

TOWN DOCK #1

Property and Facilities Inventory

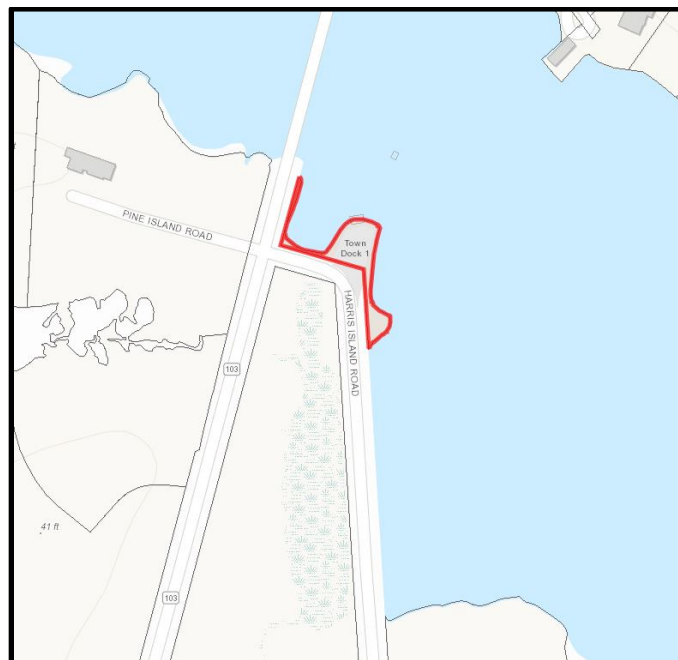
This document is one of a series of staff reports to document important information about properties owned and utilized by the Town of York. It is an attempt to compile and make available relevant information about properties to ensure the institutional knowledge is not lost over time.



September 23, 2021

TOWN DOCK #1

Location: 2 Harris Island Road. While the Town's tax maps show this property and the adjacent Strawberry Island as being a single parcel, the property on which Town Dock #1 is acquired by the Town as part of a road right-of-way in the 1950s and the Strawberry Island area was purchased from an abutting owner in 2005. *NOTE: The Strawberry Island Portion of this property is addressed in a separate report.*



Facility: This is the Town's commercial wharf. The property was initially developed as a public landing or wharf back when the bridge over the York River was discontinued. Funding to construct a wharf was approved on July 19, 1958. At some point in time this site was designated for commercial users, perhaps as early as 1962 when the Town acquired a deed allowing for construction of Town Dock #2.

Property Acquisition: The Town acquired the rights to this property when it accepted the road from the State of Maine. The sequence of events was described by former Town Attorney John Bannon in a report he prepared dated October 4, 1988 (copy attached). The initial vote of the Town to accept the southerly approach to the bridge

along with the remains of the bridge “for use as a public landing” was approved by the Town Meeting on March 7, 1953 (Article #58).

At the March 2, 1957 Town Meeting there were two articles considered in this regard, petitioned by James J. Cote and others. The first of these articles (#58) authorized the Board again to accept the property from the State and to authorize the Board of Selectmen to convert the property to a municipal wharf. The second of these articles (#59) authorized expenditure of not more than \$5,800 for the conversion process. (Note the Bannon Report incorrectly identifies the date of this vote as the 7th, not the 2nd.)

It appears the Town required additional funds to create the Town wharf. At a Special Town Meeting of July 19, 1958, voters authorized an expenditure of \$15,500 to build the Town wharf (Article #5).

Deed References: None.

Deed Restrictions: none known.

Survey and Monumentation: It is unclear what surveys may exist, though one or more are likely to exist. The most significant question is ownership of the land between Town Dock #1 and the current Route 103. It is questioned because an engineering drawing of the 2012 addition to the bait houses shows the newer portion of the building extending over the boundary of the old road right-of-way, which is the Town’s property. That plan is not a survey, but it raises an issue. It was never addressed back at the time of permitting. Any substantive future projects at Town Dock #1 should be conditioned on preparation of a certified property boundary survey.

Facility Acquisition/Construction/Alteration: Initial construction of the Town wharf was authorized and funded when the property was initially established, between 1953 and 1958, as described in the “Property Acquisition” section above.

Voters were asked in 2009 to fund the rehabilitation of Town Dock #1. In the ballot language (Article #44) there was a reference to initial construction in the mid-1950s with no indication of any substantive work since. It appears the work completed in the 2010 timeframe is the only other significant work since its initial construction.

Relationship to Bond Funds: At the time of writing (September 2021) there is one active bond which funded the rehabilitation of the facility. The bond was approved by the voters at the May 29, 2009 Budget Referendum (Article #44). The bond was issued in 2010 with an anticipated payoff in July 2030. The Town refinanced this debt in 2021 to reduce the interest rate.

Land Use Permits & Approvals: at this time no attempt has been made to inventory all permits and approvals for this property.

Other Information:

- There are two attached bait sheds located on or adjacent to Town Dock #1. The building with the lower ridgeline on the right (northeast) is privately owned and operated by the York Lobstermen's Association (YLA). The building with the higher ridgeline on the left (southwest) is Town-owned and is operated by the York Harbor Bait Shed Association, a spin-off of the York Harbor Board.



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- The older of the two bait sheds was paid for and constructed by the YLA. Early on, the YLA had a bait shed out on the far end of the dock, but it was removed and subsequently replaced in the current location sometime in the 1980s. The Board of Selectmen approved this newer structure at a meeting on March 27, 1989 (see Item #5 on page 3 of the minutes, attached). That vote of the Board of Selectmen indicated a lease was to be drafted for subsequent approval. A written agreement, apparently for this purpose, was executed in August and September 1996 (copy attached). This agreement appears to have expired at some point in the past, likely on August 1, 2001. It was renewable in 5-year increments, which would have been due in 2006, 2011, 2016 and 2021. At the very least, no such extensions were approved in 2016 and 2021 so the agreement has likely expired. Some sort of public-private agreement or lease is now needed to formalize this relationship.
 - The newer of the two bait sheds was built by the York Harbor Bait Shed Association, with permits and approvals dating back to 2012. This Association was somehow established by the York Harbor Board, though the legal basis and means of doing so are not clear at this time. Construction was initially financed by borrowing from Harbor Funds, and that debt is currently being paid off by user fees. When this debt is paid back in full, it is not clear where bait shed user fees will then go.
- Hoists – there is a hoist fund which relates to the two hydraulic hoists out at the end of the dock. There is also a hoist located immediately adjacent to the bait sheds, as shown in the photo of the bait sheds, which is seldom used and is not the subject of the hoist fund.
 - Insurance – Insurance issues may exist on this Dock because of its very nature – it exists to facilitate commercial fishing. This means there are private businesses conducting business on public property. This is okay, but the Town’s potential liability exposure and insurance coverages should be fully evaluated to ensure proper coverage because municipal tort liability protections may not cover all possibilities.

Bond-Related Restrictions	Yes
Land & Water Conservation Fund Restrictions	Not applicable
National Historic District	Yes
Local Historic District, Landmark or Site	Not applicable
In the Urbanized Area	Yes

Ballot Question

March 7, 1953

Minutes of March 7, 1953 Town Meeting

* FIFTY-EIGHTH Upon a motion duly seconded, it was voted to authorize the Selectmen to accept from the State of Maine on behalf of the Town the southerly approaches to the Bridge crossing the York River from Bragdon's Island and rights of Way thereto and to further accept such portion of said Bridge as are left for use as a public landing. SIXTY.

FIFTY-NINTH Upon a motion duly seconded, it was voted to raise the sum of fifteen hundred (\$1,500.00) Dollars for tarring the road from the Grange Hall to the residence of Hugh Lipsius. SIXTY.

SIXTYIETH Upon a motion duly seconded, it was voted not to pass this article.

SIXTY-FIRST Upon a motion duly seconded, it was voted to raise the sum of five hundred (\$500.00) Dollars to help to support the Chamber of Commerce in its advertising campaign promoting York for the 1953 year and pay the sum to the Treasurer of the Chamber of Commerce.

SIXTY-SECOND Upon a motion duly seconded, it was voted to have the Selectmen to appoint a committee to investigate insect control and report at next annual Town Meeting.

SIXTY-THIRD Upon a motion duly seconded, it was voted to install (3) hydrants starting at the intersection of Shore Road and Pine Hill Road South extending along Pine Hill Road South to the intersection of Pine Hill Road South and Pine Hill Road providing the only cost to the Town will be the yearly rental fee of the hydrants.

SIXTY FOURTH Upon a motion duly seconded, it was voted to raise the sum of fifteen hundred (\$1,500.00) Dollars for a sidewalk on Organug Road, to start at the intersection of Organug Road and York St. and extending towards the High School.

SIXTY-FIFTH Upon a motion duly seconded, it was voted to enact the following ordinance:

Be it enacted by the People of the Town of York that no person under sixteen (16) years of age shall have in possession a B. B. gun or any other spring or air-operated gun anywhere within the limits of said Town except upon his or her own premises or if accompanied by an adult. And no person shall aim or shoot any gun as aforesaid in such fashion that the B.B. pellet or other missile shall come to rest outside the premises said persons or his or her guardian.

Any person found in violation of this ordinance shall have the in question confiscated and destroyed and if said violator shall be less than twenty-one years of age, the parent or guardian thereof shall upon conviction be fined not more than five dollars for each offense.

SIXTY-SIXTH Upon a motion duly seconded, it was voted to enact the following ordinance:

Be it enacted by the People of the Town of York, Maine, that all that area within said Town which is bounded northerly by Route 1A; easterly by Lindsay Road, southerly by Indian Trail and westerly by Organug Road shall be closed to hunting and target shooting.

Whoever violates the provisions of this ordinance shall be punished by a fine of not more than \$10.00.

A true
Attest

Ballot Questions

March 2, 1957

Minutes of March 2, 1957 Town Meeting

FIFTY-FIFTH--Upon a motion duly seconded, it was voted to raise the sum of forty-eight (\$48.00) dollars to install four street lights beginning at the residence of Mr. Donald Worley along the Logging Road, north as far as the residence of Mr. Robert Liston.

FIFTY-SIXTH--Upon a motion duly seconded, it was voted to raise the sum of two hundred (\$200.00) dollars to cooperate with the Maine Forest Service and the Federal Government in controlling White Pine Blister Rust.

FIFTY-SEVENTH--Upon a motion duly seconded, it was voted to indefinitely postpone this article.

* FIFTY-EIGHTH--Upon a motion duly seconded, it was voted that the Selectmen be authorized to accept from the State of Maine so-much of the southerly approaches, abutments and portion of the existing bridge leading across the York River from York Harbor to Bragdon's Island as shall be necessary for the establishment of a town wharf, and that the Selectmen be further authorized to do whatever shall be necessary to convert said bridge municipal wharf.

* FIFTY-NINTH--Upon a motion duly seconded it was voted to authorize to spend a sum not to exceed fifty-eight hundred (\$5,800.00) dollars, which sum shall be taken from unexpended surplus, to convert the approach of the New Bridge so-called, at Bragdon's Island into a Municipal Wharf.

SIXTIETH--Upon a motion duly seconded, it was voted to raise the sum of \$45.00 to install three street lights on so-called Post Road, also known as U. S. Route 1, on Poles #209, 206 and 203.

SIXTY-FIRST--Upon a motion duly seconded, it was voted to indefinitely postpone this article.

Upon a motion made by Henry Fuller and duly seconded it was voted that the Inhabitants of the Town go on record as expressing their grateful appreciation and thanks to Edwin E. Kimball for his very able and conscientious services, during his term as Selectmen and do accept his resignation with regret.

SIXTY-SECOND-- Upon a motion duly seconded, it was voted to raise the sum of one hundred eighty (\$180.00) dollars and to install ten (10) street lights on the Shore Road to Ogunquit.

Upon a motion duly seconded, it was voted to adjourn this meeting and was so declared sine die by the Moderator at 5:20 PM.

The officers declared elected namely James H. MacIntire, Robert W. Ellis, Robert B. Craig, Cecil A. Parsons, and Robert B. Craig were called together and sworn to their respective duties by Norris A. Talpey, Town Clerk; to wit:

"I, do swear that I will support the Constitution of the United States and of this State so long as I shall continue as citizen thereof, So help me God.

I, do swear that I will faithfully discharge all the duties incumbent upon me as (their respective stations) according to the Constitution and Laws of the State. So help me God."

A true record

Attest Norris A. Talpey Town Clerk

A true
Attest

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Ballot Question

July 19, 1958

Cape Neddick, Maine and Brixham Grange Hall, Brixham, so called the same being three public and conspicuous places within said Town of York on the twelfth day of July in the year one thousand nine hundred and fifty-eight, the same being at least seven days before the time appointed for said meeting.

Dated at York, in the county of York and State of Maine, this twelfth day of July in the year one thousand nine hundred and fifty-eight.

Norman H. Hamilton

A true copy
Rec. 16 July 58

Attest Norris A. Talpey Town Clerk

MINUTES OF SPECIAL TOWN MEETING

JULY 19 1958

The meeting was called to order by the Clerk, Norris A. Talpey at 11:00 AM in the forenoon. The Clerk read the warrant and the return of the warrant.

He then proceeded with Article I of the warrant, to choose a moderator to preside at said meeting, upon a motion duly seconded it was moved that Fred W. Marshall be the nominee for Moderator. Upon a motion duly seconded it was voted that nominations be closed. Upon a motion duly seconded it was voted that the Clerk cast one ballot as the unanimous vote of the meeting for Fred W. Marshall as moderator of this meeting, which was accordingly done and Fred W. Marshall was declared unanimously elected and was duly sworn to the faithful performance of his duties by the Clerk. The Moderator then took charge of the meeting and proceeded with Article II of the foregoing warrant.

Article II. Upon a motion by Robert W. Ellis and duly seconded, it was voted to take the sum of eight thousand (\$8,000.00) for unappropriated surplus to remove the Old Wooden Bridge between Bragdon and Harris Island and replace it with rock and gravel full and three, four foot culverts.

Article III- Upon a motion duly seconded, it was voted to discontinue a piece of road on Harris Island beginning at driveway leading to the residence of David Lusty and running approximately 880 feet in a southerly direction to the bridge between Harris Island and Seabury.

Article IV. Upon a motion by James H. MacIntire and duly seconded, it was voted to discontinue the bridge and abutment between Harris Island and Seabury.

* Article V. Upon a motion by James H. MacIntire and duly seconded, after much discussion, Richard Gile moved this article be put to a vote which was accordingly done and it was voted to take the sum of fifteen thousand five hundred (\$15,500.) dollars from unappropriated surplus to build a town wharf on the southerly side of York River on the site or adjacent to the old bridge between York Harbor and Bragdon Island.

Article
was amended
in March,
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Ballot Question

May 29, 2009



**SPECIMEN BALLOT
BUDGET REFERENDUM
YORK, MAINE
MAY 29, 2009**

Card 5 of 8

Penalty for willfully defacing, tearing down, removing or destroying a List of Candidates or Specimen Ballot - fine not exceeding One Hundred Dollars.

TOWN CLERK

INSTRUCTIONS FOR VOTERS

A. To vote, completely fill in the OVAL to the RIGHT of your choice(s), like this: ☐

ARTICLE FORTY-FOUR

Shall the Town (1) approve the **Rehabilitation of Town Dock #1**; (2) appropriate the sum of **\$950,000** to fund the construction costs of this project; and (3) to fund this appropriation, authorize the Treasurer and the Chairman of the Board of Selectmen to issue, at one time or from time to time, general obligation securities of the Town of York, Maine, including temporary notes in anticipation of the sale thereof, in an aggregate principal amount not to exceed **\$950,000** with the discretion to fix the date(s), maturity(ies), denomination(s), interest rate(s), place(s) of payment, call(s) for redemption, form(s), and other details of said securities, including execution and delivery of said securities against payment therefore, and to provide for the sale thereof, to be delegated to the Treasurer and the Chairman of the Board of Selectmen?

Statement of Fact: Town Dock #1 is an extremely important Town facility supporting year-round activities of lobster boats, fishing boats and recreational boaters. Built in the mid-1950's, it has structural deficiencies and is functionally obsolete. The Harbor Board will be searching for other sources of funds to potentially offset the cost of this project.

FINANCIAL STATEMENT

Total Town Indebtedness:

A. Bonds outstanding and unpaid	\$ 16,894,000
B. Bonds authorized and unissued	\$ 0
C. Bonds to be issued if the Article is approved	\$ 950,000
Total	\$ 17,844,000

Costs:

At an estimated interest rate of 4.50% for a twenty (20) year maturity, the estimated cost of the bond issue will be:

Principal	\$ 950,000
Interest	\$ 437,625
Total Debt Service	\$ 1,387,625

Total estimated project costs including debt service: \$1,387,625

Validity: The validity of the bonds and of the voters' ratification of the bonds may not be affected by any errors in the above estimates. If the actual amount of the total debt service for the bond issue varies from the estimate, the ratification by the electors is nevertheless conclusive and the validity of the bond issue is not affected by reason of the variance.

s/Margaret M. McIntosh, Town Treasurer

Budget Committee recommends approval (7-0).

Board of Selectmen recommends approval (5-0). **YES** 1901

NO 832

Minutes of the Board of Selectmen

March 27, 1989

BOARD OF SELECTMEN
Arthur A. Berger, Chairman
George S. Powell, Vice-Chairman
Ronald N. Nowell
Paul J. O'Brien
David Strater

ADMINISTRATOR
Donald P. Cole, III



Town of York

P.O. Box 9
York, Maine 03909

TOWN HALL PHONE NUMBERS
Selectmen's Office 363-2660
Code Enforcement Office 363-2050
Assessor's Office 363-3886
Public Works Department 363-5414
Recreation Department 363-2723
Town Clerk 363-2733
Town Planner 363-5497

SELECTMEN'S MEETING
7:00 P.M. Monday March 27, 1989
Police Building, York Beach

FOR CLARIFICATION, SEE TAPE OF MEETING. ATTACHMENTS ARE KEPT WITH ORIGINAL MINUTES IN ADMINISTRATOR'S OFFICE.

ATTENDEES: Arthur A. Berger, George S. Powell, Ronald N. Nowell,
Paul J. O'Brien, David Strater, Donald P. Cole, III,
Members of the Press and Public
Absent: David Strater

REPORT:

1.a. Mr. Berger opened the public hearing for the following
Victualers License:

Lobster Barn Corp.,
d/b/a Lobster Barn

Upon motion of Mr. Powell, seconded by Mr. O'Brien, it was
voted to close said hearing. Vote: 5-0-0.

Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was
voted to grant said license. Vote: 4-0-0. (See Attachment
#1).

b. Mr. Berger opened the public hearing for the following
Liquor License:

Lobster Barn Corp.,
d/b/a Lobster Barn (Full-time - Malt,
Spirituos, Vinous - Renewal)

Upon motion of Mr. Powell, seconded by Mr. O'Brien, it was
voted to close said hearing. Vote: 4-0-0.

*Copies
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Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to endorse said license. Vote: 4-0-0. (See Att. #2).

- c.Mr. Berger opened the public hearing for the following Special Amusement License:

Stage Neck Inn, Inc.,
d/b/a Stage Neck Inn

Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to grant said license. Vote: 4-0-0. (See Att. #3).

- d.Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to sign the following Pole Location Permit. Vote: 4-0-0. (See Attachment #4).

CMP & N.E. Tel. & Tel. Co.
Long Beach 1 Pole

- 2.a.Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to set a public hearing reference non-conforming use (three definitions). Vote: 4-0-0.

- b.Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to set a public hearing reference the Board of Appeals pertaining to definition of "written decision". Vote: 4-0-0.

- c.No action reference clarification of "home occupation".

- d.Upon motion of Mr. Powell, seconded by Mr. O'Brien, it was voted to request that the proposed shelter cease and desist until it files an application and complies with local ordinances. Vote: 3-1-0. (Mr. Nowell voted in the negative). (See Att. #5).

- 3.a.Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to place the Site Design Review recommendations pertaining to York Harbor Village Corp. Ordinances on the Town Meeting Warrant and to schedule a public hearing. Vote: 4-0-0. (See Att. #6).

- b.Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to place the Route 1 Ordinance on the Town Meeting Warrant. Vote: 4-0-0. (See Att. #7).

- c.Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to place amendments to the Manufactured Housing Ordinance on the Town Meeting Warrant. Vote: 4-0-0. (See Att. #7).

- d.Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to place amendments to the Shoreland Zoning Ordinance on the Town Meeting Warrant. Vote: 4-0-0. (See Att. #7).

e. Upon motion of Mr. Powell, seconded by Mr. Berger, it was voted to table action and to contact SEA to upgrade the Plumbing Code Communal Septic System for funding. Vote: 4-0-0. (See Att. #8).

f. Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to place the following parcels of land to be accepted as gifts on the Town Meeting Warrant. Vote: 4-0-0. (See Att. #9).

Map 51, Lots 40 and 37
Map 57, Lot 79A
Map 90, Lot 84

g. No action reference amendment to Planned Growth Ordinance - sent to John Bannon for review.

h. Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to send the Parks and Recreation Advisory Board Ordinance to MMA for review. Vote: 4-0-0. (See Att. #10).

i. No action reference school petition.

Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to take no action reference Town Manager form of government until Mr. Strater returns. Vote: 4-0-0. (See Att. #11).

j. No action reference hiring full-time Town Attorney.

k. Upon motion of Mr. Powell, seconded by Mr. Berger, it was voted to place on the Town Meeting Warrant an article reference the 18 month budget as prepared in the February 27, 1989 letter from John Bannon. Vote: 3-1-0. (Mr. Nowell voted in the negative). (See Att. #13).

4. Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted authorize a workshop with the Port Authority and the Town Attorney. Vote: 4-0-0. (See Att. #14).

5. Upon motion of Mr. Powell, seconded by Mr. Berger, it was voted to authorize the Lobstermen's Association to build a bait shack in accordance with plans and to coordinate with the Port Authority at their April 3, 1989 meeting and work out any concerns of the Port Authority within 30 days a lease/maintenance agreement to be presented to the Port Authority and Board of Selectmen for authorization. Vote: 3-1-0. (Mr. Nowell voted in the negative). (See Att. #15).

6. Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to authorize Pat White, Dave Linney, John Holbrook, Ron Nowell and Keith Bishop to form the ad-hoc committee reference the York Harbor Access Project with a

representative of the York Harbor Neighborhood Association.
Vote: 4-0-0. (See Att. #16).

7. a. Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to appoint Donald P. Cole, III as Administrator and Welfare Director for the ensuing year. Vote: 4-0-0.
- b. Upon motion of Mr. O'Brien, seconded by Mr. Powell, it was voted to appoint Leon Moulton as Superintendent of Public Works for the ensuing three years. Vote: 4-0-0.
- c. Upon motion of Mr. Powell, seconded by Mr. Nowell, it was voted to appoint Richard Young as Tax Assessor for the ensuing year. Vote: 4-0-0.
- d. Upon motion of Mr. O'Brien, seconded by Mr. Powell, it was voted to appoint Timothy DeCoteau as Code Enforcement Officer, Licensed Plumbing Inspector, Building Inspector for the ensuing year. Vote: 4-0-0.
- e. Upon motion of Mr. Powell, seconded by Mr. O'Brien, it was voted to appoint James Ransom as Assistant Code Enforcement Officer, Licensed Plumbing Inspector, Building Inspector for the ensuing year. Vote: 4-0-0.
- f. Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted appoint Michael Morrison as Tree Warden for the ensuing year. Vote: 4-0-0.
- g. Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to appoint Sarah Francke as Deputy Welfare Director for the ensuing year. Vote: 4-0-0.
- h. Upon motion of Mr. O'Brien, seconded by Mr. Powell, it was voted to appoint Tom Fawcett as Deputy Harbor Master and to table the Cape Neddick Harbor Master appointment. Vote: 3-1-0. (Mr. Nowell voted in the negative).
- i. Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to appoint Keith Bishop as Shellfish Warden for the ensuing year. Vote: 4-0-0.
- j. Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to appoint Maurice Payne as Deputy Shellfish Warden for the ensuing year. Vote: 4-0-0.
- k. Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to appoint Pete Paterson (York Village) and John Welch (York Beach) Fire Inspectors. Vote: 4-0-0.
- l. Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to appoint Police Officers (Regular and Special Duty) as listed on Att. #17. Vote: 4-0-0.

8. Upon motion of Mr. Nowell, seconded by Mr. Powell, it was voted to authorize the Conservation Commission to take the current wetlands definitions and tax maps (starting with the Nubble area, then York Beach) and delineate on vacant lots possible wetlands to be used as reference by the Conservation Commission, Code Enforcement Office and Planning Department. Vote: 3-1-0. (Mr. O'Brien voted in the negative).
9. Upon motion of Mr. Powell, seconded by Mr. O'Brien, it was voted to authorize a 4% cost of living increase to the Pay scales. Vote: 4-0-0.

PUBLIC COMMENTS

Jeff Clark discussed lighting at the ball field.

* * * * *

Upon motion of Mr. Nowell, seconded by Mr. O'Brien, it was voted to authorize the Code Enforcement Officer to issue permits reference lighting at the ball field. Vote: 4-0-0.

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Rick Mace discussed the 4% figure reference MMA and various workshops with employee reps.

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SELECTMEN'S COMMENTS

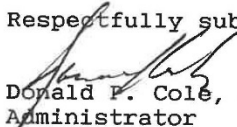
Mr. O'Brien discussed the Recreation Department reference the Nubble Light House License.

Upon motion of Mr. Nowell, seconded by Mr. Berger, it was voted to authorize Mike Sullivan and Paul O'Brien to work out the lease arrangements with the Coast Guard and control access. Vote: 4-0-0.

* * * * *

Upon motion of Mr. Berger, seconded by Mr. Nowell, it was voted to adjourn at 9:30 P.M. Vote: 4-0-0.

Respectfully submitted,


Donald P. Cole, III
Administrator

DPC:djb

Atts.

1996 Agreement of Town and York Lobstermen's Association

ORIGINAL
Town Clerk

**Agreement Between the Town of York, Maine,
Myron Freeman, Jay Fiandaca, and John Bridges
Regarding the Renovation and Use of a Bait Shack on Town Dock #1**

The Town of York agrees to permit the undersigned to make repairs to an existing Bait Shack adjacent to Town Dock #1 with the following conditions:

1. All repairs must conform with the Town of York Building Codes and must be acceptable in appearance to the Board of Selectman.
2. The current dimensions of the building may not be exceeded, except that some additional height may be added to allow someone to stand inside the building.
3. The building will be properly maintained in terms of its exterior appearance. The Board of Selectmen will determine the appropriate standard.
4. The contents of the building must be managed so that odors are minimized.
5. The Board of Selectmen reserves the right to require the removal of the building for the convenience of the Town. If removal is required the Selectmen will consider other locations on or near Town Dock #1 for the relocation of the Bait Shed.
6. This agreement is non-transferable without the prior written permission of the Board of Selectmen.
7. This agreement expires on August 1, 2001 unless renewed by mutual agreement of the undersigned for successive five year periods.

BOARD OF SELECTMEN

Mary Andrews
Mary Andrews, Chairman
Lawrence P. Jackson
Lawrence P. Jackson, Vice-Chairman
Michael Kleist
Michael Kleist
Carol J. McIntire
Carol J. McIntire
Michael V. Palumbo
Michael V. Palumbo

Approved: *August 27, 1996*
Signed: *September 3, 1996*
Date:

BAIT SHACK OWNERS

Myron Freeman
Myron Freeman
Jay Fiandaca
Jay Fiandaca
John Bridges
John M. Bridges
August 27, 1996
Date:

**Report with Respect to Public Access Rights
To the Shore in the Vicinity of Harris Island Road**

October 4, 1988

John C. Bannon, Esq.
(Town Attorney at the time of writing)

FYI

REPORT WITH RESPECT TO PUBLIC ACCESS RIGHTS
TO THE SHORE IN THE VICINITY OF HARRIS ISLAND ROAD

85 86 Survey
John C. Bannon
Murray, Plumb & Murray
75 Pearl Street
Portland, Maine 04101

BMS
BMS

REPORT WITH RESPECT TO PUBLIC ACCESS RIGHTS TO
THE SHORE IN THE VICINITY OF HARRIS ISLAND ROAD

I. HISTORICAL BACKGROUND.

Before it is possible to ascertain the rights of the public to gain access to the York River from Harris Island Road, it is necessary to ascertain the extent of private ownership rights in the islands over which that road passes. Because of the fluctuation of the shoreline, it is always difficult to pinpoint the extent of private ownership of properties abutting tidal waters such as the York River. However, certain overarching principles of law simplify this task in Maine.

A. Who Owns The Intertidal Zone, And To What Extent?

Prior to 1641, it was well established under the English common law that all lands below the high water mark of tidal water bodies belonged to the sovereign. Indeed, that is still the law in most of the United States outside the original 13 colonies. See Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (U.S. 1988). However, that common law principle was radically changed in 1641 by the Massachusetts Bay Colony.

Under the Colonial Ordinance of 1641, Chapter LXIII, Section 3 (amended 1647), the sovereign granted to riparian landholders private property rights in the "intertidal zone": the area between low and high tides. However, it is important to recognize that those rights were limited. The Colonial Ordinance provided as follows:

It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above 100 rods, and not more wheresoever it ebbs further:

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

Moreover, that ordinance granted the inhabitants of every town within the Massachusetts Bay Colony the right of "free fishing and fowling in any . . . bays, coves, and rivers, so far as the sea ebbs and flows within the precincts of the town" Ancient Charters and Laws of Massachusetts Bay, 148-149 (1814). Thus, the private rights of a riparian owner on tidal waters are limited both geographically and with respect to usage.

First, regardless of the language of any deed, the riparian owner's property interests extend only to the low water mark, or a distance of 100 rods from the high water mark, whichever is less. The "low water mark" described in the 1641 Ordinance represents ordinary low tide, not the lowest tide that could be expected under extreme meteorological conditions. Gerrish v. Proprietors of Union Wharf, 26 Me. 384 (1847).

Second, private property interests in the intertidal zone are subject to what is essentially a public easement for the purposes of fishing, fowling, and navigation which the riparian owner is powerless to obstruct. The Law Court has described this

"easement" as a right held by each individual member of the public, rather than by the public as a whole. Opinion of the Justices, 118 Me. 503, 504 (1919).

The Province of Maine was a portion of Massachusetts in the 17th and 18th Centuries, and was therefore subject to the 1641 Colonial Ordinance. When Maine became a state and was separated from Massachusetts in 1820, the 1641 Colonial Ordinance became a part of the common law of Maine. Maine Constitution Article X, Section 3. See, e.g., Conant v. Jordan, 107 Me. 227 (1910).

The extent of the public easement in the intertidal zone, and the extent of private ownership of that zone, does not depend on the nature of the tidal water body. The same analysis applies to property fronting on the Atlantic Ocean, tidal rivers, and tidal streams. Although in the case of nontidal streams, private ownership normally extends to the thread of the stream, Pike v. Munroe, 36 Me. 309 (1853), this is not true of tidal rivers. With respect to tidal rivers such as the York River, private ownership can extend no further than the bound described in the 1641 Ordinance: to the low water mark, or 100 rods from the high water mark, whichever is less. Deering v. Proprietors of Long Wharf, 25 Me. 51 (1845).

In sum, no person owning property abutting the York River owns below the low water mark, or 100 rods from shore, whichever is less; and all such property owners must honor the public easement created by the 1641 Ordinance.

B. What Are The Public Rights In The Intertidal Zone?

The public right of "navigation" in intertidal waters includes the right to sail over the flats; to rest a vessel on the flats when the tide is out; to moor vessels; and to unload cargo on the flats for the purpose of transporting it to other locations -- at least so long as that transportation does not require trespass over private property above the high water mark. Andrews v. King, 124 Me. 361 (1925).

Of particular interest in this context is the well-established principle that a member of the public may moor a boat to a public highway crossing a tidal river and utilize the public highway to gain access to the tidal river. In the case of Parsons v. Clark, 76 Me. 476 (1884), the plaintiff had accused the defendant of trespassing upon his land by mooring a boat to a public highway bridge which crossed a tidal stream, gaining access to the boat by means of the bridge, and then utilizing a tidal river which flowed in front of the plaintiff's property. In entering judgment for the defendant, the court rejected the plaintiff's objection to the defendant's use of the highway bridge to gain access to the intertidal zone:

The bridge was a structure, built and maintained for public use, resting at either end upon the soil of the plaintiff, over which the road passed. The structure did not become the property of the plaintiff by reason of its resting upon his own soil. It was put there by authority of law, and the structure did not thereby become a part of the freehold, any more than a chattel would, placed upon another's ground by permission of the owner of it. . . . If it is said that the defendant must have landed from his boat upon some part of the highway, it could make no difference, because the traveler, as against the owner of the

fee, has the right to turn from the beaten path and use any part of the highway to pass and repass upon. The defendant would have a right to approach the stream, which is a public water way, from any part of the highway, without becoming a trespasser upon the plaintiff's close.

The right to "fish" in the intertidal zone includes the right to collect shellfish, in addition to catching swimming fish. State v. Leavitt, 105 Me. 76 (1909).

Interestingly, the Law Court has held that the public easement includes such seemingly recreational uses as skating and walking. Marshall v. Walker, 93 Me. 532, 536 (1900). We note that there is presently pending before the Law Court a case, Bell v. Town of Wells, which will determine whether the public's recreational rights in the intertidal zone are limited by uses existing in 1641, or can be expanded by custom. We do not believe, however, that the resolution of that issue is fundamentally important to this study.

The only way in which public rights in the intertidal zone can be extinguished is if the intertidal zone is physically eliminated. Absent such a physical destruction of the intertidal zone, as by filling, any effort by private property owners to obstruct the public rights in the intertidal zone is a nuisance. Such an obstruction cannot extinguish the public's right, no matter how long continued:

The public rights of fishing, fowling, and navigation in the intertidal zone are matters of common rights, and such an obstruction of them, even by the holder of the fee in the seashore, is a public nuisance. These are rights, also, against which no

prescription runs. No erection, injurious to them and without legislative sanction, ever acquires the right to be, by lapse of time.

Dyer v. Curtis, 72 Me. 181, 184 (1881).

C. What Public Rights Derive From A Public Way?

Because the interaction of Harris Island Road with the Harris and Bragdon's Islands is the prime determinant of public access to the York River in this area, it should be noted that a public way is entitled to expansive use. MacKenna v. Inhabitants of Town of Searsmont, 349 A.2d 760, 763 (Me. 1976), Briggs v. L & A Horse RR Co., 79 Me. 363, 366 (1887). It is significant that the Court has compared the virtually unlimited rights of passage in public ways to the rights created by the Colonial Ordinance of 1641!

What servitude then does the public acquire by the taking of land for a public way? It is the right of transit for travelers, on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas, and sewage for the use of the public. It is a public use for the convenience of the public, to be molded and applied as public necessity or convenience may demand and as the methods of life and communication may from time to time require. Society changes and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel. When the way is constructed, the land owner has his compensation, not only for the land taken, but for the damages sustained, although usually benefits are conferred rather than injury inflicted. These damages are assessed as compensation for a surrender of his land to the public use for travel

and transit, not only by the methods then applied, and for the volume then existing, but for all time and for such future use as the exigencies of the time may develop.

When the way has been created, the public controls its use and regulates its repair by laws that the legislature shall enact. . . . We have persistently maintained the right of "free fishing and fowling," free and unobstructed navigation of our rivers, the free taking of ice upon them, the right of eminent domain over and in the waters of great ponds, and we now assert the right of the people to control the use of their public ways as shall best meet their necessities, without vexation from the landowner, whenever growth and discovery show the convenience of applying new methods for public transit. Let a public way once constructed be free for the public use and control as it may choose. Let it be free as the ocean is free, as our rivers are free, and as our great ponds and lakes are free for the use of all the people.

Taylor v. Portsmouth, Kittery, and York Street Railway, 91 Me. 193, 198 (1898). Ironically, the road discussed in the Taylor case was a road through York Harbor.

Although a Town may not use a public way for uses totally unrelated to travel, see, e.g., City of Rockland v. Johnson, 267 A.2d 352 (Me. 1970), the use of Harris Island Road to gain access to the York River is clearly a legitimate use of the public way.

Parsons v. Clark, *supra*. See also Kennedy's Executors v. Jones, 11 Ala. 63 (1847); Memphis v. Wright, 14 Tenn. 497 (1834).

Indeed, the York River is itself, in legal contemplation, a public highway. Chapin v. Maine Central Railroad Company, 97 Me. 151 (1902).

With these principles in mind, we can now address the status of the Harris Island Road as it affects public access to the York River.

II. THE HISTORY OF HARRIS ISLAND ROAD.

Because the layout of the Harris Island Road in 1906 is unusually clear, and because the survey conducted by Civil Consultants was able to locate the boundaries of the right of way with reasonable certainty, extensive attention to the history of Harris Island Road is not warranted. The acrimonious circumstances under which the bridge was constructed and financed are well set forth in the History of Town of York, page 132, as well as in the Law Court's opinion of Blaisdell v. Inhabitants of the Town of York, 110 Me. 500 (1913). However, the actions of the State, County, and Town with respect to the road which establish its present bounds may be summarized as follows:

February 17, 1905 - Chapter 50 of the Private and Special Laws of 1905 authorizes the construction of a highway and bridge across York River.

April 4, 1905 - York citizens petition York County Commissioners actually to lay out the way.

January 2, 1906 - York County Commissioners lay out a three-rod right of way for Harris Island Road, award damages to the persons over whose property the road would pass, and allow the Town two years to open and make the road safe and convenient to travelers.

1906 - 1913 - Prolonged litigation concerning the validity of the laying out, all of which is resolved in favor of the action of the County Commissioners in Blaisdell v. Inhabitants of the Town of York, 110 Me. 500 (1913).

February 2, 1907 - State Legislature formally approves the location of road and authorizes the Town both to commence construction of the road and to maintain it.

April 24, 1935 - 1958 - Harris Island Road is maintained by State of Maine as State Route 103.

1953 - Town votes to accept from the State of Maine the "southerly approaches to the bridge crossing the York River from Bragdon's Island and rights of way thereto and to further accept such portion of said bridge as are left for use as a public landing."

March 7, 1957 - Town votes to accept road back from the State when State constructs new Route 103, for purposes of constructing a wharf.

July 27, 1957 - Town votes to discontinue road southerly of the southern terminus of the bridge between Harris Island and Seabury.

1958 - State opens new Route 103; Harris Island Road reverts entirely to Town jurisdiction.

July 19, 1958 - (1) The Town votes to appropriate \$8,000 to remove the old bridge leading from Bragdon's Island to Harris Island and to replace it with a causeway. (Art. II).

(2) Town votes to discontinue a portion of the Harris Island Road beginning at the driveway of David Lusty and running approximately 880 feet in southerly direction to the northern terminus of the bridge between Harris Island and Seabury. (Art. III).

(3) Town votes to discontinue the "bridge and abutments" between Harris Island and Seabury. (Art. IV).

(4) The Town votes to appropriate \$15,500 to construct a Town wharf on the southerly side of the York River on the site or adjacent to the old bridge between York Harbor and Bragdon's Island. (Art. V).

December 23, 1961, May 12, 1962 - Town votes (apparently twice) to authorize the Selectmen to issue a quitclaim deed to Nathaniel Wheeler for the Town's remaining interest in the old bridge abutment which was adjacent to the Wheeler property and on the northerly side of the York River.

May 15, 1962 - Town quitclaims to Nathaniel Wheeler all of its right, title, and interest in that portion of the "highway lying on the northerly side of the main channel of the York River."

March 2, 1963 - Town votes to discontinue that portion of the road and the old bridge beginning at a wooden barrier on Harris Island and then running to the Western Point Road on the Seabury side of the York River.

As Surveyor James Wright has already noted in his report dated September 28, 1988, the Town's votes contain apparent redundancy and inconsistencies with respect to the discontinuances of portions of the road. However, we believe that the preponderance of the evidence contained in the Town's records support Mr. Wright's conclusions.

First, regardless of the ambiguities concerning the votes in 1957, 1958, and 1963 concerning the discontinuance of Harris Island Road south of David Lusty's driveway, the end result of those votes was to cause the discontinuance of the road on Harris Island as shown on the survey by Civil Consultants. As a technical matter, the right-of-way still persisted in the location of the bridge from Harris Island to Seabury after the July 19, 1958 vote; by apparent inadvertence, the bridge itself was omitted from the 1957 and 1958 votes. However, the vote of March 2, 1963 cured that defect, and caused a complete discontinuance of the road from the "wooden barrier" on Harris Island (identified by Jim Wright as being essentially the northern terminus of the discontinuance voted in 1958) across the bridge and to the portion of the road already discontinued in 1957.

More serious issues are posed by the purported "discontinuance" of the road on the northerly side of the York River. Again as a technical matter, the quitclaim deed from the Town to

Nathaniel Wheeler in 1962 was void, because it was not authorized by the Town Meeting vote. Monson v. Tripp, 81 Me. 24 (1888). The Town Meeting had authorized a deed of the Town's interest in the bridge abutment on the north side of the River, a physical structure rather than the highway itself. In contrast, the deed purported to convey the Town's interest in the highway - thus exceeding the authorization of the Town meeting vote.

This is not a minor distinction. The Town could only "discontinue" a road by vote at Town meeting. The Town did not discontinue the road by its vote in 1962. Neither did the quitclaim deed constitute a discontinuance, because it did not comply with the statutory procedure for discontinuing roads. Consequently, all that the 1962 deed effectively conveyed to Nathaniel Wheeler was the bridge abutment -- not the right of way. The right of way still persisted from the northern terminus of the 1906 laying-out, all the way to David Lusty's driveway on Harris Island.

Despite the foregoing, we would caution the Town against attempting to reclaim the area of the right-of-way described in the 1962 quit-claim deed hastily. Although we are personally unfamiliar with the circumstances surrounding that transaction, we infer that the conveyance of the bridge abutment and "highway" was an integral part of the creation of the Wheeler Wildlife Refuge. Thus, even though the Town could legally assert ownership of the right of way over the old northern bridge abutment, equitable considerations may preclude the Town from

doing so. In addition, the Town's failure to use the northern portion of the road, accompanied by its execution of the deed, may give rise to a presumption that the road has been abandoned. Consequently, we recommend further clarification of the circumstances of the 1962 deed before regarding it as a nullity, and that for the purposes of this study, the 1962 deed be regarded as effectual to eliminate the highway north of the river channel.

Jim Wright has indicated that the above-described records, and in particular the original laying out of the way, are sufficient to plot accurately the location of the Town way. It then becomes necessary to discuss the identity of the owners of property abutting Harris Island Road so as to determine to what extent, if any, those private property owners may have either enhanced or attempted to diminish rights of public access near the Harris Island Road.

III. WHO ARE THE ABUTTERS, AND WHAT DO THEY OWN?

A. The Town of York.

By far, the greatest portion of the western boundary of the Harris Island Road is abutted by properties owned by the Town of York itself. The conveyances by which the Town of York acquired the parcels for the "Wheeler Wildlife Refuge" are summarized in the accompanying appendix of record material. Because there is no issue of public access with respect to the property owned by the Town itself, we consider it unnecessary to consider further the circumstances of the Wheeler Wildlife Refuge except to note that we have discovered no defects in the Town's title.

B. The Newicks.

The portions of Bragdon's Island including "Strawberry" or Little Johnny" Island, located to the east of Harris Island Road are presently owned by four children of George Mason Newick and Lillian N. Newick, as shown on the plan of "Old Route 103", August, 1984, recorded in the York County Registry of Deeds at Plan Book 136, Page 19. The only lots of consequence are Lot D, owned by Sarah R. Newick (comprising the northerly portion of the islands abutting the east side of Harris Island Road); and Lot D, owned by Roberta Newick McGann (comprising the southerly portion of the islands abutting the easterly side of Harris Island Road). The remaining two parcels are Lot A, owned by Mason Newick, and Lot B, owned by Nancy Newick Platner.

It is our understanding that the Newick family has claimed title to the eastern portion of Bragdon's Islands not only to the low water mark, but also to some bounds known as "the channel." We do not know precisely what the Newicks mean by this; presumably, they are claiming ownership virtually to the middle of the York River. However, that contention is groundless, for two reasons.

1. Deed Construction.

First, it is an elementary principle, grounded both in law and in common sense, that a grantor cannot convey what he does not own. The Newicks apparently rely upon deeds, such as that from Franklin R. Bragdon to Edward L. Marshall, Book 416, Page 126, which referred to Bragdon's Islands as being bounded by "the

channel of York River." That language, however, appears relatively late in the chain of title, and appears first in a deed from William Bragdon to Edward Lowe dated August 10, 1868, recorded in the York County Registry of Deeds at Book 309, Page 464.

William Bragdon received that property through a deed from Edward and Louisa B. Chase dated February 19, 1852 and recorded in the York County Registry of Deeds at Book 223, Page 59. That deed describes the property as simply being "part of a certain island containing 30 acres more or less situated near the mouth of York River". Neither in that deed nor in any earlier conveyance is there any reference to the channel of the York River. Consequently, to the extent William Bragdon purported to convey title to the channel of the York River, that conveyance is a nullity, because he had never received so expansive a title himself.

Perhaps more importantly, still earlier descriptions of Bragdon's Islands raise the possibility that the grant of the islands did not extend even so far as the low water mark. For example, in the division of the estate of James Bragdon, III, recorded in the York County Probate Office at Volume 49, Page 81, the description of Bragdon's Island (then called "Harmon's Island") separately describes the "island" and the "marsh". A general conveyance of an entire island in a tidal river normally includes the surrounding flats to the low water mark. See, e.g., Babson v. Tainter, 79 Me. 368 (1887). However, the flats can be conveyed separately from the upland; the language of a particular

deed may indicate that only upland, only flats, or both upland and flats are conveyed. In this instance, it could be argued that because the grantor referred to the "marsh" separately from the "island," the word "island" in this context means "upland". If the grantor had actually meant to convey the island with full rights to the low water mark, it would have been unnecessary to mention the marsh independently. By this reasoning, the title to Bragdon's Island would extend only to the marsh, and not to the low water mark to the extent it was further from shore than the marsh.

This interpretation is strengthened by even earlier deeds. The earliest description which we have yet been able to discover is a description of the islands contained in the division of the Estate of Nathaniel Donnell, recorded in 1785 at the York County Probate Records in Volume 14, Page 373. In that document, the islands are described as follows: "The islands in York River, with the marsh and thatch beds thereto adjoining, containing in the whole about 30 acres." (emphasis added). This language again suggests that when the islands were originally described and conveyed, the grantor meant to convey only the uplands with adjoining marsh and thatch beds, and not the intertidal zone as a whole.

An examination of the plan of Old Route 103 prepared for George M. and Lillian N. Newick recorded in the York County Registry of Deeds at Plan Book 136, Page 19 reveals the potential significance of this issue. That plan indicates that the edge of

the marsh, and the low water mark, are not coterminous; in some locations, the edge of the marsh is as much as 75 feet closer to the uplands than is the low water mark. Accordingly, a credible argument can be made that the extent of the Newick holdings extends only to the edge of the marsh and thatch surrounding the uplands, and not to the low water mark.

In sum, as a matter of deed interpretation, the Newicks do not own to the "channel" of the York River, because the original grantors in their chain of title never acquired so broad an interest. Indeed, the Newicks' holdings may not even extend as far as the low water mark, because the deeds could be interpreted as conveying only to the edge of marsh and thatch surrounding the uplands.

2. Legal Impossibility.

Second, as was discussed above, the Colonial Ordinance of 1641 establishes an absolute limitation on ownership rights in the intertidal zone. Thus, even if the Newicks' prior grantors had attempted to convey the "channel" of the York River, that would have been legally impossible; the state has ownership of all lands below the low water mark. Consequently, the Newicks' ownership rights are, at best, no greater than those of other riparian owners on a tidal water body. They can hold only to the low-water mark, and in the intertidal zone, are subject to the public rights of navigation, fishing, and fowling.

3. General Observations.

In 1956, 1970, and 1988, members of the Newick family filed notices in the Registry of Deeds indicating that they had never "set apart, surrendered or otherwise dedicated" the island property to public use. However, as the 1988 notice itself concedes, those notices were ineffective to impair the public rights in the intertidal zone created by the 1641 Colonial Ordinance. The only function served by such public notices is to interrupt any 20-year period, after 1956, in which additional public prescriptive rights might accrue. The notices could not destroy prescriptive rights acquired by the public prior to 1956. On the other hand, the timing of the notices (1956, 1970, and 1988) effectively have prevented any 20-year prescriptive period from ripening after 1956.

We have found no evidence of any affirmative dedications of public rights on Bragdon's Island by any conveyance from the Newicks or their predecessors in title.

We would note, in passing, that the wharf presently maintained by Wayne Perkins appears, on the face of the survey, to begin within the right of way of Harris Island Road, but then to extend over property of Roberta Newick McGann before reaching submerged lands. Accordingly, it is our opinion that Mr. Perkins cannot rely upon any authority of the Town of York to maintain the wharf, but must obtain the right to maintain that wharf from the Newick family.

C. Harris Island Corporation; Donald and Katherine Durrell.

Harris Island is presently owned by the Harris Island Corporation with respect to the portion of the island east of Harris Island Road, and by Donald and Katherine Durrell, with respect to the portion of the island west of the Road.

As was discussed above in the context of Bragdon's Island, the owners of Harris Island would enjoy, at most, rights to the upland and to the flats to the low water mark, subject to the public easement. However, as was true of Bragdon's Island, some early descriptions of Harris Island suggest that the present owners received only the upland. For example, the deed that is recorded at Book 838, Page 261, describes the island as a tract "being entirely surrounded by water at high tide." As noted above, this description raises at least a legitimate question as to whether the intertidal zone was conveyed within this chain of title at all.

With one exception, we have been unable to discover any recorded documents that grant the public greater rights of access to the River and intertidal zone than did the 1641 Colonial Ordinance. That exception is a deed dated February 21, 1962, and recorded in the York County Registry of Deeds at Book 1470, Page 191. By that instrument, David L. Lusty, predecessor in title to the Harris Island Corporation, conveyed to the Town the parcel from which Town Wharf 2 now extends. That conveyance fulfilled the terms of the contract between David L. Lusty and the Town of York, dated April 17, 1961, in which Mr. Lusty agreed to

construct at his own expense landing and wharfage facilities available to the general public, together with adequate rights of way for the use of the general public "leading from said landing and wharf facilities to the public highway."

Civil Consultants have discovered sufficient field evidence to locate the terminus of Harris Island Road to a reasonable degree of certainty. As was noted in the initial portion of this report, Harris Island Road remains a public way at least from the abandoned bridge abutments on the north side of the York River to the point where the highway was discontinued at David Lusty's driveway on Harris Island.

As to those portions of the road that were discontinued southerly of David Lusty's driveway, there is no longer any public easement. Prior to 1965, the discontinuance of a public road without express reservation of a public easement extinguished all public rights in the former right of way. Piper v. Voorhees, 130 Me. 305 (1933), City of Rockland v. Johnson, 267 A.2d 382 (Me. 1970). Although the common law on this point was changed by P.L. 1965, ch. 270, Section 1, that law would not apply retrospectively to revive the public easement.

IV. HOW DOES THE HARRIS ISLAND ROAD PROVIDE ACCESS TO THE YORK RIVER ?

A. Intertidal Zone.

As has been discussed above, it is plain under Maine law that citizens of the Town of York may use the existing Harris Island Road as access to the intertidal zone and the York River. Accordingly, those points of access can be ascertained simply by

determining the intersection of the right of way to Harris Island Road with the high-water mark of the York River. If persons can pass from the public way directly to areas below the high-water mark, without passing over any private lands above the high-water mark, those areas constitute legitimate points of public access to the intertidal zone and to the River.

B. Town Wharf 1.

In addition, the right of way provides the Town with access to Town Wharf 1 notwithstanding the passage of the right of way over uplands. Moreover, as will be discussed below, so long as the wharf is not extended over lands to which the Newicks have title, and so long as the wharf does not interfere with the Newicks' actual use of their property, the Town may freely expand the wharf.

C. Town Wharf 2.

Finally, the right of way, plus the conveyance from Lusty to the Town in 1962, grants the public free access to Town Wharf 2. The same considerations just discussed in the context of Town Wharf 1 apply to any expansion of Town Wharf 2.

V. WHAT ARE THE WHARFAGE RIGHTS OF THE TOWN AND OF THE ABUTTERS ?

It has been contended that certain planned construction activities by the Town of York on Town Wharf 1 would violate the wharfage rights of the Newick Family; specifically, Sarah Newick. Based on the facts as we know them, that objection is misplaced.

First, the modifications in question will not occur on property to which Sarah D. Newick has title. As is shown both on the survey of Civil Consultants and on the "Plan of Old Route 103" by William Anderson, the modifications in question fall well below the normal low water mark. Consequently, these construction activities will occur on land owned by the State of Maine, and which are presently leased to the Town of York for the purpose of constructing the dock. Those construction activities could cause no trespass against the legal rights of Sarah Newick.

Second, 38 M.R.S.A Section 1026 does not give Ms. Newick the right to object to the construction of the wharf. On its face, that statute purports to prevent a person from erecting, in tidewaters below the low water mark, a wharf "in front of" the shore or flats of another without the latter's consent. However, the Law Court has repeatedly given a practical, rather than technical, definition of when a wharf is "in front of" the shores or flats of another. That determination is not made merely geographically, but rather by determining whether a proposed wharf is so near or so situated with reference to the abutters' shoreline that it would actually injure the abutters' rights to enjoy his shoreland property. See, e.g., Perry v. Dodge, 144 Me. 219 (1949), Sawyer v. Beale, 97 Me. 356 (1903). Moreover, it is actual -- not potential -- use of the shoreline by the abutter which gives the abutting landowner the right to object to a wharf. Perry v. Carlton, 91 Me. 349 (1898).

Accordingly, to the extent that the Town's modifications of the wharf do not actually interfere with the rights of the Newicks, then the Town's wharf cannot be said to be "in front" of the Newicks' land. Moreover, to our knowledge, Sarah Newick has not actually attempted to exercise any wharfage rights based on her riparian ownership. Consequently, it is our opinion that she does not have the benefit of this section, and therefore cannot object to the construction of the wharf.

Finally, is our understanding that there have been administrative proceedings before the Army Corps of Engineers and the Maine Department of Environmental Protection with respect to the construction of the wharf. We understand that Ms. Newick had an opportunity to be heard with respect to the potential interference of the wharf expansion with her use of her land. Nevertheless, the DEP and Army Corps of Engineers found that there would be no such interference. In consequence, it is likely that it is now a matter of administrative res judicata that the wharf will not impede the Newicks' rights of navigation or use of their shoreline, such that the Newicks may no longer raise objections to the wharf expansion.

CONCLUSIONS

1. Harris Island Road continues to be a 3-rod public way at least from the abandoned bridge abutment on the north side of the York River to the point where the road was discontinued near David Lusty's driveway on Harris Island. In fact, the way may

extend even further north. However, the Town's dealings with the northern bridge abutment cast doubt on the Town's ability to use that section of the road north of the channel of the York River.

2. The road provides formal access to Town Wharves 1 and 2, and thereby to the York River.

3. The road provides access to the intertidal zone where it abuts lands below the highwater mark.


4. The public enjoys the right to fishing, fowling, navigation, and, to some extent, recreation in the intertidal zone surrounding Bragdon's and Harris Islands.

5. Any activity by the public or the Town below the low water mark of the York River cannot represent a trespass upon private property rights.

6. The Town may expand its wharves unless it causes actual harm to existing fishing or navigational interests of riparian owners.

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