



Office of the Inspector General

Commonwealth of Massachusetts

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Inspector General

Favoritism and Private Gain in the Assignment of Boat Moorings in the Town of Harwich

July 2003

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Executive Summary

Introduction

In January 2003, two concerned citizens contacted the Office of the Inspector General concerning the issue of how boat moorings are assigned by the Harwich Port Boat Works (HPBW) in Wychmere Harbor, Harwich, Massachusetts. One of these citizens alleged that HPBW controls many moorings in Wychmere Harbor and rents them for profit to private boat owners with the full consent of the Town of Harwich (Town). Moreover, this citizen alleged that the owner of HPBW, provided moorings only to boat owners who agree to buy a boat from him, store a boat with him, or otherwise purchase various services from him.

In January, 2003, this Office initiated an investigation to determine whether HPBW was permitted by the Town to control multiple boat moorings in Wychmere Harbor and if so, whether HPBW's control over the moorings was legally permissible and in accordance with state, local, and federal laws and regulations that apply to boat moorings in Town waters.

Background

The investigation disclosed that M.G.L. c. 91, §10A,¹ authorizes municipal harbormasters in the Commonwealth to issue permits for boat moorings to the public

¹ The statute reads in pertinent part, "[T]he harbormaster of a city or town or whoever is so empowered by said city or town may authorize by permit the mooring on a temporary basis of floats or rafts held by anchors or bottom moorings within the territorial jurisdiction of such city or town upon such terms, conditions and restrictions as he shall deem necessary." The statute also states, "Floats or rafts held by anchors or bottom moorings installed without the permission from a harbormaster ... shall be considered a public nuisance and may be removed by the harbormaster at the expense of the owner"

under terms, conditions, and restrictions that they deem necessary.² The Massachusetts Department of Environmental Protection (DEP) promulgated regulations that interpret the statutory law above. DEP's Waterways Regulation 310 C. M. R. § 907(1) requires the issuance of annual permits for boat moorings located within the territorial jurisdiction of municipalities.

Another section of the regulation appears to also allow boatyards (public recreational boating facilities³) that have received mooring permits from the harbormaster, to assign the moorings to patrons in a fair and equitable manner.⁴

The investigation revealed that the Town currently issues permits to HPBW for only 2 of the 94 boat moorings that it allows HPBW to assign and control in Wychmere Harbor. There is no official contract or agreement between the Town and HPBW that authorizes HPBW to assign and control those 92 moorings. The boat yard has been allowed by the Town to assign and control multiple moorings in the absence of permits in violation of M.G.L. c. 91, §10A, and 310 C.M.R. §907(1), (2)(d).⁵

The Town has implemented a Town Harbor Management Plan to promote public safety by defining proper area usage and mariner awareness of all local by-laws and Harwich

² The statute empowers cities and towns to authorize someone other than the harbormaster to issue mooring permits. An attorney in the Office of General Counsel, Department of Environmental Protection, has informed this Office that in the absence of case law interpreting statutory language authorizing municipalities to empower someone other than the harbormaster to issue mooring permits, a fair reading of this language would suggest that the Legislature intended it to be limited to other municipal officials and not private entities. He pointed out that some municipalities do not have harbormasters and would need to assign this duty to other municipal officials.

³ For purposes of this analysis, a public recreational boating facility is: “a facility for berthing of recreational vessels at which all berths and accessory uses thereto are available for patronage by the general public on a seasonal or transient basis. Such facility may be either publicly or privately owned, and may include town piers, commercial rental marinas, or community sailing centers or yacht clubs offering open membership to the public. . . .” 310 CMR 9.02.

⁴ Department of Environmental Protection Waterways Regulations, 310 CMR 9.07(2)(d).

⁵ Other private entities in Harwich have also been allowed by the Town to control moorings in Town waters without the appropriate permits.

Harbor rules. The practice of allowing HPBW to control 92 moorings without permits violates Section 3.12(D)(11) of the Town Harbor Management Plan which restricts the number of moorings in a mooring area to two per individual.⁶

HPBW assigns the 92 moorings for profit to patrons who rent HPBW's mooring equipment. According to Town officials, 92 mooring permits are issued annually by the Town directly to the HPBW patrons. In addition to the HPBW rental fee, patrons pay a permit fee to the Town. HPBW collects the Town permit fees from its patrons and passes the fees on to the Town. The Town Administrator has referred to HPBW as an agent of the Town.

The Town controls approximately 86 other moorings in Wychmere Harbor and issues permits for these moorings to the persons holding them. It is this Office's understanding that the person holding a permit for a Town-controlled mooring is responsible for providing his or her own mooring equipment.

When a vacancy arises in the Town-controlled mooring field, it is filled from a Town-controlled waiting list.⁷ According to the Harbormaster, the person who is at the top of the appropriate waiting list will be given first opportunity to obtain the vacant mooring as long as they have a boat that will fit the size of the open mooring.

Boat moorings controlled by HPBW⁸ are treated differently with respect to mooring vacancies. The Town has allowed HPBW exclusive control over assigning moorings and filling mooring vacancies in Wychmere Harbor. Vacancies occurring in HPBW-

⁶ The Harbormaster has informed this Office that private entities are viewed in the same manner as individuals with respect to the issuance of mooring permits.

⁷ The Town Harbormaster has advised that the Town maintains separate waiting lists for different harbors and even for the inner and outer portions of Wychmere Harbor. He has also advised that individuals are permitted to place their names on as many waiting lists as they choose, as long as they pay the waiting list fee annually for each list they are on.

⁸ The investigation has also determined that the Allen Harbor Marine Service company (AHMS), a private boat yard, is in control of 35 moorings in Allen Harbor. Allen Harbor is a harbor located within the jurisdiction of the Town of Harwich.

controlled moorings are not filled from Town-controlled waiting lists. An attorney for HPBW publicly admitted during a March 2003 hearing before the Town Board of Selectmen (BOS) that HPBW maintains a mooring pool rather than a waiting list.⁹ The use of a mooring pool allows HPBW to exercise complete discretion with respect to the assignment of vacant moorings. The HPBW attorney also admitted during the same BOS hearing that in fact, HPBW will attempt to provide moorings immediately to persons who purchase expensive boats from HPBW.¹⁰

DEP's Waterways Regulation, 310 C.M.R. § 907(2)(a)¹¹ requires harbormasters to create fair and equitable procedures for the assignment of persons on waiting lists for new or vacant boat moorings. Likewise, the Town Harbor Management Plan also requires the Harbormaster to maintain a fair and equal system of waiting lists for the assignment of vacant moorings.¹² However, the Town Harbor Management Plan appears to apply fair and equal standards only to the maintenance of "Town-controlled" waiting lists.¹³ As such, it appears that the Town Harbor Management Plan allows boatyards to assign moorings and fill vacancies without regard to fair and equal standards as required by 310 C.M.R. § 907(2)(a).

The investigation has disclosed that the owner of HPBW is alleged to have at times acted in an arbitrary and unfair manner with respect to certain mooring assignments. For example, one boat owner reported he was removed from a mooring in the inner portion of Wychmere Harbor and moved to the outer harbor because he did not spend enough money with HPBW in the off season. The BOS heard the person's complaint and ordered HPBW to give him a mooring in the inner harbor. A sailboat owner

⁹ The owner of AHMS also has publicly acknowledged the use of mooring pools for his boat yard during the same hearing.

¹⁰ A similar admission was made by the owner of AHMS.

¹¹ This regulation states, "The harbormaster or other local official shall provide a written procedure for the fair and equitable assignment from a waiting list for use of vacant or new moorings"

¹² Section 3.12 (D)(7), Town Harbor Management Plan.

¹³ Section 3.15, Town Harbor Management Plan.

reported that prior to 1994, he had a mooring with HPBW and paid approximately \$350 dollars for it annually. The HPBW owner's secretary informed him that he would not be receiving the mooring for the upcoming season. He spoke personally to the HPBW owner who informed him that if he wanted the mooring, it would cost him \$950 dollars to rent it. HPBW's owner explained that the fee needed to be raised because the sailboat owner did no other business with HPBW. This person complained to the BOS. According to the sailboat owner, the BOS voted to offer him a slip in another Town harbor or an HPBW mooring for approximately \$750.

Certain other boat owners have lost moorings that they had been renting from HPBW. According to these boat owners, they, too, complained to the BOS. After reviewing the complaints, the BOS removed the moorings from HPBW's control, returned them to Town control and issued permits to the aggrieved boat owners.

In another situation, a boat owner advised that he had a business relationship with HPBW's owner and when he needed a boat mooring, he received it immediately. This Office has been unable to interview HPBW's owner concerning these allegations due to an issue with the owner's health.

An attorney from the DEP Office of General Counsel has expressed the view that while requiring the Town to create fair and equitable procedures for the assignment of new and vacant moorings, Section 907(2)(a) would likewise require fair and equitable treatment of individuals who currently hold Town mooring permits, including those holding permits for boat yard moorings. Section 3.15 of the Town Harbor Management Plan also requires that mooring permit holders be treated in a fair and uniform manner. Nevertheless it appears that treatment of persons holding HPBW moorings has not always been fair and equitable. Examples of inappropriate conduct on the part of HPBW have been described above. In fact, in certain instances where boat owners have complained about HPBW conduct in the past, the Town has acted to remedy these situations by removing control over the moorings from HPBW. This type of Town action in favor of complaining boat owners lends credibility to the allegations made by them against HPBW.

The United States Army Corps of Engineers maintains a policy that to qualify for federally funded projects, such as dredging projects, mooring regulations should be "open and available to all on equal terms."¹⁴ Failure to follow the Army Corps of Engineers' mooring policy could serve to jeopardize the Town's eligibility for future federally funded Army Corps of Engineers-sponsored dredging projects in Wychmere Harbor.¹⁵

The Town Administrator has received a legal opinion in a letter from Town Counsel stating that the Town can lawfully retake control of all moorings and waiting lists within its jurisdiction. The letter from Town Counsel concluded by stating, "the fact that the town and the harbormaster may have acquiesced in a permit assignment scheme inconsistent with the statute for many years does not give rise to any legal right or expectation for the continuance of such a scheme."

The Town Waterways Commission (WC) is an advisory body formed to provide the Board of Selectmen with recommendations on matters pertaining to Town waters. Some Town officials advised that one member of the WC may have a conflict of interest between his public duties and private interests regarding the mooring issue. This Office interviewed this individual and he advised that he has had a long-term business relationship with the owner of HPBW. Nevertheless, he voted as a WC member in favor of a recommendation that would allow HPBW to retain authority over the moorings it currently controls. Shortly thereafter, he performed additional private work for HPBW. This Office will report this matter to the State Ethics Commission.

Findings

1. The Waterways Law, M.G.L. c. 91, §10A and 310 C.M.R. § 9.07(1) authorizes municipal harbormasters to issue permits for boat moorings annually.

¹⁴ Letter to Chairman of Scituate Board of Selectmen from Richard C. Carlson, Chief, Army Corps of Engineers, Construction/Operations Division, dated April 30, 1997.

¹⁵ Letter dated February 14, 2003 to Wayne Melville, Town Administrator from William Hewig, III from the lawfirm of Kopelman and Paige, P.C.

2. The Town issues only two permits annually to HPBW.
3. The Town Harbor Management Plan § 3.12(D)(1) allows HPBW, a private entity, to assign and control 92 boat moorings in Wychmere Harbor without the permits required by law and regulation. This practice violates M.G.L. c. 91, §10A and 310 C.M.R. §§ 9.07(1).
4. Section 3.12(D)(11) of the Town Harbor Management Plan restricts mooring allocations to no more than two permits per individual/entity. By allowing HPBW to control and assign 92 moorings, the Town is in violation of its own Plan.
5. State Regulation 310 C. M. R. § 907(2)(a) requires municipal harbormasters to create a written procedure for the fair and equitable assignment from a waiting list for use of new or vacant moorings. The Harbormaster has failed to implement this regulation with respect to moorings controlled by HPBW and other private entities.
6. The Department of the Army Corps of Engineers maintains an ongoing policy that boat moorings should be open and available to all on equal terms. Failure to follow this policy could jeopardize the Town's eligibility for federal funds regarding future dredging projects in Town waters.
7. HPBW has treated certain mooring holders unfairly. This conduct violates the fairness provisions found in DEP regulations and the Town Harbor Management Plan.

Recommendations

- The Town should exercise control of all boat moorings located in municipal waters, including those controlled by HPBW. The Legislature, pursuant to M.G.L. c. 91, §10A and 310 C.M.R. 9.07(1), has given authority to harbormasters to control moorings through a permitting process. As such, no person or entity other than the Town, through its harbormaster, can control moorings in Town waters.

- As required by 310 C.M.R. 9.07(2)(a), the Harbormaster shall provide a written procedure for all boat moorings in Town waters for the fair and equitable assignment from a waiting list for new and vacant moorings.
- The Town Harbor Management Plan is currently out of compliance with state law and federal policy and should be amended to accurately reflect the law and any changes adopted by the Board of Selectmen regarding moorings.
- The Town should host ethics training as needed for the Town Waterways Commission to ensure that members do not participate in or vote on matters affecting their own interests.
- This Office will report to the State Ethics Commission allegations of a conflict of interest pertaining to a member of the Town Waterways Commission.

Investigation

In January 2003, a concerned citizen informed this Office that the owner of the Harwich Port Boat Works (HPBW) controls a large number of boat moorings in Wychmere Harbor, Harwich, Massachusetts and rents them to private boat owners. The citizen advised that HPBW controls these moorings with the permission of the Town of Harwich (Town). The citizen alleged that HPBW provides moorings only to those boat owners who will agree to purchase or store a boat from them, or otherwise purchase various services from them. This person alleged that the manner in which HPBW manages the moorings under their control is unfair and requested that this office conduct an investigation into this matter.

In January 2003, another concerned citizen contacted this office and provided a newspaper article concerning the boat mooring issue in Wychmere Harbor. This article appeared in the Harwich Oracle newspaper, dated January 22, 2003. The article was entitled, "Private Profits, Public Moorings." The article reported allegations of unfair conduct on the part of HPBW regarding its control and operation of boat moorings in Wychmere Harbor. The article also reported a significant price disparity between those obtaining moorings directly from the Town of Harwich and those receiving them from HPBW.

Based upon this information, the Inspector General initiated an investigation to obtain answers to several relevant questions. First, the investigation was designed to ascertain whether or not the Town of Harwich allows HPBW to control moorings in Wychmere Harbor and if so, whether HPBW is legally or otherwise allowed to independently decide who receives moorings under its control. Second, whether or not HPBW and its owner had acted unfairly with respect to selecting people for vacant moorings. Third, whether certain boaters renting moorings from HPBW were treated inequitably by HPBW. The investigation was designed to identify which federal, state, and local laws and regulations applied to the control and disposition of boat moorings in the Commonwealth and to determine whether the relevant laws and regulations were being appropriately followed by the involved parties.

State, Local and Federal Laws and Regulations

The harbormaster of any Massachusetts city or town is authorized by statute to issue permits for boat moorings to the public under terms, conditions, and restrictions that he deems necessary.¹⁶ Massachusetts Department of Environmental Protection (DEP) Waterways regulation 310 C.M.R. § 907(1) likewise requires the issuance of annual permits by municipal harbormasters for boat moorings located in municipal territorial waters. Another section of this regulation requires municipal harbormasters to create fair and equitable written procedures for the assignment of persons to new or vacant moorings from a waiting list.¹⁷ This section of the regulation is silent regarding the need for fair and equitable treatment for persons already holding mooring permits.¹⁸ A third section of the regulation appears to allow recreational boating facilities,¹⁹ including boat yards, to assign boat moorings to their patrons, but only if the boat yards have received permits from the Town for these moorings.²⁰ This Office believes that any such assignments by boat yards or other private entities to patrons must be done in a fair and equitable manner.²¹

¹⁶ M.G.L. c. 91, §10A. Notwithstanding the statutory authority of the Town Harbormaster to issue mooring permits to the Harwich Port Boat Works (HPBW), records of the Harbormaster reflect that HPBW has Town permits for only 2 of the 94 moorings they control in Wychmere Harbor.

¹⁷ 310 C. M. R. § 907(2)(a). This regulation specifically states that appropriate methods of assigning moorings would include date of application, physical characteristics of vessels, and the purpose of vessel use, e.g. commercial vs. recreational. The regulation also authorizes the harbormaster to allow the holder of a previously issued permit to renew the permit annually.

¹⁸ This Office has contacted an Attorney from the Office of the General Counsel, DEP, regarding whether the fair and equitable language contained in this regulation should likewise apply to persons already holding mooring permits. The attorney stated that, in his opinion, it would apply.

¹⁹ Supra, note 3.

²⁰ Supra, note 4.

²¹ Supra, note 17.

The Town Harbor Management Plan authorizes the Harbormaster to assign moorings on an annual basis.²² Likewise, the Town Harbor Management Plan permits boat yards to assign moorings under their control to individuals on an annual basis.²³ The Town in fact allows HPBW to control and assign 92 boat moorings without permits. The Town Harbor Management Plan is flawed to the extent that it allows the boat yards, which have not received the requisite permits, to control and assign moorings and fill mooring vacancies. There is no statutory or regulatory authority for the boat yards to do this unless they have first received permits from the Town for the moorings they wish to assign or fill.²⁴ HPBW has received permits from the Town for only 2 of the 94 moorings it controls in Wychmere Harbor.

The Town Harbor Management Plan requires fair and uniform treatment of all mooring permit holders and all potential mooring permit holders appearing on a Town maintained waiting list.²⁵ The Town Harbor Management Plan also requires the Harbormaster to maintain a fair and equitably administered waiting list for the assignment of vacant moorings in Town waters.²⁶ The Town Harbor Management Plan is flawed because it applies its fair and equal treatment requirement for the assignment of moorings only to those receiving moorings from a Town-controlled waiting list. The Plan's failure to apply

²² Town of Harwich Management Plan, § 3.12 (D)(1).

²³ Id. The Town Administrator received a legal opinion from Town Counsel dated 2/14/03 which states, "[I]t is my opinion that the Harwich harbormaster is not precluded by state statute from issuing multiple moorings to boat yards or yacht clubs, and is expressly empowered by provision of the DEP Waterways Regulations, and by the Town's Harbor Management Plan [to do so]" Nevertheless, as explained supra, note 1, while the Town may have the authority to issue multiple moorings to private boat yards, the statutory vehicle to do this is by the issuance of permits. This, with few exceptions, has not been done with respect to HPBW.

²⁴ Both M.G.L. c.91, §10A and 310 C.M.R. § 907(1) require municipal harbormasters to issue permits to boat mooring holders. Moreover, 310 C.M.R. § 907(2)(d) authorizes boat yards to assign moorings to patrons, **but only if they have received municipal permits for the moorings.** (emphasis added).

²⁵ Town of Harwich Management Plan, Section 3.15.

²⁶ Town of Harwich Management Plan, Section 3.12 (D)(7).

fair and equal treatment requirements to HPBW mooring assignments contravenes the express fairness requirements set forth in DEP regulation 310 C.M.R. § 907(2)(a).²⁷

By letter dated 2/17/98, the Department of the Army, Corps of Engineers, (DACOE) notified the owner of HPBW, that the rental of moorings in Wychmere Harbor, Harwich, Massachusetts required a federal permit issued by DACOE. The letter explained that a federal permit was required under Section 10 of the Rivers and Harbors Act of 1899.²⁸ DACOE subsequently issued a federal permit to HPBW. The permit authorized HPBW to rent 86 moorings in the inner portion of Wychmere Harbor and 8 moorings in the outer portion of the Harbor. By letter dated 5/11/98, DACOE informed HPBW, "that this determination [the federal permit] does not constitute an authorization to proceed until all other applicable state and local permits are obtained." HPBW has not obtained the appropriate local permits.

DACOE maintains a policy that to qualify for federally funded projects, such as dredging projects, mooring regulations should be "open and available to all on equal terms."²⁹ Failure to follow the Army Corps of Engineers' mooring policy could serve to jeopardize the Town's eligibility for future federally funded Army Corps of Engineers-sponsored dredging projects in Wychmere Harbor.³⁰

²⁷ Supra, note 17.

²⁸ Title 33 CFR § 320.2 (b) states that "Section 10 of the Rivers and Harbors Act, approved March 3, 1899 (33 U.S.C. 401) ... prohibits the unauthorized obstruction or alteration of any navigable water of the United States." Section 10 prohibits any activity affecting the location or condition of the navigable waters of the United States unless that activity has been approved by DACOE. The instrument of authorization is a permit issued by DACOE. Title 33 CFR § 320.4 (a)(1) states that the decision to issue a permit must be based on an evaluation of the probable impact of the proposed activity and "its intended use on the public interest." This section lists several factors that should be considered relevant to the evaluation of any request for a permit, including, " the needs and welfare of the people."

²⁹ Supra, note 14.

³⁰ Supra, note 15.

Interview of Harwich Harbormaster

The Harwich Harbormaster advised that he has been employed as the Harbormaster and the Natural Resources Director for the Town of Harwich for the past 31 years. He stated that there are 86 boat moorings located in the inner portion of Wychmere Harbor that are controlled by HPBW. The remaining 53 moorings in the inner harbor are controlled by the Town. In addition, there are 41 total moorings located in the outer portion of the Harbor. He stated that 8 of those in the outer portion of the Harbor are controlled by HPBW and 33 are controlled by the Town.

He advised that with respect to the 53 Town-controlled inner Harbor moorings, permit holders must annually submit a renewal application and permit fee to the Town. The fees vary depending on the size of the boat and whether the applicant is a Town resident. He advised that the fees range from approximately \$50 to \$140 dollars annually. He advised that the Town maintains a waiting list for the 53 inner harbor moorings. He stated that persons wishing to be placed on the waiting list must pay a \$5 dollar fee and complete a form provided by his office. The form must be renewed and the fee paid annually in order for an applicant to remain on the waiting list. Failure to file a renewal form and pay the fee will result in removal from the list. He advised that there are approximately 200 people on the inner Harbor Town waiting list.³¹

He advised that from the time he first became Harbormaster until 1/28/02, the procedure for administering the Town waiting list was as follows:

Moorings become available to persons on the waiting list when a party holding the permit either dies or voluntarily relinquishes it. He stated that a mooring cannot be passed by will but a surviving spouse is provided first option to take it. When a mooring becomes available, the Harbormaster contacts the person at the top of the list by letter, informing them of the opening. The first person on the list will receive the open mooring, as long as they have a boat that will fit in the open mooring. If the first person on the list turns the opportunity down, the next person on the list is contacted. After 1/28/02, the above-described procedure remained the same but two

³¹ The Town's Assistant Harbormaster advised on 6/24/03 that it takes approximately 15 years for persons on the Town-controlled waiting list for boat moorings in Wychmere Harbor to receive a mooring.

new additional steps were added. First, the Town Waterway Commission must provide written approval of the party selected for the open mooring. Second, if the boat is a state registered vessel, the party receiving the mooring must be the full owner of the boat to be berthed at the mooring or the party must be at least a 51% owner of any U.S. Coast Guard documented vessel unless some particular hardship exists.

The Harbormaster advised with respect to HPBW-controlled moorings, that prior to 1976, HPBW was owned and operated by another individual. This person still lives in Harwich and is now in his 80s. He owned HPBW from approximately 1953 to 1976. During that time, HPBW rented moorings to private parties in the Harbor and the Town allowed this to go on. He stated that during that time, controls were very loose. He advised that in 1976, the current owner purchased HPBW and began to send people bills for mooring rentals. About 20 of those people receiving invoices objected and claimed that they owned the moorings. The Town then took control of those moorings. HPBW remained in control of the other 86 moorings located in the inner Harbor. The Harbormaster advised that there is no formal contract or agreement between the Town and HPBW concerning the 86 inner Harbor moorings controlled by HPBW (nor is there one concerning the 8 moorings controlled by HPBW in the outer Harbor). The Town simply allows HPBW to control these moorings. While each party using an HPBW mooring must pay the permit fee to the Town, HPBW owns the tackle for each of these moorings and the user pays a rental fee to HPBW. He advised that an HPBW employee collects permit applications and the appropriate permit fee from each person renting a mooring from HPBW and turns all of the applications and fees over to him. The permit fees are the same as those described above for moorings controlled by the Town.

He advised that HPBW needed and obtained a Department of the Army Corps of Engineers (DACOE) permit to rent moorings in the Harbor in 1998.³² He stated that parties who rent moorings from HPBW receive a bottom mushroom anchor, a float to hold the anchor chain up in the water, a painter (a line) that travels from the float to the

³² By letter dated 5/11/98, DACOE informed HPBW that possession of the federal permit does not constitute an authorization to proceed until all other applicable state and local permits are obtained. HPBW did not obtain the permits required under state law.

boat, and a place to park their cars. He advised that at the end of each season, HPBW pulls all of their mooring equipment out of the water. He advised that once the moorings are out of the water, the Town inspects each one to insure that they are safe and durable.

He advised that on 2/3/03, with the owner's permission, an HPBW employee gave him a copy of an HPBW mooring waiting list that was created in 1999. The owner informed the Harbormaster that he has no waiting list at the present time. The HPBW employee informed the Harbormaster that she keeps the names of persons waiting for a mooring on little slips of paper. She brought them over and showed them to him. He stated that there were no more than 10 slips of paper. He advised that he does not know whether HPBW has a written contract with the parties that rent moorings from it but believes that HPBW does.

He advised that it is his belief that HPBW encourages people who rent moorings from them to do other business with HPBW. He stated that he does not know of any specific people who were required to purchase things from HPBW in order to obtain or keep a mooring.

Interviews with Boat Owners

In 2003, a boat owner (B1) was interviewed by this Office and advised that he is the owner of a sailboat. He advised that several years ago he approached the owner of HPBW, and inquired as to how he could receive a place on HPBW's waiting list pertaining to moorings that HPBW rents to boat owners in Wychmere Harbor. The owner responded that he could not receive a place on the mooring waiting list unless he was willing to purchase a boat from him, or store a boat with him or otherwise purchase services from him. B1 advised that the owner has total control of the moorings that he rents and only those who agree to spend money in his boat yard receive a mooring. He provided an example of a friend (whom he declined to name) who had several thousand dollars worth of work done by HPBW on a boat that he owned and immediately received a mooring from HPBW. B1 advised that his friend told him that he would not come

forward and discuss his relationship with HPBW because he had a mooring and didn't want any problems.

In 2003, boat owner (B2) was interviewed and advised that in 1993 he purchased a sailboat and contacted the HPBW owner in the spring of 1994 in the hope of renting a mooring. He was offered a mooring in the outer portion of Wychmere Harbor for \$1800 for the season. Before the boating season began, the HPBW owner offered B2 a mooring in the inner harbor, which he accepted. This mooring cost him approximately \$1900 for the season. During that season the owner informed B2 that he operated a full service business and HPBW would take good care of his boat for the winter for \$1000. B2 declined the offer. B2 advised that by the spring of 1995, he had heard nothing from HPBW about a mooring for the upcoming boating season. He called HPBW and asked the office manager to have the owner call him. The owner did not return the call and B2 called him. The HPBW owner informed him that he had a mooring for him but it was in the outer harbor. The owner told him that other boat owners who rented moorings from him in the inner harbor spent up to \$7,000 dollars with HPBW and that he did not do that. The owner explained that he had to take care of boat owners that spend money with him in the off season. The owner told him that he might get an inner harbor mooring with him next season, if he used HPBW's services but for now he was going to the outer harbor. B2 advised that he complained to the Harbormaster who told him to put his complaint in writing, which he did. B2 advised that he wrote two letters concerning his problem with HPBW and asked the Harbormaster to make them available to the Harwich Board of Selectmen. B2 advised that at a subsequent Selectmen's meeting, the HPBW owner informed the Board that B2 was never given a permanent mooring in the inner harbor and that in the goodness of his heart he was allowed to rent there for one season only. B2 advised that after the Board heard both sides, they decided to order HPBW to give him an inner harbor mooring.

In 2003, boat owner (B3) was interviewed and advised that he rented a mooring from HPBW for several years for his sailboat because there were no Town-controlled moorings available. He advised that his mooring rental fee during these years was approximately \$350 per season. He advised that prior to each new season, he would

receive an application for a mooring in the mail from HPBW and he would return it by mail. During these years, the HPBW owner would periodically say to him that he never made purchases from him or spent money at HPBW. B3 advised that he would respond by reminding the owner that he owned a sailboat and didn't need to buy large amounts of fuel or other things that owners of powerboats needed. B3 advised that in 1994 or 1995, he did not receive his mooring application from HPBW in the mail. He called HPBW and spoke with a secretary and informed her of the situation. She left the phone and spoke to the HPBW owner about the matter. B3 advised that she returned later and told him that the owner told her that B3 would not be getting a mooring for that season. B3 advised that he immediately went to see the owner at HPBW and asked him about the denial of a mooring. He stated that the owner responded by stating that he would get no mooring unless he was willing to pay \$950 dollars to rent it. B3 advised that the owner explained that B3 did no other business with him and therefore his rental fee needed to be raised. B3 advised that he informed the owner that he was being discriminated against because he had a sailboat and did not need his other services. B3 advised that the HPBW owner responded by telling B3 that they were his moorings and he could do whatever he wanted with them. He stated that he was in business to make and not lose money.

B3 advised that he subsequently complained to the Harbormaster both verbally and in writing. He later appeared before the Board and explained his situation directly to the Board. B3 stated that after evaluating the situation and hearing from both the HPBW owner and himself, the Board proposed a solution. He stated that in essence, they offered him a choice. He could either rent a slip from the Town in another harbor or rent a mooring from HPBW for approximately \$750 dollars a season. Neither choice was acceptable to him. He explained that to accept a slip in the other harbor would mean that he would be jumping over all the people on that harbor's waiting list. He felt that this was not fair. He also wanted nothing more to do with HPBW. He moved his sailboat to another location.

In 2003, boat owner (B4) was interviewed and advised that in 1985 he purchased a sailboat and subsequently rented a mooring from HPBW in the inner portion of Wychmere Harbor. He advised that the rental fee was approximately \$300 per year. He advised that he purchased other services from HPBW, including winter boat storage, which cost him approximately \$2500 dollars per year in addition to the mooring rental fee. He followed this routine for approximately three years.

B4 advised that in approximately 1988, he decided to store his boat during the winter months in a different location. At the end of the 1989 boating season, he had HPBW remove his boat from the water and they were supposed to deliver it that same day to his storage location. Instead, B4 advised that HPBW left his sailboat in their boat yard overnight. B4 stated that during that night, a disgruntled former HPBW employee who had been fired, damaged several boats in the HPBW yard, including B4's boat. B4 estimated the damage to his boat was in the two thousand-dollar range. He stated that HPBW tried to persuade him to allow them to do the repairs on his boat but he declined. B4 advised that he didn't place his boat in the water for the 1990 season because its repairs were not complete.

In the spring of 1991, after placing his boat in the water, he learned that HPBW had no mooring for him. B4 stated that he felt entitled to a mooring because HPBW had failed to bring his boat to its proper location as agreed on the day before it was damaged and left it in a position to be damaged later that night. He complained of unfair treatment by HPBW to the Board of Selectmen. B4 advised that after reviewing his case, the Board took a mooring away from the control of HPBW, placed it under Town control, and gave it to him. B4 provided a copy of a letter he sent to the Board, dated 2/29/92. The letter mentions a conversation that B4 had with the Harbormaster while this matter was unfolding. The letter states that the Harbormaster informed B4 that the HPBW owner had told him that he would stand on his head before letting B4 back on that mooring.

Boat owner (B5) advised in 2003 that he purchased a sailboat in 1993 and rented a mooring from HPBW for \$1300 dollars for the 1994 boating season. B5 advised that in the spring of 1995, he received a letter from HPBW informing him that there would be a

slight increase in the mooring rental fee for the new season. The letter stated that the new fee would be \$1800 dollars. B5 felt that this price increase was substantial and amounted to price gouging. B5 advised that he complained to the HPBW owner who offered to drop the fee to approximately \$1650. B5 advised that he agreed to the offer but decided to check with the Harbormaster to determine his current place on the Town mooring waiting list before committing to HPBW. B5 stated that he was able to obtain a mooring from the Town and no longer needed to rent from HPBW.

B5 advised that after receiving his Town-controlled mooring, he had to spend about \$1000 dollars to purchase his own mooring equipment. He advised that from then until the present, he has had to spend approximately \$1000 more to keep his equipment in good shape. He advised that persons renting moorings from HPBW would be spending much more money during the same time frame.

During this investigation, a person who used a sailboat with another person in Wychmere Harbor was interviewed in 2003. This person will be identified as confidential source (CS1). CS1 advised that his friend rented a mooring from HPBW. CS1 advised that he engaged in a conversation with the HPBW owner's son about HPBW removing the sailboat from the water. CS1 advised that the son responded initially by declining to remove the boat and explaining that the boat owner did not do enough business with HPBW. He later relented and did remove the boat from the water. CS1 advised that tradesmen who perform work for the HPBW owner have been able to obtain moorings. He advised that a commercial fisherman who does plumbing and heating work for the owner and a carpenter who has done carpentry work for him have both obtained moorings.

Boat owner (B6) was interviewed in 2003 and advised that he is a commercial fisherman. He advised that he has held a boat mooring from HPBW for six years. He advised that prior to obtaining a mooring from HPBW he performed oil burner work and service for HPBW. He stated that six years ago he asked the HPBW owner for a mooring for his 25-foot center console driven motorboat and the owner gave it to him immediately. B6 advised that he is obligated to pay HPBW approximately \$900 dollars

per year for the mooring. However, he explained that he has an informal agreement with the HPBW owner in which he is permitted to deduct from his rental obligation, the value of services that he performs for HPBW on the oil burner. He advised that he put in a new oil burner for HPBW and did not have to pay the boat rental fee for two years.

Boat Owner (B7) was interviewed in 2003 and advised that she is the owner of a sailboat and has rented a mooring from HPBW for many years. She stated that her current mooring rental fee is \$600 dollars. She also pays an additional permit fee to the Town of \$50.52 per year. She advised that each year she sends a permit application to HPBW with two checks. One for HPBW and one for the Town. She advised that she has never been pressured by HPBW to use its boat yard services.

Boat Owner (B8) was interviewed in 2003 and advised that he is the owner of a sailboat and has rented a mooring from HPBW for many years. He advised that his current rental fee is \$695 dollars per year. In addition, he pays the Town a permit fee of \$40 dollars, which is collected by HPBW for the Town. B8 advised that he has never been pressured by the HPBW owner to do other business with him.

Boat Owner (B9) was interviewed in 2003 and advised that he is the owner of a powerboat and has rented a mooring from HPBW for several years. He advised that his rental fee from HPBW is \$900 dollars per year. He also pays the annual Town permit fee of \$40 dollars. He advised that he does purchase fuel from HPBW during the boating season. He stated that he does not use any of HPBW's other boat services and has never been pressured to do so. He has had no problems with HPBW.

In 2003 an attorney representing boat owner (B10) was interviewed and advised that he is currently representing his client before the Board of Selectmen in an effort to obtain a mooring for his client. The attorney advised that he also had successfully represented his client in an earlier lawsuit filed on behalf of B10 against the HPBW. The attorney furnished to this Office a copy of a legal memorandum, dated 1/20/03, which he had previously submitted, to the Board on behalf of his client. This memorandum states that B10 is the owner of a 31-foot charter boat which was berthed during the summer of 1997 at a mooring rented to B10 by HPBW in the outer portion of

Wychmere Harbor. According to the memorandum, B10's mooring failed to hold [during a storm] and B10's boat ended up on the rocks and nearly sank. The boat was a total loss. The memorandum states that HPBW agreed to rent B10 a mooring free of charge, except for the Town permit fee, as full compensation for the failure of its mooring. The memorandum reflects that HPBW did not honor its agreement with B10, which forced him to sue HPBW in court.

A review of the legal opinion issued by the First Justice of the Barnstable District Court, Orleans Division, reflects that the court found that HPBW did agree to furnish B10 a mooring at no charge the following year in accord and satisfaction for any claims arising from the damages to B10's boat from the 1997 storm. The opinion further states that in mid-May 1998 the HPBW owner assured B10 that his mooring would be installed and inspected within two weeks. B10 made frequent additional inquiries but was not given an indication that the mooring was installed and inspected. Finally, in mid-July, 1998, the HPBW owner told B10 that he was doing nothing with B10's mooring because B10 was suing him. The opinion states that because of HPBW's failure to honor its agreement, B10 incurred over \$3700.00 dollars in dockage fees and other accommodations for his vessel. The court ruled that HPBW was in breach of its contract with B10 for the mooring and further ruled that HPBW knowingly and intentionally engaged in a course of conduct that was unfair and deceptive in violation of M.G.L. c. 93A. The court, along with litigation costs and attorney's fees, awarded double damages.

Notwithstanding the favorable court ruling, B10 did not regain his lost mooring until the Board voted on March 24, 2003 to take a mooring away from HPBW, place it under Town control and give it to B10. The legal memorandum described above, describes other negative consequences that B10 suffered because he had the mooring taken away. Since he had no mooring, he stood in violation of the Town Harbor Management Plan's regulations. This resulted in the Harbormaster rescinding his Class "C" Offloading Permit. According to the legal memorandum, the rescission of the permit has resulted in lost charter revenues.

Boat owner (B11) was interviewed in 2003 and advised that he is a commercial fisherman and has rented a mooring from HPBW for three or four years. He advised that he pays \$1500 and change annually to rent the mooring from HPBW. He advised that he has been treated fairly by the HPBW owner.

Attempt to Interview the HPBW Owner

On 2/14/03 investigators from this Office went to HPBW for the purpose of attempting to interview its owner and to serve an investigative summons upon him for business records concerning HPBW control of boat moorings in Wychmere Harbor. Upon arrival, the HPBW Office Manager informed us that the owner was not available due to a serious health issue. The investigative summons was served upon the Office Manager. On 2/19/03, this Office was contacted by an Attorney who advised that he represents the owner of HPBW. He advised that his client was currently in the hospital with a serious medical issue and would be unable to comply with the investigative summons for the immediate future. The summons required production, among other things, of all documents pertaining to fees paid to HPBW related to the use of boat moorings in Wychmere Harbor. The summons also required production of all documents pertaining to purchases of boats, boating supplies, boating equipment and boating maintenance services from HPBW by persons renting moorings from HPBW.

By letter dated 2/21/03, the Attorney informed this Office that his client's conduct regarding "the use, possession and leasing of moorings has at all times been specifically authorized, allowed, and permitted by the Town of Harwich." The letter also stated, "my clients' practices relative to these moorings is substantially similar to those being performed by another private entity in Harwich, Allen Harbor and Marine."

This Office contacted the Attorney in May 2003 and attempted to ascertain when HPBW would comply with the investigative summons and if the HPBW owner would submit to an interview. The Attorney advised that he would consult with his client and client's doctor and let this Office know of the results of his inquiry. On July 9, 2003 The Attorney contacted this Office and advised that he is working with an HPBW employee to gather the HPBW records relevant to the summons and hopes to provide responsive

records in the near future. He also advised that his client had a recent medical setback and would not be available for interview.

Letter from the Harbormaster

By letter dated 3/12/03, the Harbormaster informed this Office of his opinion regarding the potential ramifications that are likely to flow from a Town decision to take over full control of moorings currently leased by HPBW. He made the following points in his letter:

- If the Town took full control over HPBW moorings, the only access for boat owners to the mooring field would be through the Town Landing which also serves as the Town commercial fishing pier. He advised that there are only 26 vehicle parking spaces at this location, which are filled very early in the morning each day by commercial fishermen. He stated that mooring users are usually dropped off and picked up at this location because no parking spaces are available. He explained that if mooring controls were removed from HPBW, the numbers of boat owners using the Town landing to gain access to their moorings would increase substantially.
- All Wychmere Harbor moorings would need to be installed over the Town pier. This would have an enormous negative impact on available space at this location because all mooring permit holders would have to use the Town pier to place their mooring equipment in the water.
- Small companies would become more involved in setting the Wychmere Harbor moorings. This would place a significant additional burden on the Harbormaster who would be responsible for coordinating this activity to insure the proper placement of the moorings to prevent boats from being moored too close to each other.
- Managing the new responsibilities that would flow from a Town takeover of all moorings would require the employment of three additional employees to assist the Harbormaster. He pointed out that the Town is desperately trying to balance its budget and expects to propose a 20% reduction in budget expenses for fiscal year 2004.
- The added responsibilities would also reduce the service provided to all boaters by the Harbormaster and place an additional burden on the Town harbor patrol.
- Loss of moorings could result in the business failure of HPBW. The Harbormaster suggested that without mooring customers all boat yards in

Massachusetts would be in financial jeopardy. He also predicted the loss of six jobs from the various boat yards that operate in Harwich waters.

In addition to the points made by the Harbormaster in the letter, he advised on 4/25/03 that the Town has a rule that all moorings must be inspected by the harbormaster once every two years to insure the safety of the mooring equipment. For moorings currently controlled by the Town, it is the responsibility of each mooring permit holder to pull the mooring equipment out of the water once every two years so that the Harbormaster can inspect it. He advised that the inspections involving Town mooring permit holders are difficult to manage because many permit holders ignore the inspection rule. He stated that this is not a problem with moorings rented by HPBW and the Allen Harbor Marine Services Company. Even though inspections are only required every other year, the boat yards pull all of the mooring equipment they control out of the water every year so that they can be inspected by the harbormaster. He stated that the annual inspections of boat yard controlled moorings enhance harbor safety. The boat yards pull all of the moorings at the same time, which makes it very easy for the Harbormaster to meet his inspection responsibilities. He opined that if the Town retakes control of the moorings controlled by the boat yards, this will place a significant additional burden upon him because it is his belief that many permit holders will not be diligent regarding the inspection requirement.

Interviews of Other Town Officials

The Harwich Town Administrator was interviewed on 4/9/03 and advised that he considers HPBW to be an agent for the Town with respect to the moorings it controls in Wychmere Harbor. He explained that HPBW collects Town mooring permit applications and permit fees from boat owners that rent moorings from them and passes them on to the Town. He advised that the boat yards operating in the Town need to get out of the mooring distribution business. He explained that it is his belief that all moorings in Harwich should be distributed and controlled by the Town and not by HPBW or other private entities. He also expressed the opinion that the boat mooring waiting list also should be exclusively controlled by the Town.

A member of the Harwich, Board of Selectmen (BOS), was interviewed on 4/9/03 and advised that he has assumed the responsibility, on behalf of the BOS, to find an appropriate solution to the problems confronting the Town that have arisen from allowing private boat yards to control large numbers of boat moorings in Town waters. He provided an example of a problem that developed from boat yard control of moorings. He advised that a boat owner lost a mooring that he had been renting from HPBW, after a dispute he had with the HPBW owner. The boat owner complained to the BOS and after the BOS heard all the facts in a recent public hearing, the Selectmen voted unanimously to take a mooring away from HPBW, place it under Town control and give it to the boat owner.

He advised that public access to moorings in all of the Town's harbors should be open to all boat owners on a fair and equitable basis. He expressed the opinion that private boat yards should not be able to continue to control multiple moorings but instead be relegated to control no more than six to ten moorings. He explained that this limited number of boat yard moorings should be designated commercial moorings. The boat yards should be required to pay the Town for them at a higher rate, perhaps double what others would pay for the same size mooring. He advised that the Town should take over control of all mooring waiting lists because the lists must be handled fairly with open and equitable access for all persons who wish to obtain one.

He advised that persons who received mooring permits from the Town last year will be able to receive them again. They will not be removed from the mooring they previously held. However all future mooring vacancies would be filled from a Town-controlled waiting list. He advised that no change will occur for the current boating season but will likely go into effect in January 2004. He advised that he hopes to submit a proposal to the entire BOS in June 2003 that will contain his recommendations for change.

He advised that some of the members of the Town Waterways Commission (WC) have conflicts of interest regarding matters that come before them but vote on issues that affect them and their businesses anyway. He provided an example of a recent WC vote regarding the issue of whether private boat yards should retain control of boat moorings.

He advised that a WC member owns a dock and mooring business that operates in the Town. This WC member voted to recommend to the BOS that the private boat yards be permitted to retain control of the moorings that they currently control. The BOS member advised that he warned the WC member that he should refrain from voting because he had a conflict. The WC member voted anyway.

The Chairman of the BOS was interviewed on 4/30/03 and advised that the BOS held a public hearing on the issue of boat yard control of moorings in Town waters in March 2003. He stated that a BOS member has been designated the BOS liaison between the BOS and the Town Waterways Commission (WC) and he has been gathering information to present to the BOS regarding boat yard control over moorings in Town waters.

He advised that it is his belief that the Town should retake control over moorings currently under the control of the boat yards. The Town should then allow the boat yards to exert control over a limited number of moorings. He has not reached a conclusion about the number of moorings the boat yards should control in the future but suggested that the number should possibly be as low as 20. He opined that the boat yards should be able to control a certain number of moorings to assist them in their business operations. He advised that the Town should take control of the waiting lists for boat moorings. The Town waiting list policy in his view would recognize that the boat yards would be able to exercise control over access to the number of moorings under their control (i.e. possibly 20 moorings). He advised that nothing has been firmed up on this issue as of yet but he envisioned the likelihood that the boat yards would be required by the Town to pay more for permits to the moorings they would be permitted to control. He opined that they may be required to pay double the permit fees of other permit holders or even more. He stated that persons who currently hold mooring permits would be able to retain control of the moorings when the reorganization takes place. The Chairman advised that he expects that the BOS will conduct public hearings on the mooring control issue in September and October 2003. The BOS is likely to agree on and implement recommended changes regarding boat yard control of boat moorings in January 2004.

The Vice-Chairman of the BOS was interviewed on 5/12/03 and advised that he considers the boat moorings located in the Town's waters to be a Town asset. He believes that the multiple moorings now under the control of private boat yards in the Town should be brought under the control of the Town. He advised that he can see allocating control of a few moorings to the boat yards. He expressed the view that no more than six moorings should be left to the control of the boat yards. He stated that the waiting lists for all boat moorings should be controlled by the Town, with the exception of the few left under the control of the boat yards. He advised that he is concerned about a possible conflict of interest with respect to a vote taken recently by a member of the WC at a WC meeting. The vote related to boat yard control of moorings. He heard that member had a business relationship with the HPBW owner.

A fourth member of the BOS was interviewed on 5/12/03 and advised that the Town should control all boat moorings within its territorial waters through its Harbormaster with a few exceptions. He advised that private boat yards should be permitted to retain control of no more than six to ten moorings. Likewise, the Town should take control of the boat mooring waiting lists.

The fifth member of the BOS was interviewed on 5/19/03 and advised that it is his opinion that HPBW provides a valuable service to the Town and should be permitted to retain control over the boat moorings it now controls. He explained that if a storm occurred, HPBW would respond immediately to safety problems happening on the water to humans or boats. He advised that he did not believe that the response time of the Harbormaster could match that of HPBW or other private businesses.

He stated that if boat moorings are removed from the control of HPBW, the result will be a decline in revenue for HPBW. If the decline in revenue is significant, it may force HPBW to go out of business. He advised that another private entity owns the land upon which HPBW is located. The private entity currently rents the land to HPBW. He advised that if HPBW goes out of business, the private entity could sell the land to a new owner. The new owner could deny public access to the land, which would in turn limit public access to Wychmere Harbor.

He advised that if HPBW and other private entities go out of business due to lost revenue because they no longer control the moorings, several people who live and work in the Town of Harwich will lose their jobs. He stated that the Town, by contrast, would be required to employ more people to do the kind of work the boat yards used to do. This would increase the Town payroll and the benefits the Town would have to pay for the new employees. The Town residents would have to pay more in taxes if this occurs.

He concluded by reiterating his belief that HPBW and other private entities should be allowed to retain control over the boat moorings they now control. He stated that with respect to boat mooring waiting lists, the boat yards should be allowed to control access to approximately 50% or less of the boat moorings they now control. He advised that he has heard that some of the other Selectmen favor allowing the boat yards to retain control over only six moorings. He advised that he disagrees with that result and believes that it would be the same as the Town taking control of all the moorings.

The Chairman of the WC was interviewed on 4/11/03 and provided this Office with a copy of a document that he had prepared which contains some of his thoughts on how the issue of boatyard control of moorings in Town harbors should be resolved. The document recommends that it should be Town policy to limit the number of moorings available to individuals and corporations to two moorings. Excepted from this general rule would be private boat yards and yacht clubs. The boat yards and yacht clubs would be able to have up to six moorings under their control. He advised that in his opinion the Town must control the waiting list for all moorings that become vacant in Town waters with the exception of the six moorings that would be available to boat yards and yacht clubs.

He also provided to this Office a copy of the WC meeting minutes from the meeting on 2/25/03. The minutes reflect that current Town regulations state that no more than two moorings can be assigned to any individual. The minutes further reflect that notwithstanding this regulation, 150 boat moorings are currently under the control of boat yards, yacht clubs, hotels and boat retailers. The minutes state, "[n]o written

provision can be found that specifies the exception of Boat Yards, Yacht Clubs, Hotels, or Boat Retail organizations" (from the two moorings per person regulation limit).³³

He advised that he knows the owner of HPBW, personally. He advised that approximately ten years ago, he set up a boat brokerage business for the HPBW owner and managed it for one summer. The business sold new and used boats and also sold boats for others on consignment. He advised that the HPBW owner had a practice ten to twelve years ago of finding moorings for people who purchased boats from him.

He advised that four persons who are on the WC make money by performing various jobs on the Town waterways. He explained that some of this work involves installing and constructing docks, selling mooring hardware, installing and maintaining bulkheads and other work. He stated that one of the WC members has done private work for HPBW, another private boat yard and the Town. He advised that some Commission members vote on issues that affect their own business interests. He advised that when this happens, it amounts to a conflict of interest.

A member of the WC was interviewed and advised that he was appointed five or six years ago by the BOS to the Town Waterways Committee (The Town Annual Report refers to this body as the Waterways Commission). He advised that this Committee is an advisory committee for the BOS. The BOS sometimes seeks advice from the WC members because of their expertise on waterway issues.

He advised that the HPBW owner purchased HPBW many years ago from its previous owner and obtained the boat moorings that HPBW controlled when the business was sold. No one from the Town objected when control of the moorings went to the new owner at the time of the sale. He stated that in 1998, HPBW received a federal permit to operate the moorings in Wychmere Harbor and no one from the Town objected. He stated that the HPBW owner's mooring control problem began when a person tried to

³³ Section 3.12 (D)(11) of the Harwich Harbor Management Plan states that "[n]ot more than two mooring permits in a mooring area may be assigned to an individual."

obtain a mooring from HPBW and was rejected. He stated that after this, this person began a personal vendetta against the HPBW owner.

He advised that HPBW and another private boat yard have been able to control boat moorings in Harwich waters for years because they were there first. He opined that because they were there first, they should be allowed to continue to control the moorings they now have.

He advised that he has known the HPBW owner since 1985. He advised that in 1985, he purchased two motors for his business from the owner. He stated that he is the owner of a Marine Service company and since 1991 or 1992 has had a business relationship with the HPBW owner. He explained that he earns approximately \$1000 dollars annually from this relationship. He described the work he performs for HPBW as involving the building of floats and mooring related work.

He advised that in February 2003 the WC met to discuss the issue of boat yard control over boat moorings. He stated that they discussed three possible solutions to the problem. One solution involved recommending to the BOS that the boat yards be permitted to keep control over the moorings they currently control. A second option involved the Town retaking control over the moorings currently under the control of the boat yards. The third option involved the Town retaking control but allowing the boat yards to retain control over six moorings. He advised that he voted for the solution that involved recommending to the Selectmen that the boat yards be allowed to retain all of the moorings they currently possess. He advised that at the time he voted for a solution favorable to HPBW, he was not doing any work related projects for HPBW. Sometime after this vote, he had a conversation with the HPBW owner about doing a job for him. He then built four dock ladders for HPBW. At the time he voted as described above, he explained that he thought he had the right to vote because it was his job as a WC

member to advise the BOS. He stated that he considered abstaining because of a possible conflict of interest but decided not to do so.³⁴

Town of Harwich Board of Selectmen Meeting, 3/24/03

The Harwich Town Administrator provided to this Office a copy of a videotape of the BOS meeting, which occurred on 3/24/03. The videotape has been reviewed by an official of this Office. The tape contains information pertaining to the issue of proper handling and control of boat mooring sites in the Town of Harwich. During the meeting several individuals made presentations to the BOS.³⁵ An Attorney informed the Board that he represented the owner of HPBW. He informed the Board that when HPBW is able to sell a high priced boat, it needs to have access to moorings when and if they become available. He explained:

Does that mean that on occasion the list or the pool of applicants ... can't be followed to the letter? I would suggest to you, yes. That's exactly what it means. I'll be perfectly honest and blunt with you." He explained that this is needed for HPBW to thrive as a boat yard. The Attorney went on to

³⁴ The Waterways Commission meeting described in this interview occurred on 2/25/03. This Office has been furnished copies of two electronic mail messages (e-mail) between the above mentioned WC member and the Town Administrator. The WC member wrote in his e-mail to the Town Administrator, "in reference to conflict of intrest (sic), the Law states that anyone who has a conflict of intrest (sic)(which I may have w/a few parties involved) may not participate in discussion or voting on a motion or resolution that will be voted on by the board.... I take this to mean that if there is not going to be a vote on a resolution or motion then all members may participate. Any insights?" The Town Administrator responded on 2/24/03 by e-mail and stated, "My advice to any public official is that if a particular matter is to be discussed by a public body, of which that person is ... a member, he should recuse himself and leave the room"

³⁵ The owner of the Allen Harbor Marine Service Company (AHMS) informed the Board that he currently has 35 moorings under his control. He advised that AHMS does not maintain a mooring waiting list for the moorings it controls. He explained that they do have a mooring pool from which they draw persons who are permitted to rent a mooring when one becomes available. He informed the Board that he uses the moorings he controls to generate sales of boats. He stated that if a person just paid a million dollars for a home on Allen Harbor and buys a boat from him, he will "try every which way to get him a mooring."

state, "I would do everything I could in order to sell that boat. Would I take someone off a mooring? No. Would I agree to give everyone who had a mooring last year the opportunity to reup? Absolutely. But if there was one or two openings [for moorings under the control of HPBW] and some gentleman wanted to buy a \$400,000 boat on the condition that he has a place to put it. Is that imperative to the business of HPBW? It is essential. That's the money that keeps the boat yards alive. The mooring fee is great to help with overhead but the business does need those additional monies to succeed and thrive.

He also informed the Board that his client operates from a pool of mooring applicants rather than a list.

Legal Opinion of the Harwich Town Counsel regarding Town Control of Moorings

By letter dated 3/24/03, an Attorney from the law firm of Kopelman and Paige provided a legal opinion to Harwich Town Administrator regarding the legality of returning the power to assign mooring permits to the Harbormaster. The letter reflects that the practice of marine businesses controlling boat moorings has led to widespread allegations of abuse, coercion and unfairness. The letter states that the Board of Selectmen propose to curtail this practice and authorize the harbormaster to exercise exclusive control over the assignment of mooring permits. The letter indicates that the Town Administrator requested a legal opinion on whether retaking control of the moorings by the Town might infringe upon the property rights of the marine businesses that currently control boat moorings. It is the opinion of the Attorney that there is no basis in law for the establishment of property rights in the boat moorings that the marine businesses currently control. He advised that the land beneath the tidal waters (i.e., beyond private property lines) is owned by the Commonwealth and is held for the public trust as part of the public domain. He pointed out that pursuant to M.G.L. c.7, §40E, no person can acquire any property rights by way of easement or adverse possession in lands owned by the Commonwealth. Moreover, the only way such property rights may be obtained by private parties is through an express grant by the Commonwealth or an express act of the legislature.

The Attorney opined that the fact that commercial interests have placed moorings in the Town waters for many years is irrelevant. He advised that M.G.L. c. 91, §10A provides the Harbormaster with the exclusive regulatory power to issue mooring permits. Moreover, the statute declares moorings installed without the Harbormaster's permission to be a public nuisance. The letter concludes by stating, "the fact that the town and the harbormaster may have acquiesced in a permit assignment scheme inconsistent with the statute for many years does not give rise to any legal right or expectation for the continuance of such a scheme."

Recommendations

Based upon the information set forth in above findings, this Office has made the following recommendations:

- The Town should exercise control of all boat moorings located in municipal waters, including those controlled by HPBW. The Legislature, pursuant to M.G.L. c. 91, §10A and 310 C.M.R. 9.07(1), has given authority to harbormasters to control moorings through a permitting process. As such, no person or entity other than the Town, through its harbormaster, can control moorings in Town waters.
- As required by 310 C.M.R. 9.07(2)(a), the Harbormaster shall provide a written procedure for all boat moorings in Town waters for the fair and equitable assignment from a waiting list for new and vacant moorings.
- The Town Harbor Management Plan is currently out of compliance with state law and federal policy and should be amended to accurately reflect the law and any changes adopted by the Board of Selectmen regarding moorings.
- The Town should host ethics training as needed for the Town Waterways Commission to ensure that members do not participate in or vote on matters affecting their own interests.
- This Office will report to the State Ethics Commission allegations of a conflict of interest pertaining to a member of the Town Waterways Commission.