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RE: BRIXHAM HARBOUR CHARGES

OPINION

INTRODUCTION

1. I am asked on behalf of Torbay Council ("the Authority") to advise in relation to a number of matters relating to an audit inquiry concerning charges made at Brixham Harbour.
2. I need not set out the background in any great detail. Formal objection to items in the Authority's accounts has been made (enclosure 12 with my instructions, dated 7 June 2002 from Mr Tostevin). In short, it is alleged that certain vessels were not charged the proper amounts for using the harbour in the financial year 2000/2001 in accordance with the published scales approved by the Authority. This is said to amount to a failure to bring sums into account within s18(1)(a) Audit Commission Act 1998.
3. The vessels concerned are 5 so-called "Heritage Boats" (*i.e.* pre-1935 vessels with a strong local connection) and motor fishing vessels (MFVs - *i.e.* boats landing fish at Brixham). In relation to the 5 Heritage Boats, it is alleged that a 50% discretionary concession was wrongly applied by the

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harbour master. In relation to MFVs, it is alleged that there was a failure to levy alongside berthing charges and water/electricity charges.

4. The Authority have denied any wrongdoing.
5. I am asked, broadly, whether the charges were properly levied; and if not, about action which might be open to the Authority.

HERITAGE BOATS

6. The published charges for 2000/2001 are set out in an 8 page booklet. In relation to the position concerning Heritage Boats, there are 2 passages in the booklet which appear relevant: first, on the first page, at paragraph 7 it states:

"Visiting vessels of special interest and/or vessels owned by Registered Charities to be eligible for a 50% concession on applicable Harbour Charges at the discretion of the Harbour Master." (The "paragraph 7 discretion".)

Second, at the end of page 8, it states:

"GENERAL NOTE: In exceptional circumstances the Harbour Master may, for a specific purpose, vary the harbour charges in agreement with the harbour user." (The "exceptional circumstances discretion".)

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7. Two of the Heritage Boats ("Leader" and "Provident") are shown on a schedule produced by the Authority (appended to enclosure 12) as being respectively managed or owned by registered charities.

8. In my view, the granting of a 50% concession in respect of "Provident" appears to be within the paragraph 7 discretion, and I see nothing to indicate that the discretion was wrongly exercised. The position in relation to "Leader" may be the same, if it is in fact also owned as well as managed by a registered charity; and it might furthermore be the case that the reference to ownership in the charges booklet was intended to cover boats run and managed by charities as well. This is a point which my instructing solicitor might wish to investigate.

9. In any event, on its face, I see no reason why the exceptional circumstances discretion could not also apply to all the Heritage Boats. "Exceptional circumstances" cannot of course be defined; nor is "specific purpose" defined. In principle, the encouragement of the Heritage Boats, which appear to be small in number, seems to me to be capable of being both exceptional and a specific purpose.

10. Mr Tostevin seems to make 2 factual points in his objections: first, that an agenda for the Authority's harbours sub-committee dated 22 October 1998 apparently referred to the discretion in limited terms; and accordingly second, that there was collusion between the Authority's officers and the owners of the Heritage Boats to "bypass the democratic process". I should

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note that I have not seen this agenda, nor been given instructions in relation to it. Nonetheless, there appear to me to be at least 3 possible answers to Mr Tostevin's point: one a matter of principle, and the other 2 being matters of fact.

- a) First, as a matter of principle, although I have not been specifically referred to the legal source for the Authority's *vires* to set the harbour charges, it is very likely that this source confers a discretion on the Authority as to the amount of the charges. Inherent in this would be the discretion to reduce or waive charges in particular cases. As a matter of general administrative law, a discretion cannot be fettered (see *eg A-G ex rel Tilley v Wandsworth LBC* [1981] 1 WLR 854, CA). A decision therefore either to impose a blanket rule, or to create only defined exceptions to a general rule, would in general be unlawful. Accordingly, the background material to which Mr Tostevin refers would not, in my view, as a matter of principle operate to confine the Authority's discretion to waive or reduce charges. And in so far as the agenda may have purported to do so by way of an instruction to the harbour master, it might well have been *ultra vires* and void. Thus I doubt that reliance can be placed on the material to which Mr Tostevin refers.

- b) Second, the Authority's scheme of delegation to the harbour masters (in the version I have, approved *by the Authority* during 2000) provides:

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"6.1 In exceptional circumstances and for a specific purpose to vary the harbour charges in agreement with the harbour user."

There is nothing in the scheme of delegation which limits the discretion of the harbour master, provided the circumstances are exceptional and the variation is for a specific purpose. Accordingly, whatever may have been the position in 1998, at least by 2000 when this scheme of delegation was adopted, the harbour master's discretion was as stated in the booklet of charges.

c) Third, as a matter of fact, the materials before me do in fact indicate that the concessions which were given were the subject of consideration by members and officers. The letter dated 20 February 2003 from the Authority's director of strategic services to the external auditor (enclosure 13) refers to a number of documents demonstrating this, although I have not seen these.

11. Accordingly, it does not appear to me to be the position that the harbour master failed to recover charges in accordance with the requirements of the Authority.

12. If I was wrong as to my analysis as above, in my view it would nonetheless be open to the Authority to ratify the concessions. This follows from the Authority's discretion mentioned above (though the position would be different if there were a duty to fix and recover a specific charge). If

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members were to be asked to do this, they would need to be informed of all the circumstances as set out in my instructions and as referred to above, together with any other relevant information. Essentially, it would need to be explained to members what the amounts involved were, how the concessions had come to be granted, and the reasons why it was considered appropriate to ratify those concessions in the face of the objections to the Authority's accounts.

MOTOR FISHING VESSELS (MFVs)

13. The charges booklet makes a number of references to MFVs. Such charges appear under the heading "Harbour dues" (para 2), "Moorings" (para 4), and "Quayside Berths" (para 7). A charge based on the value of fish sold is made under para 13, headed "Goods shipped, unshipped or transhipped within the harbour". And charges for water and electricity are made under para 14, headed "Other charges".

14. In my view, there is nothing on the face of the booklet to indicate that all these various charges are not (as one might expect) separate and cumulative, rather than alternatives. Indeed, to the contrary, the charge for quayside berths at Brixham specifically states (my emphasis):

"Registered MFVs per metre per year or part when engaged in fishing **and paying fish tolls** to Torbay Council (otherwise charged as private craft) 10.96".

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15. Accordingly, on its face, it seems to me that the charges booklet provides for MFVs to pay for alongside berthing and water/electricity in addition to the fish toll under para 13.

16. This reading of the booklet, however, does not tally with actual practice. Moreover, the Authority's letter (above) dated 20 February 2003 to the external auditor states:
 - a) that the imposition of alongside berthing charges for MFVs, first suggested in 1986, was deferred in 1991 pending a working party which, on the available evidence, never appears to have reported back; and

 - b) that the Authority's intention from 1992 was to include a charge for water and electricity within the fish toll under para 13.

17. I have not seen the material to which the above letter refers. On its face, however, it seems to me the letter asserts that the charges booklet does not reflect the underlying decision of the Authority to fix the charges. An analogy in a private law context would be the argument that an instrument fails to reflect an agreement reached between the parties, giving rise to a claim for rectification of the instrument in order for it to accord with that agreement.

18. The charges booklet is the Authority's own booklet, and it seems to me that it is for the Authority in the first place to determine what was intended, and

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whether the booklet accords with that intention. If the booklet does not accord with the Authority's intention, then the booklet must be read subject to what was intended. Accordingly, it would be open to the Authority to determine that it was never intended to charge MFVs for alongside berths and water/electricity, and that such charges were accordingly never due.

19. There seems to me to be good evidence that this was in fact the position. The report to the Authority's harbours sub-committee on 24 January 2001 (enclosure 16), which considered the charges for 2001/2002, specifically stated:

"4.7 The [fishing] fleet already benefits from very competitive rates for harbour dues, no "alongside" fees, and no charges for electricity and water usage."

This seems to me to be very good contemporaneous evidence as to the position in 2000, as reported to members in 2001.

20. Furthermore, on 23 January 2002, after some issues about the charges had been raised by Mr Tostevin, the harbours sub committee resolved to adopt revisions to the charges identified in report Corp/5/02 and Strat/4/02, specifically recognising that at Brixham MFVs were not subject to any alongside berthing charge in addition to the fish toll.
21. In so far as there remains any doubt, at member level, as to what was intended, it seems to me to be sensible for this to be clarified by an

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appropriate resolution. This would not be a question of waiving charges which were otherwise due, but a clear statement that it had been the intention of the Authority not to impose alongside berthing and water/electricity charges in addition to the fish toll on MFVs at Brixham, and that the charges booklet for 2000/2001 failed to make this clear.

CONCLUSIONS

22. In summary, and addressing in order the specific questions I have been asked (with the same lettering), I advise as follows.

- a) The exceptional circumstances discretion does cover the granting of the concessions for the Heritage Boats. If I were wrong about that, it would in any event be open to the Authority (though not in my view necessary) to ratify these concessions, as to which I have set out above what would need to be considered.
- b) Although the charges booklet indicates on its face that MFVs were subject to alongside berthing and water/electricity charges in addition to the fish toll, there is good evidence to show that this was not the intention of the Authority. Accordingly, the Authority should make clear by resolution what the true intention was and, if this was the case, make clear that no amount additional to the fish toll was intended to be due for MFVs at Brixham and has not been due. In reaching such a decision, the position needs to be set out fully for

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members, explaining Mr Tostevin's objection, setting out the response in the letter (above) dated 20 February 2003 and the supporting documents, the report to the harbours sub-committee on 24 January 2001 (with the relevant committee minute), the minute and report for the meeting on 23 January 2002, and the memorandum dated 20 May 2002 from the harbour master to the Authority's internal audit (enclosure 14).

- c) On my analysis of the position, it does not appear necessary for the Authority to waive any charges, so this point does not arise. I shall, however, be pleased to consider it if it becomes necessary to do so.

- d) On my analysis of the position, it does not appear necessary for the Authority to offset any charges by a matching grant payment, so this point does not arise. I shall, however, be pleased to consider it if it becomes necessary to do so.

- e) On my analysis of the position, the Authority are not bound to take steps to recover any additional charges. Accordingly, it does not appear to be necessary to consider whether, if recovery of additional charges were to be attempted, any estoppel would arise (though I consider that the relevant defence may well be one of change of position rather than estoppel). If the Authority were, on the contrary, to decide that such charges are and remain due, the position would of

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course be different; in which event I shall be pleased to consider the point further.

- f) On my analysis of the position, the problem of evidencing actual usage of water and electricity in order to calculate an appropriate charge does not arise. I shall, however, be pleased to consider it if it becomes necessary to do so.

23. I shall be pleased to give any further assistance which may be necessary.

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