

RE: Waterways Rules and Regulations
Tim,

You will see my suggested revisions in the redline version attached. A few additional comments:

1. Residency requirements for slips: as discussed in an opinion dated July 14, 2009 from our office (attached), the restriction of leasing slips to residents/homeowners would likely survive a legal challenge (which challenge would be brought under the equal protection clause). The Town has a rational basis to exclude from eligibility those who are non-residents and/or non-homeowners and there is a reasonable relation to this permissible legislative objective. Note that the same does not apply for moorings (DEP regulations make clear that a town may not restrict its permitting for mooring based on residency). From what I understand the proposed revisions continue to only impose residency requirements for slips and NOT moorings.
2. Section III G: Swimming and Diving.
 1. MGL c 91 s. 10D provides: "No person shall be denied access during daylight hours to commonwealth tidelands across any land available to the public for swimming or recreation which is owned or controlled by the commonwealth or any of its political subdivisions for the purpose of scuba diving or skin diving which activities are hereby declared to be water dependent uses; provided, however, that if such tidelands are at any time closed to access by the general public, such access by such scuba diver or skin diver shall not be permitted." "Tidelands" is defined as "present and former submerged lands and tidal flats lying below the mean high water mark."
 2. Is the area closed for "recreation" (a term that is not defined in MGL c 91) such that the Section III G of the Chilmark WRR will not conflict with c. 91 s 10D?
3. Transfer of mooring permit to surviving spouse only.
 1. DEP has promulgated regulations, 310 CMR, governing how the Harbormaster is to issue mooring permits under MGL c. 90 s 10A. The relevant provisions are:
 - 1.310 CMR 9.07(1): "Any permit may contain such terms, conditions and restrictions as deemed necessary, consistent with the requirements of 310 CMR 9.07.... 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."
 - 2.310 CMR 9.07(2)(a): "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, floats or rafts held by bottom-anchor and ramps associated thereto."
 - 3.310 CMR 9.07(2)(c): "No permit for a mooring, float or raft shall be transferrable to another person, except to a person within the immediate family of the permittee upon approval of the harbormaster."
 2. A town may impose more restrictive regulations than the statute/state regulations (i.e. transferability more restrictive) so long as they are not in conflict with the state statute/regulations. Because the permit is a privilege/permission (rather than a vested property right), there is no right to inherit said permit. In addition, I do not think that this regulation equates to an "illegal distinction" under Section 907(1): a permit holder who is single would not have a valid discrimination claim against the restriction on transferability. Thus, it is my opinion this is a valid term of the mooring permit.

Isabelle

