

## Statement of Reasons - Brixham Harbour Fees and Charges

### **Torbay Borough Council**

**This is a statement of reasons relating to an objection to the accounts of Torbay Borough Council for the year ended 31 March 2001, issued in accordance with Section 18 (5) of the Audit Commission Act 1998**

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#### **STATEMENT OF REASONS**

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<b>Reference:</b>	Torbay B.C – Statement of Reasons –
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## Introduction

1. I am the auditor appointed by the Audit Commission for Local Authorities and the National Health Service pursuant to section 3 of the Audit Commission Act 1998 ("the 1998 Act") to audit the accounts of Torbay Borough Council ("the Council") for the financial year ended 31 March 2001.
2. In exercise of the rights conferred by section 16(1) of the 1998 Act, Mr A. Tostevin, and Mr W Walker local government electors in the Council's area ("the Objectors"), made objection to the accounts of the Council for the year ended 31 March 2001. The objection concerned 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 objection

3. The Objectors made this objection to me in an exchange of correspondence the most important of which was a letter dated 7 June 2002. The objection can, in my view, be summarised as follows.

### **Regarding Motor Fishing Vessels (MFVs), the Council:**

- Failed to levy mooring charges for quayside berths on registered MFVs engaged in fishing and paying fish tolls to Torbay Council, as prescribed in Section 7 (ii) (b) of the council's scale of harbour charges for the year ended 31 March 2001 (ie £10.96 per meter per year or part);
- Failed to levy charges for water, as prescribed in Section 14 (e) of the council's scale of harbour charges for the year ended 31 March 2001; and
- Failed to levy charges for electricity, as prescribed in Section 14 (e) of the council's scale of harbour charges for the year ended 31 March 2001.

### **Regarding five so called 'Heritage Vessels' namely Leader, Provident, Pilgrim, Regard and Vigilance, the Council:**

- Failed to levy the harbour dues appropriate to those acting as passenger carrying pleasure craft in the year, as prescribed in Section 2 (ii) of the council's scale of harbour charges for the year ending 31 March 2001;
- Improperly awarded a 50 per cent discount on the harbour charges levied; and
- Failed to levy the charges for mooring fees prescribed in Section 4 of the council's scale of harbour charges for a trot mooring in Brixham outer harbour in the year ended 31 March 2001 on the vessel 'Vigilance'.

A copy of the council's scale of harbour charges for the year ended 31 March 2001 is attached as appendix I.

## The Auditor's Duties

4. Section 18 of the 1998 Act provides:

*"(1) Where it appears to the auditor carrying out an audit under this Act, other than an audit of accounts of a health service body.....*

*(a) that any person has failed to bring into account a sum which should have been brought into account and that the failure has not been sanctioned by the Secretary of State, or*

*(b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person,*

*the auditor shall certify that ..... the amount of the loss or deficiency is due from that person.*

*(2) Subject to subsections (4) and (8), both the auditor and the body concerned..... may recover for the benefit of the body a sum or amount certified under this section as due; and if the sum or amount is certified to be due from two or more persons, they shall be jointly and severally liable for it". Whilst this section has now been repealed it was in force during the period covered by the objection and hence it is appropriate for me to consider an objection under this section*

5. The passage of the Local Government Act 2000 provided a mechanism for Section 18 to be disapplied and in due course repealed. The issues subject to the objection made to me pre-date the application of the provisions of the Local Government Act 2000. In accordance with the provisions of the Interpretation Act 1978 I am of the opinion that I have jurisdiction in the matter of this objection.
6. Wilful misconduct means deliberately doing something which is wrong or wrongly omitting to do something, knowing it to be wrong or with reckless indifference as to whether it is wrong or not (Graham v Teesdale (1983) 81 LGR 117). This definition which must be read so as to include wrongful omissions to act was cited with approval in Lloyd and Others v McMahon [1987] 1 AC 625. Misconduct occasioned by imprudence, negligence, excess of zeal, misplaced enthusiasm, error or lack of judgement falls short of wilful misconduct.
7. I am mindful of the seriousness of a charge of wilful misconduct. I remind myself that, although a section 18 enquiry is not a criminal proceeding, it should take a large volume of evidence to tip the balance in favour of a positive finding of wilful misconduct, because the accusation is serious and the consequences of such a finding are grave (see Lawton LJ in Lloyd and Others v McMahon [1987] 1 AC 625, 647).
8. In later correspondence the objectors asked that I certify a sum due arising from failure to bring a sum to account within the meaning of section 18(1)(a) of the 1998 Act. I have therefore also considered whether any duty falls on me in this regard.

## Relevant facts

9. I have already issued a management letter to the Council, which sets out the background to the events which are the subject of this objection. I do not propose to repeat that material here, rather I have included a copy of that management letter as appendix II to this statement of reasons. Instead I will focus only on those considerations impacting directly on my decision regarding this objection. This statement of reasons should therefore be read in conjunction with the attached management letter.

## Consideration of objection

### Motor fishing vessels

10. The harbourmaster for Brixham Harbour, Captain Paul Labistour, is the council officer directly responsible for enforcing the appropriate harbour charges on relevant activities taking place within Brixham Harbour. In exercising his duties he is directly accountable to Captain Kevin Mowatt, the senior harbourmaster for Torbay and ultimately Mr Tim Whitehead, the council's Director of Strategic Services. All three officers have confirmed to me in interview that they were aware of the significance of Section 7 (ii) (b) in the scale of harbour charges current for the year ended 31 March 2001 and that it was not applied in practice thus foregoing, I have been told, an estimated £21,000 income in the year. They also told me that in general members of the council's Harbour's Sub Committee and other senior officers were also aware of this although they were unable to produce any documentary evidence to substantiate this. In any event the harbourmasters accepted responsibility for the decision not to apply the charge.
11. Essentially they explained their failure to apply this charge by pointing out that although it had existed as an element in the scale of harbour charges since prior to their respective appointments, this charge had never to their knowledge been applied. From council reports and minutes it appears that this element of the harbour fees was suspended during the extensive work carried out during 1991 and in practice was not reinstated. They thus regarded themselves as merely conforming to established precedent and considered the inclusion of this item in the scale of harbour charges as an 'anomaly'.
12. They further argued that if Brixham based MFVs were required to pay these mooring charges in addition to the tolls they already paid for landing fish, this could undermine the long term future of the Brixham based fishing fleet.
13. I have already made the point in my management letter that in such circumstances in my view the proper course is for officers to report the situation to members and to invite them to take the appropriate action. In this case presumably to remove this item from the scale of charges. They failed to do this. I nevertheless accept that the officers were genuine in their belief that they were acting properly in not levying this charge, and that in their view this belief was not wholly unreasonable. I therefore conclude that although in my view these officers' actions fell short of proper administrative practice, there has been no willful misconduct on their part. Given that the harbourmasters have accepted responsibility for the failure to apply this charge, I can see no case for a willful misconduct decision against any other person.
14. As regards charges for water, the infrastructure of Brixham Harbour is such that there is currently no way of establishing the volume of water taken on by an individual vessel mooring at the fish quay. To do so it would be necessary to meter the supply to each vessel. This could not be done in the year in question, and indeed still cannot be done. As such this

element of the scale of charges cannot be applied. Therefore in my view there can be no question of willful misconduct in failing to apply it.

15. The situation with electricity charges is slightly more complex. As with water, there exists no way of metering the volume of electricity consumed by individual vessels moored at the quay, so again this part of the scale of fees and charges is impossible to apply.
16. It should however be possible, in theory at least, to levy the flat rate charge per point per day ie £4.76 plus VAT. But again I note the harbour masters' point that they thought they were justified in following established precedent and not applying this charge at the fish quay. I note also their point that some vessels use the electricity points at night or when there are no harbour staff on duty, so ensuring this charge was levied equitably and consistently would be impossible. Given the above I conclude that although there has been clear administrative sloppiness in the way that an (in part) impractical scale of charges has been presented for members approval, this falls well short of willful misconduct.

### Heritage vessels

17. I note that none of the vessels identified in the objection were licensed as passenger carrying pleasure craft in the year ended 31 March 2001, although there is still considerable doubt over whether at least some of them should have been so licensed.
18. I regard this as a serious issue, although the (direct) financial cost to the council in terms of income forgone due to the use of the 'incorrect' (if indeed it was incorrect) basis of charge is not great. I have already noted in my management letter that following modifications to the vessels concerned it is now doubtful that their original GRTs are a realistic basis on which to calculate charges but the harbourmasters have supplied me with a calculation that the difference in income accruing to the council from applying the two different bases of charging is some £200 per annum in total.
19. I accept that the harbour masters thought that in using the lengths of the vessels involved as a basis for calculating harbour dues they were adopting a pragmatic solution to the problem generated by the uncertainty regarding their correct GRTs. I further accept that they were not clear that the vessels were operating as passenger carrying pleasure craft and therefore whether the use of GRTs as a basis for charging was appropriate. I consider they should have been much more proactive in seeking clarity on this issue, but as already noted I am satisfied that any losses (if there were any) were negligible and were not a consequence of willful misconduct.
20. 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, worth a little under £4,000 in the year. I have already noted in my management letter that I have been given different reasons at different times as to why this discount has been granted. Essentially, however, the harbourmasters have drawn my attention to a provision in the harbour charges which allows them to award discounts to registered charities and also to a general note which allows them to vary the prescribed charges 'in exceptional circumstances'. They argue that whether or not a particular vessel was operated by a registered charity was of little consequence since in practice if a member of the heritage fleet had not qualified for a discount as a registered charity it would have been awarded the same discount under the 'exceptional circumstances' provision.
21. I have reservations about this argument. The term 'exceptional circumstances' is not defined but in my view, as I have already said in my management letter, the word 'exceptional' implies unusual, non routine, possibly emergency situation. Given that the heritage vessels operate out of Brixham on a regular basis, I am not convinced that the discounts provided to these vessels could be described as a response to 'exceptional circumstances'. Nevertheless I

accept that the harbourmasters genuinely believed (wrongly in my view) that this provision could be used in such a way. Given this belief was genuine, then I can see no case for a finding of willful misconduct.

22. As regard the part of the objection focusing on the mooring fees for the vessel 'Vigilance', I note that moorings are let to individual members of the public or organizations, not to specific boats, and that the fees are calculated as an annual charge on the mooring concerned, based on the length of the vessel it is anticipated will occupy it. It is I understand common practice for the actual boat assumed to be using the mooring to change in the course of the year ie the use of the mooring is not limited to a specific vessel. In the case in question the mooring fee concerned was based on the assumption that the mooring would be occupied by a vessel with a maximum overall length of 28.04 meters. In fact Vigilance is only 23.77 meters in length.
23. Thus there was no loss to the council through Vigilance's use of this mooring.

### Failure to bring to account

24. I have also considered whether a duty falls on me to certify a sum due from any person as a result of failure to bring to account a sum which ought to have been brought to account under section 18(1)(a) of the 1998 Act.
25. In *R v Roberts* (1901) 2 KB 177, the court upheld a decision to surcharge an officer who, pursuant to a decision of the council, did not collect fees prescribed by statute. *R v Roberts* is an isolated decision. Whilst superficially analogous to the facts in the current case, I believe that this case may be distinguished in the following regards:
- In *R v Roberts* there was a personal statutory duty placed upon the officer to collect sums which he did not collect; in the current case no personal statutory duty to collect fees fell on any officer
  - In *R v Roberts* the fees to be collected were prescribed by Parliament whereas in this case the fees to be collected were in the discretion of the body.
26. I am not, therefore, of the opinion that any officer of the council failed to bring to account a sum which they ought to have brought to account.

### Conclusion

27. I have given careful consideration to the evidence and submissions before me, whether or not specifically referred to in this document. Given this material, I conclude that although there is evidence of poor administrative practice and disregard for proper procedures, I can find no willful misconduct. Accordingly, I am satisfied that I am not under any duty under section 18 of the 1998 Act to certify any sum as due from any person.
28. This document constitutes my statement of reasons for my decision. The Objector has a right of appeal to the Court against my decision not to uphold his objection. The enclosed form AF74 (Appendix III) gives guidance as to the appeals procedure

**Alun Williams**  
**District Auditor**

**Date: 19 January 2004**