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January 9, 2023

City of Bayfield Harbor Commission
125 South First Street
Bayfield, WI 54814

RE: Harbor Commission Operations

Dear Billie & Harbor Commissioners:

This letter is in response to your request for a legal opinion on several aspects of the City of Bayfield marina and its Harbor Commission (“HC”).

Question 1: Why would the City choose to have a Harbor Commission?

The two main reasons that municipalities in Wisconsin elect to manage marina facilities through a harbor commission is the efficiency and expertise that it provides and the opportunity to generate additional revenue for the city. Most importantly, Wisconsin Statutes do not authorize a municipality to use its harbor facilities as a general revenue source unless it runs through a harbor commission. Wisconsin Statutes § 30.35(2a) provides that a municipality (that is not run through a harbor commission) can only set rates and charges for use of harbor facilities “sufficient for the payment of the cost of operation and maintenance of such facilities” and for the other operational and improvement expenses of the harbor facilities. This is contrasted with § 30.38(9), Wisconsin Statutes, that authorizes a harbor commission to set fees and charges for the use of harbor facilities *without* the restriction that such fees and charges be solely for the purpose of offsetting the costs of harbor operations. Thus, the establishment of a harbor commission allows revenue from the marina operations to exceed the operational costs and to act as a general revenue source for the City.

Question 2: Why is the Harbor Commission made up of unelected officials?

Response: Wisconsin Statutes § 30.37(3) sets the requirements for who may serve on the harbor commission. The statutes allow a harbor commission to be made up of 3, 5, 7, or 9 members, and the City has elected to have a five member harbor commission. The Mayor is granted the authority to appoint the members to the Harbor Commission, similar to the Mayor’s authority to appoint members to most other commissions/committees in the City. Any such appointments are required to be approved by the Common Council. The appointment and confirmation structure to select commission members allows for efficiency in filling these vacancies without having to go through a whole election while also giving the elected council members oversight and final approval authority on who may serve in such positions.

Question 3: Does the HC have the authority to decide the fate of the Apostle Islands Marina and how it’s operated?

Response: Yes. Once the City decided to move forward with a harbor commission format for its marina operations, the Harbor Commission essentially has complete operational control over any harbor facilities such that the Common Council cannot take direct control of those operations. Several actions from the Harbor Commission still need consent of Common Council, including to (1) financially obligate the City; (2) make any improvements, constructions, or expansions to the harbor facilities; (3) expend any funds for repairs to harbor facilities that are in excess of the revenue from harbor operations or designated funds in the Harbor Fund; or (5) charge any fees for the use of harbor facilities. The statutes also state that the HC does not have the authority to enter into leases without the City's consent unless the City waives that right. The City's ordinance § 21-7(L)(4) grants the HC the exclusive right to lease the harbor facilities without further approval from the City.

Question 3: Assuming the HC has this authority, the Statutes indicate they are not empowered to “financially obligate” the City in any way without Common Council’s approval. Does this mean the HC could use its own revenues to pay its debt OR any time a loan is needed the City Council must approve?

Response: This section means that the HC cannot require the City to provide any financial assistance to the HC without the Common Council's consent. In reality, this typically would arise in instances where the HC cannot obtain a loan in the City's name to fund harbor improvements/operations without consent from the City. Also, Wis. Stats. § 30.38(7) specifically states that the HC may make repairs to harbor facilities without obtaining the city's consent *to the extent that funds, “including revenue from harbor operations, are available for such purpose.”* This section implies that, if funds are not available from harbor operation revenue, then the City would have to consent to contributing additional funds to the HC for harbor maintenance. Section 21-7(I) of the City's ordinances specifically states that the HC cannot obligate itself to any amount in excess of what has been designated to the Harbor Fund budget. Thus, the enabling ordinance for the HC limits its ability to take on financial obligations in excess of its generated revenue and the amount allocated to the Harbor Fund.

Question 4: The HC has had several closed-session discussions of the marina lease, was the use of closed session appropriate for these matters?

Response: It does not appear that the HC acted improperly in discussing matters relating to the Marina Lease in closed session. The agendas for the HC meetings have said for nearly two years that this was a topic of discussion and the HC would contemplate meeting in closed session to discuss these items. The public was put on notice of the topic being discussed (the dock lease expiration) and the purpose for the closed session (discussing potential negotiating tactics and bargaining points). The reason that the agendas need to be specific on the topic that may be discussed during closed session is to alert the public to the fact that they may be interested in what is being discussed. If any member of the public wanted these items to be discussed in open session, they could have attended the HC meetings and made that request instead of raising the issue as accusations after the fact.

Question 4: What information needs to be made public regarding the matters discussed in closed session, specifically regarding the Marina Study?

Response: I have reviewed the Marina Study and provided a copy for public dissemination that has a few items redacted. The redacted information falls into two categories, the first being the proposed rate of pay for potential marina employees and the second being some of the necessary equipment and the costs for purchasing that. The redaction of the proposed pay rates is appropriate at this time as the HC will still have to negotiate with employees/managers if it chooses the self-operation route. The redaction of the identification and proposed budget for certain pieces of equipment is appropriate because I understand that the HC is currently identifying potential sellers of this equipment and moving forward with the negotiations of those purchases. The benefit of making these financial figures public at this time does not necessarily outweigh the Harbor Commission's interest in negotiating for the best possible price on this equipment and services. Publicly releasing this financial information would severely limit the HC's negotiation abilities.

I will be present at the January 9, 2023 Harbor Commission meeting to address any additional questions and clarification that you may need.

Yours truly,
ANICH, WICKMAN & LINDSEY, S.C.

/s/

Max T. Lindsey