-law shall regulate or restrict the use of materials or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture or floriculture, nor shall they prohibit or unreasonably regulate the expansion or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture or floriculture, except that all such activities may be limited to parcels of more than five acres in areas not zoned for agriculture, horticulture or floriculture. For such purposes land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect

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ZONING BOARD OF APPEALS

EXHIBIT TWO

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**MAY 11 2020**

**ZONING BOARD OF APPEALS**

**From:** reveriii@aol.com,  
**To:** Brian.Florence@town.barnstable.ma.us,  
**Subject:** Re: Beacon Marine Construction Barge  
**Date:** Thu, Mar 5, 2020 4:46 pm

Brian:

In reply to your email.

Sec. 240-7.A prohibits uses not in conformity with the use regulations of the Barnstable Zoning ordinance.

Sec. 240-14.A states that single family dwelling detached is the only allowed principle use in the RF zoning district.

Paul Revere, III  
Law Offices of Paul Revere, III  
508-237-1620

-----Original Message-----  
From: Florence, Brian <Brian.Florence@town.barnstable.ma.us>  
To: reveriii@aol.com <reveriii@aol.com>  
Sent: Wed, Mar 4, 2020 5:29 pm  
Subject: RE: Beacon Marine Construction Barge

Hi Paul,

I have reviewed your request for enforcement and respectfully request additional information. Your letter states, “I hereby request pursuant to G.L. ch. 40A, Sec. 7, that you enforce the ordinance and prohibit Beacon from storing the barge at this or any other residentially zoned location.” You follow that request with several statements ostensibly in support of your request. (see also para. 5 – the demand does not cite the ordinance).

I would like to complete my response for you right away as you have been very patient, however in order for me to do that I am going to need for you to rephrase your request to include a specific citation of the zoning ordinance that you would like enforced.

If you have any questions regarding this request for additional information please do not hesitate to contact me.

Regards,  
Brian Florence, Building Commissioner  
Building Department I Town of Barnstable  
200 Main Street  
Hyannis, MA 02601  
508-862-4038  
Brian.florence@town.barnstable.ma.us

**From:** reveriii@aol.com [mailto:reveriii@aol.com]  
**Sent:** Thursday, February 27, 2020 4:59 PM  
**To:** Florence, Brian  
**Subject:** Re: Beacon Marine Construction Barge

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ZONING BOARD OF APPEALS



I would be more than pleased to have a response by then.

Paul R

-----Original Message-----

From: Florence, Brian <Brian.Florence@town.barnstable.ma.us>  
To: reveriii@aol.com <reveriii@aol.com>  
Sent: Thu, Feb 27, 2020 4:34 pm  
Subject: RE: Beacon Marine Construction Barge

Hi Paul,

Thank you for your email and follow-up. I apologize for the delay in your response it was not intentional. With your permission I will have a full response for you including findings and a determination no later than the end of next week.

Regards,  
Brian Florence, Building Commissioner  
Building Department I Town of Barnstable  
200 Main Street  
Hyannis, MA 02601  
508-862-4038  
Brian.florence@town.barnstable.ma.us

**From:** reveriii@aol.com [mailto:reveriii@aol.com]  
**Sent:** Wednesday, February 26, 2020 6:40 PM  
**To:** Florence, Brian  
**Subject:** Re: Beacon Marine Construction Barge

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ZONING BOARD OF APPEALS

Brian:

Tomorrow will be two weeks since I sent the email below to you about this matter and 42 days since I requested enforcement.

By statute, you were supposed to respond within 14 days. I recognize that the statute has been interpreted as "directory" not "mandatory." However, the statute does constitute a "direction" and the time for a response has long grown.

As I said before, I do understand that this matter presents unique issues.

And, I ask again: "Do you know when a response to the request will be forthcoming?"

Paul Revere, III  
Law Offices of Paul Revere, III

508-237-1620

-----Original Message-----

From: reveriii <reveriii@aol.com>  
To: Brian.Florence <Brian.Florence@town.barnstable.ma.us>  
Sent: Thu, Feb 13, 2020 6:51 pm  
Subject: Beacon Marine Construction Barge

Brian:

Tomorrow will be the 28th day since I delivered the attached letter to you requesting enforcement with respect to the Beacon Marine barge.

I have received nothing in response to my request.

Obviously, I know that the request presents some interesting and unique issues of zoning compliance when compared to other requests to your office and likely will require some consultation with Town counsel, etc., before providing a response.

Do you know when a response to the request will be forthcoming?

Paul Revere, III  
Law Offices of Paul Revere, III  
508-237-1620

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EXHIBIT THREE

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ZONING BOARD OF APPEALS

**LAW OFFICES OF PAUL REVERE, III**  
226 River View Lane  
Centerville, Massachusetts 02632  
(508) 237-1620  
revereiii@aol.com

April 10, 2020

Brian Florence  
Barnstable Building Commissioner  
200 Main Street  
Hyannis, Massachusetts 02601

Via Email and First Class Mail

RECEIVED

RE: Request for Enforcement  
Beacon Marine Construction Barge  
Supplemental Information

MAY 11 2020

ZONING BOARD OF APPEALS

Mr. Florence:

This letter follows up on my January 17, 2020, letter requesting enforcement on behalf of Charlene and Charles Nickson of 695 Old Post Road, Cotuit.<sup>1</sup> In particular, my prior letter explained that Beacon Marine Construction, LLC (“Beacon”) stored a commercial barge and crane off Cordwood Landing on a mooring located in a RF residentially zoned district. I attached photographs of the barge and crane and the Town’s zoning map showing that the RF District and the Town’s regulatory authority extended into the waters of North Bay, and pointed out that the storage of commercial vehicles is not an allowed use within the RF district. On that basis, I requested pursuant to G.L. ch. 40A, Sec. 7, that you as Building Commissioner enforce the Barnstable Zoning Ordinance and prohibit Beacon from storing the barge at this or any other residentially zoned location.

On March 4, 2020, you wrote me and asked that I “include a specific citation of the zoning ordinance that you would like enforced.” On March 5, 2020, I responded that:

Sec. 240-7.A prohibits uses not in conformity with the use regulations of the Barnstable Zoning ordinance.

Sec. 240-14.A states that single family dwelling detached is the only allowed principle use in the RF zoning district.

After some follow up emails asking for a response to my January 17, 2020, request for enforcement, you

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<sup>1</sup> There is no requirement that the Nickson’s demonstrate that they are aggrieved to request enforcement of the Barnstable Zoning Ordinance pursuant to G.L. ch. 40A, Sec. 7. *See* Bobrowski, Handbook of Massachusetts Land Use and Planning Law (4<sup>th</sup> Edition, 2018) at p. 7-15. Regardless, even if they were required to demonstrate aggravement, the Nickson’s could readily do so as not only are they aggrieved by the commercial storage of the barge in direct contravention to the requirements of the residential zoning district, but, further, the Barnstable Zoning Ordinance specifically provides the purpose of the Ordinance includes the regulation of the location and use of buildings, structures, or land for trades to promote the public welfare, Sec. 240-2, and, thus, damages to their property values by the unlawful use are within the interests of the Barnstable Zoning Ordinance.

emailed on April 2, 2020, stating that the wording of the original request and my follow up were not an “actionable request for enforcement” and that I needed to rephrase my request.

While I respectfully disagree that G.L. ch. 40A requires that I specifically designate how the barge violates the Barnstable Zoning Ordinance and, if my request does not properly make such designation, a building commissioner can deny the request on that basis alone, I will rephrase my request consistent with your emails.

### **Rephrased Request**

It is a fundamental principle of zoning that, to be lawful, a use must conform with the allowed uses in the zoning district. Consistent with this principal, the Sec. 240-7A of Barnstable Zoning Ordinance expressly provides: “No building shall be erected or altered and no building or **premises shall be used for any purpose except in conformity** with all of the regulations herein specified for the district in which it is located.” Sec. 240-14.A(1) of the Barnstable Zoning Ordinance provides that the only “Principal permitted uses . . . in the RC-1 and RF Districts [are] Single-family residential dwellings.”

As I explained in my January 17, 2020, request, the zoning regulations of towns extend to the marine waters within their jurisdiction, G.L. ch. 40A (codification of 1975 Acts Ch. 808); *see also* 1975 Acts Ch. 808 Sec. 2A (zoning extends to “uses of bodies of water”). The Barnstable Zoning Map shows that the RF zoning district extends southerly from the Cotuit shoreline into Cotuit Bay at Cordwood Landing until it reaches the RF-1 District which covers Great Island/Oyster Harbors. Thus, the barge and crane are located in the RF zoning district.

The barge and crane are commercial construction devices that Beacon uses to construct piers and locate docks within the waters of the Town of Barnstable. No construction operations (excepting perhaps preparatory/staging activities) are performed at Cordwood Landing. Rather, the barge is moved from location to location throughout the Fall and Spring to perform construction at various locations. In the summer, it is simply stored on a mooring off Cordwood Landing near the Nickson’s home in the RF District.

No provision of the Barnstable Zoning Ordinance allows for the full-time storage of any commercial vehicle such as a barge and crane in the RF district as is being done by Beacon off Cordwood Landing.<sup>2</sup> Further, even when a home occupation is allowed in a residential district, the homeowner can only keep one truck and a trailer on the premises. Barnstable Code Sec. 240-46(B)(12). Frankly, if commercial uses like Beacon are allowed by lack of enforcement, then an individual could open up a floating restaurant, bed and breakfast, or lumber storage yard in any mooring field.<sup>3</sup>

The only exemption from conforming with use requirements is when a use existed prior to the zoning change and that use continued through the present. The storage of the barge cannot meet those requirements for two reasons. First, the area has been zoned residential since at least 1970 and the

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<sup>2</sup> Obviously, temporary storage is allowed at construction sites while construction is ongoing, but, in this case, Beacon is simply storing its barge and crane on a mooring when it is not being used on dock construction projects elsewhere in Barnstable.

<sup>3</sup> The Town might be concerned as to how to distinguish between this enforcement request and various other commercial ventures on the Town waterways which happen regularly such as sportfishing, tour boats, and ferries. The primary difference is that the barge is fixed in a single location for months off Cordwood Landing. In contrast, the other commercial ventures previously set forth are mobile and are navigating the waterway similar to a taxi cab or tour bus on a roadway within the Town. As such, these mobile operations are not the subject of zoning. Furthermore, the storage location where such boats and ferries are kept are limited to areas which are properly zoned such the Hyannis Harbor District, Barnstable Code Sec. 240-24.1.7A(1)(f) (allowing “charter fishing, marine sightseeing, and excursion facilities” as principal permitted uses) and the Marine Business Districts, Barnstable Code Sec. 240-23 (allowing “commercial fishing” and “whale-watching”).



barge and crane have not been stored of Cordwood Landing continuously since that time. In particular, the barge was not stored on that mooring when the Nickson's purchase their home in 2000. The barge first appeared on the mooring circa 2012-2013. The Nickson's complained to Harbormaster Horn and the barge was removed for a number of years only to return in 2019. Thus, the barge was not stored for over three years at the Cordwood Landing mooring during the last ten years and cannot qualify as a pre-existing nonconforming use even if it predated zoning.<sup>4</sup> Finally, I note that the burden of proof is not on my client to demonstrate an exemption, *Hall v. Zoning Board of Appeals of Edgartown*, 28 Mass. App. Ct. 249 (1990), and there is no statute of limitations preventing enforcement against a nonconforming use which did not receive a building permit. *Lord v. Board of Appeals of Somerset*, 30 Mass. App. Ct. 226 (1991). As such, there is no exception that would allow the barge to be stored in the RF District.

In summary, the use of a mooring for the storage of a commercial barge in the RF District as Beacon is doing is a violation of the Barnstable Zoning Ordinance. As such, the Nickson's hereby demand that the Barnstable Building Department inform Beacon that it cannot store its barge in a residential district in the Town of Barnstable and require its removal from the RF District.

In accordance with G.L. ch. 40A, Sec. 7, please "notify [me], in writing, . . . of any action [which you have taken] or [your] refusal to act, and the reasons therefor, within fourteen days of receipt of this request."

If you have any questions, please feel free to contact me.

Very truly yours,



Paul Revere, III

cc: Nickson, Harbormaster's Office

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MAY 11 2020

ZONING BOARD OF APPEALS

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<sup>4</sup> My understanding is that the barge was stored in the Little River area of Cotuit Bay and generated complaints from property owners in that area.

EXHIBIT FOUR

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MAY 11 2020

ZONING BOARD OF APPEALS

**Coyle, Brenda**

---

**From:** Florence, Brian  
**Sent:** Friday, April 10, 2020 12:06 PM  
**To:** revererii@aol.com  
**Cc:** Nober, Karen; McLaughlin, Charles; Coyle, Brenda; Shea, Sally  
**Subject:** RE: Rephrased Request for Enforcement -- Beacon Marine Barge  
**Attachments:** Nickson Zoning Req Enf Denial -20.docx; Nickson Beacon Marine Watersheet Zoning Opinion Final.docx

Attorney Revere,

Thank you for your email. Please be advised that your clients request for enforcement is denied. Enclosed please find copies of that denial (unsigned) as well as a legal opinion from the Town Attorney's office for your convenience.

The original documents will be sent today by USPS to:

Attorney Paul Revere III  
226 River View Lane  
Centerville, MA 02632

If you have any questions please do not hesitate to contact me.

Regards,  
Brian Florence, Building Commissioner  
Town of Barnstable  
200 Main Street  
Hyannis, MA 02601  
(508) 862-4038  
[Brian.florence@town.barnstable.ma.us](mailto:Brian.florence@town.barnstable.ma.us)

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**From:** [revererii@aol.com](mailto:revererii@aol.com) [mailto:revererii@aol.com]  
**Sent:** Friday, April 10, 2020 10:42 AM  
**To:** Florence, Brian  
**Subject:** Rephrased Request for Enforcement -- Beacon Marine Barge

Brian:

Attached please find a rephrased request for enforcement.

Paul Revere, III  
Law Offices of Paul Revere, III  
508-237-1620

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ZONING BOARD OF APPEALS

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**Town of Barnstable**  
**Building Department Services**  
**Brian Florence, CBO**  
**Building Commissioner**  
200 Main Street, Hyannis, MA 02601  
www.town.barnstable.ma.us



Office: 508-862-4038

Fax: 508-790-6230

**Notice of Zoning Ordinance Request for Enforcement  
Denial**

**4/9/2020**

Charles and Charlene Nickson of 695 Old Post Road, Cotuit, MA and all persons having interest in this notice C/O Attorney Paul Revere :

I am in receipt of a request for zoning enforcement dated January 17, 2020. Your request is made in accordance with M.G.L. c. 40A § 7 concerning the property referred in your letter as “waters off of Cordwood Landing”. Please be advised that your request for enforcement is DENIED.

**Summary of Request for Enforcement:**

In your request for enforcement you allege that Beacon Marine Construction has moored a “commercial barge and crane” in the waters off of Cordwood Landing and you allege that in doing so they have violated the Town of Barnstable Zoning Ordinance sections 240-7.A and 240-14.A respectively. (Please reference follow-up email by you on March 5, 2020 and again on April 10, 2020.)

Your request specifically demands that “the Barnstable Building Department inform Beacon that it cannot store its barge in a residential district in the Town of Barnstable”.

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**Summary of Reason(s) for Denial:**

**MAY 11 2020**

Your request for enforcement is denied in accordance with M.G.L. c. 40A § 7 for the following reasons:

**ZONING BOARD OF APPEALS**

1. Your request is not enforceable as the claim being made is without merit.
  - a. The land below the mean low water mark belongs to the Commonwealth and is beyond the jurisdiction of the building commissioner.
  - b. The waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.
2. Your clients lack standing to request enforcement

Enclosed with this Notice of Denial for your convenience please find a legal opinion from the Town Attorney’s office which was used in part for this determination.

If you have been aggrieved by this determination, you may file an appeal with the Town Clerk as well as the Planning and Development Department of the Town Barnstable,

specifying the ground thereof within thirty (30) days of the receipt of this notice in accordance with Chapter 40A Section 15 of the Massachusetts General Laws.

Regards,

*Brian Florence*

Brian Florence  
Building Commissioner

*Ble*

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MAY 11 2020

ZONING BOARD OF APPEALS



April 6, 2020

To: Brian Florence, Barnstable Building Commissioner

From: Karen Nober, Town Attorney  
T. David Houghton, First Assistant  
Charles S. McLaughlin, Jr., Senior Counsel

Re: Beacon Marine Construction, L.L.C. (“Beacon”) Mooring; Demand for Enforcement

**Background:**

In a letter to you dated January 17, 2020, Attorney Paul Revere asserted on behalf of his clients, Charlene and Charles Nickson, owners of waterfront property at 695 Old Post Road, Cotuit, that a barge and crane owned by Beacon is moored in an area of tide-waters (i.e., below the mean low water mark) off of Cordwood Landing, Cotuit. The Nickson’s allege that the RF zoning district extends southerly into Cotuit Bay from the upland and that the “storage” of this obviously commercial equipment in an alleged RF residential zone is a violation of the Barnstable zoning Ordinance. They demand that you undertake an enforcement action to abate this alleged violation.

As more fully explained below, no such enforcement action should be undertaken because,

1/ the Town’s zoning does not extend to the watershed and submerged land below mean low water, as is the case here, because that land is owned by the Commonwealth and is held in trust for the Public Benefit,

2/ the Nickson’s have no standing to demand such enforcement, and,

3/ the waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.

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**Analysis:**

MAY 11 2020

**Ownership of the seabed below mean low water:**

ZONING BOARD OF APPEALS

The essence of the Nickson claim is that the town’s zoning extends below mean low water and across the navigable tide-waters of the Town that are connected and open to the sea. The claim is without merit. As explained in two Supreme Judicial Court cases and in one Appeals Court decision discussed below, it is black letter law dating to the Colonial Ordinances of 1647 that a Town’s ownership of lands and hence its zoning ends at the mean low water mark of navigable tide-waters.

In *Boston Waterfront Development Corporation v. Commonwealth*, 378 Mass. 629 (1979), the Supreme Judicial Court went to great lengths to explore the European and especially the English history of public rights to navigation in salt waters connected to the sea and how those rights were subsumed by the Commonwealth as eventual successor to the rights of the English Crown. At issue in *Boston Waterfront* was the ownership of that portion of Boston's Lewis Wharf which had been constructed below the mean low water line into Boston Harbor. Noting the importance of wharf development to the economic viability of the colonies and the post-revolution states, the SJC quoted an 1850 State Senate report on the subject:

“By the law of all civilized Europe, before the feudal system obtained in England, there was no such thing as property in tidal waters. Tide waters were *res omnium*, that is, they were for the common use, like air and light ... In England, the fiction of a fee in the Crown, and the control of the trust in Parliament, we understand to have been a mode, suited to the times and the genius of the feudal law, for insuring to the State the control over tide-waters. The Commonwealth succeeds to this right of control.” 378 Mass., at 633.

“Land ownership in the colony was governed by the English Common Law, which our ancestors brought with them, claiming it as their birthright. Owners of land bounded by the sea or salt water ‘could not, by such boundary, hold any land below the ordinary low water mark; for all the land below belonged of common right to the king.’” 378 Mass., at 634. Internal citations and quotations omitted.

Thus, the ultimate holding in *Boston Waterfront* was that any portion of Lewis Wharf below the mean low water mark would need to be devoted to public use and, failing such continuing public use by the owner of the wharf, title would revert to the Commonwealth.

In reference to this particular matter, *Boston Waterfront* makes clear that the Sovereign, now the Commonwealth, owns the seabed below mean low water. See, also, *Fafard v. Conservation Commission of Barnstable*, 432 Mass. 194 (2000), discussed immediately below.

**Public Trust Rights:**

*Fafard* is a seminal case quoted regularly for the proposition that a municipality may adopt a general ordinance that is more restrictive than G.L. c. 131, §40 (the Massachusetts Wetlands Protection Act) with respect to matters or projects within the jurisdiction of the Conservation Commission. Barnstable had itself enacted a wetlands protection ordinance that was stricter than G.L. c. 131, §40 and purported to protect, among other values, “public trust rights in trust lands”.

The Fafard proposal to build a pier and dock extending into the Eel River in Osterville, a salt water estuary located in the same general locale known as the Three Bays and less than one mile from the Nickson property was presented to the Barnstable Conservation Commission.

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ZONING BOARD OF APPEALS

After hearing, the Commission issued a detailed decision which denied the Fafard application, As reasons for denial, the Commission cited the interference that the large project would impose on “recreational” values of navigation protected by the local ordinance as well as the fact that the pier “would pose significant adverse impacts to ... *public trust rights*.”

The Supreme Judicial Court first examined Barnstable’s attempt to exercise control and judgement of the extent to which a project was consistent with “public trust rights”. The Court concluded that the attempt was an improper claim of authority to administer public trust rights. That authority rests solely in the Commonwealth unless it has been granted to the Town by the Commonwealth or by an entity to which the Commonwealth has expressly delegated that authority. Finding that no such power had been granted to the Town, it followed that the Town did not have the authority to grant that power to its Conservation Commission. The Court noted,

“The Commonwealth, as successor to the colonial authorities, owns and controls the lands seaward of the flats (i.e., below mean low water, *ed.*). These lands are held in trust by the Commonwealth to preserve the general rights of the public. ‘The waters and the land under (waters) beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The Commonwealth’s authority with respect to these lands, to which we refer today as ‘Commonwealth Tidelands’, is subject only to Federal Law<sup>1</sup>, the State Constitution, and the State’s obligation as trustee.” (Interior citations omitted.) 432 Mass., at 198.

The Court struck the portion of the Barnstable ordinance that purported to exercise *public trust rights* in the Tidelands. Nevertheless, the Court then held that the balance of the Barnstable ordinance was valid and therefore sustained the Conservation Commission’s permission to build the dock and pier.

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**Zoning:**

It is axiomatic that municipalities are a creature of and subject to the authority of the Sovereign, here, the Commonwealth of Massachusetts. See *Fafard*, above. Because the Commonwealth both owns the lands below mean low water and acts as trustee for the Public Trust Rights in and to those lands, and because the Commonwealth has neither surrendered nor assigned those rights to the Town, the Town has no authority to zone Commonwealth Tidelands as this would interfere with powers reserved to the Commonwealth.

ZONING BOARD OF APPEALS

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<sup>1</sup> See *Michaelson v. Silver Beach Ass’n, Inc.*, 342 Mass. 251, 253 (1961), where the Court noted, “The right of the Legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the Government of the United States to act in the interest of interstate or foreign commerce”.

This issue came before the Appeals Court of the Commonwealth six years ago in the case of *Zammito v. Board of Selectmen of Mashpee*, a section 1:28 decision at 13-P-1710 (2014). Zammito and others who owned waterfront property on Popponneset Bay objected to the Town's granting of a shellfish aquaculture license in the Bay, claiming that it was a commercial enterprise that required review by the Cape Cod Commission and that, as a commercial enterprise, it also violated the Town's zoning by-law.

The Appeals Court ruled that, for reasons that need not be discussed here, aquaculture was not an enterprise that would generate a mandatory referral to the Cape Cod Commission. The ruling was essentially dispositive of the case.

However, the Appeals Court then addressed the zoning violation claim,

“We need not consider the plaintiffs' additional claim – that the board's granting of the license was contrary to the local zoning by-law – as it was not argued in the Superior Court. In any event, *the claim is without merit*. Reasonably construed, the zoning by-law and official zoning map do not apply to the site of the project, which is located beyond the extreme low water mark.”

In other words, the Appeals Court expressly recognized that a Town's zoning does not, because it cannot, control activity in Commonwealth Tidelands. The Beacon barge, crane, and mooring occupy the watersheet at Cordwood Landing, as did the aquaculture project infrastructure at issue in *Zammito*; both utilize the watersheet, an area reserved under the Colonial Ordinances to the State for the purpose of protecting the public rights to *fishing* (i.e. aquaculture, in *Zammito*), *fowling*, and *navigation* (Nickson/Beacon). Any attempt to impose zoning control on the navigable watersheet by excluding commercial uses would necessarily conflict with the public right to navigate freely for every type of vessel, be they commercial, recreational, or otherwise.

The Town simply has no authority to zone the property of the Commonwealth. In a recent local and terrestrial example of this application, Cape Cod Community College in West Barnstable launched a solar carport project a few years ago. The project was not well received by the neighbors and by representatives of the Old King's Highway Regional Historic District Commission. Their protests were to no avail because the Commonwealth responded correctly that neither the Town's zoning ordinances nor the Town's OKH regulations could legally dictate to the Commonwealths the uses of its property.

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**Standing; Selective Enforcement:**

ZONING BOARD OF APPEALS

The explanations above resolve the issue. However, it is worth noting a further bar to the Nickson arguments is that they lack standing to bring this argument forward. A fundamental

precept of zoning enforcement requires as a matter of law that the party claiming a right to enforcement must show that they are specially and specifically affected by the alleged zoning violation in a manner that is distinctly different from that of others in the same zoning district. The Nickson's cannot show this particularized damage from the alleged zoning violation. The Nickson's essentially assert an aesthetic grievance with the appearance of Beacon's barge and crane that, if true, would affect all waterfront neighbors who have a similar view. Their damage, if a waterfront view can be described as damaging, is identical to that of others in the area and is not particular to them. This type of undifferentiated claim is strongly disfavored by the Courts and would result in a successful motion to dismiss the claim for lack of standing.

So, too, any successful attempt to bar "commercial" activity on this watersheet would produce dramatic, unintended consequences for all commercial navigators. Fishing vessels, tow boats, passenger launches, sight-seeing and other commercial vessels would be ensnared in the anti-commercial crackdown. A failure to seek enforcement on these other clearly commercial users would be a classic example of selective enforcement about which Beacon would reasonably and loudly complain.

### **Conclusion**

Commercial uses of the Commonwealth's watersheet are classic examples of maritime commerce which were highly encouraged and indeed vital to the growth of the Colonies and later the New Republic. See the detailed recitation of the history of commercial use and development in *Boston Waterfront*, cited above. These rights are jealously guarded and promoted to this day as part of our cherished Federal and State maritime history.

Unfortunately, the Nickson claims run afoul of this history and must be rejected.

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EXHIBIT FIVE

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**ZONING BOARD OF APPEALS**



# ZONING MAP of the TOWN OF BARNSTABLE, MASSACHUSETTS

LAST AMENDED OCTOBER 7, 2010

## COTUIT - SHEET 7 OF 7

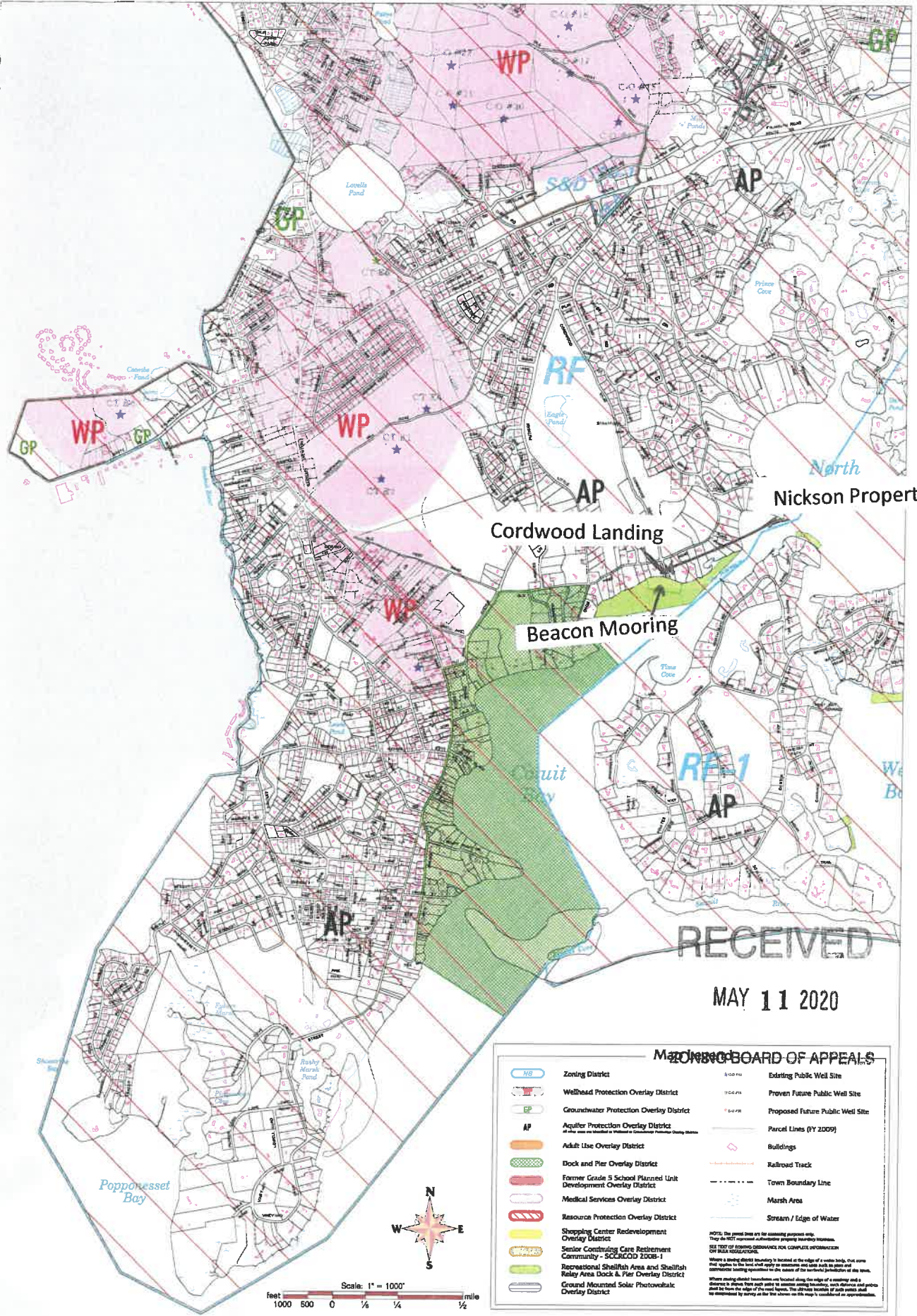


EXHIBIT SIX

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ZONING BOARD OF APPEALS



**ALLAN F. CRAWFORD & others** [Note 1]  
**vs. BUILDING INSPECTOR OF  
 BARNSTABLE & another.** [Note 2]

**356 Mass. 174**

**March 7, 1969 - June 6, 1969**

**Barnstable County**

**Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, & KIRK, JJ.**

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**ZONING BOARD OF APPEALS**

On the facts respecting a small commercial hotel or club at the seashore having the zoning status of a preexisting nonconforming use, a change in the building consisting of removing outside steps leading to a narrow open porch supported by the foundation of the building and enclosing the porch so that it became part of an adjacent room was not, within G. L. c. 40A, Section 5, a "reconstruction, extension or structural change" or an alteration of the building "to provide . . . for its use for the same purpose to a substantially greater extent"; and, within the town's zoning by-law, the change was not a "substantial" alteration requiring a special permit from the board of appeals but was a "minor" alteration permitted at the discretion of the building inspector. [177-178]

Blacktopping of a parking area on the premises of a small commercial hotel or club at the seashore having the zoning status of a preexisting nonconforming use was not in violation of the town's zoning by-law and did not require a permit from the building inspector. [178-179]

A new, substantial timber seashore pier, not a replacement of any previous pier, which extended nearly three hundred feet into the water and had an attached float and on both sides a number of mooring or berthing bays defined by driven piles and which was constructed in connection with a small commercial hotel or club having the zoning status of a preexisting nonconforming use, did not acquire the protection of that status [179-180]; nor was the pier, within the town's zoning by-law, a permissible accessory use as "customarily incident" to the hotel or club [180].



A seashore pier, constructed in violation of the town's zoning by-law, was not validated by the fact that it was constructed under a license granted

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by the Department of Public Works of the Commonwealth "subject to all applicable . . . Municipal laws . . . and regulations." [180]

Zoning covering the entire area of a seashore town was applicable to a pier constructed within that area. [180-181]

PETITION for a writ of mandamus filed in the Superior Court on June 25, 1965.

Following the decision reported in 352 Mass. 504 the case was heard by Hennessey, J.

Daniel J. Fern for the petitioners.

Bernard A. Dwork (Enid M. Starr with him) for the intervener, Harbor View Realty, Inc.

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**KIRK, J.** The petitioners for a writ of mandamus seek to compel the building inspector of Barnstable to revoke a building permit granted to the intervener Harbor View Realty Inc. (Harbor View), and to enforce the zoning by-law of the town. After our earlier decision overruling a demurrer of Harbor View and ordering the petition to stand for hearing on the merits (*Crawford v. Building Inspector of Barnstable*, 352 Mass. 504 ) there has been a hearing, and an order for judgment dismissing the petition. The petitioners appeal. We have a report of material facts, a narrative condensation of testimony and the exhibits. The judge took a view. Since the applicable principles of review for mandamus are the same as in equity we accept as final the findings of the judge unless plainly wrong, make such other findings as are necessary and justified by the evidence and decide the case on our own judgment. *Hanrihan v. Hanrihan*, 342 Mass. 559 , 564. *Chartrand v. Registrar of Motor Vehicles*, 347 Mass. 470 , 473. *Iverson v. Building Inspector of Dedham*, 354 Mass. 688

Harbor View is the owner of premises in the village of Cotuit in the town of Barnstable. The premises are within a "Residence D" district under the zoning



by-law. All of Cotuit is zoned for residence purposes. Harbor View conducts on the premises for commercial purposes a small hotel or "club," as a lawful, nonconforming use under the by-law, 352 Mass. 504 , 507. Since May, 1965, pursuant to a permit "to repair and remodel . . . no area change" issued by the

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building inspector, certain changes later to be described in the Harbor View building have been accomplished.

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ZONING BOARD OF APPEALS

During the same period, and without any permit from the building inspector, other changes were made on the premises. One of these was the leveling and blacktopping of an area in front of the building for use as a parking lot. [Note 3] The other was the construction of a timber pier and float which "extends into the bay some 280 feet" from the beach or water side of the premises.

We consider the challenges of the petitioners to the judge's decision on (1) the building changes, (2) the parking lot and (3) the pier.

1. The building changes at issue concern a porch and stair landing at the rear or water side of the building. An outside stairway, consisting of five or six steps, supported by the fieldstone foundation of the building, led up to an outdoor porch or landing, eight or ten feet long by two feet wide, also supported by the foundation of the building. Part of the porch had a roof over it. By the change, the steps were eliminated. The landing-porch area above the foundation was so enclosed that it became part of the room to which it always had been contiguous on the ground floor of the building. The judge found "(a) that the cubic area of enclosed space on the first, or 'ground,' floor of the building has been increased by the recent enclosures by no more than three to four per cent, (b) that the cubic area of enclosed space in the entire building, above ground, has been increased by said enclosures by no more than one to two per cent, (c) that the enclosure of these areas followed, and

resulted from, the advice of an expert construction engineer that persisting and increasing dry-rot which was occurring in the wood of the formerly open porch and stairlanding could be prevented only by enclosing these areas, (d) that the said new enclosures have enhanced the internal

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and external appearance of the building and rendered it more attractive to the eye than it was previously, (e) that the square footage of area and foundation covered by the entire building including porches is precisely the same as it was prior to the aforesaid enclosure work."

ZONING BOARD OF APPEALS

The petitioners argue that these changes (the enclosure of the porch stair-landing and the elimination of the steps) are, on the one hand, "reconstruction, extension or structural change" not exempt under G. L. c. 40A, Section 5, and in violation of the zoning by-law in the absence of a special permit; or, on the other hand, that they are "substantial alterations" under part D, 3 of the zoning by-law and beyond the "minor alterations" permissible in the discretion of the building inspector. [Note 4]

It is our view that the facts found by the judge and supported by the evidence bring the building changes within "the minimum of tolerance that must be accorded to non-conforming uses" under G. L. c. 40A, Section 5. Inspector of Bldgs. of Burlington v. Murphy, 320 Mass. 207 , 209. This is not the case of an "alteration of an existing building for substantially greater use [which] is expressly put outside the exemption by the statutory words: `but it shall apply . . . to any alteration . . . when the same would amount to reconstruction, extension or structural change, and to any alteration . . . to provide . . . for its use for the same purpose to a substantially greater extent' . . . [cases

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cited]." Chilson v. Zoning Bd. of Appeal of Attleboro, 344 Mass. 406 , 411-412.

It is the case of repairs replacing rotted exposed parts of a building, and alterations to preserve the replaced parts from deterioration by weather and to improve the appearance of the building rather than to enlarge the use of the building. Whatever enlargement followed the alteration (and there was none whatever so far as overall floor space was concerned) was negligible rather than substantial and was incidental rather than purposeful. Parrish v. Board of Appeal of Sharon, 351 Mass. 561, 567, relied upon by the petitioners, has no application to the case at bar. There was no violation of zoning provisions in the building changes attacked by the petitioners. The order to dismiss the petition in so far as it sought to undo acts done under the building permit was right.

2. The parking area is located between the building and public road side of the premises. The physical facts are best described by the findings of the judge that "(a) the surface of the area . . . was formerly dirt, grass, shrubbery and trees, (b) the majority of this area has now been blacktopped, although some grass and shrubs remain, (c) the new surface was applied in professional fashion and is attractive in appearance, (d) motor vehicles of patrons formerly parked upon a dirt path and indiscriminately upon all parts of the grass surface, (e) there is no credible evidence that any larger number of vehicles is presently accommodated upon the new blacktop surface during the busy summer season than were formerly parked upon the dirt and grass, and (f) there has been a substantial decrease in dust caused by motor vehicles since the blacktop was installed."

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The building inspector did not issue a permit to level and blacktop the surface in front of the building. He testified that as inspector he had never issued a permit for the blacktopping of any area and knew of no authority empowering him to prohibit or permit it. The petitioners cite no authority to that effect and we are aware of none. The situation is comparable to that dealt with in Williams v. Inspector of Bldgs. of Belmont, 341 Mass. 188 (tennis court),

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and is controlled by the discussion and conclusion of that opinion. There was no error in ordering the dismissal of the petition as it related to the parking area.

3. The pier, on the beach or water side of the premises, presents a different situation. On the law and the evidence we reach a different conclusion from the judge. Unlike the blacktopped parking area, the pier is unquestionably a structure. The pier is 285 feet long and eight feet wide. The deck forming the "T" at the end of the pier is forty-eight feet by fifteen feet. On one side of the pier there are seven bays, each about ten feet wide and defined by piles driven twenty feet from the pier, for the mooring or berthing of boats. On the same side of the pier there is a float, sixteen by twenty feet, which is reached from the pier by a ramp ten feet long. On the other side of the pier there are thirteen bays or berths each about twelve feet wide and defined by mooring piles driven twenty feet from the side of the pier. The pier does not stop or end at the beach. It continues over the beach and bulkhead to the graded premises of Harbor View. The pier is the dominant structure in Cotuit Bay. Piers which are accessory to residences in the bay are much smaller. The town pier, about 600 feet away, extends 100 feet into the bay. The photographs show the Harbor View pier to be for commercial, not residential purposes.

Before the pier was built people moored their boats in the bay and came to the beach by dinghy; others would beach directly in front of the inn. [Note 5]

The facts show much more than expansion within nonconforming premises of the nonconforming business of a small hotel or club. See Brady v. Board of Appeals of Westport, 348 Mass. 515 , 523. The pier is a wholly new and permanent structure where none had existed before. It makes a use of the water side of the premises which is different in quality, character and kind as well as degree from that which

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was made of it before. See *Bridgewater v. Chuckran*, 351 Mass. 20 , 23, and cases cited. Indeed, to quote the judge, "the efficiency and utility of that portion of the harbor has been enhanced, *as a site for sport boating* , by the installation of the pier" (emphasis supplied). The effect on the neighborhood which the new use will produce consequent upon the inevitable advertising needs no elaboration. In our judgment the pier is not, as Harbor View contends, a "reasonable substitution of facilities" for reaching the hotel from the bay, but is the creation of a wholly new facility designed especially to attract and accommodate the boating public on a large scale. It is a new enterprise on the beach side of a residence D area. In bold contravention of the provisions of G. L. c. 40A, Section 5, and the zoning by-law, Harbor View has literally staked out an area in excess of 14,000 square feet on the water side of the premises for an impermissible use. It is a use which may be prevented on a petition for a writ of mandamus. *Brady v. Board of Appeals of Westport*, 348 Mass. 515 , 517-522.

The pier is not, as argued, a permissible accessory use under part E of the zoning by-law. [Note 6] A pier for the use of residents may well be "customarily incident" to a waterfront residence, but we reject Harbor View's contention that a pier constructed for commercial purposes in a single residence district is "customarily incident" to a nonconforming commercial hotel in that district.

No special rights accrue to Harbor View because the pier was constructed under a license granted by the Commonwealth's Department of Public Works. The license was "subject to all applicable Federal, State, County, and Municipal laws, ordinances and regulations." Such licenses may not be used contrary to the terms of zoning by-laws. *Rose v. Board of Appeals of Wrentham*, 352 Mass. 301 , 303.

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The entire area of the town of Barnstable has been zoned.

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The seaward boundary of the town coincides with the marine boundary of the Commonwealth. G. L. c. 42, Section 1. Cf. Brady v. Board of Appeals of Westport, 348 Mass. 515 , 524. The whole pier is within the area subject to the zoning regulation.

The record does not support any suggestion that the pier was erected with the acquiescence of the building inspector or board of appeal or counsel for the town or the board of appeal. The license from the Commonwealth was filed and recorded January 7, 1965. This petition for a writ of mandamus was filed June 25, 1965. Harbor View has proceeded at its risk.

The order for judgment dismissing the petition is reversed. An order is to be entered for issuance of the writ forbidding forthwith the use of the pier for the mooring of boats or as a means of access to or egress from the intervener's premises, and directing the building inspector to have the pier dismantled by the intervener. The case is to be retained by the Superior Court with power to enter such additional orders, consistent with this opinion, as may be necessary to insure the enforcement of the zoning by-law by the building inspector.

So ordered.

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ZONING BOARD OF APPEALS

#### FOOTNOTES

[Note 1] Edith S. Crawford, Donald E. Higgins and Mary Higgins, all taxpayers of Barnstable and residents of the village of Cotuit in the vicinity of the locus.

[Note 2] Harbor View Realty Inc., intervener.

[Note 3] The judge's findings of fact imply that the blacktopping and the building of the pier were done under permit from the building inspector. The inspector testified that he did not issue a permit for these purposes, and the permit does not refer to

them.

[[Note 4](#)] "N. Residence D Districts 1. Use-No building shall be erected or altered and no building . . . shall be used for any purpose except: (a) Detached one-family dwelling." Part D of the by-law regulates nonconforming uses. It provides: "1. Any lawful building or lawful use of a building or premises or part thereof in the Town of Barnstable existing at the time this by-law is adopted may be continued, although such building or use does not conform to the provisions hereof. 2. Any such non-conforming building which has been damaged by fire or other cause to any extent may be repaired or rebuilt, *but the total floor area shall not be increased* , unless first authorized by a special permit from the Board of Appeals, and providing said owner shall apply for a building permit . . . . 3. In all Districts: (a) Provided the Board of Appeals first grants a special permit therefor, any such non-conforming building or structure may be altered or increased in size or any such non-conforming use may be extended over all or any part of the premises upon which the same is located at the time this by-law is adopted. It is the intent of this paragraph that only substantial alterations require a special permit; minor alterations may be permitted at the discretion of the Building Inspector" (emphasis supplied).

[[Note 5](#)] There was testimony that there were in years past moorings near the edge of the beach and in the Harbor View area of the harbor for the use of guests of the hotel.

[[Note 6](#)] Part E of the by-law which governs accessory uses provides that "[a]ccessory uses customarily incident to any of the uses permitted in a particular residence district and not detrimental to a residential neighborhood shall be permitted in that particular residence district."

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ZONING BOARD OF APPEALS

EXHIBIT SEVEN

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ZONING BOARD OF APPEALS



Print

Map title:

ArcGIS Web Map

Layout:

Letter ANSI A Portrait

Format:

PDF

Advanced

Print



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ZONING BOARD OF APPEALS

EXHIBIT EIGHT

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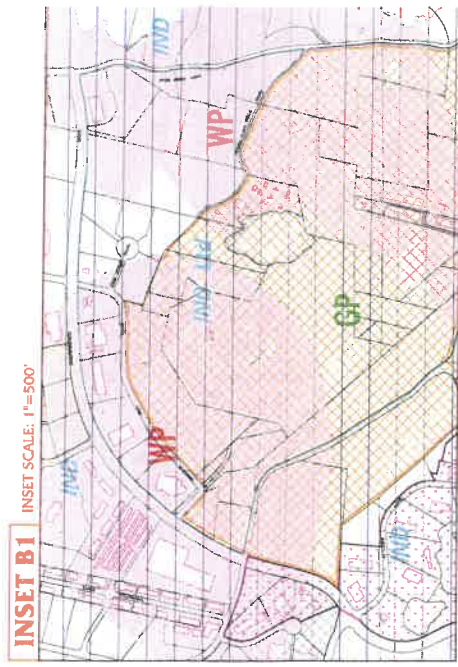




# ZONING MAP of the TOWN OF BARNSTABLE, MASSACHUSETTS

LAST AMENDED MAY 19, 2016

# BARNSTABLE - SHEET 1 OF 7



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MAY 11 2020

### Map Legend

RF-1	WP	GP	AP
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Zoning District	Wellhead Protection Overlay District	Groundwater Protection Overlay District	Aquifer Protection Overlay District	Adult Use Overlay District	Dock and Pier Overlay District	Former Grade 5 School Planned Unit Development Overlay District	Medical Services Overlay District	Resource Protection Overlay District	Shopping Center Redevelopment Overlay District	Senior Continuing Care Retirement Community - SCRCOD 2008-1	Recreational Shellfish Area and Shellfish Relay Area Dock & Pier Overlay District	Solar Photovoltaic Overlay District	Medical Marijuana Overlay District	Craigville Village Neighborhood Overlay	Long / Short Beach Neighborhood Overlay	Craigville Beach Neighborhood Overlay	Cranford River North Bank Neighborhood Overlay
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Existing Public Well Site	Proposed Future Public Well Site	Parcel Lines	Buildings	Railroad Track	Town Boundary Line	Marsh Area	Stream / Edge of Water	Carabney Bog
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**SCALE OF ZONING DISTRICTS FOR COMPLETE INFORMATION ON MAP REGULATIONS:**

When a zoning district boundary is located at the edge of a parcel, the zoning district shall be applied to the entire parcel and not just the portion of the parcel that is within the zoning district. The zoning district shall be applied to the entire parcel and not just the portion of the parcel that is within the zoning district. The zoning district shall be applied to the entire parcel and not just the portion of the parcel that is within the zoning district.

**Town of Barnstable**  
**Building Department Services**

**Brian Florence, CBO**  
**Building Commissioner**  
200 Main Street, Hyannis, MA 02601  
[www.town.barnstable.ma.us](http://www.town.barnstable.ma.us)



Office: 508-862-4038

Fax: 508-790-6230

**Notice of Zoning Ordinance Request for Enforcement**  
**Denial**

**4/9/2020**

Charles and Charlene Nickson of 695 Old Post Road, Cotuit, MA and all persons having interest in this notice C/O Attorney Paul Revere :

I am in receipt of a request for zoning enforcement dated January 17, 2020. Your request is made in accordance with M.G.L. c. 40A § 7 concerning the property referred in your letter as “waters off of Cordwood Landing”. Please be advised that your request for enforcement is DENIED.

**Summary of Request for Enforcement:**

In your request for enforcement you allege that Beacon Marine Construction has moored a “commercial barge and crane” in the waters off of Cordwood Landing and you allege that in doing so they have violated the Town of Barnstable Zoning Ordinance sections 240-7.A and 240-14.A respectively. (Please reference follow-up email by you on March 5, 2020 and again on April 10, 2020.)

Your request specifically demands that “the Barnstable Building Department inform Beacon that it cannot store its barge in a residential district in the Town of Barnstable”.

**Summary of Reason(s) for Denial:**

Your request for enforcement is denied in accordance with M.G.L. c. 40A § 7 for the following reasons:

1. Your request is not enforceable as the claim being made is without merit.
  - a. The land below the mean low water mark belongs to the Commonwealth and is beyond the jurisdiction of the building commissioner.
  - b. The waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.
2. Your clients lack standing to request enforcement

Enclosed with this Notice of Denial for your convenience please find a legal opinion from the Town Attorney’s office which was used in part for this determination.

If you have been aggrieved by this determination, you may file an appeal with the Town Clerk as well as the Planning and Development Department of the Town Barnstable,

specifying the ground thereof within thirty (30) days of the receipt of this notice in accordance with Chapter 40A Section 15 of the Massachusetts General Laws.

Regards,

Brian Florence  
Building Commissioner

TOWN OF BARNSTABLE  
LEGAL DEPARTMENT  
367 MAIN STREET  
HYANNIS, MA 02601

April 8, 2020

Mr. Paul Revere III  
226 River View Lane  
Centerville, MA 02632

Via email

Re: Beacon Marine Request for Enforcement

Dear Mr. Revere,

In response to your letter of January 17, 2020 to Harbormaster Daniel Horn who retired in December 2019 and has been replaced by Harbormaster Derek Lawson on whose behalf I am responding, I offer the following.

You request on behalf of your clients that the Harbormaster revoke a transfer of a commercial mooring permit from Gilmore Marine to Beacon Marine. This transfer occurred in 2015 and has been subsequently renewed annually thereafter.

You have cited a number of Town regulations that you suggest support an argument that the transfer was not in accordance with various sections of the Town's mooring regulations. You assert that the Gilmore mooring should instead have been returned to town inventory to be made available to a waiting list for moorings in the relevant mooring field. For the reasons below, your request is denied.

Factually, the mooring in question had been classified as a commercial mooring for at least ten years prior to transfer to Beacon. The Chapter 91 Waterways Regulations appearing in 309 C.M.R. 9.07 (2) (a) (3) expressly allow for classification of moorings to accommodate vessel types as commercial, or recreational/public, or private.

“9.07: Activities Subject to Annual Permit

(2) Annual Permits for Moorings, Floats and Rafts.

(a) The harbormaster or other local official shall provide a written procedure for the fair and equitable assignment from a waiting list for use of vacant or new moorings, floats or rafts held by bottom-anchor and ramps associated thereto. Methods for mooring assignment which are appropriate include, but are not limited to, one or more of the following:

1. date of application;
2. physical characteristics of vessels, *e.g.*, size and type;
3. purpose of vessel use, *e.g.*, **commercial vs. recreational or public vs. private.**”



Thus, even if the Gilmore Marine mooring had been surrendered to the Town, it would only have been returned to the “Commercial” inventory of moorings and would not, under any circumstances, have been available to anyone on the recreational/public or private mooring waiting lists.

Secondly, the Harbormaster properly followed procedure by referring the requested transfer to the Waterways Committee for its review and recommendation. The Waterways Committee recommended approval of the transfer of the Gilmore permit to Beacon. The mooring permit enabled an important and valued commercial service in the Three Bays area to continue uninterrupted. Both businesses were and are known for the quality of their work and respect for environmental considerations. The business gainfully employs a number of skilled workers in year-round employment.

It is also worthy of mention that the Town’s regulation, Section 406-24, accords significant deference to the Harbormaster’s judgment to deviate from the Town’s regulations if deemed in the best interest of the Town.

**§406-24**

**“The Harbormaster, using his/her discretion and after consultation with the Town Manager and the Waterways Committee, may deviate from the regulations noted above if deemed to be in the best interest of the Town of Barnstable.”**

Thus, even if deviation from regulations was needed to accomplish the subject transfer, the recommendation of the Waterways Committee to endorse the transfer would have supported the Harbormaster’s discretion to approve the requested transfer. To be clear, the Harbormaster did not need to and did not invoke this discretionary provision in this case but, had he done so, that exercise of discretion would have been reasonable and endorsed.

Next, your clients lack standing to challenge the Gilmore – Beacon transfer. They have not demonstrated that they have been prejudiced in any manner by the approval of the subject license transfer. As such, they are not, and cannot have been, aggrieved by that approval. Standing is an absolute prerequisite to the maintenance of a valid challenge to local action and failure to demonstrate standing as a matter of law deprives a Court of jurisdiction to hear any such challenge.

Finally, even assuming *arguendo* that your clients could have demonstrated standing to challenge the transfer almost five years after the transfer of the mooring permit was approved and completed, the 60-day statute of limitations imposed by G.L. c. 249, §4 to do so would have expired in approximately February of 2016 and barred their challenge thereafter.

In conclusion, the transfer was proper and the routine renewals are proper.

In light of this analysis, the Town respectfully declines to revoke the mooring permit in question.



A separate letter from the Building Commissioner denying your request for zoning enforcement will follow from him shortly.

Very truly yours,

*/s/ Charles S. McLaughlin, Jr.*

Charles S. McLaughlin, Jr.  
Senior Town Attorney

cc: Mark Ells, Town Manager  
M. Andrew Clyburn, Assistant Town Manager  
Council Vice-President Jessica Rapp-Grasetti  
Harbormaster Derek Lawson  
Mass DEP

June 9, 2020

Paul Revere, III  
Law Offices of Paul Revere, III  
226 River View Lane  
Centerville, Massachusetts 02632

RE: 695 Old Post Road, Cotuit

Dear Mr. Revere:

You have asked my opinion as to whether the mooring of a commercial barge with crane within the water view shed of the home owned by Charlene and Charles Nickson at 695 Old Post Road, Cotuit would negatively impact its value. In my opinion, the mooring of the barge in front of their home on a regular basis would result in the Nickson property having a lower market value than a similarly situated property that did not overlook the barge.

I hold a real estate broker's license issued by the Commonwealth of Massachusetts and am the co-founder of Robert Paul Properties. I have been licensed since 1982 and in 1994, with Robert Kinlin, I co-founded Kinlin Grover Real Estate which was acquired by GMAC several years later. My specialty is high-end residential real estate and I have sold numerous waterfront properties in the Three Bays area of Barnstable. I am familiar with the Nickson Property as I was a broker in the transaction when the Nickson's purchased the property in 2000 for \$1,600,000. I am familiar with the view of the barge and crane from the Nickson's property.

Numerous factors influence the value of a property including location, lot size, quality of home construction, setting and view. Based upon my experience listing and selling waterfront property in this area, and my knowledge of the barge and crane in close proximity to the Nickson property, it is my opinion that the barge and crane has a negative impact on the value of the property.

You have asked me whether a property located near and overlooking a commercial barge would be less valuable than the same property which did not. The answer is yes. That is, if two residential properties are essentially equal on all factors except one property is located in close proximity to a commercial operation and overlooks that commercial operation, but the other does not, the property in close proximity will have a lesser value except in the rare circumstance when the residential property directly benefits from its proximity to the commercial use.

Tel: 508.420.1414 Fax: 508.420.1472  
867 Main Street | Osterville, MA 02655

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At the Nickson property, I am not aware of any benefit from proximity to the barge and crane and, therefore, it is my opinion that the mooring of the barge and crane reduces the value of their property. The reduction in value is difficult to quantify as there are few, if any, similar situations in the Town of Barnstable and neighboring towns. As such, an exact figure would require significant speculation. Further, if I was a listing agent for this property, I would likely include photographs or other indications that the crane was moored off of the property in any marketing materials to ensure that any buyer was aware of its proximity.

Sincerely,

A handwritten signature in black ink that reads 'Paul E. Grover'.

Paul E. Grover

Tel: 508.420.1414 Fax: 508.420.1472  
867 Main Street | Osterville, MA 02655

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April 6, 2020

To: Brian Florence, Barnstable Building Commissioner

From: Karen Nober, Town Attorney  
T. David Houghton, First Assistant  
Charles S. McLaughlin, Jr., Senior Counsel

Re: Beacon Marine Construction, L.L.C. (“Beacon”) Mooring; Demand for Enforcement

**Background:**

In a letter to you dated January 17, 2020, Attorney Paul Revere asserted on behalf of his clients, Charlene and Charles Nickson, owners of waterfront property at 695 Old Post Road, Cotuit, that a barge and crane owned by Beacon is moored in an area of tide-waters (i.e., below the mean low water mark) off of Cordwood Landing, Cotuit. The Nickson’s allege that the RF zoning district extends southerly into Cotuit Bay from the upland and that the “storage” of this obviously commercial equipment in an alleged RF residential zone is a violation of the Barnstable zoning Ordinance. They demand that you undertake an enforcement action to abate this alleged violation.

As more fully explained below, no such enforcement action should be undertaken because,

1/ the Town’s zoning does not extend to the watershed and submerged land below mean low water, as is the case here, because that land is owned by the Commonwealth and is held in trust for the Public Benefit,

2/ the Nickson’s have no standing to demand such enforcement, and,

3/ the waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.

**Analysis:**

**Ownership of the seabed below mean low water:**

The essence of the Nickson claim is that the town’s zoning extends below mean low water and across the navigable tide-waters of the Town that are connected and open to the sea. The claim is without merit. As explained in two Supreme Judicial Court cases and in one Appeals Court decision discussed below, it is black letter law dating to the Colonial Ordinances of 1647 that a Town’s ownership of lands and hence its zoning ends at the mean low water mark of navigable tide-waters.

In *Boston Waterfront Development Corporation v. Commonwealth*, 378 Mass. 629 (1979), the Supreme Judicial Court went to great lengths to explore the European and especially the English history of public rights to navigation in salt waters connected to the sea and how those rights were subsumed by the Commonwealth as eventual successor to the rights of the English Crown. At issue in *Boston Waterfront* was the ownership of that portion of Boston's Lewis Wharf which had been constructed below the mean low water line into Boston Harbor. Noting the importance of wharf development to the economic viability of the colonies and the post-revolution states, the SJC quoted an 1850 State Senate report on the subject:

“By the law of all civilized Europe, before the feudal system obtained in England, there was no such thing as property in tidal waters. Tide waters were *res omnium*, that is, they were for the common use, like air and light ... In England, the fiction of a fee in the Crown, and the control of the trust in Parliament, we understand to have been a mode, suited to the times and the genius of the feudal law, for insuring to the State the control over tide-waters. The Commonwealth succeeds to this right of control.” 378 Mass., at 633.

“Land ownership in the colony was governed by the English Common Law, which our ancestors brought with them, claiming it as their birthright. Owners of land bounded by the sea or salt water ‘could not, by such boundary, hold any land below the ordinary low water mark; for all the land below belonged of common right to the king.’” 378 Mass., at 634. Internal citations and quotations omitted.

Thus, the ultimate holding in *Boston Waterfront* was that any portion of Lewis Wharf below the mean low water mark would need to be devoted to public use and, failing such continuing public use by the owner of the wharf, title would revert to the Commonwealth.

In reference to this particular matter, *Boston Waterfront* makes clear that the Sovereign, now the Commonwealth, owns the seabed below mean low water. See, also, *Fafard v. Conservation Commission of Barnstable*, 432 Mass. 194 (2000), discussed immediately below.

### **Public Trust Rights:**

*Fafard* is a seminal case quoted regularly for the proposition that a municipality may adopt a general ordinance that is more restrictive than G.L. c. 131, §40 (the Massachusetts Wetlands Protection Act) with respect to matters or projects within the jurisdiction of the Conservation Commission. Barnstable had itself enacted a wetlands protection ordinance that was stricter than G.L. c. 131, §40 and purported to protect, among other values, “public trust rights in trust lands”.

The Fafard proposal to build a pier and dock extending into the Eel River in Osterville, a salt water estuary located in the same general locale known as the Three Bays and less than one mile from the Nickson property was presented to the Barnstable Conservation Commission.



After hearing, the Commission issued a detailed decision which denied the Fafard application, As reasons for denial, the Commission cited the interference that the large project would impose on “recreational” values of navigation protected by the local ordinance as well as the fact that the pier “would pose significant adverse impacts to ... *public trust rights*.”

The Supreme Judicial Court first examined Barnstable’s attempt to exercise control and judgement of the extent to which a project was consistent with “public trust rights”. The Court concluded that the attempt was an improper claim of authority to administer public trust rights. That authority rests solely in the Commonwealth unless it has been granted to the Town by the Commonwealth or by an entity to which the Commonwealth has expressly delegated that authority. Finding that no such power had been granted to the Town, it followed that the Town did not have the authority to grant that power to its Conservation Commission. The Court noted,

“The Commonwealth, as successor to the colonial authorities, owns and controls the lands seaward of the flats (i.e., below mean low water, *ed.*). These lands are held in trust by the Commonwealth to preserve the general rights of the public. ‘The waters and the land under (waters) beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The Commonwealth’s authority with respect to these lands, to which we refer today as ‘Commonwealth Tidelands’, is subject only to Federal Law<sup>1</sup>, the State Constitution, and the State’s obligation as trustee.” (Interior citations omitted.) 432 Mass., at 198.

The Court struck the portion of the Barnstable ordinance that purported to exercise *public trust rights* in the Tidelands. Nevertheless, the Court then held that the balance of the Barnstable ordinance was valid and therefore sustained the Conservation Commission’s denial of permission to build the dock and pier.

### **Zoning:**

It is axiomatic that municipalities are a creature of and subject to the authority of the Sovereign, here, the Commonwealth of Massachusetts. See *Fafard*, above. Because the Commonwealth both owns the lands below mean low water and acts as trustee for the Public Trust Rights in and to those lands, and because the Commonwealth has neither surrendered nor assigned those rights to the Town, the Town has no authority to zone Commonwealth Tidelands as this would interfere with powers reserved to the Commonwealth.

---

<sup>1</sup> See *Michaelson v. Silver Beach Ass’n, Inc.*, 342 Mass. 251, 253 (1961), where the Court noted, “The right of the Legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the Government of the United States to act in the interest of interstate or foreign commerce”.

This issue came before the Appeals Court of the Commonwealth six years ago in the case of *Zammito v. Board of Selectmen of Mashpee*, a section 1:28 decision at 13-P-1710 (2014). Zammito and others who owned waterfront property on Popponesset Bay objected to the Town's granting of a shellfish aquaculture license in the Bay, claiming that it was a commercial enterprise that required review by the Cape Cod Commission and that, as a commercial enterprise, it also violated the Town's zoning by-law.

The Appeals Court ruled that, for reasons that need not be discussed here, aquaculture was not an enterprise that would generate a mandatory referral to the Cape Cod Commission. The ruling was essentially dispositive of the case.

However, the Appeals Court then addressed the zoning violation claim,

“We need not consider the plaintiffs' additional claim – that the board's granting of the license was contrary to the local zoning by-law – as it was not argued in the Superior Court. In any event, *the claim is without merit*. Reasonably construed, the zoning by-law and official zoning map do not apply to the site of the project, which is located beyond the extreme low water mark.”

In other words, the Appeals Court expressly recognized that a Town's zoning does not, because it cannot, control activity in Commonwealth Tidelands. The Beacon barge, crane, and mooring occupy the watersheet at Cordwood Landing, as did the aquaculture project infrastructure at issue in *Zammito*; both utilize the watersheet, an area reserved under the Colonial Ordinances to the State for the purpose of protecting the public rights to *fishing* (i.e. aquaculture, in *Zammito*), *fowling*, and *navigation* (Nickson/Beacon). Any attempt to impose zoning control on the navigable watersheet by excluding commercial uses would necessarily conflict with the public right to navigate freely for every type of vessel, be they commercial, recreational, or otherwise.

The Town simply has no authority to zone the property of the Commonwealth. In a recent local and terrestrial example of this application, Cape Cod Community College in West Barnstable launched a solar carport project a few years ago. The project was not well received by the neighbors and by representatives of the Old King's Highway Regional Historic District Commission. Their protests were to no avail because the Commonwealth responded correctly that neither the Town's zoning ordinances nor the Town's OKH regulations could legally dictate to the Commonwealths the uses of its property.

### **Standing; Selective Enforcement:**

The explanations above resolve the issue. However, it is worth noting a further bar to the Nickson arguments is that they lack standing to bring this argument forward. A fundamental

precept of zoning enforcement requires as a matter of law that the party claiming a right to enforcement must show that they are specially and specifically affected by the alleged zoning violation in a manner that is distinctly different from that of others in the same zoning district. The Nickson's cannot show this particularized damage from the alleged zoning violation. The Nickson's essentially assert an aesthetic grievance with the appearance of Beacon's barge and crane that, if true, would affect all waterfront neighbors who have a similar view. Their damage, if a waterfront view can be described as damaging, is identical to that of others in the area and is not particular to them. This type of undifferentiated claim is strongly disfavored by the Courts and would result in a successful motion to dismiss the claim for lack of standing.

So, too, any successful attempt to bar "commercial" activity on this watersheet would produce dramatic, unintended consequences for all commercial navigators. Fishing vessels, tow boats, passenger launches, sight-seeing and other commercial vessels would be ensnared in the anti-commercial crackdown. A failure to seek enforcement on these other clearly commercial users would be a classic example of selective enforcement about which Beacon would reasonably and loudly complain.

### **Conclusion**

Commercial uses of the Commonwealth's watersheet are classic examples of maritime commerce which were highly encouraged and indeed vital to the growth of the Colonies and later the New Republic. See the detailed recitation of the history of commercial use and development in *Boston Waterfront*, cited above. These rights are jealously guarded and promoted to this day as part of our cherished Federal and State maritime history.

Unfortunately, the Nickson claims run afoul of this history and must be rejected.

**Town of Barnstable**  
Planning and Development Department  
Elizabeth Jenkins, Director  
Staff Report



**Appeal No. 2020-022 – Nickson**  
**Appeal of Building Commissioners Decision**

**Date:** June 25, 2020  
**To:** Zoning Board of Appeals  
**From:** Planning and Development Staff  
**Appellant:** **Charlene and Charles Nickson**  
695 Old Post Road, Cotuit, MA  
**Subject Property Address:** **Barge located in Cotuit Bay near Cordwood Landing**  
**Assessor's Map/Parcel:** n/a  
**Zoning:** Residence F (RF)

Filed: May 8, 2020

Hearing: July 8, 2020

Decision Due: August 16, 2020

### Copy of Notice

Charlene and Charles Nickson are appealing the decision of the Building Commissioner in denying a request for enforcement action filed with the Town of Barnstable's Building Commissioner in January, 2020. The Appellants requested that the Building Commissioner require Beacon Marine Construction LLC., to stop the storage of a commercial barge and crane on a mooring off Cordwood Landing in a residentially zoned district. The application indicates the approximate location of the barge and crane are located adjacent to Cordwood Road on a mooring located in the Residence F (RF) Zoning District.

### Appeal

This matter involves an appeal of the denial of a request for enforcement filed with the Building Commissioner in January 2020. The Appellants requested that the Building Commissioner require Beacon Marine Construction LLC to stop the storage of a commercial barge and crane on a mooring off Cordwood Landing in a residentially zoned district. The Building Commissioner denied the request. The Appellants are requesting the Board reverse the Commissioners April decision as the area is residentially zoned and no provision of state or local law allows Beacon to store or maintain a commercial barge in a residential district.

### Background

The Appellants, Charlene and Charles Nickson, own the property located at 695 Old Post Road, Cotuit, and immediately adjacent to Cordwood Landing. Cordwood Landing is located at the foot of Cordwood Road in the northern portions of Cotuit Bay and includes a mooring field. The request for enforcement explained that Beacon stored a commercial barge and crane off Cordwood Landing on a mooring located in a residentially zoned district (RF). The Towns zoning map shows that the RF District extend into the waters of North Bay. The Appellants stated the storage of commercial vehicles is not an allowed use within the RF District and requested pursuant to Chapter 40A Section 7, that the Building Commissioner enforce the Barnstable Zoning ordinance and prohibit Beacon from storing the barge at this location.

On April 9, 2020 the Building Commissioner issued a denial for enforcement stating:

1. The request is not enforceable as the claim is without merit.
  - a. The land below the mean low water mark belongs to the Commonwealth and is beyond the jurisdiction of the building commissioner.

- b. The waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.
2. The Appellants lack standing to request enforcement.

The denial also attached a legal opinion of the Town Attorney’s office to support the Building Commissioners denial.

**Procedural Review**

This appeal was filed with the Town Clerk’s office on May 8, 2020 and the Planning and Development Department, Zoning Board of Appeals office on May 11, 2020. It was filed within 30 days of the denial to enforce zoning as required by MGL 40A.

*The Board should note that there were no abutters within 300 feet to notify.*

**Findings**

The Board should make findings when either voting to uphold or overrule the Building Commissioner’s determination. It is the Board’s responsibility to determine if the Building Commissioner properly determined that the Appellant’s use of the property violates the Zoning Ordinance.

Should the Board with to uphold the Building Commissioner’s decision to deny enforcement, the Board should consider the following findings:

The Board affirms the Building Commissioner’s finding that the request is not enforceable as the claim is without merit. The request is not enforceable as the claim is without merit.

- ) The land below the mean low water mark belongs to the Commonwealth and is beyond the jurisdiction of the building commissioner.
- ) The waters in question are navigable tide-waters controlled exclusively by the Commonwealth and the Federal Government, neither of which will countenance any municipal interference through zoning, or otherwise, with public rights to free navigation.
- ) The Appellants lack standing to request enforcement.

Should the Board wish to overrule the Building Commissioner’s Decision, below are draft findings for the Board’s potential consideration.

- 1. The Board finds the storage of a commercial barge and crane in a resident district violates the Zoning Ordinance.

**Procedural Information**

Upon making findings, the Board may choose to vote to:

- ) Uphold or the Building Commissioner’s denial of enforcement action; or
- ) Overrule the Building Commissioner’s denial of enforcement action,

A vote of 4 members of the Board is required to overrule the Building Commissioner’s decision.

CC: Appellants (c/o Attorney Paul Revere)  
Attachments: Application  
Assessor’s aerial photo  
Copy of Denial letter from Building Commissioner



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July 7, 2020

Alex Rodolakis, Chair  
Zoning Board of Appeals  
Town of Barnstable  
200 Main Street  
Hyannis, Massachusetts 02601

*Via Email:* [anna.brigham@town.barnstable.ma.us](mailto:anna.brigham@town.barnstable.ma.us); [carol.puckett@town.barnstable.ma.us](mailto:carol.puckett@town.barnstable.ma.us)

**Re: Mark B. Elefante, Trustee, et al.**  
**8 East Avenue, Osterville, Massachusetts**  
**Appeal No. 2020-024**

Dear Chair Rodolakis:

On behalf of the Applicants, and due to a publication issue, we are respectfully requesting a continuance of above referenced matter from July 8, 2020 to August 12, 2020 to allow for the revised publication.

Thank you for your consideration, and as always, please do not hesitate to contact my office should you have any questions.

Very truly yours



Michael F. Schulz



## Town of Barnstable Zoning Board of Appeals

### Agreement to Extend Time Limits for Holding of a Public Hearing and Filing of a Decision on a Other Powers

Original Hearing Due Date: 08-08-20  
New Hearing Due Date: 10-07-20

ZBA Appeal#: 2020-024	Map: 139	Parcel: 075 000
Appellant(s): Elefante/Gardiner as Trustees		
Address: 8 East Avenue	Village/City: Osterville	State: MA
Date Application was Time Stamped with Town Clerk: 06-04-20	Original Hearing Date: 07-08-20	
Original Decision Due: 09-12-20	Number of Days Extended: 60	
New Decision Due Date: 11-11-20		

In the matter of: Elefante/Gardiner as Trustees

the Applicant(s) and the Zoning Board of Appeals, pursuant to Mass. General Laws, Chapter 40A, Section 15, agree to extend the required time limits for holding of a public hearing and filing of a decision on this application for Other Powers for a period of 60 days beyond that date the hearing was required to be held and the decision was to be filed. This extension requires that the decision be filed 14 days after the decision is rendered by the Zoning Board of Appeals and that the decision be filed no later than: November 11, 2020.

In executing this Agreement, the Appellant(s) hereto specifically waive any claim for a constructive grant of relief based upon time limits applicable prior to the execution of this Agreement.

Signatures	
Appellants)	Zoning Board of Appeals
Print Name: <u>Michael F. Schulz</u>	Print Name: <u>Alex M. Robolskis, Chair</u>
Signature: <u>[Handwritten Signature]</u>	Signature: <u>[Handwritten Signature]</u>
Date: <u>7/9/20</u>	Date: <u>7/9/2020</u>

Zoning Board of Appeals  
Planning & Development Department  
200 Main Street, Hyannis, MA 02601  
Phone: 508-862-4785 Fax: 508-862-4784

cc: Town Clerk  
Applicant(s)  
File