

STATE OF CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

IN RE: :
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 :
 PETITION OF JONATHAN KALLMAN, :
 STEPHEN M. ZIDE, THE 8 INDIAN DRIVE :
 NOMINEE REAL ESTATE TRUST, AND :
 JOHN SHAW FOR A DECLARATORY :
 RULING : December 31, 2015

PETITION FOR DECLARATORY RULING:

I. INTRODUCTION

1. Pursuant to § 22a-3a-4 of the Regulations of Connecticut State Agencies and § 4-176 of the Connecticut General Statutes, Petitioners Jonathan Kallman, Stephen M. Zide, The 8 Indian Drive Nominee Real Estate Trust and John Shaw (collectively “Petitioners”) requests a declaratory ruling for a determination on the following question:

Whether § 26-157a(e) of the General Statutes, the enforcement of which is under the authority of the Commissioner, applies to the Petitioners’ moorings in the waters off of their properties in Old Greenwich, Connecticut.¹

II. SUMMARY OF CONFLICT

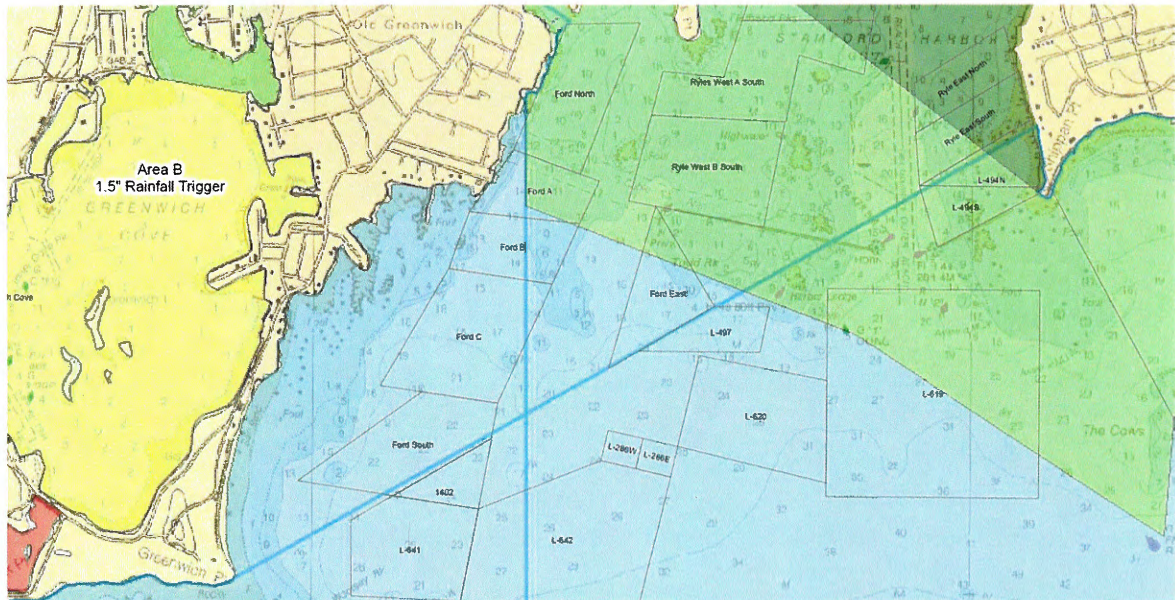
2. Jonathan Kallman is the owner of certain oceanfront property located at 63 Binney Lane, Old Greenwich, Connecticut 06870, and his phone number is (914) 468-7300. *See Exhibit A.*
3. Stephen M. Zide is the owner of certain oceanfront property located at 35 Binney Lane, Old Greenwich, Connecticut 06870, and his phone number is (203) 637-3136. *See Exhibit B.*

¹ In *Karen A. Sadik-Kahn v. Robert E. Griffith et al.*, Docket No. FST –CV-156025758-S (Judicial District of Stamford at Stamford), which concerns the same issues as in the petition, Judge Heller recently decided:

The motion to dismiss of the defendants Ian Macmillan, harbor master of the Town of Greenwich, and Eric Knott, harbor master of the City of Stamford (collectively, the harbor masters) (#117.00) is granted on the ground that the court lacks subject matter jurisdiction because the plaintiff has failed to exhaust her administrative remedies. *The issue of whether General Statutes §26-157a(e) is applicable to the plaintiff’s moorings requires a declaratory ruling from the Connecticut Department of Energy and Environmental Protection prior to the court’s exercise of jurisdiction.* A memorandum of decision articulating this order will follow.

Given the Judge’s ruling, this question is properly brought to the Commissioner for a determination.

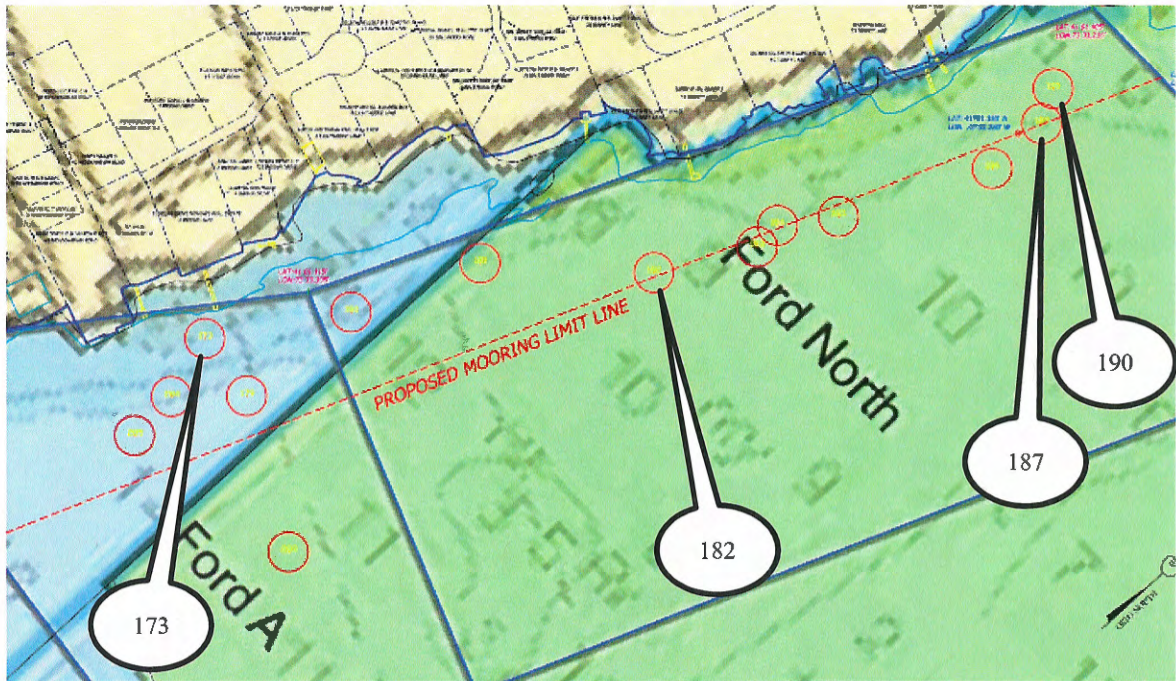
4. The 8 Indian Drive Nominee Real Estate Trust is the owner of certain oceanfront property located at 8 Indian Drive, Old Greenwich, Connecticut 06870. John Shaw resides at 8 Indian Drive, Old Greenwich, Connecticut 06870. See Exhibit C. Shaw's phone number is (203) 637-4465. The 8 Indian Drive Nominee Real Estate Trust and John Shaw are collectively referred to herein as "Shaw."
5. The easterly boundaries of the Petitioners' oceanfront properties abut the tidal waters of Long Island Sound.
6. The *Commercial Area Shellfish Map: Greenwich to Stamford* (the "Shellfish Map"), issued by the Department of Agriculture, Bureau of Aquaculture (the "Bureau"), an excerpt of which is below, and a true and accurate copy of which is attached as Exhibit 2 to the Affidavit of Raymond Redniss, Exhibit D hereto (hereinafter the "Redniss Affidavit"), shows five purported shellfish beds entitled Ford North, Ford A, Ford B, Ford C, and Ford South (the "Ford Beds") along the shoreline where the Petitioners' properties are located.² Petitioners' upland property are adjacent to areas identified on this map as Ford A and Ford North. The area in question is in the jurisdiction of the local shellfish commission, not the Bureau. See Conn. Gen. Stat. § 26-192.



7. The Petitioners maintain, or have maintained, moorings in the waters off their properties. Below is an excerpt from a map prepared by Michael Finkbeiner, upon

² For purposes of clarification, the term "Ford Beds," as used herein, shall mean the shellfish beds that are shown as Ford North, Ford A, Ford B, Ford C, and Ford South on the Shellfish Map. "Ford Beds," therefore, refers exclusively to the areas demarcated by the Bureau as Ford North, Ford A, Ford B, Ford C, and Ford South. Conversely, the term "Ford Grounds," as used herein, shall mean the *actual* oyster beds, described in the Greenwich and Stamford land and shellfish records as belonging to the Ford family, which oyster beds most likely consist of a lesser sum of acres than shown on the Shellfish Map, and which oyster beds almost certainly bear different boundaries from those demarcated by the Bureau.

information and belief, for the use of Ian MacMillan, the Greenwich Harbormaster (the “Finkbeiner Map”). The Petitioners’ moorings are identified on this map as 187 and 190 (Kallman), 182 (Zide) and 173 (Shaw) and are generally shown on the map in the approximate locations of where they have been located for many years. A full copy of the Finkbeiner Map is attached as Exhibit E.



8. Robert Griffith is a shellfisherman who claims license to fish in the areas identified as the “Ford Beds.” The basis for his claim is a Power of Attorney from Ellen Woelfel (“Woelfel”), the owner of certain Ford Grounds,³ dated June 26, 2013, a true and accurate copy of which is attached as Exhibit 3 to the Redniss Affidavit. For several years prior to 2011, Griffith held license to fish the Ford Grounds from Woelfel’s ex-husband, Chris A. Ford. *See* Redniss Affidavit, ¶¶ 11-12 and exhibits attached thereto (explaining that Woelfel was previously married to Chris A. Ford, but they divorced in 2011, at which time Woelfel acquired her interest to the Ford Grounds).
9. However, as described more particularly both herein and in the Redniss Affidavit, neither the size nor the location of the Ford Beds shown on the Shellfish Map are corroborated by the historic record. There is no proof that the approximately 183 +/- acres of shellfish beds that allegedly make up the Ford Beds to which Griffith now claims license, exist as charted on the Shellfish Map.
10. Nonetheless, in April of 2014, Griffith, through his attorney, Carolyn Swiggart, demanded that property owners along the shore who have maintained moorings in or near the beds for decades, enter into one-year agreements with Griffith to obtain his permission to maintain the moorings for one boating season in exchange for a \$200

³ See distinction of terms “Ford Beds” and “Ford Grounds” discussed *supra* at footnote 2.

annual fee. Griffith's proposed agreement, a true and accurate copy of which is attached hereto as Exhibit F, reserved to Griffith "the right to change any and all terms upon renewal," and "the right to decline to renew the Agreement." In so doing, Griffith, directly or through his attorney, has asserted to the Petitioners and the owners of other nearby properties that he possesses the right to grant or withhold his consent to the maintenance of their moorings. Thus, by signing Griffith's proposed agreement, a property owner would be conceding that he or she requires Griffith's permission to maintain a mooring that the property owner had otherwise maintained for years with Griffith's knowledge and apparent approval and pursuant to their common law littoral rights.⁴

11. Griffith bases his demand upon § 26-157a(e) of the General Statutes, which is part of the Lobster Management Program, and which provides:

No person shall set, tend or assist in setting or tending any lobster pot, trap or similar device for the catching of lobsters or set any mooring on any oyster bed without the permission of the owner or lessee of such bed.

12. Regardless of whether this provision is now being properly applied, neither Chris A. Ford, who owned and leased the Ford Grounds to Griffith prior to Woelfel, nor Griffith himself had ever invoked § 26-157a(e) in the past, even though it has been in effect since 1986. *See* Public Act 86-403; *infra*, ¶ 26.
13. As a result of the foregoing, Ian MacMillan, the Greenwich Harbormaster, has refused to issue mooring permits to the Petitioners unless they present proof that they have obtained permission from Griffith to install their moorings. The use of § 26-157a(e) in this manner – to extract fees and damaging concessions from waterfront property owners – is unprecedented in Connecticut, where shellfish bed owners and lessees generally coexist in harmony with mooring owners.
14. This conflict has seriously injured the Petitioners' use and enjoyment of their properties and could cause the properties to lose value, if despite the fact they own waterfront properties, they cannot maintain moorings as they have done for years. Moreover, the application of the statute as proposed by Griffith aims to set a dangerous precedent, if other shellfish bed owners in Connecticut begin to make the same demands of waterfront property owners along the entire coastline.

⁴ Notably, even if *arguendo* the Ford Grounds actually extended to the locations at which Petitioners seek to moor their boats (and there is no evidence that the Grounds do) Griffith's proposed agreement would be unenforceable as it stands in contravention Conn. Gen. Stat. § 26-240(a)'s prohibition on shellfishermen "entering a contract with another person that requires the [shellfisherman] to refrain from cultivating or harvesting shellfish for any period of time except upon approval by the shellfish commission or selectmen, as applicable." There is no evidence that Griffith or Woelfel obtained the requisite approval mandated by statute.

III. FACTUAL BACKGROUND

A. Griffith's Claim To The Disputed Area

15. Presently, Griffith claims license to the Ford Grounds pursuant to a Power of Attorney from Woelfel, dated June 26, 2013, a true and accurate copy of which is attached as Exhibit 3 to the Redniss Affidavit. Therein, Woelfel describes her interest in “real property in Stamford and Greenwich, Connecticut, which consists of **150 acres**, more or less, of shellfishing grounds ... more particularly described in Schedule A attached hereto.” (Emphasis added.) The “Schedule A” appended thereto, however, purports to comprise a total acreage of **183.33 acres**. Further beclouding these measurements, Woelfel has been assessed a property tax by the Greenwich Tax Assessor based upon **119.8 acres** of shellfish grounds located within the Town of Greenwich, valued at \$100.00 per acre, or a total fair market value of \$12,000. Woelfel is not taxed by the City of Stamford for any shellfish grounds. The reason for this discrepancy between **150 acres** referenced in the license, the **183.33 acres** described in its attached schedule, and the **119.8 acres** taxed by the Town of Greenwich is unknown. This is the most recent in a series of inexplicable discrepancies plaguing the history of title transfers involving the Ford Grounds.⁵ See Redniss Affidavit, ¶¶ 8-9.

B. Title and Mapping Defects in the Historic Record

16. As previously indicated, Woelfel took title to shellfish beds belonging to Chris A. Ford, *i.e.* the Ford Grounds, in accordance with a 2011 Judgment of Dissolution and Separation Agreement under which Woelfel received from Chris A. Ford:

- a. A quit claim deed⁶ purporting to release all of Chris A. Ford's right, title and interest in “four acres ... bounded northerly by Tomac Harbor, so-called: easterly by lands now or formerly of William A. Cummings an land formerly of Frelinghuysen Ferris; southerly by ground now or formerly of Oliver Ford and westerly by the shore mainland, so called,” which Deed was recorded in the Greenwich Land Records on May 8, 2012, in Book 6337 at page 320. See Redniss Affidavit, ¶ 13(a) and exhibit attached thereto.

⁵ Evidently, in contravention of Conn. Gen. Stat. § 26-240(a), neither Griffith nor Woelfel have “stake[d] out” the “waters within town jurisdiction” where their alleged shellfish grounds are purportedly situated.

⁶ The fact that Chris A. Ford conveyed the Ford Grounds by means of a quit claim deed is significant because a quit claim deed is an instrument of conveyance that simply passes any title, claim or interest that the grantor has in the premises, but does not make any representations as to the validity of such title. See Conn. Gen. Stat. § 47-36f (“A ... “Quitclaim Deed” ... has the force and effect of a conveyance to the release of all the releasor's right, title and interest in and to the property described therein except as otherwise limited therein, but without any covenants of title.”). A quit claim deed is not a guarantee that the grantor has clear or absolute title to the property; rather it is a relinquishment of the grantor's rights, if any, in the property. As such, if Chris A. Ford had no interest in Ford Beds as shown on the Shellfish Map, he did not, and could not, pass any such interest on to Woelfel, and Griffith could not claim “ownership” of the beds for purposes of invoking § 26-157a(e).

- b. A quit claim deed purporting to release all of Chris A. Ford's right, title and interest in (i) 58 acres, bounded westerly by "no ground designated," which Deed was recorded in the Greenwich Land Records on May 8, 2012, in Book 6337. *See* Redniss Affidavit, ¶ 13(b) and exhibit attached thereto.
17. In addition, by virtue of a quit claim deed recorded in the Stamford Land Records on May 9, 2012, in Book 10418 at page 23, Chris A. Ford purported to release to Woelfel his right, title and interest in:

All that certain tract, piece or parcel of land, comprising the Oyster Grounds in the City of Stamford, County of Fairfield and State of Connecticut owned by CHRIS A. FORD which general boundaries are Easterly by the West end of the Stamford Breakwater,⁷ Northwesterly by Red Island⁸ and Westerly by the Greenwich Stamford Town Line and the Ford Estate.

These bearings make it impossible to determine the actual size of the tract. *See* Redniss Affidavit, ¶ 14 and exhibit attached thereto.

18. Chris A. Ford, the predecessor in title to the Ford Grounds to Woelfel, appears to have acquired title to the Ford Grounds in 1996 and 1997 from the Estates of Carl A. Ford and Calvin G. Ford. However, the known historic record indicates that the shellfish beds acquired by Chris A. Ford, to which Griffith claims title, were consolidated under the ownership of only Carl A. Ford, not Calvin G. Ford, in the mid-20th Century. The description of beds purportedly owned by the Estate of Calvin G. Ford and conveyed to Chris A. Ford by way of a quit claim deed dated July 12, 1996, is identical to the description of beds purportedly owned by the Estate of Carl A. Ford and conveyed five months earlier, and there is no known evidence that Calvin G. Ford otherwise owned the beds described. *See* Redniss Affidavit, ¶¶ 15-22 and exhibits attached thereto.
19. Prior to consolidation under Carl A. Ford, title to the Ford Grounds was generally held by two families: the Fords, who appeared to own approximately **50 acres** of whatever beds now constitute the Ford Grounds, and the Husteds, who appeared to own approximately **20 acres** of whatever beds now constitute the Ford Grounds. By 1940, these approximately **70 acres** were unified under the name of Carl A. Ford. Documents appear to demonstrate that Ford then claimed title to a **58 acre** tract sometime between 1940 and 1996, though the source thereof is unknown. It is further unknown whether these 58 acres were mutually exclusive of the **70 acres** claimed as of 1940. *See* Redniss Affidavit, ¶¶ 15-34 and exhibits attached thereto. Regardless, for reasons more particularly explained at length in the Redniss Affidavit, it is

⁷ It is worth noting that the Stamford Breakwater was constructed between 1943 and 1947 and it was not used as a boundary on any of the historic deeds to the Ford Grounds. It is only in this conveyance that it is used, along with the Greenwich/Stamford Town Line, as a boundary for any Ford shellfish ground.

⁸ To the extent that Red Island denotes what is now commonly known as "Red Rock," that spot is located far west of Old Greenwich, in an area south of Mead Point, and nowhere near Petitioner's littoral properties.

- essentially impossible to determine from information available in local, state, and federal land records the location and reach of the Ford Grounds acquired by Carl A. Ford, let alone establish and identify a precise bases for the total acres he purportedly owned.
20. Notably, none of the descriptions contained in the known chain of title to the Ford Grounds bear any understandable relation to the designation of the four tracts allegedly leased to Griffith, which descriptions rather appear to be based upon the Shellfish Map. *See* Redniss Affidavit, ¶¶ 22-38 and exhibits attached thereto.
 21. Moreover, there is no proof that the Shellfish Map is itself accurate. *See* Redniss Affidavit, ¶¶ 35-38 and exhibits attached thereto. According to David Carey, Director of the Bureau, the Shellfish Map was not created by the Bureau to prove title to the beds or represent their accurate location. *Id.* Rather, the location of the Ford Beds depicted on the Shellfish Map was based on a survey produced by S.E. Minor & Company, Inc. (“S.E. Minor”) in 1997 *for Chris A. Ford*, the former and at-the-time-purported-owner of the beds, *in support of his application for approval to reestablish the beds*, which beds had been inactive and undeveloped since 1961 due to pollution. *See* Exhibit G. Further, S.E. Minor confirmed that it *did not conduct any title research* on the shellfish beds located in the subject area, and that *S.E. Minor relied upon Chris A. Ford’s claims* about the area his family used to fish in order to determine the boundaries charted on its 1997 survey, which survey David Carey in turn confirmed was *exclusively relied upon* in charting the Ford Beds identified on the Shellfish Map. *See* Redniss Affidavit, ¶¶ 35-38 and exhibits attached thereto.
 22. The Shellfish Map under which Griffith now asserts an ownership interest in the Ford Grounds simply has no accurate bearing on the actual location of the grounds to which Woelfel’s predecessors truly held title. All available evidence indicates that the surveyor who created S.E. Minor’s 1997 survey significantly increased the area of beds described by Chris Ford without any legal justification, and instead relied upon guesswork and Chris A. Ford’s anecdotal claims about the area his family supposedly fished – over 36 years prior, before the area was closed due to pollution – in order to determine the boundaries of the beds now identified as belonging to the Ford family on the Bureau’s Shellfish Map.
 23. In contrast to the S.E. Minor survey, 1905 and 1957 Oyster Grounds maps produced by the State Shellfish Commission, which maps are, like the Bureau’s current Shellfish Map, not evidence of title and are insufficient for purposes proving title to and a right of possession in the purported shellfish beds, show that the Ford Grounds were never reported as extending as far north as shown on the 1997 S.E. Minor survey or the Bureau’s Shellfish Map. Moreover, as is obvious from a full review of the historic record, there is no evidence that the 1905 and 1957 maps accurately depict the location of the true Ford Grounds. Historic use, to the extent it might be claimed in this matter, does not expand or change the boundaries of beds granted by a municipal shellfish committee. *See, e.g., Town of Clinton v. Bacon*, 56 Conn. 508 (1888) (finding that use of oyster bed that was invalidly granted does not provide the

person claiming ownership of the bed with any special rights to the bed); *Walz v. Bennet*, 95 Conn. 537 (1920) (in Connecticut, riparian rights are limited by the intent expressed in property's original conveyance, as articulated by "the essential boundary in its description"); *accord Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963) (historic use of waters insufficient to establish title and right to exclusively shellfish same).

24. To demonstrate valid title to the beds claimed and the benefit of § 26-157a(e), Griffith must overcome countless defects in over a century of title transfers, and must produce evidence of the original grant and a valid chain of title that leads to Woelfel, the purported current owner.

IV. LEGAL PRINCIPLES AT ISSUE

A. Statutes At Issue

25. *An Act Regulating and Protecting the Planting of Oysters*, 1855 Conn. Pub. Acts 112 and CONN. GEN. STAT. § 26-249

In 1855, the Connecticut Legislature passed *An Act Regulating and Protecting the Planting of Oysters* (the "Act"). The Act allowed a town to create a committee that was empowered to grant to an individual, upon application, a suitable place no greater than two acres in size, for the planting and cultivation of oysters in navigable waters.

Notably, Section 3 of the Act specified that "nothing in this act contained, shall affect the rights of any owner or proprietor of any meadow or other lands ... which may be opposite or contiguous to such navigable waters." As such, the granting of a shellfish bed had no impact on, and does not diminish, an adjoining owner's littoral rights. The General Statutes' current iteration of Section 3 of the Act, (Title 26, Chapter 492 – Local Shellfisheries) contain provisions that mirror those in the Act, including § 26-249 ("Private ownership in cultivated shellfish"), which states: "nothing herein contained shall affect the rights of any owner of lands ... which may be opposite or contiguous to such navigable waters." See *Lovejoy v. van Emmenes*, 177 Conn. 287, 291 (1979) (holding, based on § 26-249 "that the rights of riparian owners are expressly excepted from the rights granted by statute to oyster bed owners.")

26. CONN. GEN. STAT. § 26-157a(e)

General Statutes § 26-157a(e), which is part of the Lobster Management Program, provides: "No person shall set, tend or assist in setting or tending any lobster pot, trap or similar device for the catching of lobsters or set any mooring on any oyster bed without the permission of the owner or lessee of such bed."

This language was originally passed in 1985 as Public Act 85-175, but did not take effect, having been repealed by implication by Public Act 85-434, which was a substantial amendment to the entire Lobster management Program, passed that same year, that did not include a prohibition on placing lobster pots or moorings in oyster

beds. It was then reenacted in 1986 as part of Public Act 86-403, which was a bill that made technical corrections to a number of statutes.

The legislative history of General Statutes § 26-157a(e) shows that its principal purpose was to facilitate communication between the various users of the waters of the State, namely lobstering and shellfishing, in the hopes of leading to compromises to allow competing uses in the same area. John Volk, the then Aquaculture Division Chief of the Connecticut Department of Agriculture, testified during a hearing on the proposal that: “The shellfish industry wants to avoid damaging any lobster gear, *and certainly their intent is not to prohibit the setting of pots on their grounds*, but to establish a line of communication between user groups who use the bottom and harvest different resources via traditional methods.” Similarly, State Senator Gunther, proponent of the provision stated “...perhaps a placement of moorings again to [sic] line of communication should be open.” Conn. Standing Committee Hearings, Environment, Pt. 4, 1985 Sess., pp. 1020 (Mar. 8, 1985, Hearing on SB 113, passed as P.A. 85-175).

27. *CONN. GEN. STAT. § 26-3*

Pursuant to General Statutes § 26-3, the Commissioner has the authority interpret, enforce and regulate application of General Statutes § 26-157a(e).

B. Common Law Principles At Issue

28. *Superiority of Upland Owners' Littoral Rights To Moor Boats*

Petitioners' littoral rights to moor their boats are superior to the right of a shellfish bed owner or lessee to exclude them. For over a century, Connecticut courts have uniformly recognized that the property rights of littoral owners to adjoining waters are superior to the rights of the owners of oyster bed franchises, and are limited only by the public trust doctrine which protects the public right to free and unobstructed use of navigable waters for navigation. *Prior v. Swartz*, 62 Conn. 132 (1892) (mere designation of oyster bed insufficient to deprive littoral property owner of right to dredge channel through it to navigable water subject only “to the qualification that he thereby does no injury to the free navigation of the water by the public.”); *accord Rochester v. Barney*, 117 Conn. 462, 468-69 (1933) (a littoral property owner “has a certain exclusive yet qualified rights and privileges in the waters and submerged land adjoining his upland. He has the exclusive privilege of wharfing out and erecting piers over the upon such soil, *and of using it for any purpose which does not interfere with navigation ...*”) (emphasis added). This principle has been reaffirmed in many Supreme Court and Appellate Court cases, including *McGibney v. Waucoma Yacht Club, Inc.*, 149 Conn. 560, 563 (1962); *Water Street Associates Ltd. Partnership v. Innopak Plastics*, 230 Conn. 764, 769-70 (1994); and *DelBuono v. Brown Boat Works, Inc.*, 45 Conn. App. 524, 526, *cert. denied* 243 Conn. 906 (1997); and *Matto v. Beard*, 15 Conn. App. 458, 482, *cert. denied* 209 Conn. 812 (1988).

In cases dealing with conflicts between littoral property owners and the owners of shellfish beds, the Supreme Court has specifically determined, based on the 1892 case of *Prior v. Swartz*, mentioned above, that the littoral rights of property owners that abut shellfish beds are superior to the rights of a shellfish bed owner. See *Lovejoy v. van Emmenes*, 177 Conn. 287, 291 (1979); *Lovejoy v. Water Resources Commission*, 165 Conn. 224, 229 (1973); *Lovejoy v. Darien*, 131 Conn. 533, 538 (1945).

29. This long-established principle has been further reaffirmed by the DEEP itself, which expressly recognizes and promotes an upland owner's littoral right to moor a boat in waters abutting his property. As confirmed by the DEEP on its webpage entitled, *Living on the Shore, Access to Your Boat: Your Littoral Rights*:

The littoral right of access provides the property owner reasonable access to the water from his or her property. Reasonable access can be achieved by launching a boat directly from the shore, *by use of a mooring*, or by constructing a dock as appropriate for the site conditions and as appropriately authorized by permits from the DEEP and the U.S. Army Corps of Engineers.

Department of Energy and Environmental Protection, LIVING ON THE SHORE, ACCESS TO YOUR BOAT: YOUR LITTORAL RIGHTS, *available at* <http://www.ct.gov/deep/cwp/view.asp?a=2705&q=323800> (last visited Nov. 19, 2015).

30. Recent DEEP proposed and final decisions have also properly recognized a waterfront owner's littoral rights:

The Connecticut courts clearly confirm that waterfront property owners hold littoral rights that include a right to erect structures to reach navigable waters.

In the Matter of Ronald Harvey, Application No. 200802576-KB, Final Decision, Sept. 23, 2014, p. 1.

The construction of a structure over the inter-tidal area to gain access to navigable waters from the upland is understood to be an acceptable exercise of one's littoral rights if impacts to navigation and coastal resources are sufficiently minimized in compliance with the applicable statutes, regulations, and policies.

In the Matter of Daniel McLeod, Appl. No. 200801981-KB, Final Decision, June 5, 2014, p. 16; *see also In the Matter of 16 Highgate Road, LLC*, Appl. No. 201207495-TS, Final Decision, June 23, 2015, p. 14 (upholding proposed final decision issued October 30, 2014, pp. 13-14).

31. In addition, as has been noted in recent DEEP decisions, the very first goal and policy in the Coastal Management Act begins "To ensure that the development, preservation or use of the land and water resources of the coastal area proceeds *in a manner consistent with the rights of private*

property owners ...” Conn. Gen. Stat. § 22a-92(a)(1) (emphasis added);⁹ *see also 16 Highgate, supra*, p. 6.

32. *A Party Attempting to Enforce Title and Alleged Possession by Excluding Another from a Subject Area Bears the Burden of Proving Clear Title and Possession*

Griffith, directly or through his attorney, has attempted to enforce his alleged right of possession to shellfish beds, even though he has not shown – and cannot show – clear title to the beds in the areas from which he claims he can eject Petitioners and remove their moorings. Stripped down, Griffith is attempting to prevent what he perceives to be a trespass. Like trespass, Griffith’s claim to exclude Petitioners is premised upon his alleged right of possession. Because Griffith is attempting to enforce his alleged possessory right to the purported shellfish beds, the burden of establishing title to and exclusive possession thereof must lie with him, the party attempting to enforce the alleged right of possession at issue. *See LaFreniere v. Gallinas*, 148 Conn. 660 (1961); *see also Boyne v. Glastonbury*, 110 Conn. App. 591, 601, *cert. denied*, 289 Conn. 947 (2008); *Wadsworth Realty Co. v. Sundberg*, 165 Conn. 457 (1973); *Chapel-High Corp. v. Cavallaro*, 141 Conn. 407 (1954). “Actual possession means actual and exclusive possession of the disputed area.” *Radigan v. Hughes*, 86 Conn. 536, 545 (1913).

V. DISCUSSION

A. The Location of the Ford Grounds Has Not Been Proven And There Is No Evidence That Shellfish Beds Actually Exist At the Petitioners’ Mooring Locations; As Such, § 26-157a(e) Does Not Apply to the Petitioners’ Moorings

33. From the outset, it should be noted that enclosure of shellfish beds in Connecticut has been pursued in an ad hoc fashion, with grants describing tracts in vague and indefinite terms. From the Act’s inception, contemporary shellfish commissioners agreed that the laws concerning the apportionment of rights to cultivate shellfish beds were “diverse and conflicting, and their administration [was], to the last degree, loose and inefficient.” *The Connecticut Oyster Grounds: Report from the Commissioners of the General Assembly*, HARTFORD POST, Feb. 19, 1880 (on file in the Rowe Scrapbook, White Library). In another contemporary report, Samuel M. Hotchkiss, Commissioner of the Connecticut Bureau of Labor, observed in his *Fifth Annual Report of the Bureau of Labor Statistics of the State of Connecticut for the Year Ending November 30, 1889*, that “legislation affecting oyster interests ... would have been admirable if the designation of oyster grounds

⁹ The legislature added language regarding the rights of private property owners in 2012, adding it before the existing language which requires consideration of “the capability of the land and water resources to support development, preservation or use without significantly disrupting either the natural environment or sound economic growth.” Public Act 12-101, § 1. By adding this language the legislature clearly intended to reinforce that permitting decisions must respect private property right, such as the littoral rights of the Applicant here.

from the outset had been regulated by methods which would have insured to the owners accurate town records respecting the location of their ground.” Hotckiss, S.M. 1889. *The Fisheries Industry: General Summary*. United States Bureau of Labor Statistics, 92, available at <https://play.google.com/books/reader?id=vNpMAAAAYAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.PA96>.

34. Documentation of the metes and bounds of the original Ford Grounds sheds light on the unreliable language typically invoked. *See* Redniss Affidavit, ¶¶ 27-30 and exhibits attached thereto.
35. In order to have a valid title to the beds, Griffith must produce evidence of the original grant and a valid chain of title that leads to Woelfel, the purported current owner. Until he has done so, the claim to the bed has not been established. For example, the bed labelled as “Ford North” on the Shellfish Map, which is purportedly 46 acres in size, needs to be traced back to 23 individual two-acre grants from the Greenwich Shellfish Committee.
36. The Shellfish Map, the map upon which Griffith relies, is clearly inaccurate on its face and, as such, neither Woelfel nor Griffith can use it to establish the true boundaries of the beds to which they claim rights. Further, the 1905 and 1957 Oyster Grounds maps produced by the State Shellfish Commission, support the conclusion that the Ford Grounds to which they may have rights are significantly smaller than their current claims – and the entire historic record reveals that the location of any valid grounds (if any) are indeterminable. *See* Redniss Affidavit, ¶ 37 and exhibits attached thereto.
37. Because there is no proof that the Petitioners’ moorings are located in a shellfish bed, § 26-157a(e) does not apply and the Petitioners do not require permission from Griffith or Woelfel to maintain their moorings in their current locations, as shown on the Finkbeiner Map.
38. Furthermore, as discussed *supra* at ¶ 26, the legislative history of General Statutes § 26-157a(e) shows that its principal purpose was to facilitate communication between the various users of the waters of the State, namely lobstering and shellfishing, in the hopes of leading to compromises to allow competing uses in the same area. Conn. Standing Committee Hearings, Environment, Pt. 4, 1985 Sess., pp. 1020 (Mar. 8, 1985, Hearing on SB 113, passed as P.A. 85-175).
39. Griffith’s actions are contrary to the purpose of the provision. First, these moorings are not being “set” for the first time; rather these mooring have been in place for decades. Second, the moorings are a reasonable exercise of the littoral owners’ rights, rights that are given precedence in the applicable statutes and common law. Third, no new lines of communication between the shellfisherman and the littoral owners was necessary here because the littoral

owners had maintained moorings in this area – including areas designated as shellfish beds – for decades without incident or complaint.

VI. REQUEST FOR RELIEF

40. The Petitioners hereby request that the Commissioner find that there is no proof that the Petitioners' moorings are located in a shellfish bed and that, as such, § 26-157a(e) does not apply and the Petitioners do not require permission from Griffith or Woelfel to maintain their moorings in their current locations, as shown on the Finkbeiner Map.
41. If the Commissioner determines that a fact or facts must be established in order to make a declaratory ruling in this matter, the Petitioners request that the Commissioner direct that a hearing be held in accordance with § 22a-3a-4(c)(4) of the Regulations of Connecticut State Agencies.
42. If the Commissioner determines that a hearing is not necessary, Petitioners respectfully request the opportunity to respond to any public comments submitted in response to this Petition by providing the Commissioner with additional evidence for the record and additional legal arguments in support of the Petition.

Respectfully Submitted,
JONATHAN KALLMAN, STEPHEN M.
ZIDE, THE 8 INDIAN DRIVE NOMINEE
REAL ESTATE TRUST, AND JOHN
SHAW

By: 

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Their Attorneys

AFFIDAVIT OF NOTICE OF REQUEST FOR DECLARATORY RULING

I, Gregory J. Bennici, Esq., being duly sworn, do hereby depose and say:

1. I am an attorney at law with the firm of Robinson & Cole LLP, representing the Petitioners Jonathan Kallman, John Shaw, and Stephen M. Zide in their request for a declaratory ruling from the Department of Energy and Environmental Protection.

2. I hereby certify that on December 31, 2015, a copy of the foregoing Petition and a notice pursuant to Section 22a-3a-4(a)(3) of the Regulations of the Connecticut State Agencies was sent to the following individuals, persons who are known to the Petitioner to have an interest in the subject matter of the Petition, via United States Postal Service Certificate of Mailing:

William John "Ian" Macmillan, Harbormaster, Town of Greenwich

William John "Ian" Macmillan, Harbormaster, Town of Greenwich
c/o Charles H. Walsh III, Esq.
Assistant Attorney General – Transportation
P.O. Box 120
Hartford, CT 06141

Eric Knot, Harbormaster, City of Stamford

Eric Knot, Harbormaster, City of Stamford
c/o Charles H. Walsh III, Esq.
Assistant Attorney General – Transportation
P.O. Box 120
Hartford, CT 06141

David Carey, Director, Connecticut Department of Agriculture, Bureau of Aquaculture

David Carey
Connecticut Department of Agriculture
Bureau of Aquaculture
P.O. Box 97
Milford, CT 06460

Karen A. Sadik-Khan, 41 Binney Lane

Karen A. Sadik-Khan
c/o James R. Fogarty, Esq.
Fogarty Cohen Selby & Nemiroff, LLC
1700 East Putnam Avenue, Suite 406
Old Greenwich, CT 06870

Robert E. Griffith, Purported Licensee of Subject Oyster Beds

Robert E. Griffith
c/o Carolyn C. Swiggart, Esq.
165 West Putnam Avenue
Greenwich, CT 06830

Ellen Woelfel, Purported Owner of Subject Oyster Beds

Ellen D. Woelfel
c/o Carolyn C. Swiggart, Esq.
165 West Putnam Avenue
Greenwich, CT 06830

3. I hereby certify that on December 31, 2015, a notice pursuant to Section 22a-3a-4(a)(3) of the Regulations of the Connecticut State Agencies was sent to the following individuals, persons who are known to the Petitioner to have an interest in the subject matter of the Petition, via United States Postal Service Certificate of Mailing:

Greenwich First Selectman

Hon. Peter Tesei, First Selectman
Town of Greenwich
101 Field Point Road
Greenwich, CT 06830

Greenwich Shellfish Commission

Greenwich Shellfish Commission
Town of Greenwich
101 Field Point Road
Greenwich, CT 06830

Greenwich Harbor Management Commission

Greenwich Harbor Management Commission
c/o Selectmen's Office
Town of Greenwich
101 Field Point Road
Greenwich, CT 06830

Stamford Mayor

Hon. David Martin, Mayor
City of Stamford
Stamford Government Center
888 Washington Boulevard
Stamford, CT 06904-2152

Stamford Shellfish Commission

Stamford Shellfish Commission
City of Stamford
Stamford Government Center
888 Washington Boulevard
Stamford, CT 06904-2152

Stamford Harbor Management Commission

Stamford Harbor Management Commission
City of Stamford
Harbor Management
90 Magee Avenue
Stamford, CT 06902

Owners of Nearby Waterfront Properties in Old Greenwich, Connecticut¹⁰

Paul Forster
19 Chaucer Road
Cambridge
CB2 7EB
UNITED KINGDOM
[re 55 Binney Lane]

Elliott M. & Nancy S. Alcheck W/S
9 Woodside Road
Greenwich, CT 06830
[re 45 Binney Lane]

Neil R. & Nancy R. Austrian
22 Ballwood Road
Old Greenwich, CT 06870

¹⁰ Per information of record at the office of the Town of Greenwich Tax Assessor as of December 29, 2015.

Ballwood Park Inc.
0 Ballwood Road
Old Greenwich, CT 06870
[re 0 Ballwood Road (Park)]

Frederick M. Campbell, Trustee of the Frederick M. Campbell Revocable Real Property Trust U/A/D
11/17/2005 and Barbara M. Campbell, Trustee of the Barbara M. Campbell Revocable Real Property
Trust U/A/D 11/17/2005
23 Magnolia Crossing
Savannah, GA 31411
[re 10 Lighthouse Lane]

Bertil & Karen Rydevik W/S
6 Lighthouse Lane
Old Greenwich, CT 06870

Karl M. & Gerda Mayer-Wittmann
2 Lighthouse Lane
Old Greenwich, CT 06870

Indian Drive LLC
10 Ledge Road
Old Greenwich, CT 06870
[re 25 Ledge Road]

4 Indian Drive LLC
596 Indian Field Road
Greenwich, CT 06870
[re 4 Indian Drive]

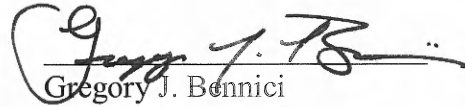
12 ID LLC
c/o Ogden Cap Properties
390 Park Avenue – Suite 600
New York, NY 10022
[re 12 Indian Drive]

Daryl D. & Lauren R. Simm W/S
41 Meadowbank Road
Old Greenwich, CT 06870

Rocky Point Club Inc.
P.O. Box 359
Old Greenwich, CT 06870
[re 60 Rocky Point Road]

Permittee of Float in the same area of Old Greenwich, Connecticut

Sylvan Shore Park Association, Inc.
c/o Kevin Ertel, President
21 Ann Street
Old Greenwich, CT 06870

A handwritten signature in black ink, appearing to read "Gregory J. Bennici", written over a horizontal line.

Gregory J. Bennici
Commissioner of the Superior Court