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July 14, 2009

Mr. Dennis Jason
Chilmark Harbormaster
P.O. Box 119
Chilmark, MA 02535

RE: Waterways Rules and Regulations - various issues

Dear Dennis:

This letter addresses several questions submitted by Frank Fenner via e-mail.

Question 1: Who has the right to be on the waiting lists for moorings permits and slips leases?

We construe this question to ask whether the Town can limit the waiting lists to Town residents (or other restricted groups).¹ The answer is different for moorings and slips.

a. Slip Lease waiting lists.

Section II(L) of the The Chilmark Waterways Rules & Regulations, approved on October 21, 2008 (the "2008 CWR&R"), defines the "Slip Waiting List" as "a chronological listing of qualified applicants for a harbor slip". The provision further notes:

"There shall be separate waiting lists for the east side of the Filled Dock, the commercial dock on the east side of the Causeway, the floating dock on the east side of the

¹ Under G. L. c. 30B, § 1(b)(17), the Uniform Procurement Act does not require a "lease by a governmental body of its boat slips, berths, or moorings" to go out to bid.

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Causeway, the channel dock on the west side of the Causeway and the charter dock area on the east side of the harbor. Section VI describes the various dock requirements."

The definition of "Slip Waiting List" does not specify who is eligible to be on the various waiting lists. However, the descriptions of the specific docks in Section VI variously restrict each dock to "Year Round Residents", "Chilmark homeowners", "Charter Fisherman who reside in the Town", or a combination of the first two. Section II neither defines "qualified applicant" nor "Chilmark homeowner".

A person excluded from eligibility to lease a slip at a Town controlled facility could challenge the restriction under the equal protection clause of the Massachusetts and Federal Constitutions.² To survive an equal protection challenge, a town need only advance a "rational basis" to justify its regulation if the restriction does not affect a so-called "suspect class" or impinge upon a "fundamental right". See Barlow v. Town of Wareham, 401 Mass. 408, 415 (1988).

In the Barlow case, the Supreme Judicial Court ("SJC") held that "regulations disfavoring non-residents do not involve a 'suspect class' [or impinge upon a fundamental right]." Id. Accordingly, the SJC upheld Wareham's regulation restricting the commercial harvesting of shellfish to residents or taxpayers of the town. The Court relied, in part, on its 1977 holding in Commonwealth v. Petralia, 372 Mass. 452 (1977), where it sustained a Cambridge parking regulation (against an equal protection challenge) excluding nonresidents from parking in certain areas of the city.

A municipal regulation favoring residents must also bear a "reasonable relation to a permissible legislative objective" to pass equal protection review. See Barlow, supra at 416. In the

² Massachusetts Courts apply the same standard of review to equal protection claims under the State Constitution and the Federal Constitution. See, e.g., Dickerson v. Attorney Gen., 396 Mass. 740-743 (1986).

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Petralia case, for example, the SJC reasoned that the resident/nonresident parking classification system did not violate the equal protection clause because:

"Those Cambridge residents most interested in parking in a restricted area are those who live in it. If they leave their cars parked near their homes, they contribute nothing to air pollution or to the congestion of moving traffic on the highways. In general, those Cambridge residents who do not live in the restricted area but are permitted to park in it have a shorter distance to travel and contribute less to traffic congestion and pollution than will persons driving to the restricted area from other municipalities. Legislative classifications need not be perfect in order to survive a challenge on equal protection grounds." 372 Mass. at 518.

The Town could advance sufficiently similar reasons to restrict leasing of its finite number of Town slips to Year Round Residents or Chilmark homeowners. Accordingly, it is my opinion that the Town's decision to restrict the leasing of Town-owned slips, and the attendant waiting lists, to Town residents/homeowners would be likely to survive a challenge under the equal protection clause.³

b. Moorings.

Moorings are on different footing. Section 9.07(1) of DEP's waterways regulations states, in pertinent part:

³ In LCM Enterprises, Inc. v. Town of Dartmouth, 14 F.3d 675 (1st Cir. 1994), the First Circuit Court of Appeals considered an equal protection challenge to Dartmouth's harbor usage fee schedule, which imposed higher fees on nonresidents "who use the waterways of Dartmouth for more than limited periods of time." 14 F.3d. at 677. The plaintiffs in that case owned boats which were "habitually moored or docked in Dartmouth." Id.

The Dartmouth regulation at issue defined "resident" as: a registered voter; a person domiciled in the Town; a person who pays real estate taxes to the town; or a spouse or dependent of any of the above. See id.

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"A written application for an annual permit must be submitted to the harbormaster of a city or town . . . for the placement on a temporary basis of moorings, floats, or rafts held by bottom-anchor, and ramps associated thereto which are located within the territorial jurisdiction of the municipality. . . . A city or town implementing 310 CMR 9.07 shall not discriminate against any citizen of the Commonwealth on the basis of residency, race, religion, sex, age, disability or other illegal distinction."
(emphasis added).

As discussed in Town Counsel's March 28, 2008, opinion regarding mooring permits, Section 9.07(2)(A) provides as follows:

"The harbormaster . . . shall provide a written procedure for the fair and equitable assignment from a waiting list for use of vacant or new moorings, floats, or rafts held by bottom-anchor, and ramps associated thereto."

Given the plain meaning of Section 9.02, the Town cannot restrict its mooring permit procedure to Town residents only: mooring permits (and the right to be on the waiting list) are available to all residents of the Commonwealth. In addition, as set forth in the answer to the question regarding slips, a nonresident of the Commonwealth could raise an the equal protection challenge under the Federal constitution if denied a right to apply for a mooring permit. Therefore, limiting the mooring wait list to residents of the Commonwealth raises both practical and legal issues.⁴

⁴ Many Chilmark "homeowners" or "taxpayers" may be considered to be "residents" of another state, and could base a challenge under the federal constitution. While we cannot predict with certainty whether such a challenge would be successful, a nonresident taxpayer would claim that his or her taxes contribute to the overall support of the Harbor.

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Question 2: Can we limit slip leases/mooring permits to one per "household"?

Again, the answer is different for slips and moorings. Based on the limited number of slips available - and because slips are not governed by Section 9.07(1) - it is permissible for the Town to limit issuance of slip leases on Town-owned property to one per "resident". Further, it is my opinion that, based on the equal protection cases noted above, it would be permissible for the Town to limit its lease of slips to one per "household" on which the applicant's residency is based.

For example, were the Town to adopt a definition of residency similar to the one used by Dartmouth (and reviewed by the First Circuit in the LCM Enterprises case (see supra note 3)), it would be permissible to add language to the 2008 CWR&R defining a "qualified applicant" for a slip lease to be a "resident" with a further limitation that, if the Town has issued a slip lease to another resident based on the same residential address or the same Assessors Map parcel for which taxes are paid, then the second resident is not eligible for an additional slip lease.

As to moorings, it is my opinion that Section 9.07(1) precludes the Town from a.) distinguishing between residents and nonresidents, and b.) from discriminating based on age (although with reasonable safety parameters, see below). Therefore, siblings and children, whether residents of the same household or not, have the right to apply for a mooring and maintain a place on the mooring waiting list.

As to limiting age as a safety issue, it is my view that requiring a mooring permit applicant to be 18 years of age is reasonable and consistent with 310 CMR 9.07(1).

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Question 3: Elimination of the so-called "B" List.

I construe your concerns regarding the "B" List⁵ to ask whether it would be permissible to transfer those currently on that list to the Channel Dock waiting list (where, you suggest, they would be placed at the bottom of the present Channel Dock waiting list.) The answer to your question is "yes", provided that the Town adopts a definition of resident which would make those on the B List eligible for a slip lease.⁶

Section II(L) of the 2008 CWR&R states, in part: "A person may be only on one slip waiting list at a time and anyone moving from one slip waiting list to another will start as a new applicant for that list." Accordingly, under that provision, a B List person who is a "homeowner" could voluntarily switch to the Channel Dock waiting list, but would lose his or her chronological preference. Thus, there is no unfairness in transferring the whole list over, in one move, and placing the B List applicants at the bottom of the Channel Dock waiting list.

Question 4: Can we limit rental of one slip lease per household?

I have addressed this question raised in point 4 of Mr. Fenner's email in previous answers. As noted above, I am of the opinion that the Town can legally restrict the awarding of slip leases to one per "household" by revising the definitions of resident and inserting a definition of "qualified applicant", but that a similar restriction cannot be imposed on mooring permit applicants.

⁵ As we understand the B List, it is comprised of Chilmark "taxpayers" who are not "Year Round Residents". Presumably a "taxpayer" is a "homeowner" (not a defined term) and therefore is qualified to lease a slip on the Channel Dock according to Section VI H.

⁶ Under the 2008 CWR&R, a "homeowner" is eligible for a slip on the Channel Dock; but, as noted, you have told us that "taxpayers" who are not "Year Round Residents" have historically been eligible for the B List. There consequently could be a distinction between a "taxpayer" and "homeowner".

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Please call with any further questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. A. Goldsmith", with a long horizontal flourish extending to the right.

Michael A. Goldsmith

MAG/jmh

cc: Frank Fenner
Tim Carroll