



The Commonwealth of Massachusetts
Office of the Inspector General

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Donna D. Holaday, Mayor
City of Newburyport
P.O. Box 550
Newburyport, Massachusetts 01950

March 31, 2010

RE: Newburyport Waterfront Trust

Dear Mayor Holaday:

This Office received an inquiry asking (1) whether the Newburyport Waterfront Trust ("Trust") is a "governmental body" subject to the Massachusetts Uniform Procurement Act, M.G.L. c. 30B, and, if so, (2) what is the status of a contract between the Trust and Atlantic Fuel, Inc., which was procured without a competitive bid process, and (3) whether the Trust can dispose of "dock space" by lease without a competitive procurement process. Whether or not the procurement statute applies to the Trust rests on the determination of whether or not it is an instrumentality of the City of Newburyport. Our analysis suggests that the Trust is an instrumentality of the city and therefore use M.G.L. c. 30B to procure supplies, services or real property is required.

Chapter 30B applies to "governmental bodies," which the statute defines as "a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county." M.G.L. c.30B, §2.

Based on a review of documents provided, interviews and independent investigation, this Office made the following determinations.

According to its Declaration of Public Trust, the Trust was formed for a public purpose (Art. III); the grantor of the trust and the donor of Trust's property was the City of Newburyport; its trustees are appointed by the mayor and the city council (Art. IV.2); in the event the city does not fill a trustee vacancy, the remaining trustees can petition a court with "jurisdiction over "public trust lands" to appoint a replacement (Art IV.3);

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removal of trustee may be made by a court or by the other trustees and the city mayor (IV.10); the city has the obligation to maintain Trust property and all fixtures and structures (Art. VI.1); the city agrees to indemnify the trustees for any loss or liability and to procure "adequate liability insurance coverage" for that purpose (Art. VI.2); the city shall pay the Trust's management expenses (Art. VII.1); the city shall provide secretarial support and office space to the Trust at no cost (Art. VII.2); Trust meetings shall be public meetings (Art. VII.3); the city shall store the Trust's records (Art. VII.4); and the Trust shall make an annual financial report to the city (Art. IX). In short, the Trust receives public funds and services as well as staff and office space from the city. A 1992 amendment to the Trust states that the trustees shall take no action to impair the Trust's 501(c)(3) tax exempt status. According to IRS records, the Trust is a registered as a 501(c)(3) entity (TIN 223232975) and it filed its last Form 990 in 2008.

In a 2009 letter to the Division of Public Records,¹ a co-drafter of the Trust stated that

[t]he purpose of establishing [the Trust] rather than another department or just another park within the City of Newburyport was to combine the administrative and financial support of a city government, and policy direction by elected official with safeguarding public trust properties within an enforceable trust [The Trust] was created so that a public entity that held public property (plus prospective grants of other property) would be more accountable, and subject to greater oversight than existing municipal government departments.

The Chair of the Trust's Board, on the other hand, says that even though the city used to do so, it gives no funding to Trust. The Trust

grants absolute control and management authority to the Trustees. Whether the obligations of the City to "pay all expenses" were met initially, that is no longer the arrangement and the Trust is self supporting from its fees from boats, and other uses of the Trust's property. For example, parking fees from our 64 parking spaces represent our second revenue generator after the summer tour boats. Private donations, a land lease to the Firehouse Center, fishing vessel winter tie-ups, and summer park event fees make up the rest of our income (in that order of importance).

The City DPW helps us with routine trash and snow removal and occasional tree maintenance. Some assistance from the DPW we pay them for. Unlike City boards or commissions, we do not receive funds from

¹ Letter of William R. Harris to Shawn Williams, Office of the Supervisor of Public Records, Secretary of State, One Ashburton Place, Boston MA 02108 (1/7/09).

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the City or other public sources, ... we do not use City employees to assist us in the conduct of our business. We are scrupulous in not intermingling public funds with our private sources of income. Depending on the health of the City budget, sometimes there is a small amount for the Trust. To utilize that funding we will from time to time forward an invoice to the City Treasurer and it gets paid directly. It has long been my assumption that these procedures were implemented to protect the Trust's private status.

Email from Clifford Goudey, Chairman, Newburyport Waterfront Trust Board of Trustees (12/30/09).

The city's website (www.cityofnewburyport.com/boardwalk) refers to the Trust as a "quasi-public nonprofit organization."

The Massachusetts test of whether or not an entity is a public instrumentality is set forth in two Supreme Judicial Court cases, *Globe Newspaper Company et al. v. MBTA Retirement Board et al.*, 416 Mass. 1007 (1993) and *MBTA Retirement Board et al. v. State Ethics Commission et al.*, 414 Mass. 582 (1993). These cases are referred to collectively as the *Globe Newspaper* test. This Office recommends that municipalities use this test if they are "unsure of whether they must follow M.G.L. c. 30B." *Procurement Bulletin*, v. 8, n. 1 (2/02), p. 4.

The principal factors to be considered are as follows:

1. The means by which the entity was created;
2. Whether or not the entity performs an essentially governmental function;
3. The extent to which the entity receives and/or expends public funds;
4. The involvement of private interests; and
5. The extent of control and supervision exercised over the entity by governmental officials or agencies .

How a court will apply the *Globe Test* depends on the depth of analysis it applies to each of the factors based on the specific facts and circumstances of a case: it is not necessary that all factors be considered or that the court will weigh factors equally.

While this Office recommends that municipalities use the *Globe Test* to determine whether or not an entity is an instrumentality, it does not make determinations of an

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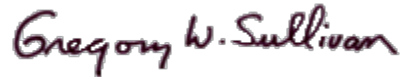
entity's status.

Based on the forgoing, however, a court could reasonably conclude that the Trust is an instrumentality of the City of Newburyport. If so, laws besides M.G.L. c. 30B, including ethics, open meeting, and public records law, would apply to the Trust's activities.

If it is determined that the Trust is an instrumentality of the city and it has failed to follow M.G.L. c.30B requirements, its contracts would be rendered invalid and no payment could be made or service rendered under them. M.G.L. c. 30B, §17(b). Unless they are prepared to request a judicial determination of the Trust's status, I recommend that the city and the Trust agree that the Trust comply with all requirements applicable to governmental bodies under M.G.L. c.30B.

Please contact me with any questions you may have.

Sincerely,

A handwritten signature in black ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan
Inspector General