

Public Consultation Explanatory Document

Establishment of the Southwold Harbour Management Committee

Ashfords LLP has nationally recognised expertise in Ports and Harbours. Lara Moore, who is the lead lawyer advising on this matter from Ashfords LLP, sits on the UK Harbour Masters' Association National Council (elected by Industry). The firm acts for a large number of statutory harbour authorities made up of Municipal, Trust and Private Ports.

Clients include Cornwall Council (10 ports and harbours, including seven statutory harbours), Torbay Council (Brixham, Paignton and Torquay harbours), Littlehampton Harbour Board (Trust Port), Port of Shoreham (Trust Port), and Dorset Council (harbours of Weymouth, Bridport and Lyme Regis). The firm is also acting for a group of stakeholders at Whitby Harbour, challenging Scarborough Borough Council's management (as statutory harbour authority) of Whitby Harbour and use of harbour funds. The firm therefore has an excellent understanding of a range of statutory harbour authorities and best practice in the sector.

Introduction

Ashfords LLP has been instructed to advise East Suffolk Council in respect of the setting up of a new harbour Management Committee (HMC) for Southwold Harbour.

In order to provide the advice, Ashfords LLP has carried out a review of the local statutory harbour legislation that applies in relation to Southwold Harbour. In addition, we have reviewed the Council's new constitution, the previous consultation carried out in June 2014, and the Council's reports of December 2018 and March 2019. We have also considered the Department for Transport's 'Ports Good Governance Guidance' (March 2018) and key relevant principles of the 'Port Marine Safety Code'.

The Council now wishes to carry out a consultation on the draft documentation Ashfords has prepared to establish the HMC. This includes 'Terms of Reference' which would be inserted into the Council's constitution and a draft 'Memorandum of Understanding' ('MoU') that would be put in place between the Council and the HMC to establish the responsibilities of the HMC.

In preparing the above documentation, Ashfords has drawn not only on the recommendations of the Ports Good Governance Guidance ('PGGG'), but also upon the experience and practices of some other municipal ports and harbours where HMCs have been operating successfully for a number of years. As such the draft MoU (and accordingly the Terms of Reference (which are based on the contents of the MoU) reflects best practice guidance and the arrangements in place in some other municipal ports and harbours that have established and well-respected HMCs.

Once the consultation has concluded, all responses will be considered. A decision will then be taken as to whether any amendments should be made to the draft documentation prior to the establishment of the HMC.

One of the purposes of establishing the HMC in advance of any application for a harbour revision order (HRO) to improve and modernise the local statutory harbour legislation that applies to Southwold Harbour is to enable the Council and all interested stakeholders to gain experience of the HMC being established and operated in practice. This experience can then be used to guide the drafting of the provisions that are very likely to be included in any proposed HRO to formally establish the HMC as a statutory requirement.

Ashfords considers that, as the draft documentation reflects the requirements of the PGGG and successful working practices at some other municipal ports, the most important next step is to get the HMC established and operating, with the support of both the Council and stakeholders. Until an HRO is obtained which sets out the HMC requirements through statutory provisions, the arrangements governing the HMC can be further refined, if necessary, after a period of operation of the HMC.

March 2019 Report

The future governance of the harbour is currently being considered by the Southwold Harbour Lands Joint Committee (JC) which is comprised of four elected members of East Suffolk Council (formerly Waveney District Council's) Cabinet and four elected members of Southwold Town Council (STC).

For the reasons set out in the Council's Report of March 2019, Ashfords LLP has been instructed to advise on the appropriate constitution for an HMC to improve governance arrangements in respect of the harbour and to replace the JC.

Divergence from the March 2019 Report

Ashfords does not agree that either Littlehampton Harbour Board or Langstone Harbour Board are a good example of the type of constitution that the Council should be considering when forming a new HMC (either in the short term or in the medium to longer term for an HRO). This is for the following reasons:

- a. Both Littlehampton Harbour Board and Langstone Harbour Board are Trust Ports¹ not municipal ports. Given the wider constitutional and other constraints on local authorities, it makes more sense to look at HMC arrangements amongst municipal ports, than to take, as a starting point, a Trust Port. The Department for Transport has confirmed to Ashfords that it agrees with this approach.
- b. Littlehampton Harbour Board and Langstone Harbour Board are two of only three statutory harbour authorities in England, that are Trust Ports, but also have the ability to call on local council funds each year to make up any shortfall in their revenue. The Department for Transport has confirmed to Ashfords LLP that owing to recent difficulties at one of the three harbour authorities, it is very unlikely that the Department for Transport would support the creation of a new statutory harbour authority based on this model.
- c. Neither Littlehampton Harbour Board nor Langstone Harbour Board's governance arrangements are in line with the recommendations for HMCs set out on page 37 of the PGGG.

Recommendations for the structure of the HMC

The HMC should be strategic and aware of the commercial and legal framework within which the harbour operates.

Ashfords has considered the governance arrangements of a number of other municipal harbours and ports that already operate a successful HMC as part of their governance arrangements. Cornwall Council (which owns 7 statutory harbours and ports) in particular, has been operating a very well-respected HMC for a number of years. The core structure of the HMCs Ashfords has considered are broadly in line with current PGGG and can be summarised as follows:

- a) They consist of between 10 and 12 voting members
- b) The harbour master / port chief executive attends HMC meetings in an advisory capacity but is not a committee member and does not have voting rights.
- c) Approximately 50% of the voting members are local authority elected members of the constituent authority (these do not all have to be local authority councillors; they could be co-opted representatives who are appointed by the local authority or provide specific skills in support of port management. However, they normally are all local authority elected members).
- d) Approximately 50% of voting members are external appointees, selected for their skills and experience (which can include local stakeholder knowledge). Members of Southwold Town Council could also be appointed under this category.
- e) The Chair of the HMC is elected by the HMC, but only those persons who sit on the HMC that are also members of the Council are eligible for election.
- f) In most cases the HMC is not the 'Duty Holder' for the purposes of the PMSC (see further below) but has a direct line of communication to the Duty Holder.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525076/trust-port-study-key-findings-and-recommendations.pdf

- g) The HMC is required to operate within a budget approved by the Council, with restraints on the level of expenditure that can be approved by the HMC. The disposal of assets (particularly land) also generally requires approval by the Council. The Council must act within the constraints of its statutory harbour powers and duties when approving the budget and expenditure. In the interests of good governance, the financial regulations and the contract standing orders of the Council are applied in so far as they relate.
- h) The HMC manages the harbour in line with a business plan created for the harbour (normally 5 year but with a section on longer term matters) which is updated and reviewed as required. The HMC reports on its progress against the business plan annually. In accordance with PGGG guidance the business plan should seek to establish and implement a strategy to put harbour operations on a commercial basis wherever this is possible (without continuing subsidy from Council general funds).
- i) Separate accounts for the harbour are prepared annually.
- j) The HMC prepares and conducts meetings in accordance with the meeting rules of the Council.

Ashfords considers that that the above arrangements are suitable for any HMC set up in respect of Southwold Harbour.

Basic Structure of the MoU

The draft Terms of Reference for incorporation into the Council's Constitution (Part 2, section C) are contained in Appendix 1 to this document. They reflect the provisions of the MoU (particularly Annex 4) but are necessarily much shorter as they have been adapted to make them appropriate for incorporation into the Constitution. The Terms of Reference set out the matters that would be delegated to the HMC.

The MoU itself is split into 6 sections (the main body of the document and five appendices).

The main body of the document sets out the purpose of the MoU and a brief explanation of the PGGG before going on to lay down the commitments and agreements of the Council and the HMC in respect of the running and management of the Harbour. It also includes provisions related to the length of the MoU and Confidentiality.

The Appendices contain:

- 1. An Extract from the Ports Good Governance Guidance about Harbour Management Committees**
- 2. A basic 'establishment plan' for the Southwold Harbour Management Committee.** This sets out some of the tasks that will need to be completed to establish the HMC.
- 3. An Asset Register.** This will need to be populated, having regard to the provisions of the 1933 Order which set out the harbour limits. It will then need to be reviewed by the new HMC and a recommendation made to Council. Council will then need to review and approve the Asset Register. It is very important to the proper functioning of both the HMC and the harbour, that the assets which are being managed by the HMC (within the parameters set out under the MoU) are clearly identified. These assets include land and property as well as assets such as vessels, moorings etc.
- 4. The Southwold Harbour Management Committee Guidance Notes.** The Guidance Notes are effectively a more detailed version of the Terms of Reference. They set out how members are appointed to the HMC, the responsibilities of the HMC, conduct of HMC meetings etc.
- 5. Organisational Structure.** The final appendix will contain, once populated, a clear organisational structure that shows the reporting lines between the HMC and Council (including the Duty Holder). Again, this is important to ensure the proper functioning of the HMC and the harbour and to add compliance with the PMSC.

Setting up of HMC

Before the HMC is set up, the Council, as recommended by the PGGG, will carry out a skills audit to assess the balance of skills required to effectively govern the harbour and deliver against the business plan.

As there is not yet a formal business plan in place, the audit will instead need to be carried out with a view to the first tasks of the new HMC (which will include putting in place a new business plan, potentially pursuing a harbour revision order application to modernise the statutory powers and duties applying to the harbour etc.) and the approach taken by other local authorities. The types of skills, experience and knowledge often considered useful to an HMC include:

- (a) maritime industry and activities;
- (b) commerce;
- (c) health and safety;
- (d) management;
- (e) public relations and community issues;
- (f) industrial relations;
- (g) shipping, fishing or cargo handling;
- (h) accountancy or financial management;
- (i) boating and other water related leisure activities;
- (j) environmental matters affecting harbours; and
- (k) any other skills and abilities considered from time to time by the Council to be relevant to the discharge by the HMC of its functions.

The exact list can be refined in relation to the particular circumstances of the harbour in question. For example, in relation to Southwold Harbour, it clearly is appropriate for Southwold Town Council to have a position on the HMC (possibly more than one, depending on the outcome of the skills audit and the applicants for HMC positions following public advertisement). It is important that when carrying out the skills audit, the Council try to secure, so far as reasonably practicable, that the persons appointed by them to the HMC (including members of the Council), have special knowledge, experience and ability in a broad and complementary range of matters relevant to the efficient, effective and economic discharge by the HMC of the HMC's functions.

In making appointments to the HMC, the Council should also act in accordance with any guidance issued by the Secretary of State from time to time with regards to the exercise of such functions. Currently this guidance is contained in the PGGG which advises that external members should be appointed by public advertisement using the guidance applicable to public appointments.

Duties of members of the HMC to the HMC

When sitting as the HMC, the duties of all members of the HMC are primarily to the harbour, within the terms of reference and parameters of the MoU governing its operation. As set out in the PGGG, municipal harbours should (within the constraints of their statutory harbour powers and duties) be "*governed and operated in the interests of stakeholders including the local community*".

For example, if a stakeholder has been appointed to the HMC, they are required when making decisions to act in the best interests of the harbour as a whole. Similarly, in respect of members of the Council appointed to the HMC, they are required to act in the same way. Ashfords, therefore, prefers not to refer to any HMC members as 'representatives' of any particular stakeholder group etc. as it leads to confusion about the nature of the role. Knowledge of local stakeholders (or a particular group of them) is a valid criterion against which to appoint a person as a member of the HMC, but once appointed to the HMC that person is not there as that group's representative.

If stakeholders wish to 'represent' the interests of their particular stakeholder group only, then this should be done through stakeholder user groups, or the potential Advisory Group described below.

The draft MoU proposes that the HMC will consider setting up a formal stakeholder 'Advisory Group' within the first two years of its operation. The HMC would then liaise formally with this advisory group on all matters substantially affecting the harbour, including business plans etc. and take account of its views when making decisions or recommendations.

Identity of the Duty Holder

The Port Marine Safety Code (“PMSC”) requires that all statutory harbour authorities have a “duty holder” who is accountable for compliance with the PMSC and ensuring safe marine operations. The duty holder is publicly accountable for marine safety under the PMSC, both individually and collectively (where the duty holder is more than one person).

It is standard for an HMC to operate under an approved budget and to have limits on the level of financial transaction it can authorise without further approval from its Council. For this reason, it is not generally considered appropriate for the HMC to be appointed as the Duty Holder.

Therefore, in respect of Southwold Harbour, having considered the new constitution of the Council it is recommended that the Duty Holder is the Cabinet. Duty holders cannot assign or delegate accountability for compliance with the PMSC to others, such as a Harbour Master.

Works outside the harbour limits / Drainage & Flood Defence works

Ashfords has been advised that one of the longer-term matters under consideration is the protection of surplus harbour revenue, for the protection and benefit of the Harbour, while specifically allowing expenditure on works outside the Harbour such as work on the Blyth Estuary.

The harbour as defined under the Southwold Harbour Order 1933 (‘the 1933 Order’), includes the Southwold Harbour Lands within its limits. As such references below to the ‘harbour’ include the Southwold Harbour Lands and in relation to ‘harbour revenue’ include monies payable to the Council as the Statutory Harbour Authority in respect of the Southwold Harbour Lands.

Article 39 of the 1933 Order sets out how harbour revenue has to be allocated and effectively ring fences the harbour revenue. This does not mean that harbour revenue cannot ever pass into the Council’s General Fund. In certain limited circumstances it can. For example, article 39(7) expressly authorises the repayment of monies provided to the Harbour by General Fund (under article 40) as long as there are surplus funds available to utilise for this purpose. There are also provisions related to the repayment of borrowed monies.

However, having carried out a review of the current statutory harbour legislation, Ashfords can confirm that whilst harbour funds are already ringfenced (as described above) under the current statutory harbour legislation, it does not consider that it would, in most circumstances, currently be a lawful use of harbour funds to fund drainage or flood defence works or other improvements to the Blyth Estuary not within the harbour limits or related to the harbour undertaking. Nor would it be lawful for the Council to lend money to the harbour to carry out such works and then to recover these monies from the harbour funds over time.

Drainage and flood defence are a separate responsibility to the statutory harbour authority function. This is made particularly clear by article 13 of the 1933 Order which contains protections for the East Suffolk Rivers Catchment Board in relation to the main channel of the River Blyth. Whilst some infrastructure may serve a dual purpose (whether it does or not is a matter for expert advice), the statutory harbour authority function and harbour funds are not responsible or indeed (in most circumstances) authorised to carry out or fund works that are essentially required for drainage or flood defence purposes. A Harbour Revision Order application would therefore need to be made to authorise such expenditure and activities if considered appropriate in the future. However, there is no guarantee any such application would be successful.

21 June 2019

Ashfords LLP

Appendix 1 – Draft Terms of Reference

Appendix 2 – Draft Memorandum of Understanding