



## SCARBOROUGH BOROUGH COUNCIL

FAO Cameron Waddell  
Mazars LLP  
The Corner  
Bank Chambers  
26 Mosley Street  
Newcastle upon Tyne  
NE1 1DF

Your Ref:  
Our Ref: LD/

29 October 2021

Dear Cameron,

### Statement of accounts for the year ending 31 March 2016

I refer to your letter dated 27 October 2021 and confirm that this will be sent to the Council's members in advance of the full Council meeting on 1 November 2021.

I also note the further statutory recommendation (the "**Further Recommendation**") made by Mazars under the Local Audit and Accountability Act 2014 (the "**2014 Act**") as set out in your letter, in relation to the audit of the Council's statement of accounts for the year ending 31 March 2016.

Your letter dated 27 October 2021, addressed to the Council's members, purports to explain the reasons for the Council's delay in taking the steps which you now say are required to implement the recommendation contained in your letter dated 26 March 2021 (the "**First Recommendation**"). I am concerned however that your letter does not provide a full and accurate account of the discussions that have been ongoing, or our respective positions on these matters. A copy of this letter will therefore be provided to the Council's members, along with your letter dated 27 October, in advance of the full Council meeting on 1 November 2021.

Whilst we feel the need to respond to your letter to Council members, the most important issue for officers of this Council is that all parties are now agreed on the way forward to resolve the Objection for the benefit of the Council, any successor body, and the electorate, the Council is working to implement that agreement, and accordingly officers will recommend that the Further Recommendation be accepted by its members.

The Council's position throughout in respect of the below matters has been informed by legal advice received from leading counsel and experienced solicitors.

#### 1 THE FIRST RECOMMENDATION

- 1.1 On 23 July 2021 the Council's members resolved to accept the First Recommendation, which was made by Mazars following its consideration of the objection made to Mazars by a local elector on 11 August 2016 (the "**Objection**"). Although it took almost five years for Mazars to consider and reach a final view in response to the Objection, the First Recommendation asked the Council to



commence legal proceedings within a relatively short timeframe, namely by 26 September 2021.

1.2 The officers' report for the meeting on 23 July 2021 (including the Council's recommendation to members to accept the First Recommendation) was shared with Mazars prior to it being published and circulated to members. This made clear the Council's understanding that it was being asked to seek a declaration on the status of the car parking land in and around Whitby Harbour, being:

- a. Endeavour Wharf;
- b. Whitby Marina Front car park;
- c. Whitby Marina Back car park; and
- d. Whitby Marina Reserve car park,

(collectively, the "**Car Parks**").

1.3 For the reasons set out below, the Council considers that this was the scope of the declarations it was asked to seek from the court in order to comply with the First Recommendation. Mazars did not at that stage challenge the Council's understanding, despite having reviewed the officers' report, or suggest that the scope of the declarations required First Recommendation was significantly wider than the Car Parks, as is now suggested in your letter dated 27 October 2021.

1.4 Your letter dated 27 October notes that there was some discussion at the full Council meeting on 23 July 2021 about the text of the resolution to be agreed, and the wording proposed in the officers' report, in relation to the declarations to be sought by the Council, was amended accordingly.

1.5 Following the meeting on 23 July 2021, we confirmed to you on 26 July 2021 that the First Recommendation had been accepted.

1.6 After subsequently discussing the matter, the Council's legal advisors, including its instructed leading counsel, did not consider that the widened scope of the declarations proposed at the full Council meeting on 23 July could be sought in the limited proceedings pursued by the Council in order to implement the First Recommendation. As I explain further below, this is because the form of litigation that the Council was asked to commence by Mazars, and the jurisdiction of Mazars to make the First Recommendation at all, constrained the matters that the Council could ask the court to consider to just those which were: (i) within the scope of the Objection itself; and (ii) considered by Mazars as part of its determination of the Objection.

1.7 In light of the limited timeframe in which proceedings were required to be commenced by the First Recommendation, the Council proposed to commence the proceedings which were required in order to implement the First Recommendation by the deadline of 26 September 2021. This would not have prevented the Council from commencing a separate set of proceedings in due course, in accordance with its general power of competence, to seek clarity on the extent of the Whitby Harbour undertaking as a whole. Similarly, it would have been appropriate for the Council to take into account the court's decisions in relation to the status of the Car Parks to inform any subsequent proceedings commenced, as well as progress its proposal for seeking a Harbour Revision Order ("**HRO**") to seek certainty as to the extent of the Whitby Harbour undertaking.

1.8 As litigation was intended, the Council's solicitors wrote to you on 23 August 2021 to set out the actions that the Council proposed to take by 26 September 2021 in a letter before claim. This step was required in order to comply with the Pre-Action Protocol and/or the Practice Direction on Pre-Action Conduct, which requires parties

to identify and narrow any issues of disagreement before formal legal proceedings are commenced.

## 2 THE COUNCIL'S PROPOSAL: FORUM FOR THE PROCEEDINGS

- 2.1 In its letter before claim, the Council proposed to commence proceedings by issuing a claim for Judicial Review. Judicial Review is a forum in which the Administrative Court is asked to review a decision, act, or failure to act, by a body exercising a public or statutory function. In order to bring Judicial Review proceedings, a decision, act, or a failure to act, must be identified as the target or focus of those proceedings, and the court will apply public law principles (i.e. rather than purely private law). This means that the Administrative Court can consider matters such as the powers – or *vires* – of public bodies and the exercise of their functions.
- 2.2 On an application for Judicial Review, the Administrative Court can be asked to grant a number of remedies. One of these is a quashing order, which has the effect of setting aside, or invalidating, a decision taken by the decision-making body. However, a quashing order does not always need to be sought. Instead, Judicial Review proceedings can be pursued in order to obtain remedies such as a declaration from the court.
- 2.3 Based on the content of the First Recommendation itself, and the legal advice it had received, the Council considered that this form of litigation was what you had intended when making the First Recommendation. This is for a number of reasons:
- a. the reasons for making the First Recommendation, as explained in your letter dated 26 March 2021, explicitly stated that the Council was expected to commence Judicial Review proceedings, including to reduce the costs burden on local taxpayers (i.e. rather than Mazars making a Judicial Review application itself);
  - b. the reasons stated that if Mazars made an application itself, rather than the Council, the Council would have to be named as an 'Interested Party' to the proceedings, which would duplicate the costs to be borne by local taxpayers. The reasons also stated that the local elector who made the Objection (the "**Objector**") should expect to be named as an 'Interested Party' to the proceedings. An 'Interested Party' is commonly understood to be, and is only defined in court rules, as a party with an interest in Judicial Review proceedings; and
  - c. the matters to be considered by the court before it could make the required declarations include public law issues. For example, the court will need to hear arguments as to the *vires* of the Council, acting in its capacity of statutory harbour undertaker for Whitby Harbour, operating and levying charges for car parking facilities, rather than in its capacity as a road traffic authority under the Road Traffic Regulation Act 1984.
- 2.4 Your letter dated 27 October suggests that you had cited Judicial Review in the reasons for making the First Recommendation as simply 'a potential method by which those proceedings could be brought' and that it was for the Council to decide what was the most appropriate method of seeking declarations. You then go on to say that issuing a Judicial Review application against Mazars' decision to make the First Recommendation was 'inappropriate'. Respectfully, the Council does not agree with either of those statements.
- 2.5 As set out above, the reasons given by Mazars for making the First Recommendation were very clearly aimed at the Council making an application for Judicial Review. Whilst there are other litigation forums which can also be pursued to seek a

declaration, such as private law proceedings under Part 8 of the civil litigation rules, there can be no reasonable criticism of the Council for seeking to do precisely that which was proposed to it by Mazars in the First Recommendation. Indeed, if it was not intended by Mazars that the Council should commence Judicial Review proceedings, your letter dated 26 March 2021 would no doubt have explained differently the capacity in which you considered the Council and the Objector should be named or represented in proceedings.

2.6 In this regard, your solicitors have only recently suggested that the Objector should be a defendant to Part 8 proceedings to be commenced by the Council, which is entirely different to being named as an Interested Party.

2.7 I note in this regard that the Council did not propose to seek an order quashing the First Recommendation. The remedies which the Council proposed to ask the court to grant were limited to the making of those declarations which the Council understood it was being asked to seek. The First Recommendation would therefore have remained valid and legally effective regardless of the outcome of the Council's proposed Judicial Review proceedings. There is accordingly no question of any inconsistency or incompatibility between the Council's decision to accept the First Recommendation, and to name the First Recommendation as the focus of the Judicial Review proceedings.

### **3 SCOPE OF THE OBJECTION AND DECLARATIONS SOUGHT**

3.1 At the heart of the above issues is a recent change in what you consider to be the scope of the Objection itself, and therefore the 'land in contention'.

3.2 You state in your letter dated 27 October 2021 that the Objection 'was not limited to the car park income'. Insofar as it relates to the matters that the Council had been asked to seek declarations for, the Council does not agree; the scope of the Objection was (and at all times until very recently had been understood to be) limited to the Council including within its statement of accounts income received from the Car Parks, rather than attributing all of that revenue to the statements of account maintained for the Whitby Harbour undertaking, which the Objector considers to be contrary to section 16 of the Whitby Urban District Council Act 1905 (the "1905 Act").

3.3 This is clear from the details provided in the Objection itself, which states:

**'3. Funds which should have been reserved exclusively for the use of the Whitby harbour undertaking have been added to the Council's general purpose funds.'**

- Not all of the car park income has not [sic] been included in the Statement of Accounts 2015-16 for the harbour. The SBC 3<sup>rd</sup> Quarter Financial Monitoring report (to Dec 2015) shows the car park income as contributing to the Council's General Fund, not to a fund reserved for Whitby Harbour use.'

3.4 This limited scope of the Objection also reflects the correspondence exchanged between the Objector and the Council prior to the Objection being submitted to you on 11 August 2016, which challenged the Council's accounting of revenue received from specific land and property assets. Whilst the Objector's initial letter to the Council dated 1 August 2016 referred to land and property assets other than the Car Parks, this was narrowed down to just the Car Parks in the Objection when it was submitted to Mazars.

3.5 It is therefore clear that the Objection was squarely focussed on specific items of account, namely revenue received from the Car Parks, which the Objector

considered had been wrongly included in the Council's statement of accounts (i.e. rather than those of the Whitby Harbour undertaking), contrary to section 16 of the 1905 Act. Similarly, the comments in your letter dated 26 March 2021 that the Council should commence Judicial Review proceedings indicated that the Car Parks should be the subject of the declarations sought, as Mazars had only considered matters pertaining to the Car Parks, and a court on Judicial Review can only determine matters that were considered by the decision-maker.

- 3.6 In these circumstances, it was reasonable for the Council and its advisors to consider that the reference in the First Recommendation to 'the land in contention' was a reference to the land on which the Car Parks are situated. This reference informed the Council's understanding of the scope of the 'land and property' for which declarations needed to be sought from the court.
- 3.7 Previous correspondence in relation to the Objection substantiates the view that the parties had only considered evidence in relation to the treatment of income received from the Car Parks. It is therefore unclear on what statutory basis the Objection was considered by Mazars to encompass the whole of the land comprised in the Whitby Harbour undertaking, given that the only allegedly unlawful item of account identified in the Objection pursuant to the 2014 Act is income received from the Car Parks.
- 3.8 Mazars' jurisdiction to consider a valid objection is confined by sections 27(1) and 28(1) of the 2014 Act (as summarised above) to items included in the Council's accounts which are contrary to law. Other than the Car Park income which the Objector asserted was included contrary to section 16 of the 1905 Act, no other allegedly unlawful items of account which would trigger an external auditor's power to apply to court for a declaration have ever been identified, including in your letter dated 27 October 2021.


#### **4 SUMMARY AND NEXT STEPS**

- 4.1 For the reasons given above, the Council considers that its proposals were appropriate for, and met the requirements of, the First Recommendation.
- 4.2 Notwithstanding the disagreements between us, in the interests of resolving this long outstanding matter as expediently as possible the Council has agreed that it will commence the Part 8 proceedings that have been discussed between us, in order to seek appropriate declarations which clarify the entire extent of the Whitby Harbour undertaking. The Council will endeavour to commence those proceedings by 31 December 2021.
- 4.3 In summary, the Council considers that:
  - a. the proposals set out in its letter before claim dated 23 August 2021 did give proper effect to the First Recommendation, and the reasons given for the First Recommendation, as set out in your letter dated 26 March 2021;
  - b. the litigation forum and scope of proceedings which the Council was (at that time) being asked to commence were subsequently changed; and
  - c. the Council has agreed to take the actions you have now requested it to, rather than proceed as it originally proposed, in order to avoid unnecessary litigation and expense, which would not be in the public interest.

Please be assured that the Council is focussed on dealing diligently with issuing the agreed court proceedings, rather than recent professional disagreements between us, and I trust you will share this view.

Yours sincerely,

Lisa Dixon  
Director

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