

James Merriam

From: Lauren F. Goldberg [LGoldberg@k-plaw.com]
Sent: Monday, August 02, 2010 5:11 PM
To: James Merriam
Cc: John Giorgio
Subject: RE: waterways fee

Jim,

John Giorgio forwarded the below e-mail and asked me to respond. Specifically, you have requested an opinion concerning the Town's ability to impose a Waterways Fee on boats moored within the Town. I understand that Board of Selectmen voted to impose a Waterways Fee on all boats on moorings or docks within the Town. For persons mooring or docking their boats on Town-owned moorings or docks, the fee has been included in the mooring or dockage fee. For persons mooring or docking their boats on other than Town-owned moorings or docks, the fee has been set at \$125.00. You indicate that the Waterways Fee is being challenged.

In my opinion, the Town may assess a waterways fee, provided that the fee complies with the so-called "Emerson Test."

Municipalities may assess fees whenever the municipality provides a service, issues a permit, or offers a benefit. See Department of Revenue Division of Local Services Technical Assistance Section, "User Fees" summary (attached). However, the fee must be a valid fee rather than an impermissible tax, in my opinion. The case of Emerson College v. City of Boston, 391 Mass. 415 (1984), sets forth the test for determining whether a charge assessed is a valid fee or an impermissible tax, as follows:

1. The fee must be charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of the community.
2. The service must not be compulsory, meaning that the person paying the fee must utilize the service as a matter of choice.
3. The fee must not be used to raise revenue, but instead to offset the cost of governmental services.

In my opinion, the Waterways Fee satisfies all three prongs of the Emerson College test. In Harwich, the Harbormaster is responsible for the performance of duties as set forth in the G.L. c.88, 91, 91A, and 102, the Town Charter and Bylaws, applicable regulations, and other orders. Such responsibilities include: issuance of permits for temporary mooring of floats or rafts and docking of commercial vessels pursuant to G.L. c.91, §§10A and 10C; regulating the movement and anchorage of vessels within the harbor pursuant to G.L. c.102, §21; ordering the removal of any vessel lying within the harbor or at a public wharf, pursuant to G.L. c.102, §§24 and 25; and regulating and stationing all vessels in the channels of the harbor pursuant to G.L. c.102, §26. See Com. v. Caldwell, 25 Mass.App.Ct. 91, 94 (1987). The Harbormaster is also responsible for administering the policies adopted by the Board of Selectmen pursuant to 7-14-3 of the Town Charter. The Waterways Fee is, as I understand it, intended to partially reimburse the Town for costs of operating the harbor generally. While payment of boat excise taxes and mooring and dockage fees also reimburse the Town for some of those costs, the remainder of the funds necessary to operate the harbor and regulate the use thereof are appropriated through the annual budget process and are raised through the collection of real estate taxes assessed upon those who own property in the Town of Harwich. All boats moored or docked in the Town of Harwich are the primary beneficiaries of the Harbormaster's services, and such services are sufficiently particularized to meet the first element of the Emerson test.

Second, boat owners have a meaningful choice as to whether to pay the Waterways Fee and take advantage of the services offered by the Town, or to keep their boats in a different town. Therefore, the second prong of the Emerson College test is also met, in my opinion.

Finally, the fee must be calculated to reimburse the Town for the services provided, rather than to raise revenues. "In order for a monetary exaction to be a fee, however, the equivalence between the cost of providing the services and the revenue collected need not be exact. It is sufficient that the revenue collected is not significantly and consistently in excess of the cost of providing the services." Caldwell, 25 Mass. App. Ct at 97. Although we have not discussed budgetary issues in depth, it is common for harbor operations expenses to exceed the amounts collected through excise taxes, mooring and dockage fees. Therefore, assuming that the Waterways Fee does not result in the collection of revenue that is in excess of the cost of providing harbor-related services, in my opinion, the Waterways Fee will meet the third prong of the Emerson College test.

Additionally, note that in LCM Enterprises, Inc. v. Town of Dartmouth, 14 F.3d 675 (1994) (attached), the First Circuit Court of Appeals held that a waterways fee imposed by the Town of Dartmouth with different rates for residents and non-residents was constitutional. In my opinion, although LCM Enterprises, Inc. does not focus on whether the Town of Dartmouth may impose a Waterways Fee, it implicitly recognizes that imposition of such a fee is consistent with the Town's authority. Further, the court states in a footnote, LCM Enterprises, Inc., 14 F.3d at 680, n.6:

Without delving into the issue of whether the use fee is really a fee or a tax, it is sufficient for our purposes to note that *Metropolitan Life* held that using a discriminatory tax to encourage the formation of domestic companies at the expense of foreign companies was not a legitimate purpose under the Equal Protection Clause. *Id.* at 876-83, 105 S.Ct. at 1680-84. That holding does not apply to the present case because, unlike the tax at issue in *Metropolitan Life*, the aim of Dartmouth's use fee is to equalize disproportionate burdens, not to favor locals at the expense of nonresidents. [emphasis added].

In this case, the Town is clearly not favoring locals at the expense of non-residents. The fee at issue is being imposed on all persons who moor or dock their boat in the Town of Harwich, regardless of whether the owner of the boat resides.

Please let me know if you have further questions concerning this matter.

Very truly yours,

Lauren F. Goldberg, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110
(617) 556-0007 (voice)
(617) 654-1735 (fax)
lgoldberg@k-plaw.com

This message and the documents attached to it, if any, are intended only for the use of the addressee and may contain information that is PRIVILEGED and CONFIDENTIAL and/or may contain ATTORNEY WORK PRODUCT. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please delete all electronic copies of this message and its attachments, if any, and destroy any hard copies you may have created and notify me immediately.

From: James Merriam [mailto:jmerriam@town.harwich.ma.us]
Sent: Friday, July 16, 2010 9:53 AM
To: John Giorgio
Cc: 'Harwich Harbormaster'
Subject: waterways fee

Hi John. Our Waterways Commission implemented a new Waterways fee of \$125 effective July 1st, which is being challenged. Harbormaster Tom Leach has advised me that the Town of Dartmouth Harbormaster successfully won a case challenging the fee. Do you have any knowledge of this case or any other confirmation that a community can implement such a fee? Jim

Sandy Robinson

From: James Merriam [jmerriam@town.harwich.ma.us]
Sent: Tuesday, August 03, 2010 3:20 PM
To: 'Harwich Harbormaster'; 'David Ryan'
Cc: 'Sandy Robinson'
Subject: FW: Waterways Fee - Municipal Finance Issues

Here's a second piece to Lauren's opinion. Jim

-----Original Message-----

From: Lauren F. Goldberg [mailto:LGoldberg@k-plaw.com]
Sent: Tuesday, August 03, 2010 2:07 PM
To: James Merriam
Cc: John Giorgio
Subject: Waterways Fee - Municipal Finance Issues

Jim,

This is to follow-up on our conversation of yesterday's date. We discussed that correspondence from the Harbormaster sent to owners of boats moored in Harwich indicating that Waterways Fees collected by the Town would be placed in the Waterways Improvement and Maintenance Fund. I suggested that further consideration may need to be given to whether the Waterways Fee is a "mooring fee" under G.L. c.91, §10A, or some other type of fee. This distinction is important, as only "mooring fees" under G.L. c.91, §10A and excise taxes under G.L. c.60B, §2(i) may be credited directly to the Town's Municipal Waterways Improvement and Maintenance Fund. Receipts from any other type of fee would be credited to the Town's General Fund in accordance with the provisions of G.L. c.44, §53. In my opinion, if after discussion with the Harbormaster, you determine that the fee is not a "mooring fee," you may nevertheless ensure that the receipts from the fee are spent for harbor-related purposes by creating a revolving fund for such purposes in accordance with the provisions of G.L. c.44, §53E ½.

As you are aware, G.L. c.44, §53 provides that unless otherwise provided by statute, any funds received by any officer or employee of the Town are credited to the Town's General Fund. General Laws c.40, §5G is one such statute. Pursuant to G.L. c.40, §5G:

A city or town may establish a municipal waterways improvement and maintenance fund to receive revenue under subsection (i) of section 2 of chapter 60B and under section 10A of chapter 91 and sums received from the commonwealth or the federal government, and may appropriate monies in said fund for (1) maintenance, dredging, cleaning and improvement of harbors, inland waters and great ponds of the commonwealth, (2) the public access thereto, (3) the breakwaters, retaining walls, piers, wharves and moorings thereof, and (4) law enforcement and fire prevention.

Further, G.L. c.91, §10A provides, "Any mooring fee collected shall be deposited into and used in accordance with the purposes of a municipal waterways improvement and maintenance fund established pursuant to section 5G of chapter 40." Thus, in my opinion, boat excise taxes and mooring permit fees must be credited to the Waterways Fund, and no other funds may automatically be credited to that fund. Thus, in my further opinion, only if the Waterways Fee is a "mooring fee" under G.L. c.91, §10A would the fee, by operation of law, be credited to the Fund. Moreover, as a "revenue fund," in my opinion, no other monies may be credited to the fund, although, of course, the Town may, by vote of Town Meeting, appropriate funds for similar purposes.

General Laws c.91, §10A provides, in part:

Notwithstanding any contrary provision of law, the harbormaster of a city or town or whomsoever 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. He shall act on applications for such permits within a period of fifteen days from receipt thereof.

A reasonable fee for such mooring permit, proportionate to the city or town's cost of overseeing mooring permits, may be imposed by the city or town or whoever is so authorized by the city or town, but no mooring fee shall discriminate on the basis of residence. [emphasis added]

Accordingly, if the Waterways Fee constitutes a "permit" for the "mooring on a temporary basis of floats or rafts held by anchors or bottom moorings within the territorial jurisdiction of the Town," the Waterways Fee would be a "mooring fee" for purposes of the statute. Note that the statute requires the fee imposed to be proportionate to the Town's cost of overseeing mooring permits. In addition, G.L. c.91, §10A provides that any person aggrieved by refusal to permit a temporary mooring, or "by any condition or restriction imposed relative to such mooring," may appeal to the State Division of Waterways within 30 days after notice of refusal, or imposition of a condition or restriction, and that the Division may either confirm or set aside the decision of the Harbormaster. Thus, if the Waterways Fee is a mooring permit, the State Division of Waterways would have jurisdiction to review complaints made concerning the Waterways Fee. Further, as discussed above, if the Waterways Fee is a "mooring fee" issued under the authority of G.L. c.91, §10A, the receipts from the fee would be credited automatically to the Waterways Improvement and Maintenance Fund.

If, however, the Waterways Fee is not a mooring fee, and is instead imposed pursuant to the authority of the Town to seek compensation for the services or benefits it provides, the fee would not constitute a mooring fee under G.L. c.91, §10A. Under such circumstances, the funds received would not be credited automatically to the Waterways Fund, in my opinion. However, to ensure that the funds collected would be used for waterways-related purposes, the Town could create a revolving fund for such purposes. General Laws c.44, §53E ½ generally limits the creation of revolving funds to Annual Town Meetings. However, the law contains an exception for those funding sources, as certified by the Town Accountant, that were not included in the last year's tax levy. Thus, in my opinion, the Town could create a revolving fund at a Special Town Meeting, to which the receipts from the Waterways Fee would be credited, and which fund could be expended for all of the purposes specified in the Waterways Fund statute (i.e., (1) maintenance, dredging, cleaning and improvement of harbors, inland waters and great ponds of the commonwealth, (2) the public access thereto, (3) the breakwaters, retaining walls, piers, wharves and moorings thereof, and (4) law enforcement and fire prevention).

Finally, I note that the Waterways Fee application form includes, at the bottom, the following:

Remember...

Be it known that under Chapter 175 of the Acts of 1987 (Amending General Law Ch. 60 B, S. 4 of the Law imposes two penalties for failure to pay Boating excise tax when due. This includes a \$20 or 20% penalty and the Harbormaster shall refuse to allow the vessel to "moor, dock, or otherwise be situated within the waterways" of the Town, i.e., people from the waiting lists shall be refused dockage or mooring if boat excise or other fees are owed.

The above referenced provision applies only to the boat excise tax assessed under G.L. c.60B. Where the Waterways Fee is not imposed under G.L. c.60B, in my opinion, the penalties provided in G.L. c.60B, §4 would not applied to late-paid Waterways Fees. In my further opinion, therefore, the Town may wish to consider revisiting the inclusion of such information on the Waterways Fee form, and/or clarifying the reminder's application to boat excise taxes only.

Please contact me with any further questions regarding this matter.

Very truly yours,
 Lauren F. Goldberg, Esq.
 Kopelman and Paige, P.C.
 101 Arch Street, 12th Floor
 Boston, MA 02110
 (617) 556-0007 (voice)
 (617) 654-1735 (fax)
lgoldberg@k-plaw.com