

Appendix A – Instructions to solicitors

Dear []

New matter – Harbour Management Committee for the Southwold Harbour Lands

As arranged, I set out below our draft instructions. These are deliberately detailed, to seek to explain the position and reference material in one.

At this stage, we would be asking you to:

- 1) As explained in section 8 below, advise on whether we could appoint external voting members to the proposed Harbour Management Committee (**HMC**) for the Southwold Harbour Lands (**SHL**), or, if not, how we can provide for external appointees to have appropriate involvement and influence and whether they could be paid for their attendance/expenses; and
- 2) Prepare terms of reference, consistent with our new constitution, to establish the proposed HMC.

We would be aiming to have your advice and initial draft terms of reference in May/June in good time for the Southwold Harbour Lands Joint Committee (**JC**) to consider and discuss when they meet on 5 July and put out for consultation.

I would be grateful if you could please let us have an initial cost estimate. It might be helpful to discuss the matter, but I explain the details below for completeness.

For completeness, I attach copies of the following reference/background documents, which are explained below:

- 1) The Council's constitution;
- 2) The Harbour Order of 1933, which is the current governing legislation for the harbour undertaking, as described below;
- 3) The plan to the Harbour Order;
- 4) The June 2014 consultation document, which refers on page 3 to the "key principles" set out below;
- 5) Our report from December 2018, which explains the background (if needed); and
- 6) Our report from February 2019, which sets out, in section 12, particular points (in relation to each of the "key principles" and the constitution of a HMC) which emerged from a further consultation exercise.

1. Work by the Southwold Harbour Lands Joint Committee (JC) to advise on a HMC to replace the JC

The client contact for billing purposes will be Legal Services at East Suffolk Council of East Suffolk House, Station Road, Melton, Woodbridge IP12 1RT.

East Suffolk Council replaced Waveney District Council (**WDC**) and Suffolk Coastal District Council on 1 April, when all property, rights and liabilities of those predecessor councils transferred to and vested in East Suffolk Council by operation of the East Suffolk (Local Government Changes) Order 2018 and the Local Government (Boundary Changes) Regulations 2018.

This work is being arranged to assist the Southwold Harbour Lands Joint Committee (**JC**), which was established after a consultation exercise in 2014 by WDC's Cabinet and members of Southwold Town Council (**STC**), who resolved that the rules of procedure for committees of WDC's Cabinet would apply to the JC. The JC is comprised of four elected members of WDC's Cabinet and four elected members of STC.

The intention is to enable immediate governance improvements by establishing a HMC. In line with the resolutions described below, the design of the terms of reference of the HMC will need to take into account the points set out in section 12 of the attached report from February 2019 and will need to enable the HMC to:

- a) have places for member(s) of STC and other external appointees (to represent local and other stakeholders and ensure more local involvement and engagement in management and delivery, in line with the key principles in the June 2014 consultation document and the Ports Good Governance Guidance (**PGGG**) issued by the DfT in 2018);
- b) replace the Joint Committee;
- c) govern the SHL, subject to any requirements of Cabinet and the requirements of the Council's constitution;
- d) confirm who will be the duty holder for the purposes of the Port Marine Safety Code; and
- e) plan further governance improvements, including annual reports and proposals to deliver longer term improvements (which are likely to be made by application for a Harbour Revision Order to update the current Harbour Order), addressing future ownership and providing for the long term welfare, sustainability, responsibility, liability and delivery of the SHL. Those proposals for longer term improvements should take into account recommendations that specific safeguards should, subject to legal advice and the requirements of stakeholders including the Department for Transport/Marine Management Organisation, be included: (i) to protect surplus income from the SHL, for the protection and benefit of the Harbour and Harbour

Lands, while specifically allowing expenditure on works outside the SHL such as work on the Blyth estuary as explained below; (ii) to preserve the Harbour Lands in the ownership of WDC and its successor local authority; and (iii) to complement the HMC arrangements.

2. Harbour Order of 1933

The current governing legislation for the harbour undertaking is the Southwold Harbour Order 1933 (**Harbour Order**), a copy of which is attached. As explained in section 2 of the December Report, the Harbour Order was brought into effect by the Pier and Harbour Orders (Elgin and Lossiemouth and Southwold) Confirmation Act 1933, which confirmed the transfer of land for the harbour undertaking to the former Southwold Borough Council.

The Council acts as the “Corporation” as described in the Harbour Order. WDC took over the management of the SHL in 1974 when the original Corporation, Southwold Borough Council, was dissolved and WDC was created on local government reorganisation under the 1972 Act. Ownership has been queried over the years and the land has not been registered, but WDC and the relevant government department at the time agreed that the SHL transferred to WDC under the relevant transfer of property order. Further, WDC had exclusive possession of the material parts of the SHL from 1974 onwards. The property, rights and liabilities of WDC were then vested in East Suffolk on 1 April 2019, as explained above.

3. Southwold Harbour Lands (SHL)

We have described the SHL as the same areas of land which may fall within the definition of “harbour undertaking” under the Harbour Order, which uses the attached plan to describe its limits. These are Southwold harbour and neighbouring lands, including the relevant stretch of the River Blyth, Buss Creek, Salt Creek, the caravan and camping site and commercial properties leased to independent operators to generate rental income for the harbour.

Harbour activities under the Harbour Order are accounted for separately from the Council’s general fund with appropriate adjustments. In particular, as required by guidance from the District Auditor in 2007, the caravan and camping site is operated by the Council as part of the general fund after deduction of an allowance in favour of the harbour undertaking for the value of the use of the land on which it sits.

4. Key principles from the June 2014 consultation

When establishing the Joint Committee, WDC’s Cabinet and STC adopted the following “key principles” which had been set out in the consultation document from June 2014:

- Improvements that reflect the culture & character of Southwold
- Local influence & accountability
- Working in partnership
- Discharging of statutory obligations
- Financial transparency
- Investment & local re-investment
- Viability & sustainability (both financially and in terms of governance)

5. Recommendations of the JC

On 6 March 2019, after considering the results of a consultation exercise, the Joint Committee resolved to rescind resolutions made previously about a different proposed governance model and to:

- 1) *recommend to WDC and STC that they direct the Joint Committee to, in line with its terms of reference, arrange to consult professional advisers and stakeholders and advise WDC and STC on proposals for a HMC to succeed the Joint Committee and:*
 - (i) *enable short term governance improvements (including more local involvement and engagement in management and delivery) in line with the key principles in the June 2014 consultation document and the Ports Good Governance Guidance issued by the Department for Transport in March 2018;*
and
 - (ii) *design proposals to deliver medium term improvements (which are likely to be made by application to the Marine Management Organisation for a Harbour Revision Order), addressing future ownership and providing for the long term welfare, sustainability, responsibility, liability and delivery of the Harbour Lands,*
- 2) *recommend that, when planning the short term improvements described in 2(i) above, the points set out in section 12 of the report from February 2019 to the JC (copy attached) should be taken into account, including places on the proposed Committee for member(s) of STC and other external appointees to represent local and other stakeholders.*
- 3) *recommend that, when designing the medium term improvements described in 2(ii) above, specific safeguards should, subject to legal advice and the requirements of stakeholders including the Department for Transport/Marine Management Organisation, be included: (i) to protect surplus income from the Harbour and Harbour Lands, for the protection and benefit of the Harbour and Harbour Lands; (ii) to preserve the Harbour Lands in the ownership of WDC and its successor local authority; and (iii) to complement the short term governance improvements made in accordance with the resolutions above.*

- 4) *arrange to instruct professional advisers to advise on the appropriate constitution for a HMC as outlined above; and*
- 5) *make stakeholder engagement arrangements to consult community stakeholders and all other relevant stakeholders on the improvements outlined above.*

On 15 March 2019, WDC's Cabinet and STC held a simultaneous meeting and each resolved to note and endorse the above recommendations and to direct the Joint Committee to arrange to consult professional advisers and stakeholders and advise Cabinet and STC on proposals for such a HMC.

6. The Council's constitution

Governance of the SHL is a responsibility of the Council's Cabinet. In particular, under Part 2, D3.2 of the constitution, any function of the Council as harbour authority and any function under a local Act (other than those specified or referred to in reg. 2 or sch.1 of The Local Authorities (Functions and Responsibilities) (England) Regulations 2000, which do not apply here) is a Cabinet responsibility.

Under the constitution, Cabinet may arrange for any decision that it is collectively responsible for to be taken by a committee of the Cabinet. Similarly, under the Cabinet Procedure Rules in the constitution, the Leader of the Council may provide for executive functions to be discharged by a committee of the Cabinet and such committee may delegate further to an area committee or joint arrangements (a Cabinet Member).

The Suffolk Local Code of Conduct as set out in the constitution applies to all elected Members and any co-opted Members entitled to vote on any decisions of the council or its committees, sub committees or joint committees. Under the Code, a co-opted Member has the same meaning as that set out in Section 27(4) of the Localism Act 2011 and means a person who is not a Member of the authority but who: (a) is a Member of any Committee or Sub-Committee of the authority, or (b) is a Member of, and represents the authority on, any joint Committee or Joint Sub-Committee of the authority, and who is entitled to vote on any question that falls to be decided at any meeting of the Committee or Sub-Committee.

Under Part 1, 8.1 of the constitution, decisions are made by simple majority, with the Chairman of a meeting entitled to a casting vote in the event of a tie.

7. Reference models

When consulted, the DfT mentioned that it might be helpful to look at the governance arrangements for Langstone harbour or Littlehampton harbour when considering the constitution of any HMC. This is explained in more detail in the February report, but:

We gather that Langstone has a Harbour Board (two of whom are elected by the Advisory Committee) and an Advisory Committee (which has a number of members to represent the various stakeholder organisations involved). The Advisory Committee meets the week before

each Harbour Board meeting and considers the full agenda for the next Harbour Board meeting. The Harbour Board have a duty to consult the Advisory Committee on all matters substantially affecting the preservation, regulation, management and improvement of the harbour. The Harbour Board must also consider any matters referred to them on these topics by the Advisory Committee.

We gather that Littlehampton harbour is governed by a Harbour Board, which consists of 11 members. Eight are appointed by the local authorities involved, one is appointed by the Environment Agency, one is appointed by the Board to represent recreational users of the port and one is appointed by the Board to represent commercial users of the port.

However, please do not consider yourself limited to these if there are better examples/models which you would recommend.

Subject to the question in section 8 below, it seems to us that it would be better to have co-opted members of the committee with voting rights (bound by the Suffolk Local Code of Conduct, as above), generally and so that they could be paid for their attendance and expenses, if this is possible. The Members' Scheme of Allowances at Part 5 of the constitution allow for co-opted members to be paid an allowance for each meeting and for travelling/subsistence.

8. Can we have voting external appointees or, if not, provisions enabling external appointees to have appropriate involvement and influence?

We would be grateful for your advice as to whether, and if so how, we could appoint co-opted members with voting rights to the proposed HMC or, if not, the best arrangement which could be made to accommodate external appointees in line with the aims described in these instructions.

Harbour Order

We are dubious about relying on article 7 of the Harbour Order, because (even apart from the points mentioned below, and claims from some local people that the council is not the Corporation under the Harbour Order), this seems narrow (as to which types of external appointees are permitted, and referring only to the harbour, not the land neighbouring the harbour) and to expect only an advisory committee:

"The Corporation may at any time and from time to time by resolution appoint as members of any committee appointed by the Corporation for the management of the harbour and for such period as the Corporation may determine any number of persons not being members of the Council being persons of experience in or having a special knowledge of the harbour undertaking or being payers of harbour rates and any such person may be at any time removed by the Corporation from such committee and subject as aforesaid the provisions of S.22 of the Municipal Corporations Act 1882 shall apply to any such committee..."

We note that s.22 of the 1882 Act provided that the council may from time to time appoint such committees out of their own body, *but the acts of every such committee shall be submitted to the council for their approval.*

Local government law restrictions on powers to appoint external voting members

It seems that a committee of cabinet could only appoint external members with voting rights if it is an “area committee” established under s.102(1A) of the 1972 Act as inserted by the Local Government Act 2000, since s.13 of the Local Government and Housing Act 1989 does not apply to such an area committee and s.102(3) of the 1972 Act allows the inclusion of persons who are not members of the appointing authority. This option is unlikely to be available, because the SHL cover a relatively small area; the members of the committee who are members of the council will not be elected for electoral divisions or wards which fall “wholly or mainly within” the part of the council’s area in respect of which the committee is to discharge functions, as required for an area committee.

We are not sure that cabinet (as opposed to council) could appoint external members to a committee under s.102(1) of the 1972 Act, but if it could it would be subject to the restrictions under s.13(1) of the 1989 Act, so a member of the committee would “*for all purposes be treated as a non-voting member*” of that committee if they are not a member of the council.

We doubt that the committee would be treated as having been established exclusively for the purpose of discharging such functions as may be prescribed by regulations made by the Secretary of State under s.13(4)(f) of the 1989 Act, since the Harbour Order does not seem to fall within this.

Given the exclusion under s.13(4)(e) of the 1989 Act, we would perhaps have the option of voting co-opted members on an advisory committee appointed by the Council under s.102(4) of the 1972 Act to advise Cabinet on any matter relating to the discharge of their functions, since s.102(4) provides that such committee may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the appointing authority or authorities, and may appoint one or more sub-committees to advise the committee with respect to any such matter. The restrictions under S.13(1) of the 1989 Act do not apply to such advisory committee, so the external members could have a vote (so long, in the case of the members of any sub-committee, as they were members of the committee which appointed that sub-committee). This does seem to be the type of committee which was envisaged by article 7 of the Harbour Order, as described above.

However, we would like to investigate the options for a HMC with appropriate governance powers (subject always to any requirements of cabinet) rather than a HMC which only advises cabinet. If it is not possible for external appointees to have voting rights, we expect that the terms of reference could provide for Cabinet to appoint external representatives to attend committee meetings in an advisory capacity, but not vote? This is of course what the Ports Good Governance Guidance expects in relation to the harbour master and the like, for example. If so, could the draft terms of reference provide for this and provide for external appointees be given notice of meetings and for those external appointees who attend committee meetings to be consulted? We are seeking to ensure that the new arrangements

provide, so far as feasible, for local influence and accountability in line with the principles and recommendations explained in these instructions.

9. Particular representations made by consultees

During the last consultation exercise, some consultees appear to have worked together to separately submit very similar representations. Substantially the same representations were also produced by a Councillor at the simultaneous meeting on 15 March 2019 with a request that they be used as a “framework” for discussions about the constitution of the HMC. It was confirmed at the meeting that these would be taken into account.

Accordingly, please find below copies of these representations with comments under each in turn.

“1. The Council acknowledges it has a key strategic role in determining and securing the future of Southwold Harbour, the Caravan park and the Blyth Estuary, all of which are mutually interdependent.”

The Council takes the position that it owns the SHL, which include the harbour and the caravan park.

It could usefully be reflected in the terms of reference that work/expenditure outside the SHL can be appropriate; upstream work on the River Blyth is likely to be necessary in future to raise river banks and consultees appeared to agree that the Council should be entitled to use harbour revenue to finance or contribute towards the financing of such work. Since there have been questions about whether this is permitted under the terms of the current Order, plans for any HRO should include clarification of this.

“2. The proposed Management Committee must be enabled to act independently and take and implement decisions for the long-term. Its delegated duties and powers should combine, as far as possible, those of a Trust Board and Management Committee as set out in the Ports Good Governance Guidelines.”

The HMC cannot be independent of the Council because it will be a committee of the Council’s Cabinet, which is responsible for governance of the harbour, and the Council expects to need to advance substantial sums to the harbour (being repaid from income over time), as it has in the past, so needs to retain control of the SHL.

It should be part of the terms of reference for the HMC to plan proposals for long term improvements, as explained above.

It will not follow a trust board model because it is not a trust port; the DfT has confirmed that it is a municipal (local authority) port. The plans take into account the recommendations in the PGGG for the constitution of HMCs for municipal ports, with suitable external appointees to represent other stakeholders, including STC, as set out in the recommendations made by the JC.

“3. The future ownership of all the Harbour Lands must be guaranteed in perpetuity such that they are permanently protected from sale.”

There are of course legal issues here; we should follow the recommendation by the Joint Committee, as recited above, that when designing medium term improvements, specific safeguards should, subject to legal advice and the requirements of stakeholders including the Department for Transport/Marine Management Organisation, be included: (i) to protect surplus income from the Harbour and Harbour Lands, for the protection and benefit of the Harbour and Harbour Lands; and (ii) to preserve the Harbour Lands in the ownership of East Suffolk Council.

“4. All profit (income less legitimate costs) from the Harbour and the Caravan Park, must be ringfenced for use in, or to preserve the future of the Harbour. This must include an appropriate financial contribution from the Harbour to the maintenance of flood protection in the estuary since this is vital to the continued viability of the Harbour itself as we have discussed above.”

The Harbour Order already contains restrictions and of course any such provisions need to be carefully considered and drafted; we should follow the JC's recommendation as described under point 3 above. When doing so, the potential need to use harbour revenue to finance work outside the harbour which directly or indirectly benefits the harbour/local environment should be accommodated, as suggested here and noted under point 1 above.

“5. The membership of Board/Management Committee should be balanced to reflect the roles and expertise of stakeholders. We propose: Two appointed by WDC, two appointed by STC (It is important that those appointed to these posts have relevant expertise and that non-councillors should be considered), four Independent Members appointed to bring required expertise (eg from Caravan owners, Harbour Businesses, Harbour Users, Statutory Agencies etc). An independent Chairman, whose expertise and experience should be appropriate to the role, should be appointed, after advertisement, by the other eight members of the Board/Committee. The terms of office should be set to provide both continuity and the opportunity for change and an element of community control through the elected members.”

These proposals should be taken into account, but we have concerns that they may not be feasible. For the reasons explained in the reports, the Council needs to retain control of the SHL, so external appointees will need to be in the minority or non-voting, or the HMC would have to be advisory. We note the recommendations from the PGGG that the key features of HMCs are that they should be strategic and aware of the commercial and legal framework within which ports operate, ideally comprising:

- *PGGG: approximately 50% elected members of the local authority, although 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;*

As a starting point for this draft, we propose that the HMC consists of the following members:

[up to eight] appointed by the Council/Cabinet, including elected members and potentially external specialists, such as marine engineers;
[one or two] nominated by STC;
[number TBC] appointed by the HMC to represent recreational/commercial users.

This follows the PGGG so far as possible; the Council needs to appoint more than 50% of the members of the HMC because it has substantial potential liabilities in relation to the SHL and is likely to be asked to advance many millions to fund improvement works for the SHL, recovering the advances from income over time, as it has in the past and as explained in more detail in the reports.

- *PGGG: the port chief executive/harbour master, who should have access to the HMC in an advisory role, but as an officer of the council they should not serve on the committee or have voting rights;*

As a starting point, we propose this be the case (for the harbour master; there may be no chief executive of the harbour going forward).

- *PGGG: external appointees who are stakeholder representatives or individuals with valuable skills and experiences and should be appointed by public advertisement; and*

We propose this be the case for all external appointees other than the member(s) of STC. The reason for the difference is that STC are a key local stakeholder who naturally represent local Southwold electors and an automatic place or places for them was frequently requested by consultees during the previous consultation exercise and this was accordingly recommended by the Joint Committee, as explained above.

- *PGGG: a Chairman appointed on merit, skills and suitability, who should ideally be an elected representative of the Council as this will automatically maintain reporting lines and accountability to the Council.*

As a starting point, we propose this be the case.

The PGGG indicates that, before recruiting to a HMC, the local authority should undertake a skills audit to assess the balance of skills required to effectively govern the port and deliver against any adopted business plan. These skills should be considered for all committee members. This is being investigated.

“6. The constitution of the Board/Management Committee must allow it to operate independently but require and enable it:...”

As noted above, the HMC cannot be independent of the Council. A number of the points below are addressed in more detail, with other relevant matters, in section 12 of the report from February 2019, but we comment briefly on each below.

“a. to work solely in the interests of the Harbour Lands, their users and stakeholders;”

We are dubious about a constitution which imposes requirements which cause problems in future because they are unduly narrow or do not allow sufficient flexibility. The main reference points should be the Ports Good Governance Guidance and the “key principles” from 2014 as described above, but these are of course guidance, not mandatory requirements.

“b. to contribute to the protection of the Estuary;”

As noted above, it is agreed that the HMC should so far as possible be permitted to arrange work which benefits areas outside the SHL and should consider this when planning to update the Harbour Order in future.

“c. to work in partnership with Waveney/East Suffolk Council and Southwold Town Council;”

The HMC will be a committee of East Suffolk Council’s Cabinet. It should work with STC and other stakeholders in accordance with the Ports Good Governance Guidance; the intention is that appointment of external appointees, including nominee(s) of STC, will help to achieve this.

“d. to develop a strategic and financial business plan to ensure investment is secured for the Southwold Harbour Lands and for the protection of the Blyth Estuary;”

As noted in section 12 of the February report, the HMC should follow the PGGG, which confirms that municipal harbours should generally operate in an open, transparent and accountable way, making a range of information available to stakeholders about their organisation and activities, subject to commercial and data confidentiality considerations. The PGGG notes that annual reports and regularly updated websites are likely to be important ways of complying with this and the harbour authority should consider producing a business plan that looks at the future prospects of the port and how it will meet the requirements of the stakeholders, who should be fully involved in its development.

The HMC should be tasked with working to achieve this, taking into account representations from consultees that minutes should be published and/or that there should be annual public meetings, and consideration should be given to production of a business plan or plans as described in the PGGG, when the planned harbour study (which is in the process of being commissioned from external advisers) is available, to enable meaningful projections.

“e. to be responsible for an agreed budget and ensure the financial results of the Southwold Harbour Lands are properly accounted for and reported to the Department for Transport;”

If the Council is willing to give the HMC a budget, it is likely to be relatively modest, being a budget for ordinary expenses. Any major proposed expenditure would need to be submitted through the Council’s financial control systems for capital projects or the like for consideration by Council or Cabinet as appropriate.

As explained in section 12 of the February report, the Council accounts for the harbour as part of its overall published local authority accounts. Further, annual accounts should continue to be submitted to the DfT as required by the Harbours Act 1964. The HMC should consider as part of longer term improvements preparing accounts on a commercial basis, as proposed by the PGGG, but this is unlikely to be feasible in the short term in view of the requirements for local authority accounts.

“f. to raise the necessary investment funds to improve the infrastructure of the Harbour Lands;”

As with previous improvement works, the Council is likely to be asked to advance the sums needed for such improvement works, recovering the sums advanced from the harbour revenue over time. Match or grant funding or other sources of funding may be available for some projects and these should be investigated as appropriate, as they have been in the past.

“g. to investigate how the Harbour can benefit from an associated charity to support fundraising and ensure available tax advantages are claimed (e.g. as is now being done successfully for the Alde and Ore Estuary).”

The HMC should be free and encouraged to investigate any such options and any other options to assist fundraising, tax efficiency, operational efficiency or any other improvements.

“7. To protect the integrity of the Harbour Lands and recognise their historical origins as part of a Haven Port developed for the community, there should be a single management structure responsible for all financial and operational matters (including Health and Safety).”

It will not be constructive to engage in a debate about the historical origins of the harbour. It has been governed by East Suffolk Council and its predecessor council, Waveney District Council, as a municipal port for over 40 years. The HMC would be responsible for governance of the harbour for the Council and would liaise with the Head of Operations at the Council to implement their requirements.