Submission on Mooring Management Bylaw 2010 (MDC File ref L225-01)

Background

MBMA is an incorporated society with over 340 fully subscribed members. Of the approximately 180 mooring owners in Waikawa Bay, 120 are members of MBMA.

Existing moorings in Waikawa Bay were authorised by previous legislation under Harbour Board Bylaws. Moorings are required to be re-validated under the Resource Management Act (RMA).

There were a number of options to validate the existing moorings under the RMA. Council decided that individual mooring holders should apply for a coastal permit under the RMA. The applications were publicly notified. Port Marlborough Ltd (Port Marlborough) submitted on mooring applications as it wanted to expand its marina facilities in Waikawa Bay. MBMA was formed around this time to represent the interests of mooring and marina berth holders in Marlborough.

A single hearing was held for all mooring applications as a bulk lot in April 2008. The case was heard by Commissioner John Maassen. The Commissioner identified fundamental legal flaws in being able to approve all the mooring applications. This was mainly due to the fact that many moorings were not located in accordance with their previous authorisations and also many mooring swing circles overlapped.

The hearing was adjourned to enable the parties to discuss alternative methods to deal with the issues.

Port Marlborough and MBMA representatives have subsequently worked together to investigate alternative proposals that could provide for Port Marlborough's aspirations, provide for validation of existing moorings and that also could provide for better management of the existing moorings in the Bay. A representative from the Marlborough District Council chaired many of the meetings.

The agreed solution was for a combined bay-wide approach that would include new Mooring Management Areas and also provide for a new marina zone on the north-west side of the Bay. In terms of the moorings in Waikawa Bay, this co-operative process has culminated in proposed Mooring Management Areas in Plan Change 21. The intent of the proposed bylaw was to allow for a simple licensing system for moorings within the Mooring Management Areas rather than requiring individual resource consents.

General Matters of Submission

MBMA in general terms supports the proposal for a bylaw to safely and efficiently manage moorings in Waikawa Bay.

MBMA acknowledges that the provision of a bylaw to enable management and licensing of moorings, is a logical adjunct to the concurrent proposed Plan Change 21.

MBMA agrees that a licensing system for individual moorings by means of a bylaw, is preferable to the alternative of individual resource consent applications for each mooring in the Bay. MBMA considers that a licensing system has the potential to be more flexible, to manage moorings more efficiently and to provide more certainty to mooring owners than individual resource consents.

MBMA's good will in jointly promulgating and supporting the establishment of the proposed Moorings Management Areas and a relevant Bylaw was based on a desire for current mooring owners to ultimately gain very clear rights to occupy, sell or sub-lease their moorings under a simple licensing system.

Many MBMA members are more concerned with the detail of how their moorings may be managed in the future rather than the legislative framework. It is unfortunate that the draft Mooring Management Plan and also the draft Mooring Licence were not publicly notified as part of the information package so that potential submitters could more completely understand the nature of the proposed bylaw and how it would operate. It is also unfortunate that MBMA were not consulted on the final form of the Bylaw before it was notified.

However MBMA accepts that the Marlborough District Council, through its facilitator Toby May, has consulted with as many of the existing mooring owners as possible and it is hoped that through that process most of those mooring owners will understand the mechanics of how their moorings will be managed.

MBMA considers that there are some essential matters in the Management Plan that should be transferred to the Bylaw, to provide assurance for its members that those matters can not be changed at the discretion of the Moorings Manager.

MBMA also considers that the limits on decision making by the Mooring Manager need to be referred specifically back to the Bylaw, the Management Plan or the Licence as relevant.

The process of setting licence fees is also loose and is not aligned in any way to reasonable market values.

Specific Matters of Submission on the Proposed Bylaw

MBMA's submission on specific clauses of the proposed Bylaw is as follows. Changes are underlined:

> **Clause 3.1 -** definition of terms. The meaning of *owner* should include reference to the mooring and licence as well as the vessel. MBMA suggests the following wording or similar:
>
> > *Owner means the person <u>who is the licensee and</u> who is for the time being responsible for the <u>provision and maintenance and other relevant obligations under this Bylaw for the mooring and also the management of the vessel when on that mooring as set out in this Bylaw and associated Licence.</u>*

Clause 5.1(c). This clause needs to be qualified in terms of the intent of the Bylaw, the terms of the Licence and the rules of the Management Plan rather than being open ended. MBMA suggests the following wording or similar:

> *Comply with <u>any</u> other reasonable directions issued by the Moorings Manager <u>that may be necessary to achieve the safe, efficient and equitable management of moorings as determined by this Bylaw, the Licence and the Mooring Management Plan</u> on the basis that such directions by the Moorings Manager shall be in writing unless the exigencies of the situation require an oral notice to be given.*

Clause 6.1. This clause is not clear enough that sub-leasing of moorings is also provided for. MBMA suggests the following wording or similar:

> *No person may moor or permit any vessel to be moored in any Moorings Management Area unless such person has been issued with a licence <u>(which may include approval to sub-lease the mooring)</u> by the Moorings Manager enabling the mooring of such vessel in such Area.*

Clause 6.2(c). This clause needs to be qualified in terms of the intent of the Bylaw, the terms of the Licence and the rules of the Management Plan rather than being open ended. MBMA suggests the following wording or similar:

> *Comply with <u>any</u> other reasonable directions issued by the Moorings Manager <u>that may be necessary to achieve the safe, and efficient mooring of such a vessel as determined by the this Bylaw, the Licence and the Mooring Management Plan</u> on the basis that such directions by the Moorings Manager shall be in writing unless the exigencies of the situation require an oral notice to be given.*

Clause 7.4(a). The terms of the Licence and Management Plan determine the circumstances in which a licence can be terminated and should not be at the discretion of the Mooring Manager. MBMA suggests the following wording or similar:

> *Every mooring licence shall include the following terms and conditions:*
> *(a) A term that the licence shall end on the 30th day of June following the date on which the Licence was issued but on the basis that unless <u>there is non compliance with the terms of the Licence or the Licence is voluntarily surrendered by the Licensee</u>, the Licence shall be renewed for a further term of one year commencing on the 1st day of July next following and shall thereafter continue on a rolling term basis unless and until terminated by the Moorings Manager <u>for reasons of non compliance with the terms of the Licence or the Licence is voluntarily surrendered by the Licensee.</u>*

Clauses 7.4(b). MBMA is concerned that this clause is open for abuse and that such costs may not reflect fair and reasonable commercial rates and may include (as with many Council fees), 'cost of democracy' costs which are not directly attributable to the management of moorings. MBMA also is concerned that there is no transparent process for challenging the fees that may be set. MBMA suggests the following wording or similar:

> *A term that the holder of the licence shall pay all reasonable fees as shall be determined by Marlborough District Council in terms of the Local Government Act 2002, Part 6, Subpart 3, and as determined elsewhere in this Bylaw and as publicly notified from time to time in terms of Section ???? of the Local Government Act 2002 . Such fees shall not be unfairly discriminatory against any particular licensee and shall be of uniform application according to reasonable classifications.*

Clause 7.5. MBMA is concerned that this clause is open for abuse and that such costs may not reflect fair and reasonable commercial rates and may include (as with many Council fees and rates), 'cost of democracy' costs which are not directly attributable to the management of moorings. MBMA suggests the following wording or similar:

> *The reasonable fees for which Marlborough District Council shall be entitled to recover shall be such as to allow a fair and proper recovery of all costs incurred or likely to be incurred by Council in relation to the particular Mooring Management Area. Such fees shall be in general accord with fair and reasonable commercial market costs or where that is not applicable, to fees as set by other local authorities in New Zealand for the management of moorings. Such fees shall include: ……*

Clause 8.1. This clause provides excessive power for the Moorings Manager to unilaterally change the rules under which moorings are managed and does not provide certainty for MBMA members on some critical matters.

MBMA suggests that the words "*or for such other reasonable purposes as may be associated with the Moorings Management Area",* be deleted from 8.1(a).

MBMA also submits that some matters that are contained within the Mooring Management Plan should be included in the Bylaw to protect them from potentially being unilaterally changed by the Mooring Manager. Inclusion of these matters as set out below is consistent with Bylaws dealing with moorings in other parts of the country.

The sections of the draft Management Plan that MBMA considers should be included in the Bylaw are as follows. In addition some suggested changes to the relevant clauses are shown underlined:

- **2. Sublicensing.** There is a need to clarify that moorings can be sublet by licence holders. MBMA suggests the following wording or similar and that this be inserted into the Bylaw document:

  2.1 A licensed mooring holder may lease their mooring to another party provided-
  (a) Written notification is given to the Moorings Manager.
  (b) There are no outstanding fees applying to the subject mooring.
  (c) The mooring has been serviced within the last two years or as otherwise specified by the Moorings Manager.
  (d) The subject vessel is an appropriate type and size for the allocated water space or approved mooring system.

- **3.0 Transfers.** There is a need to clarify that moorings can be sold by licence holders. MBMA suggests the following wording or similar and that this be inserted into the Bylaw document:

  3.1 A mooring may be sold or transferred and the associated licence transferred by a licensee and the rights and obligations of a licensee under a licence shall be transferable in accordance with the provisions of that licence.

Draft Mooring Management Plan and Mooring Licence

These two documents were not publicly notified, but were discussed by Councils facilitator in consultation with mooring owners. MBMA had sighted these draft documents but until it was publicly notified, had not sighted the final form of the draft bylaw.

While MBMA acknowledges that Management Plan and Licence documents have not been publicly notified, now that MBMA has sighted all three documents, MBMA wishes to provide further comment on the Draft Management Plan and Licence to deal with issues of concern with the Draft Bylaw.

Draft Management Plan

As stated above under the heading of Clause 8.1, MBMA considers that clauses 2.1 and 3.1 of the Management Plan should be transferred to the Bylaw to protect them from potential unilateral change by the Mooring Manager. MBMA also submits that the changes to those statements as underlined also be made to clarify their intent.

Draft Licence

Clause 2(a). This clause is too open to interpretation by the Mooring Manager. It should be subject to the terms of the licence (and therefore also the rules of the Management Plan) not the discretion of the Mooring Manager. MBMA suggests the following wording or similar:

> *This licence shall begin on the Commencement Date specified in the Licence and shall end on the 30th day of June next following the Commencement Date. The licence shall automatically be renewed for a further term of one (1) year commencing on the 1st day of July next following and shall thereafter continue on a rolling basis unless and until terminated due to non-compliance with this Licence.*

Clause 3. The setting of fees needs to be tied in with the suggested amended provisions of the bylaw which require a better level of accountability for setting of fees. MBMA suggests the following wording or similar:

> *The licensee shall pay all reasonable fees as shall be determined by the Mooring Management Bylaw 2010.*

Clause 5. This clause is too restrictive. For example people could be travelling overseas for 3-4 months and could lose their mooring due to oversight of non-payment well in advance of the due date or due to a mooring management issue that arises after they leave the country. MBMA suggests the following wording or similar:

> *The Moorings Manager may terminate this Licence with immediate effect and without prejudice to the Mooring Manager's legal rights and remedies in the event that the Licensee is in serious breach of the Licensee's obligations.*
>
> *Non-payment of the Licence Fee for more than sixty (60) days from its due date constitutes a serious breach.*
>
> > *The Mooring Manager must notify the Licensee of a serious breach in writing and provide the Licensee at least sixty (60) days to put the breach right.*
> >
> > *In the event of termination under this clause: ….*

Clause 6(a). There appears to be no justification for payment of fees one month in advance. This could cause administrative problems for example as in the case of payment of transfer fees on sale of a mooring. MBMA suggests the following wording or similar:

> > *The Licensee has the following financial obligations:*
> >
> > *(a) To pay all licence fees. These fees are to be paid within thirty (30) days of the date of invoice. In the event that …..*

Clause 9(a). There is a need to clarify that moorings and the relevant licence may be transferred. MBMA suggests the following wording or similar:

> *This Licence and mooring are personal to the Licensee but the mooring and licence may nevertheless be transferred by the Licensee to some other person or persons subject to compliance with the following:……*

Clause 12. This clause is confusing as to whose negligence the Council and Moorings Manager are not responsible for. For the sake of clarity MBMA suggests the words '*This exclusion of liability includes liability for negligence'* be removed or similar.

Decision

The decision MBMA wishes Council to make is to approve the Bylaw including the relevant amendments or similar as suggested by MBMA in this submission.