



The Commonwealth of Massachusetts
Office of the Inspector General

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Mr. David R. Whitcomb
Chairman
Board of Selectmen
549 Main Street
Chatham, Massachusetts 02633

Dear Chairman Whitcomb:

The Office of the Inspector General received a request from a citizen of Chatham (Town) in June 2006 to examine the issue of fairness regarding public access to mooring spaces that were being rented to the public by private boatyards in Town waters. This Office had previously conducted an investigation in 2003 in the Town of Harwich concerning allegations that private boatyards were illegally and unfairly controlling public access to numerous moorings located in public waters.¹ I subsequently ordered a new investigation to determine whether private boatyards in Chatham were operating lawfully and fairly with respect to their control of moorings in public waters.

Investigative Summary

Accordingly, the Town Harbormaster was interviewed by investigators from this Office. He advised that private boat yards collectively control approximately 312 mooring spaces in Town waters which they rent to

¹ The investigation in Harwich disclosed that the Town allowed private boatyards to assign and control numerous moorings without permits in violation of state law and regulations. M.G.L. c. 91, § 10A and 310 C.M.R. § 9.07(1). Moreover, with respect to moorings controlled by private boatyards, the Town failed to follow state regulations pertaining to the requirement that municipal harbormasters create a written procedure for the fair and equitable assignment from a waiting list for use of new or vacant moorings. 310 C.M.R. § 907(2)(a). The Harwich investigation also determined that one private boatyard treated some of its customers unfairly with respect to moorings.

private boat owners. He advised that the private boatyards are required to receive mooring tackle (anchor) permits from the Town that cover the 312 mooring spaces that they control.² The private boatyards are thus able to collectively rent approximately 312 mooring spaces to private boat owners. Each of the private boat owners must also receive a separate mooring permit for their boats from the Town.

According to records supplied by the Harbormaster, the Town issued permit invoices to the boatyards in March 2006. These records reflect that the two boatyards which receive the largest number of boatyard permits from the Town are Ryder's Cove Boatyard (Ryder's Cove) and Stage Harbor Marine (Stage Harbor). Ryder's Cove was billed by the Town for 73 moorings in the amount of \$7,300.00 and Stage Harbor was billed for 48 moorings in the amount of \$4,680.00.

The Harbormaster advised that private boatyards control approximately eight to ten percent of the boat moorings located in Chatham waters. He advised that the Town maintains waiting lists for moorings located in Town waters. There are approximately 1300 people on Town mooring waiting lists. The average waiting list time for boat owners is 8 to 10 years. The Harbormaster advised that vacancies in the mooring spaces controlled by private boatyards are not filled from the Town waiting lists. The boatyards are given complete discretion to fill vacancies at moorings under their control.

As mentioned above, private boatyards rent the moorings under their control to boat owners. The Harbormaster has heard that rental fees for mooring spaces charged by the boatyards range from \$2,500.00 to \$3,000.00 per boat for the boating season. He reiterated that each boat owner must also purchase a mooring permit from the Town. The Town charges resident boat owners \$2.00 per foot for a permit fee and non resident boat owners \$6.00 per foot. He advised that the Town by-laws contain no limits on the number of mooring permits that can be issued to individual boat owners and private boatyards. The Harbormaster stated that he does not know whether private boatyards maintain waiting lists from which they fill vacancies in mooring

² The Harbormaster provided information to this office which reflects that approximately 262 mooring tackle (anchor) permits are issued from the Town to the private boatyard owners for the 312 mooring spaces controlled collectively by these owners. The reason for the difference between the number of permits issued, i.e. 262, and the number of mooring spaces, i.e. 312, is the fact that 100 of the mooring spaces are made up of two boat floats. Each float requires only one town permit for a total of 50 permits. $212 + 50 = 262$.

spaces under their control. He has no input regarding the manner in which the boatyards fill mooring vacancies. They are not accountable to any authority in this regard.

This Office interviewed an assistant to the Chatham Harbormaster who advised that she has heard that some private boatyard owners pass on the fees they pay the Town for mooring permits to their customers. She noted that when this happens, the boat owners end up paying the Town twice for mooring permits. They pay once to the Town for their personal boat mooring permits and again to the boatyard for the fees the boatyard pays the Town.

During the investigation it was alleged that some boat owners were treated unfairly while doing business with the Ryder's Cove Boatyard in Chatham. Subsequently this Office interviewed one boat owner who advised that he obtained a mooring at Ryder's Cove in 1980 and paid the boatyard approximately \$350.00 per year for it until approximately 1992. At that time a new owner took over at Ryder's Cove. Under new ownership, the boat owner's annual fees were raised to \$700.00 or \$800.00 dollars annually. The boat owner continued on a mooring at Ryder's Cove until approximately 1997 when he purchased a new boat from a boat dealer in New Hampshire. He obtained a boat permit from the Town in December 1997 for the new boat and expected that he would be able to continue renting mooring space at Ryder's Cove as he had done for the past seventeen years. However, his expectations were dashed when he received a letter from the Manager at Ryder's Cove in December 1997 which informed him that there was no mooring space available for him for the 1998 boating season. No explanation was furnished by Ryder's Cove regarding their rationale for removing him from a mooring. He expressed shock and dismay at this turn of events.

The boat owner and his wife met with the Ryder's Cove Manager and attempted to obtain a reason for their removal from a mooring. He advised that he received no satisfactory explanation for his removal. The Manager told him that he owns the boatyard and can do whatever he wants. The boat owner sent a letter dated January 7, 1998 to the Town Harbormaster after his meeting with the boatyard Manager. In the letter he stated that during his meeting with the Ryder's Cove Manager, the Manager informed him that he had a waiting list which he wanted to use "so we along with six or seven others were not being renewed." The boat owner further stated in the letter

that the Ryder's Cove Manager also said "that he needed people who would use his services more." The boat owner believes that he was denied a mooring at Ryder's Cove because he did not purchase his new boat from Ryder's Cove. After his complaint was received by the Harbormaster, he was able to obtain a Town controlled mooring in the vicinity of the location of his Ryder's Cove mooring. He continues to dock his boat at the Town mooring and pays the Town a small permit fee annually. He has heard that Ryder's Cove currently charges boat owner's approximately \$1200.00 per season for a mooring space for a 20' boat.

During the investigation this Office interviewed another boat owner who complained that Ryder's Cove took away a boat space from him that he had previously rented from them. The boat owner approached the Ryder's Cove Manager for an explanation and was informed that the space was taken away because he questioned the amount of a boat repair bill. The boat owner was likewise subsequently able to obtain a boat mooring from the Town. The boat owner advised that he has heard that if a person buys a boat from Ryder's Cove, the buyer will also be able to obtain a mooring or a slip from them as well.

In December 2006, an investigator from this Office, acting in an undercover capacity, had a conversation with the Manager at Ryder's Cove about the possible purchase of a boat from Ryder's Cove. The purchase price of the boats discussed was in the vicinity of \$45,000.00. During the conversation, the Manager stated that a person who wishes to obtain a mooring from the Town must wait approximately six years. However, he stated that he tries to "take care of customers" who purchase boats from him. In response to a question about how long he would have to wait if he purchased a boat from Ryder's Cove, the Manager responded, "it could be this year, could be next year."

In a follow-up conversation with the Ryder's Cove Manager, the investigator inquired about the cost of obtaining a mooring space for the boating season for a 21' foot boat that he was thinking of purchasing from Ryder's Cove. The Manager responded by stating that it would cost \$1777.50 for the season to the boatyard and \$126.00 to the Town for a personal mooring permit. The Manager explained that the boatyard fee would include the \$150.00 dollar mooring tackle permit fee that the Town charges Ryder's Cove for mooring the boat.

In December 2006, an investigator from this Office, acting in an undercover capacity, had a conversation with the Stage Harbor Marine Sales Manager about the possible purchase of a boat. During the conversation, the Sales Manager explained that he is a sub-dealer for Bosun's Marine of Mashpee and that his prices are controlled by Bosun's Marine. The Sales Manager explained further that if a purchase was made, he would be able to "provide a mooring for the season." The Sales Manager stated that he intended to keep some moorings available to accommodate buyers who purchase boats from them at the New England Boat Show in February 2007. During a subsequent contact with an official of Stage Harbor Marine, the investigator was informed that it would cost him \$2,250.00 to rent a mooring space for the upcoming boating season.

Law and Analysis

In 2000, the Massachusetts Supreme Judicial Court, in the matter of Farfard v. Conservation Com'n of Barnstable, 432 Mass. 194, stated "[t]he waters and the land under [waters] beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public." Moreover, the Court explained that the "history of the origins of the Commonwealth's public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, persuades us that only the Commonwealth, or an entity to which the Legislature properly delegated authority, may administer public trust oaths." By this language, the Court reaffirmed the absolute duty of the Legislature and other public entities to ensure that public waters are to be held in public trust for the benefit of the public.

Pursuant to M.G.L. c. 91, §10A, the Massachusetts Legislature has, consistent with the view of the Supreme Judicial Court, authorized municipal harbormasters to issue mooring permits for moorings in public waters. The Commonwealth's Department of Environmental Protection (DEP) has been charged with the responsibility of creating regulations that interpret c. 91, §10A. Accordingly, DEP has created Waterways Regulation, 310 C.M.R. §9.07(1) which requires municipal harbormasters to issue mooring permits to prospective applicants under such terms, conditions and restrictions that are deemed necessary by the harbormaster. Further, DEP created regulation, 310 C. M. R. §907(2)(a) which requires municipal harbormasters to create fair and equitable written procedures for the

assignment of persons on waiting lists to new or vacant boat moorings in public waters. The responsibility for deciding who should be assigned to new and vacant moorings in public waters was clearly delegated to municipal harbormasters.

DEP has also promulgated regulation 310 C. M. R. §907(2)(d) which reads in pertinent part as follows: “Nothing in 310 C.M.R. §907 shall be construed to prevent moorings for which permits are issued from being assigned to individual patrons or members of such [recreational boating] facility.” In the past, individuals representing the interests of private boatyards operating in public waters have suggested that regulation §907(2)(d) grants to private boatyards the right to assign moorings to persons of their choice, as long as the boatyards have received mooring permits from the Town. As mentioned above, 310 C.M.R. §907(2)(a) requires municipal harbormasters to create fair and equitable written procedures for the assignment of persons on waiting lists to new and vacant moorings in public waters. To the extent that private boatyard managers interpret regulation §907(2)(d) to give them carte blanche with respect to assignment of moorings under their control, such interpretation is in direct contravention of the spirit and the letter of §907(2)(a). The latter section charges municipal harbormasters with the duty of insuring that new and vacant moorings are assigned fairly and equitably from a waiting list.

Investigations conducted by this Office in Harwich in 2003 and Chatham at the present time have determined that private boatyards place persons on moorings under their control without consulting with the local harbormaster. The Chatham Harbormaster has no input whatsoever in deciding who will be placed on moorings controlled by private boatyards when they become vacant. The Chatham Harbormaster has created a waiting list for the assignment of new and vacant moorings as mandated by DEP regulation §907(2)(a). However, this list, created for the fair and equitable assignment of moorings to the public, is never used to fill vacancies for moorings under the control of private boatyards. In fact, our investigation has revealed that private boatyards in Chatham are ready and willing to provide moorings quickly and expeditiously to customers who are willing to spend significant amounts of money to purchase boats from them. This was the case in Harwich and continues to be the case in Chatham. All the while, hundreds of members public wait for years, marooned on painfully slow moving municipal lists, for vacancies on moorings controlled by the Town to open up.

Boat moorings in public waters should be available to all of the public on a fair and equal basis. Vacancies in boat moorings under the control of private entities, even when covered by permits issued by local harbormasters, should not be left to the unfettered discretion of private boatyard owners. Our investigations in Harwich and Chatham have revealed several examples of boatyards exercising that discretion arbitrarily, by placing personal interest and private gain above the right of the public to fair and equitable access to the public waters.

Boatyards have the power to arbitrarily remove boat owners from moorings without explanation and replace them with more desirable customers', e.g. those who purchase large amounts of goods and services from them. One boat owner in Chatham described a climate of fear that exists among boat owners in Chatham who have their boats moored by private boatyards. For example, he explained that during Town consideration of a recent request by a boatyard for a change in zoning regulations, persons who had moorings with that boatyard were afraid to speak against the request out of fear that they would lose their moorings. This kind of power cannot be left in the hands of individuals who do not represent the interests of the public at large.

By enacting M.G.L. c. 91, §10A, the Legislature intended to place the control of moorings in the hands of municipal harbormasters. The reason for this is clear and simple. The Legislature wisely recognized that municipal waters are to be held in trust for the benefit of all the people. Moreover, it was understood that for this to happen, the power to control moorings in public waters must be given to persons that would be held accountable to the people. Public officials who do not act in the best interest of the people, who act arbitrarily without fairness, are accountable to the people and can be swiftly removed from office. When this power is delegated to private interests, accountability to the public, fairness and equity disappear. Accountability is replaced by personal interest and private gain.

Unless §9.07(2)(d) is interpreted to mean that private entities can assign moorings to their patrons only if they are at the top of a publicly controlled waiting list, it stands in contradiction to the broader provisions of c. 91, §10A and §9.07(2)(a).

Recommendations

- The Town of Chatham, through its Harbormaster, should take all necessary and appropriate steps to assert control over all new and vacant mooring spaces in Town waters that are currently controlled by private entities. From this point forward, private entities should no longer be permitted to decide who is assigned to moorings under their control. All such assignments should be made by the Harbormaster from a written waiting list in a fair and equitable manner;
- Any attempt by private entities to assert authority over mooring assignments by relying on 310 C. M. R. §9.07(2)(d) should be immediately overcome by rescinding mooring tackle permits issued by the Town to these private entities. §9.07(2)(d) is clearly inapplicable in the absence of mooring permits issued to these entities by the Town; and,
- The Department of Environmental Protection is urged to carefully review 310 C. M. R. §9.07(2)(d) and clarify or rescind it on the basis that it clearly contravenes the spirit and letter of 310 C.M.R. §9.07(2)(a) and M.G.L. c. 91, §10A. As currently written, it can be improperly interpreted to delegate the authority of an accountable public official, i.e. the harbormaster, to unaccountable private entities who clearly operate under principles of self interest and personal gain.

Sincerely,

Gregory W. Sullivan

Gregory W. Sullivan
Inspector General