

1 to be paid (which they did). Thus, the Millers argue, because the same fee purchases fewer services, the
2 policy was a *de facto* fee increase and, therefore, should have been adopted by regulation (if at all). The
3 Millers seek a refund of the higher fees they paid, over and above the annual rate.

4 ***Discussion.***

5 The Docks and Harbors Code, CBJ 85.20.010, provides:

6 **85.20.010 Rentals, fees, and terms.**

7 All mooring and stall rentals, fees, and other charges for use of boat harbor facilities, terms of
8 rental agreements, and procedures for applying for space and making rental payments shall be
9 established by the board by regulation. Failure of any boat owner, master, operator or managing agent
10 to register or pay mooring or service fees provided by this title shall be presumed to be an
11 abandonment.

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13 CBJ 85.02.060(a)(2), governing general powers of the Docks and Harbors Board, provides the
14 authority to:

15 (2) Adopt pursuant to CBJ 01.60 and enforce regulations necessary for the administration of the
16 facilities under its management.

17 These are the primary CBJ Code sections cited by the Millers in support of their argument that the
18 Board must set fees by regulation rather than by policy. There is no question that the Board did not adopt
19 the Statter Harbor Winter Space Management plan by regulation; the policy was adopted by motion only.
20 Although there was notice provided of the Board meeting at which the policy was adopted, the specific notice
21 requirements of the CBJ regulatory process set forth in CBJ 01.60 were not followed.

22 The Millers acknowledged at oral argument that the Board has the authority to pursue the same goals
23 in the Statter Harbor 2004 Winter Space Management plan, if it does so by regulation; the Assembly
24 concurs.

1 The Assembly notes, based on a document provided by the City Attorney outside the record on
2 appeal, that the Army Corps of Engineers no longer requires vessels in Statter Harbor to periodically vacate
3 the harbor. That document, a Permit Modification dated 16 October, 2003, provides in part:

4 The permit is hereby modified to eliminate and remove from further use in this DA [Department of the
5 Army] permit and all subsequent modifications, all language, wording and/or conditioning as pertains
6 to the duration and location of ‘transient moorage’ within Statter Harbor.

7 This Army Corps Permit Modification indicates that the Board is no longer constrained by the Corps directive
8 regarding transient moorage in Statter Harbor. Under CBJ Title 85, Docks and Harbors fees must be set
9 by regulation, not mere Board policy.

10 ***Remedy.***

11 The Assembly grants the Millers’ appeal. Harbor fees must be set by regulation pursuant to CBJ
12 01.60.

13 The Board shall rescind its Statter Harbor 2004 Winter Space Management plan, and proceed to issue
14 regulations allocating space in Statter Harbor, and setting fees.

15 The Docks and Harbors Department shall refund to the Millers the difference between the fee they
16 actually paid and the amount they would have paid at the annual fee rate. The Department shall also make
17 available the same refund to other vessel owners who would have been eligible to pay the annual fee but
18 chose to pay the higher monthly or seasonal fee.

19 In granting this appeal, the Assembly does not wish to see the Board require vessels to vacate Statter
20 Harbor every ten days (or similar period). In other words, the Assembly wishes the long-standing “Winter
21 Grace Period” to remain in effect. Either of two theories could apply: 1) The Assembly could find that the
22 Board *de facto* adopted the Winter Grace Period as a regulation in February, 2004, when it adopted the
23 new fee schedule which referred to the Winter Grace Period; or 2) the existence of the Winter Grace Period
24 for the past twelve years – pre-dating the Title 85 rewrite requiring all fees to be by regulation pursuant to
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1 CBJ 01.60 – could be given preclusive effect or the *de facto* force of regulation. In addition, the record
2 includes a memorandum from the Port Director to the Board dated November 24, 2003, providing:

3 The winter grace period currently runs from October 1 to March 30. The [Finance] Committee
4 recommends the Board extend the winter grace period to April 30 because the busy season does not
5 start until early May.

6 [R. 115].

7 In this 2003 memorandum, the Board (Port Director) has acknowledged that the Winter Grace Period exists;
8 and accordingly, it would be improper for the Board to revert from a long-standing, acknowledged policy
9 that has been in effect every winter since 1992.

10 In any event, the Assembly understands that the Harbors Department is presently in the process of
11 promulgating regulations on the Statter Harbor Winter Space Management Policy which will presumably, be
12 in force in the near future. The Winter Grace Period shall be in effect until those regulations are effective.

13 The Clerk shall refund the Millers' appeal fee.

14 **Conclusion.**

15 Harbor fees and space management policies have a substantial impact on the public, and many harbor
16 users, like the Millers, have substantial investment to protect in their boats. The CBJ regulatory process, with
17 specific requirements for public notice and opportunity to be heard, is intended to aid vessel owners and
18 others in protecting their investment and their use and enjoyment of Harbor facilities.

19 The Assembly acknowledges that the Board is struggling to solve a difficult, near intractable, space-
20 management problem at Statter Harbor under time and budgetary constraints and within the CBJ Code. The
21 Assembly appreciates the Board's efforts to seek comprehensive solutions. The Assembly also wishes to
22 acknowledge the excellent job done by Mr. Preston in presenting the Board's oral argument on short notice.

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1 The extraordinary efforts of volunteer Board members makes possible the governing structure envisioned by
2 the CBJ Charter.

3 DATED this 25th day of January, 2005.

4 ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

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6 
7 By: Bruce Botelho, Presiding Officer on Appeal

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9 I:\ASSEMBLY\2004\Appeals\Miller\2005-01-16 Order granting Miller Harbors appeal in part.wpd

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