


'A' ITEM

	REPORT TO COUNCIL TO BE HELD ON 23 JULY 2021	
	Key Decision	NO
Corporate Priority All	Cabinet Portfolio Holder	Cllr Janet Jefferson

**REPORT OF: THE MONITORING OFFICER AND DIRECTOR (LD) –
21/131**

WARDS AFFECTED: ALL

**SUBJECT: RESPONSE TO STATEMENT OF REASONS ISSUED BY
MAZARS LLP REGARDING OBJECTION TO THE
STATEMENT OF ACCOUNTS FOR THE YEAR ENDING
31 MARCH 2016**

RECOMMENDATIONS:

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.
2. Notes that the legal costs incurred by the Council to seek the Court declaration will be funded from the Council's Risk Management Reserve and are estimated as being £50-100k.

REASON FOR RECOMMENDATION (S):

To ensure the Council complies with its obligations pursuant to the Local Audit and Accountability Act 2014.

HIGHLIGHTED RISKS:

A detailed risk register is attached at Appendix A to this report.

1. INTRODUCTION

- 1.1 Scarborough Borough Council is the statutory harbour undertaker for Whitby Harbour which, in recent years, has been the subject of local opposition on the Council's treatment of income received from the land in proximity to the harbour.
- 1.2 Following publication of the Council's draft 2015/16 Statement of Account, a formal objection to the accounts was received from a local elector.
- 1.3 After some delay in reaching a determination on the objection, Mazars LLP (Mazars), the Council's external auditors, have now issued their Statement of Written Reasons to the elector and the authority. A copy of the Statement of Reasons dated 26 March 2021 is attached to this report.
- 1.4 Mazars have made a recommendation under section 24 and paragraph 5 of Schedule 7 of the Local Audit and Accountability Act 2014 that the Council should seek a declaration from the Court with regards to an element of the objection and have asked that Council formally meet to consider its response to the statutory recommendation by 26 July 2021.

2. CORPORATE OBJECTIVES

- 2.1 The Council's Accounts and Financial Statements cover all of the Council's priorities.

3. BACKGROUND AND ISSUES

3.1 OBJECTION TO 2015/16 STATEMENT OF ACCOUNTS

- 3.1.1 The objection to the 2015/16 Statement of Accounts was, in summary, on the grounds that:
 - Form and Content of the statement of accounts: the draft Statement of Accounts for Harbours does not comply with Scarborough Borough Council's legal obligations as the Statutory Harbour Authority for the Port and Harbour of Whitby. The details of the objection were specifically that the Statement of Accounts provided for Whitby Harbour 2015/16:
 - includes activities of Scarborough Harbour, which is a separate and distinct statutory harbour undertaking, and
 - does not report on the longer-term financial position which would conventionally be covered by a Balance Sheet and Notes to the Accounts, in accordance with the Companies Act 2006.
 - the Statement of Accounts provided for Whitby Harbour 2015/16 does not comply with statutory requirements.
 - the 'Charge for Use of Assets' levied on Whitby Harbour Car Parks was inappropriate.

- funds which should have been reserved exclusively for the use of the Whitby Harbour undertaking have been added to the Council's general fund purpose funds.

3.1.2 Following receipt of this objection in 2016 the Council sought legal advice from Queen's Counsel to review the matters raised in the objection and in particular whether the Council was acting lawfully in the treatment of the car park income from Whitby Harbour. The Council also sought legal advice from a partner and parliamentary agent at Bircham, Dyson, Bell LLP.

3.1.3 The advice concluded that the Council had acted lawfully in the administration of its accounts and had not been in breach of Sections 16 or 17 of the Whitby Urban District Council Act 1905 (the 1905 Act) in relation to its treatment of harbour income and expenditure.

4. CONSULTATION

4.1 This report will be considered by the Audit Committee on 22 July 2021 in advance of the Council meeting.

4.2 Officers will hold Member briefings on this report in advance of the Council meeting.

5. ASSESSMENT

5.1 Form and Content of the statement of accounts

5.1.1 This part of the objection covers the form and content of the Whitby Harbour accounts and the requirements set out in the Harbours Act 1964 as amended by paragraph 10 of Schedule 6 to the Transport Act 1981.

5.1.2 Mazars have confirmed that they concur with the Council's assessment that the Harbours Act 1964 (as amended) does not place a statutory duty on the Council to 'prepare an annual statement of accounts relating to the harbour activities and to any associated activities.'

5.1.3 Given the above, the requirements detailed in the 1905 Act were then considered. Section 62 of the 1905 Act contains a requirement for the Council to keep 'separate accounts of their receipts and expenditure from or in respect of the harbour undertaking on capital and revenue account' and that the 'harbour account shall be audited in each year in the same manner as the other accounts of the Council are audited and subject to provisions relating thereto'.

5.1.4 The Accounts and Audit Regulations 2015 (the 2015 Regulations) and the CIPFA Code of Practice on Local Authority Accounting (the CIPFA Code) do not make explicit reference to separate harbour accounts. Regulation 7(2)(d) of the 2015 Regulations states that the Statement of Accounts for Category 1 authorities (including Scarborough Borough Council) must include:

"(d) any other statements relating to each and every other fund in relation to which the authority is required by any statutory provision to keep a separate account."

5.1.5 In light of the above the Council has amended its draft 2015/16 Statement of Accounts to include a separate Whitby Harbour account and disclosures to meet the requirements of the 2015 Regulations and Section 62 of the 1905 Act. This account does not include income or expenditure generated from harbour activities in relation to Scarborough Harbour.

5.1.6 Mazars have accepted this amendment and have furthermore clarified that to follow an accounting treatment as argued by the objector would be to turn the clock back to accounting practices long since given up by local authorities and external auditors and considered not fit for modern times.

5.1.7 Mazars have confirmed that, for the purposes of deciding the objection, that they are satisfied with the approach that the Council has taken in preparing its separate account as it appears to be in accordance with proper practices and modern accounting methods, which provide a more transparent and useful way of presenting financial information to the public.

5.2 **Charge for Use of Assets levied on Whitby Harbour Car Parks**

5.2.1 The Council has accepted the need to keep separate accounts for receipts and expenditure in respect of the harbour undertaking and has produced revised financial statements for 2015/16 to reflect this. The “charge for use of assets”, which was only ever included within internal ‘management accounts’ is not reflected within the additional disclosure.

5.3 **Ring fencing of funds and funds inappropriately passed to General Funds.**

Objector's position

5.3.1 The objector argues that:

- the income and expenditure from all land and property owned by the Council in its capacity as the Statutory Harbour Authority for Whitby harbour should be included in the Statement of Accounts for Whitby harbour 2015-16; and
- any surplus revenue from the Whitby harbour undertaking, including the car parks on harbour land, should be held in earmarked reserves for the improvement of Whitby harbour
- funds lawfully earmarked for the Harbour Authority should not be passed to the General Fund

5.3.2 The objector considers that income, specifically car parking income, earned on land in and around Whitby Harbour has not been allocated in full in accordance with Section 16 and 17 of the 1905 Act.

5.3.4 Section 16 provides:

“All moneys in the nature of revenue received by the Council in respect of the harbour undertaking shall be applied by them as follows:

(1) In payment of the working and establishment expenses and cost of maintenance of the harbour undertaking;

- (2) *In payment of the interest or dividends on any mortgages or other securities granted and issued in respect of money borrowed for the purposes of the harbour undertaking;*
- (3) *In the payment of sums required to be paid for any instalment or contributions to a sinking fund in respect of moneys borrowed for the purposes of the harbour undertaking;*
- (4) *In repayment to the district fund of the district of any of the sums paid out of that fund or the general district rates of the district for the purposes of the harbour;*
- (5) *In providing (if the Council think fit) a reserve fund by the setting aside from time to time such moneys as they think reasonable and investing the same and the income thereof in statutory securities until the fund so formed amounts to a sum of five thousand pounds which fund shall be applicable to answer any deficiency at any time happening in the revenue of the Council from the harbour undertaking or to meet any extraordinary claim demand or liability at any time arising against the Council in respect thereof and so that if the fund is at any time reduced it may thereafter be again restored and so from time to time as often as such reduction happens.*

Any surplus from the revenue from the harbour undertaking in any year and the income of the reserve fund so long as that fund amounts to five thousand pounds shall be applied to the improvement of the harbour undertaking.”

5.3.5 Section 17 provides:

“If in any year the revenue of the harbour undertaking proves insufficient to meet the payments specified in paragraphs (1), (2) and (3) of the last preceding section the deficiency shall be made up out of the district fund and general district rates of the district.”

5.3.6 Section 16 therefore prescribes the way in which revenue received by the Council in respect of the ‘harbour undertaking’ is to be applied (and in particular, requires any surplus revenue from the harbour undertaking to be applied to the improvement of the harbour undertaking). Section 17 prescribes what happens should the Harbour revenue not be sufficient to meet the Harbour undertaking’s liabilities.

5.3.7 The objector contends that any land which has been purchased in the vicinity of the harbour, or land which has been reclaimed from the harbour and in particular the car parks in and around Whitby Harbour, are held by the Council in its capacity as harbour authority therefore any revenue related to that land is received in respect of the “harbour undertaking” for the purposes of section 16.

Council’s position

5.3.8 On receipt of the objection the Council took legal advice from Queen’s Counsel and a firm specialising in parliamentary procedure.

5.3.9 The advice concluded that the extent of land held by the Council as harbour undertaking was uncertain. The Council in its capacity as statutory harbour undertaker did not have the power to run a commercial car parking facility therefore

the revenue derived from the car parking sites could not be income in respect of the harbour undertaking and was not therefore caught by the provisions of the 1905 Act.

5.3.10 The definition of the 'harbour undertaking' for the purposes of the 1905 Act refers back to section 5 of the Whitby Port and Harbour Act 1879 (the 1879 Act) which provides:

"The port of Whitby shall, for all purposes of this and the recited Act and of other Act relating to the harbour of Whitby extend over and along the seashore for a distance of one mile and a half westward and one mile eastward from the existing Lighthouse on the northern extremity of the West Pier of the Harbour and to a distance two miles seaward from and co-extensive with that portion of the seashore and shall include all places where the sea flows and reflows within those limits and all the lands buildings and works within or near to those limits from time to time vested in or belonging to or under the control of the Trustees."

5.3.11 Section 6 of the 1879 Act provides the definition of harbour works within this wider definition to include those parts of the Port "... *within and above the existing piers and works, and such piers and works, and all alterations, extensions, and improvements of the existing piers and works, and all such parts of the ports as shall hereafter be comprised and included within such alterations....*"

5.3.12 The Council's legal advice therefore concluded that the limits of the harbour are capable of changing 'from time to time' depending on what is vested in or belongs to, or is under the control of the Council, in its capacity as successors of the Trustees under the 1905 Act.

5.3.13 Accordingly, land vested in the Council's predecessor under the 1905 Act, or held by it for harbour purposes between 1905 and the present day, can cease to form part of the harbour undertaking if it is no longer held by the Council in its capacity as harbour authority. Once land is no longer part of the harbour undertaking, revenues derived from it fall outside the scope of section 16 of the 1905 Act.

5.3.14 In particular, the car parks concerned in and around Whitby Harbour were no longer held as part of the harbour undertaking but in the exercise of the Council's functions under the Road Traffic Regulation Act 1984. Accordingly the totality of the car parks' income does not automatically fall to be considered in its entirety as revenue of the harbour undertaking. Rather it should only be the revenue from the spaces allocated for harbour users that falls to be dealt with as harbour revenue.

5.3.15 To address the uncertainty about the precise extent of the harbour undertaking the Council was advised, and proposed to Mazars, that the Council would seek a Harbour Revision Order. This would be the more cost effective and would be more likely to give a definitive answer than seeking a Court declaration.

5.3.16 In addition to the local legislation the Council reviewed its title deeds as well as its decision records in order to determine when and why land was acquired by Whitby Urban District Council or latterly Scarborough Borough Council. Based on the evidence available all of the land that was considered was conveyed or purchased

post the transfer date referred to in the 1905 Act by Whitby Urban District Council and later by Scarborough Borough Council.

5.3.17 It has not been possible to establish with any certainty the reasons all of the land was originally purchased. Some of the land was however purchased from British Rail and this indicates that some of the land had previously been used for purposes other than harbour activities.

Statement of Reasons and Recommendation

5.3.18 The Statement of Reasons issued by Mazars to the Council and attached to this report outlines that there may be some force in the Council's legal opinion that the Council cannot receive income in its capacity as road traffic authority without first appropriating the land for those purposes. However even if this is correct, Mazars are of the view that these issues are still dependent on which land is and was part of the harbour undertaking.

5.3.20 It is noted from the Statement of Reasons that the proposal by the Council to obtain a Harbour Revision Order to resolve the uncertainty has not been accepted by Mazars as this would only provide certainty going forward and would not address the historical treatment of harbour revenue.

5.3.21 In providing their Statement of Reasons Mazars state that they have considered whether it is more likely than not that income from each of the car parks is revenue received in respect of the harbour undertaking and whether the Council has failed to hold any surplus funds from the Whitby harbour undertaking in earmarked reserves for the improvement of Whitby harbour and inappropriately passed these to the General Fund. Mazars conclude however that it is not proportionate or appropriate for the time being, and dependent on the Council's response to the recommendation, for them to take this any further.

5.3.22 In light of the uncertainty in relation to the revenue which is received by the Council in respect of the harbour undertaking, Mazars therefore recommend that the Council seeks a declaration from the Court as to the status of the land in contention within 6 months of its Statement of Reasons. In the event that the Court decides that any revenue is received by the Council in respect of the harbour undertaking and is caught by section 16 of the 1905 Act the Court should be invited to give a direction as to the rectification of accounts including the financial years which should be rectified.

5.3.23 Recent advice received by the Council based on the Statement of Reasons and recommendation from Mazars concurs that the matter is not straightforward and that it is not possible, on the evidence obtained to date, to give a definitive view on the land which is caught by the requirements of section 16 of the 1905 Act.

5.3.24 After examining the Statement of Reasons, the most recent legal advice considers that the most likely outcome for the court to reach may be mixed. It is possible that a court may declare that some of the land was purchased for the harbour undertaking (for a harbour purpose) and some not.

5.3.25 Should the Court determine that some revenue from the Whitby harbour undertaking has been misallocated the court will then have to consider the financial years that should be rectified.

5.3.26 There are four car parks where the income is being queried, these are:

- i. Endeavour Wharf
- ii. Marina Front
- iii. Marina Back
- iv. Marina Reserve

The income from the harbour users' car park is already allocated to Whitby Harbour as it is deemed a core harbour activity.

5.3.27 It is worth clarifying that the way that the Council has treated this income in 2015/16 is consistent with prior years and in line with CIPFA guidance and accounting regulations. This objection is not as a result of a change in accounting treatment during 2015/16 but rather an objection to the treatment that has been in place for a number of years that the objector argues is not in line with historic legislation.

5.3.28 By way of illustration, the total net income generated by these car parks over the last six financial years is as follows:

	DRAFT		ACTUALS			
	2020/21	2019/20	2018/19	2017/18	2016/17	2015/16
Income	(638,034)	(1,038,234)	(1,144,282)	(1,076,006)	(1,080,730)	(1,009,611)
Costs specific to individual car parks (note 1)	27,311	233,980	95,602	153,585	150,481	83,575
Total 'non specific' costs (note 2)	146,233	167,545	179,541	144,688	129,199	118,711
Net surplus generated from car parks (note 3)	(464,490)	(636,709)	(869,138)	(777,733)	(801,051)	(807,325)

Note 1: these are costs specific to the individual car park and includes business rates and DBID costs

Note 2: this is a percentage of car parking costs that are not specific to individual car parks and include items such as enforcement costs, equipment, cash collection and vehicle costs

Note 3: this excludes corporate costs such as Member costs and backfunded pension costs which, in line with CIPFA guidance, are not allocated to service units. If these were added then the surplus presented would reduce.

5.3.29 It is possible that the Court may determine that some of the revenues derived from car parking facilities relate to and/or are connected with property which is held by the Council in its capacity as statutory harbour undertaker. In these circumstances, a possible outcome would be to determine that the following (net) income would relate directly to Whitby harbour.

	DRAFT		ACTUALS			
	2020/21	2019/20	2018/19	2017/18	2016/17	2015/16
Income	(397,293)	(578,642)	(693,446)	(703,093)	(686,915)	(649,103)
Costs specific to individual car parks (note 1)	33,520	80,682	(7,680)	66,816	78,393	16,593
Total 'non specific' costs (note 2)	91,057	93,379	108,804	94,543	82,119	76,322
Net surplus generated from car parks (note 3)	(272,717)	(404,582)	(592,323)	(541,735)	(526,403)	(556,188)

The net income outlined in the table above totals £2.9m over the six year period.

5.3.30 Clearly this is one of many possible outcomes and the Council will robustly defend its treatment of the income that has been received in line with its legal advice. Members should note however that the position is uncertain and the Court's decision could be very unfavourable to the Council. Conversely the Court may determine that the Council has acted reasonably and determine that the current

treatment is lawful and appropriate. Over the illustrative six year period, the maximum income that the court could determine has not been allocated correctly would be £4.36m with the minimum being £nil.

5.3.31 Should the Court rule that some of the car parking income should be ring-fenced for harbour activities then the Council would need to review the funding of its capital programme over the relevant period. The Council invests General Fund monies in the harbour and this generates substantial sums of external funding. Over the illustrative six year period the Council's General Fund balance has directly contributed £567k to the capital programme and this has allowed total investment, including external grants, of £8.73m. The Council's contribution outlined above is purely the direct funding and does not represent officer time required to source and claim the grant funding.

5.3.32 In addition to this the Council has earmarked £1.5m of capital monies from the General Fund to undertake works on Eskside Wharf. Should the Court rule that some car parking income needs to be earmarked specifically for Whitby harbour then this funding would no longer come from the Council's General Fund but would instead be funded from Whitby harbour reserves.

5.3.33 Anything in addition to the above would need to be addressed through the Council's Medium Term Financial Plan and could reduce the scope of the capital programme. If a court orders rectification of the accounts for a period exceeding the illustrative six year period, clearly the Council's maximum financial exposure could be significantly higher.

5.3.34 Notwithstanding the Council's contention as to the extent of the harbour land, the Council's legal advice also suggests that a further argument can be advanced that even if the land is harbour land, the income is not derived from harbour purposes and should therefore be excluded from any harbour accounts.

6. IMPLICATIONS

6.1 Policy

6.1.1 There are no direct policy implications arising from this decision.

6.2 Financial

6.2.1 This objection and recommendation relates only to 2015/16 statement of accounts. Mazars have received similar objections to all of the Council's accounts since then however the resolution to the 2015/16 objection should in turn determine the resolution of the other objections.

6.2.2 The financial implications are set out in the body of the report.

6.3 Legal

6.3.1 Legal implications are set out in the body of this report.

Local Audit and Accountability Act 2014 (the 2014 Act)

- 6.3.2 On 26 March 2021 the Council's external auditors, Mazars, made a statutory recommendation to the Council under section 24 and paragraph 5 of Schedule 7 of the 2014 that, *in light of the 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 is held by the 'harbour undertaking', [...] that the Council seeks 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.*
- 6.3.3 The recommendation further states that the Council should, in the event that the Council decides that any revenue is received by the Council in respect of the 'harbour undertaking,' the Court should be asked to give direction as to the rectification of the Council's accounts including the financial years which should be rectified.
- 6.3.4 Mazars were not minded to exercise their power under section 28(1) of the 2014 Act to apply to court for a declaration that the Council's statement of accounts included an unlawful item, or to make a public interest report under section 24 and schedule 7 of the 2014 Act.
- 6.3.5 Under the 2014 Act the Council is required to consider this recommendation at a meeting before the end of one month beginning on the day which it was sent to the Council or such other period of extension as the external auditor may agree. In this instance Mazars agreed an extension until 26 July 2021 for the Council to meet to consider its response in recognition of the highly complex nature of the issue, the significant amount of work undertaken by the Council in response to the objection to-date and to allow sufficient time for the Council to instruct Counsel to review the Council's case and advise.
- 6.3.4 If the Council accepts the recommendation it has until 26 September 2021 to issue an application at Court to seek the declaration recommended by Mazars.
- 6.3.5 The Council is not obligated under the 2014 Act to accept the recommendation, and may lawfully refuse to do so if it has good reason. The Council could argue that it is acting in reliance upon advice provided by Queen's Counsel and its allocation of the revenue received from the relevant car parking sites between its general fund and the Whitby Harbour undertaking account is therefore lawful. In addition, the Council may argue that it is seeking a Harbour Revision Order to obtain certainty on the position going forward.
- 6.3.6 If the Council refuses to accept the recommendation then the likely consequences will be:
- Mazars may seek to apply to court for a declaration under section 28(1) of the 2014 Act on the basis that the Council's statement of accounts includes an unlawful item;
 - Mazars may challenge the Council's refusal to accept the Recommendation by way of Judicial Review under section 33(1) of the 2014 Act; and/or

- The Objector may seek to challenge the Council's decision by way of Judicial Review. It is noted in this regard that the Objector has retained experienced legal counsel throughout and has been seeking to raise funds via crowdfunding to bring a challenge against the Council.

6.3.7 Accordingly, even if the Council was to refuse to accept the recommendation, there is a strong likelihood that the matter will be referred to the court for a declaration in any event. It is therefore recommended that the Council accepts the recommendation from Mazars.

6.4 Equalities and Diversity

6.4.1 There are no direct equalities and diversity implications arising from this report.

6.5 Staffing

6.5.1 There are no direct staffing implications arising from this report.

6.6 Communications

6.6.1 The Council has complied with the publicity requirements contained in the 2014 Act relating to the Recommendation from Mazars and this meeting.

6.7 Planning Implications, Crime and Disorder Implications, Health and Safety and Environmental implications

6.7.1 There are no particular implications arising from this report.

7. ACTION PLAN

7.1 If Council accepts the recommendation the Council will issue an application at court to seek a declaration by 26 September 2021.



Lisa Dixon
Monitoring Officer and Director