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Dear Councillors

Scarborough Borough Council: Accounts for the year ended 31 March 2015/16

This is a letter containing a statutory written recommendation issued under section 24 of and paragraph 4 of Schedule 7 to the Local Audit and Accountability Act 2014 (“**the 2014 Act**”) setting out steps we consider Scarborough Borough Council (“**the Council**”) should take in relation to the objection of Ms Susan Boyce to the Council’s accounts for the year ended 31 March 2016 (“**the Objection**”). The Objection was received by us on 11 August 2016.

This letter and the accompanying statutory written recommendation follow an earlier statutory written recommendation contained in our statement of reasons on the Objection dated 26 March 2021. This provided a six-month timeframe and the need for this further recommendation is because the Council has not yet taken the necessary steps of implementation. We have, with the support of our own legal advisers, now explained the approach expected to implement the statutory recommendation and satisfy the Council’s evident intention to comply.

This letter and recommendation are intended to explain the reasons for the delays and to allow the Council to inform the public of the action it is taking to resolve the issues raised in the Objection.

Background

The Objection argues that in light of the Council’s duties set out in sections 16 and 17 of the Whitby Urban District Council Act 1905:

1. the income and expenditure from all land and property owned by the Council in its capacity as the statutory harbour authority for Whitby Harbour (“**the Harbour Undertaking**”) should be included in the Statement of Accounts for Whitby Harbour 2015-16;
2. any surplus revenue from the Harbour Undertaking, including the car parks on harbour land, should be held in earmarked reserves for the improvement of Whitby Harbour; and

3. funds lawfully earmarked for the statutory harbour authority should not be passed to the General Fund.

The Objection raised the specific issue of income from car parks (Endeavour Wharf; Whitby Marina Front car park; Whitby Marina Back car park; and Whitby Marina Reserve car park) which are said to be situated on land which comprises part of the Harbour Undertaking. The Objection, however, was not limited only to the car park income. In light of the issues raised by Objection, also at issue was whether the Council's accounts complied with the requirements of the Whitby Urban District Council Act 1905 which requires clarity on the extent of the Harbour Undertaking because the duty to ring-fence income for harbour purposes only relates to income in respect of the Harbour Undertaking.

On 26 March 2021, after consideration of the Objection, we issued a statement of reasons in which we decided that it was not possible for us, on the basis of the evidence available, to determine the extent of the land which comprises the Harbour Undertaking and thus to determine the substance of the Objection. We considered whether to apply to the Court for a declaration as to whether there were items of account contrary to law from the High Court under s28(1) of the 2014 Act but decided it was not in the public interest to do so because of the disproportionate cost to the taxpayer and due to the relevant evidence being in the possession of the Council. We also considered the Council's intention to seek a Harbour Revision Order ("HRO") which would provide certainty as to the extent of the whole of the Whitby Harbour undertaking but noted that it would only apply prospectively. We instead made a statutory recommendation to the Council under sections 24 and Schedule 7 of the 2014 Act 2014 ("the First Recommendation") which read as follows:

We recommend that the Council should seek a declaration from the Court as to the status of the land in contention, with a claim being issued within 6 months of this decision. That is to say, the Council should take proceedings to seek a ruling on the land and property which comprises the statutory 'harbour undertaking', and whether all income from activities associated with that land and property is revenue received by the Council in respect of the 'harbour undertaking'. In the event that the Court decides that any revenue is received by the Council in respect of the 'harbour undertaking', the Court should be invited to give a direction as to the rectification of the accounts, including the financial years which should be rectified.

(emphasis added)

The requirements of the First Recommendation were that the Council should issue proceedings seeking a declaration from the Court as to (i) the extent of the entirety of the land which comprises the Harbour Undertaking, and (ii) the meaning of the accounting requirements set out in sections 16 and 17 Whitby Urban District Council Act 1905. The proceedings required by the First Recommendation were to be issued within six months, i.e. by no later than **26 September 2021**. Whilst the statement of reasons mentions judicial review proceedings as a potential method by which those proceedings could be brought, the First Recommendation did not require proceedings to be issued by way of judicial review and did not identify any decision which could or should be challenged by way of judicial review. It was therefore always for the Council, having taken its own legal advice, to determine the most appropriate way to seek declarations from the Court.

In accordance with paragraph 5(5) of Schedule 7 to the 2014 Act, the Council was required to consider the First Recommendation by 26 April 2021. However, the Council requested an extension of time to 26 July 2021 to consider the First Recommendation in light of the complex nature of the issues involved, the need to brief members, appoint and instruct a new Queens Counsel and secure a

venue that enabled a public meeting of full Council to be held safely, and in accordance with Government guidance and social distancing measures. On 25 April 2021, following discussions with officers, in exercise of our powers under paragraph 5(8) of Schedule 7 to the 2014 Act, we formally extended time for the Council to consider the First Recommendation to 26 July 2021.

On 22 July 2021, the Council's Audit Committee met to consider the First Recommendation. At that meeting the Council's Audit Committee resolved to (i) note the report of the Monitoring Officer and Director on the Council's response to the statement of reasons issued by Mazars LLP regarding the Objection, and (ii) report the views of the Audit Committee's independent member, Dr Jim Brace, that the Council should proceed with the recommendation, as outlined in the report, to bring certainty and clarity to this matter.

On 23 July 2021, a meeting of the full Council was held. At that meeting the report of the Monitoring Officer and Director on the Council's response to the statement of reasons issued by Mazars LLP regarding the Objection was considered. That report proposed, insofar as relevant, the following recommendation ("**the Officers' Recommendation**"):

It is recommended that Council:

1. Accepts the recommendation issued to the Council by Mazars under section 24 and Schedule 7 of the Audit and Accountability Act 2014 (and outlined in the Statement of Reasons dated 26 March 2021 attached to this report) and approves that the Council seeks a declaration from the Court as to the status of the car park land in and around Whitby Harbour being:

i. Endeavour Wharf;

ii. Whitby Marina Front car park;

iii. Whitby Marina Back car park;

iv. Whitby Marina Reserve car park.

The Recommendation proposed by Council officers restricted the scope of the declarations to be sought by narrowing the scope to only the car parks and not the entirety of the land comprising the Harbour Undertaking.

In the draft minutes of the meeting of the Council of 23 July 2021, it is recorded that Councillor Chance proposed an amendment to the Officers Recommendation because "*by accepting [the Officers' Recommendation] would leave this, and any future Council open to possible future challenge on the extent of harbour lands and any revenues received from them by way of rents and wayleaves*" and "*that greater clarity was needed in the recommendation which was not as proposed by the auditors and limited the scope of what the Council should be asking the Courts to clarify.*" The amended recommendation proposed by Councillor Chance read:

It is recommended that Council:

(i) Accepts the recommendation issued to the Council by Mazars under section 24 and schedule 7 of the Audit and Accountability Act 2014 (and outlined in the Statement of Reasons dated 26th March 2021 attached to the report). That this Council takes proceedings to seek a ruling on the Land and Property which comprises the 'Statutory Harbour Undertaking', and whether all income from activities

associated with that land and property is revenue received by the Council in respect of the 'Harbour Undertaking'. In event that the Court decides that any revenue is received by the Council in respect of the 'Harbour Undertaking', the Court be invited to give direction as to the rectification of the accounts, including the financial years which should be rectified.

Councillor Chance's amendment replaces the wording in the Officers' Recommendation with the exact wording from the second sentence of the First Recommendation. It appears that Councillor Chance considered that the Officers' Recommendation was not sufficient to implement the First Recommendation by restricting the declarations to only the land on which the car parks were situated. Instead, he considered that declarations should be sought as to identify the extent of the land which comprises the Harbour Undertaking. Following consultation, the Council's Monitoring Officer and the Section 151 Officer advised Members that the proposed amendment accorded with the First Recommendation. The Council carried Councillor Chance's amended resolution and, in our view, decided, pursuant to paragraph 5(6) of Schedule 7 to the 2014 Act, to issue proceedings seeking declarations as to the entirety of the land which comprises the Harbour Undertaking.

On 26 July 2021, the Council's Monitoring Officer wrote to us to advise us that the Council had met and accepted the First Recommendation. This confirmed that:

"The Council resolved that the Council accepts the recommendation issued to the Council by Mazars under section 24 and schedule 7 of the Local Audit and Accountability Act 2014 (and outlined in the Statement of Reasons dated 26th March 2021 attached to the report) that this Council takes proceedings to seek a ruling on the Land and Property which comprises the 'Statutory Harbour Undertaking', and whether all income from activities associated with that land and property is revenue received by the Council in respect of the 'Harbour Undertaking'.

In event that the Court decides that any revenue is received by the Council in respect of the 'Harbour Undertaking', the Court be invited to give direction as to the ratification of the accounts, including the financial years which should be rectified."

Upon consideration of Councillor Chance's resolution, we considered that the Council had properly understood and decided to implement the First Recommendation by agreeing to issue proceedings to seek declarations as to the extent of the entire Harbour Undertaking. We did not, therefore, need to take any further action in relation to the Objection at that point.

On 23 August 2021, the Council's solicitors, Bevan Brittan LLP, sent us a pre-action letter as required by the Judicial Review Pre-action Protocol before proceedings are commenced. In that letter, we were informed that the Council proposed to challenge our decision to make the First Recommendation which the Council had accepted. In addition, we were informed that the Council stated that the following declaration would be sought from the Court in an attempt to comply with the First Recommendation:

*7.15.1 the land, or part of the land, on which the Car Parks are situated does not form part of the Whitby Harbour undertaking and/or **is not held** by the Council for harbour purposes or in its capacity as statutory harbour undertaker for Whitby Harbour;*

In our view, this declaration would not have properly implemented the First Recommendation and, for the same reasons as the Officer's Recommendation, unduly have narrowed the scope of the declarations we recommended be sought from the Court. We also consider that if the Council had

issued proceedings seeking this declaration, they would not have been implementing the decision taken by the Council on 23 July 2021.

On 9 September 2021, our solicitors responded to the Council's solicitors to raise concerns about the way in which the way in which Council officers were seeking to implement the First Recommendation. This is because we did not agree including that (a) a claim in judicial review against the decision to make the First Recommendation was inappropriate because (i) the Council had accepted that decision and (ii) the Court would be restricted in terms of the evidence that would be available for it to consider and (b) the declarations sought were too narrow to implement the First Recommendation which required declarations to be sought as to the extent of the land which comprises the Harbour Undertaking.

Nevertheless, we proposed a way forward which was for the Council to issue proceedings under Part 8 of the Civil Procedure Rules to seek "advisory declarations" from the Court. We considered this to be the most proportionate and cost-effective way forward, which would allow the court to consider a wider scope of evidence and declarations than in judicial review proceedings, and obtain certainty as to the extent of the whole of the Whitby Harbour undertaking which would avoid further disputes in future. We invited the Council to agree to this approach.

On 26 September 2021, the deadline set in the First Recommendation to issue proceedings to seek the necessary declarations from the Court passed without the Council issuing such proceedings. The Council had therefore not taken sufficient steps to fully implement the First Recommendation by the deadline set therein.

On 27 September 2021, the solicitors for the Council wrote to our solicitors to confirm that Council officers agreed with our proposed approach, namely that it would issue proceedings under Part 8 to seek a declaration as to: (i) the extent of the land held by the Council *qua* statutory harbour authority for Whitby Harbour; and (ii) if necessary, the rectification of the Council's accounts, on the basis that we agreed to a further extension of the time within which to bring proceedings.

On 4 October 2021, our solicitors wrote to the Council's solicitors to welcome the agreement to the proposed approach and that we would issue a further statutory recommendation providing that proceedings are to be issued by no later than 31 December 2021. We explain our decision on timeframe below.

Conclusions

As set out above, despite accepting the First Recommendation, Council officers have not yet taken sufficient steps to implement it within the six-month timeframe by the First Recommendation: issued proceedings seeking declarations from the Court. We appreciate that there were some unusual issues to consider, such as the appropriate forum in which to bring proceedings, but a suitable way forward has now been agreed. We welcome Council officers' confirmation that it is now taking all necessary steps to issue proceedings as quickly as possible and are grateful for its cooperation with us.

Nevertheless, we continue to be unable to determine the substance of the Objection as there remains significant uncertainty over what land comprises the Harbour Undertaking for the purposes of the Whitby Urban District Council Act 1905. This important question cannot, for reasons given in our statement of reasons dated 26 March 2021, be resolved without a declaration being sought from the Court. The Council has not yet been able to publish a final financial report for the years 2015/16 to-date and as a consequence this important accountability duty remains unfulfilled.

Therefore, in light of the public interest in this matter, we consider that the public should know what steps are being taken to resolve the issues raised by the Objection as expeditiously and proportionately as possible. We consider the appropriate way of doing this is by us issuing a further statutory recommendation in almost the same terms as the First Recommendation save for the date by which it is to be complied with. This aims to ensure that the public is informed, in an open and transparent manner, of the way which we have asked the Council to resolve the issues raised by the Objection and the reasons for that approach.

Timeframe

As to the timeframe in which proceedings seeking a declaration should be issued, we have given careful consideration to Council officers' request that proceedings should be required to be issued no later than 9 March 2022. We appreciate that time will be needed to gather the evidence and that it is important that the Court have the best possible evidence that it is proportionate to gather. We also appreciate that the Council has limited resources available to it and needs to continue to perform its other public functions and that this capacity constrains its ability to gather information quickly. We are, however, concerned about the length of time requested and consider that a further six months is inappropriate. We have recommended that proceedings be issued by 31 December 2021.

We consider that, balancing the public interest in the Council having an adequate period of time in which to gather the relevant evidence so that the Court is provided with the best evidence that it is proportionate against the public interest in resolving the Objection expeditiously as possible, a deadline of 31 December 2021 is a proportionate compromise between these competing interests.

This deadline should be seen as a longstop and the Council should seek to issue proceedings as soon as practicable so that the issues raised in the Objection can be resolved without further delay.

Recommendation under section 24 and Schedule 7 of the 2014 Act

In light of the continuing uncertainty in relation to the revenue which is received by the Council in respect of the Harbour Undertaking, which appears to derive in turn from lack of clarity over which land comprises the Harbour Undertaking, we recommend that the Council takes the following steps:

We recommend that the Council should seek a declaration from the Court as to the status of the land in contention, with a claim being issued by 31 December 2021. That is to say, the Council should take proceedings to seek a ruling on the land and property which comprises the statutory 'harbour undertaking', and whether all income from activities associated with that land and property is revenue received by the Council in respect of the 'harbour undertaking'. In the event that the Court decides that any revenue is received by the Council in respect of the 'harbour undertaking', the Court should be invited to give a direction as to the rectification of the accounts, including the financial years which should be rectified.

As previously explained, in circumstances such as these, only a Court can reach a definitive decision, which would bind relevant parties and bring this long running dispute to a close. We remain of the view, moreover, that the Council is best placed to take this action – it holds most of the relevant evidence (some, or most, of which we are likely not to have seen or even to know about). Further, action taken by the Council would inevitably cost less than the auditor taking such legal action, as our costs including those of our lawyers are passed on to local taxpayers which would be duplicated with those of the Council's officers and lawyers, as the Council would have to be a party to proceedings.

This recommendation will be sent to the Secretary of State. The Council is required to consider the recommendation at a meeting held before the end of the period of one month beginning with the day on which the recommendations were sent to them. At that meeting it must decide what action, if any, to take in response to the recommendations. The Council is required to publicise the meeting and, subsequently, the decision taken at the meeting.

Final remarks

We have been informed that the Council is currently in the process of gathering the relevant evidence with a view to issuing proceedings to seek the necessary declarations from the court as soon as practicable and, in any event, by 31 December 2021. We are grateful to the Council for confirming this.

Yours sincerely

Cameron Waddell



Partner