

Management Letter - **Torbay Borough Council**

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Reference:	Torbay Borough Council
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Introduction

1. During the course of my audit of the Torbay Borough Council accounts for the year ended 31 March 2001, I have received a number of representations from local government electors in the council's area about the manner in which the council applied, or failed to apply, certain provisions in the scale of fees and charges relating to the use of various facilities provided by the council at Brixham Harbour. The local media has also shown interest in this area of the council's operations. This management letter specifically addresses these issues. It is the second management letter I have sent you as part of my audit of the council's 2000/2001 accounts.
2. One of the representations referred to above constituted a formal objection under section 16 (i) of the Audit Commission Act 1998. The objection required me to:
 - Take action under section 18 of the Act and certify that a sum is due from certain officers and members of the council in respect of a loss caused by them through willful misconduct; and
 - Exercise my powers under section 8 of the act and issue a report in the public interest.
3. Although I have not upheld either part of this objection, in my view it has highlighted a number of instances of poor administrative practice and disregard for proper procedures. This letter is intended to make members aware of the issues which have been referred to me and the actions necessary to address them.

Scale of Charges

4. The charges to be levied at all harbours operated by Torbay Borough Council are specified in a scale of charges reviewed annually. In the year ending 31 March 2001 the relevant scale of charges was approved following consideration of a report reference Corp/2/00 and Strat/2/00 submitted to a meeting of the Council's Harbour's Sub Committee held on 26 January 2000.
5. The scale of charges included the following provisions relating to Motor Fishing Vessels (MFVs) not having moorings or berths at Brixham, but using the facilities there to land fish:

"7 Quayside Berths (Laying alongside or placed on quay)

(ii) (b) Registered MFVs per meter per year when engaged in fishing and paying fish tolls to Torbay Council (otherwise charged as private craft) £10.96 per meter"

And:

"14 Other Charges

(e) Charges for Water and Electricity

*Water: For water supplied from the Council's standpipes
up to 50 tonnes, per tonne*

£2.00

50 tonnes and over, per tonne

£1.05

Electricity: Purchase of cards (plus VAT at 5%)

£0.95

Use of electricity point per day (plus VAT at 5%)

£4.76

6. As regards pleasure craft, the scale of charges includes the following:

"2 Harbour Dues

(i) Private craft including pleasure craft for hire seating six or less (per meter per year or part)

Paignton and Brixham

£17.21

(ii) Passenger carrying pleasure craft

Open boats and decked boats under 25 GRT (per meter LOA) £23.03

Fully decked Boats 25 GRT (per GRT)

£17.00"

And:

"4 Moorings (all measurements LOA)

BRIXHAM

Trot moorings per meter per annum

Outer harbour

£43.08"

7. The scale also includes the following general note:

"In exceptional circumstances the Harbour Master may, for a specific purpose, vary the harbour charges in agreement with the harbour user."

Motor Fishing Vessels

8. MFVs are accommodated in Brixham Harbour at a purpose built quay reserved exclusively for their use and known as the 'Fish Quay'. This was first built in 1971 and extended in 1991.
9. In practice, the separate charges for laying alongside the quay specified in section 7 (ii) (b) were not levied in the year ended 31 March 2001. The harbourmaster for Brixham Harbour, Captain Paul Labistour, has told me that in the year in question there were just over 100 registered MFVs operating out of Brixham Harbour, and has estimated that the total income forgone as a result of not applying these charges would have been some £21,000.
10. It is common ground that the charges specified in section 7 (ii) (b) have never been separately enforced. I understand Council officers are not now able to establish with certainty how long a provision similar to this has been incorporated in the scale of charges, although in interview the Director of Strategic Services said he thought that the provision for such a charge had been in existence since the fish quay was first built in the 1970s. In any event it has not been applied in practice to vessels using the fish quays, at least since construction work on the extension to the fish quay was initiated. He told me there were two reasons for this.
11. First, all vessels using the fish quay are charged a percentage of the value of their catch (2.5 percent in the year in question) for all fish landed on the quay. Given this charge it was considered inappropriate and unfair to levy an additional charge for mooring alongside the quay, and also likely to provoke a backlash from the fishermen that could threaten the long term future of the fishing fleet in Brixham. Thus in effect charges for mooring alongside were assumed to be included within the toll for landing fish.
12. Second, some fishing vessels moor up for only a few hours to discharge their fish, possibly overnight when there may be no harbour staff on duty, so it would be administratively difficult to ensure any separate charge for mooring alongside was applied consistently.

13. Similarly no separate charges have been made for supplies of water and electricity to vessels using the fish quay. The harbourmaster has told me that the total charge for the year arising from the electricity meters which serve the fish quay was just under £28,000. The total charge on the relevant water meter was just under £4,500.
14. The volume charges for water and electricity consumed have never been applied at the fish quay despite having been included in the scale of harbour charges since 1998/1999, I am told as the result of a drafting error. It has been pointed out to me that the infrastructure of the harbour, and specifically the location of the electricity and water meters, is such that it is simply impractical to apply a metered charge. (I note in passing that this begs the question of whether it would be to the financial benefit of the council to invest in the infrastructure of the harbour to facilitate the application of this charge)
15. As far as the flat rate per day charge for the use of an electricity point is concerned (ie £4.76 plus VAT), I have been told that the short duration of stay of some MFVs, sometimes out of working hours, again would make it administratively difficult to ensure this charge was applied consistently.
16. I make no comment on the merits or otherwise of these arguments, but I note that the scale of charges in force at the relevant time provided for these charges to be levied. The scale included no specific provision allowing Council officers discretion in this. I accept it was widely recognised that these charges were not applied, but in my view in such circumstances the correct course would have been to report the position to members and invite them to delete the charges concerned from the charging scale. In fact officers continued year after year to propose a scale of charges that included these charges, which they then routinely ignored. Such a course of action undermines the process of democratic accountability and at its best speaks of administrative sloppiness which reflects poorly on the council.
17. In the immediate term, however, the council must now decide how it will deal with the discrepancy between the provisions of the scale of harbour charges for the year ended 31 March 2001 and the charges that have been levied in practice. Given that the scale of charges was created as the result of a lawful resolution made on 26 January 2000, the question now arises of whether the present council would be acting unlawfully if it failed to enforce these charges.
18. I note in this context that the council has now obtained an opinion from Counsel in relation to the issues raised in the objection referred to above. I note specifically that, having considered the relevant legislation, in his 'further opinion' dated 14 November 2003 Counsel expresses the view that:

'It seems to me that it is possible for the authority to roll up charges for water and electricity together with fish tolls into a combined charge' (Paragraph 11); and

'It therefore follows that, as a matter of law, the authority's published list of charges did not need to include any combined charges, composition agreements or rebates in particular cases. Accordingly, to the extent that arguments have focused on the precise wording of the authority's charges booklet, as a matter of law that booklet is not exhaustive in these respects. Even though the booklet may not have made the position entirely clear, or may not have accurately spelt out the position in relation to rebates given in particular cases, or to levying a combined charge by way of a fish toll which included alongside berthing fees and water/electricity charges in certain cases, this would not involve any breach of statutory duty' (Paragraph 13).

19. Thus in effect this opinion allows the view that officers were not necessarily acting improperly in failing to levy charges for mooring alongside, water and electricity separately in addition to fish tolls, although I note that the responsible officers would not have had the benefit of Counsel's analysis at the time they took the relevant decisions. I also draw a clear distinction between what is legally permissible on one hand and sound administrative practice on the other. Just because a council has not acted unlawfully in a particular situation does not absolve it from criticism.

Pleasure Craft – Heritage Vessels

20. As regards the charges for pleasure craft, a number of challenges have arisen as a result of the way these charges have been applied to a group of boats known as 'Heritage Vessels'. Although in the year in question no formal definition of the term "Heritage Vessel" had been formulated, the term had been applied to a small fleet of boats satisfying certain criteria (eg British built prior to 1936 etc.), and as such considered to be of a design that enhanced the overall environment of the harbour and so contributed to its attraction as a tourist destination.
21. In the year ended 31 March 2001, these vessels were charged harbour dues in accordance with section 2(i) of the fee scale ie as private pleasure craft. The question arises as to whether at least some of them should have been charged under section 2(ii) of the fee scale, as passenger carrying pleasure craft, on the basis of their gross registered tonnage (GRT). I have been given different answers to this question at different times, but as far as I can understand in essence there are two points.
22. First, there are now no reliable figures for the GRTs of these vessels. I have been told that they have undergone substantial modification since their original GRTs were measured, to the extent that those GRTs are now meaningless and would not provide a reliable basis for charging.
23. Second, the harbourmasters are uncertain whether or not all the vessels concerned were acting as passenger carrying pleasure craft in the year ended 31 March 2001.
24. I have been told that the council's officers will now investigate these vessels and raise supplementary invoices to cover the difference in the two charging bases if appropriate. I have also been told they will not. I am still unclear on the council's definitive position on this issue and the council will need to decide what action it will take.
25. For my part I am satisfied that the difference in the charges due on the two different bases is in all probability negligible. The harbourmasters have supplied me with a calculation suggesting that the charges to some vessels would increase if they were reclassified as passenger carrying craft while for others they would reduce, and suggesting that overall the total income to the council in the year ended 31 March 2001 would have been reduced by around £200. I am unable to endorse all elements in this calculation but I am nevertheless satisfied that, as already noted, any difference is very small. Nevertheless, I do however regard this question as highlighting another example of poor administrative practice at Brixham Harbour.

26. I find it disturbing that this fleet should be operating out of Brixham Harbour without the harbourmaster or anyone else in the council knowing whether they were acting as passenger carrying craft or being able to formulate a coherent plan of what to do when faced with the suggestion that they were. Although the direct financial implications of this failure may not have been great, there are wider implications. Section 22 of the Tor Bay Harbour Act 1970 gives the Council power to license passenger carrying pleasure craft operating from its harbours. As part of the licensing process I understand the council is required to check, among other things, that the vessel concerned holds a Certificate of Compliance with Maritime and Coastguard Agency requirements, to obtain a declaration of insurance etc. Clearly this is an important responsibility and it is disturbing that, even at this stage, the officers responsible are unsure whether they have failed to discharge this responsibility properly or not.
27. I further note that the vessels concerned were given a 50 percent discount on the charges calculated in accordance with section 2(i) of the fee scale. I have been given different reasons at different times as to why this discount has been granted. It has been pointed out to me that the council's scale of harbour charges permits a 50 percent discount to visiting vessels of special interest and/or vessels operated by registered charities.
28. The harbourmasters have also drawn my attention to the general note to the harbour charges which allows the harbourmasters to vary those charges 'in exceptional circumstances'. The term 'exceptional circumstances' is not defined but in my view the word 'exceptional' implies unusual, non routine, possibly emergency situation. This was not the case with the so called 'Heritage Vessels'. They operate regularly out of Brixham Harbour and have now done so for a number of years. It is their routine and as such it is not 'exceptional', although I recognize that in the year ending 31 March 2001 not all of these vessels were operating out of Brixham and those that were were newly arrived. I also note in counsel's opinion dated 16 October 2003 his view that the exceptional circumstances discretion could apply to all the Heritage boats
29. The harbourmasters have told me that individual members of the Harbours Sub Committee were aware of and supported the use of these discounts. This may well be true but does not detract from the fact that the council had every opportunity, over a number of years, to approve explicitly the use of these discounts but did not do so.
30. In fact the value of the discounts is not great, in the year ended 31 March 2001 they totalled to less than £4,000 all told, but the failure to put them on a proper footing has left the council vulnerable to criticism which could, and should, have been avoided.

Conclusions and Recommendations

31. In the year ended 31 March 2001, the council did not apply certain discrete provisions in the scale of fees and charges relating to various facilities provided to MFVs by the council at Brixham Harbour, specifically, those charges specified in sections 7 and 14 (e) of that scale. The council should now:
- Decide what action it is required to take to regularise this position, and specifically whether it now intends to recover the income foregone as a result of not applying the separate charges for mooring alongside, water and electricity (In this context I draw attention to paragraph 22b of Counsel's opinion dated 16 October 2003);
 - Review its current scale of charges to ensure that it accurately reflects the council's intentions regarding all charges contained in that scale; and
 - Enforce the charges specified in the new scale.

32. As far as the so called 'Heritage Fleet' is concerned there is still doubt over whether these vessels should be properly classified as 'passenger carrying pleasure craft'. The council should now:
- Clarify the status of these vessels as a matter of urgency and satisfy itself that it is discharging its function as a licensing authority properly in relation to these vessels;
 - Clarify whether it wishes to award any discounts from the standard scale charges or any other special concessions to these vessels, and if so to reflect any such concessions in the fee scale explicitly (I note in this context that in paragraph 22a of his opinion dated 16 October 2003, Counsel states that in his view this is not legally necessary. Nevertheless, given the public interest in this issue the council should in my view take this opportunity to make its position absolutely clear); and
 - Consider whether it should recover any income foregone from these vessels in previous years.
33. I can confirm that I am now able to close the audit for the year ended 31 March 2001.

Alun Williams
District Auditor

Date: 19 January 2004