



Committee report

Committee	CABINET
Date	TUESDAY, 3 APRIL 2012
Title	NEWPORT HARBOUR ESTATE
Report to	THE DEPUTY LEADER AND CABINET MEMBER FOR THE ECONOMY AND THE ENVIRONMENT

EXECUTIVE SUMMARY

1. This paper is intended to confirm the Isle of Wight Council's approach to the management of Newport Harbour so that: -
 - It is able to manage the harbour in the most economic and effective way to the benefit of the economy of Newport and the Isle of Wight.
 - It is able to seek and take advantage of development opportunities for the harbour area to increase its use and improve the Island's economy and sustainability.
2. The difficulties in coming to a consensus about the management approach are discussed in the paper. Principal among them is in understanding that the harbour estate can change over time and may increase or reduce depending on the scale of the harbour's use at any point in time.
3. A summary of the council's powers to provide and manage the harbour is discussed in the paper. The interpretation of these powers is central to being able to identify the key actions the council needs to take to maximise the benefits the harbour can bring to the Isle of Wight.

CONFIDENTIAL ITEMS

4. Appendix 5a is confidential and is exempt by virtue of Paragraph 3 of Part 1 of Section 12A of the Local Government Act 1972 because it 'relates to financial or business affairs of any particular person'. In this case it comprises the detailed terms of the existing leases of the current harbour estate. The information contained in this appendix that is not confidential has been provided in Appendix 5b.

INTROUCTION

5. A version of this paper was prepared for the consideration of the cabinet on 13 December 2011 (as paper F). The publication of the paper caused a number of claims to be made by a small number of individuals. As a consequence the council withdrew the paper for consideration at that time in order to examine the issues raised which in summary are that: -
- The council has allowed leases on harbour estate for longer than it has the powers to do so even after becoming aware of the limitations on its powers.
 - The council has no power to dispose of harbour estate.
 - The council has a duty to have a harbour board.
 - The council should reduce all of the leases on harbour estate to the maximum term of three years by way of offering a rolling three year lease to these tenants.
 - Any costs associated with amending leases or reversing disposal decisions would be recoverable from an improved usage of the harbour.
6. This paper seeks the same outcomes as its earlier version and addresses the issues raised in response to it and the written questions that were asked of the Cabinet at its meeting in December 2011. These questions are reproduced and answered in Appendix 1 to this paper.

BACKGROUND

7. The Isle of Wight Council as a local authority has powers to act in respect of its land and property. It also has additional powers to provide and operate Newport Harbour.
8. A discussion of the interpretation and use of these powers in the management and operation of the harbour and the land and property adjacent to it is relevant to preparing a clear statement of intent as to the council's approach to the future management of the harbour and is attached at Appendix 2 to this paper.
9. Central to being able to improve the management of the harbour is having absolute clarity about what actually constitutes the harbour. Whilst there is a clear plan to define the waters of the harbour there is no similar which defines the land and buildings (harbour estate) to be used and managed in support of the operation of the harbour. This is only provided by way of a written definition
10. Legislation indicates the council owned land and assets adjacent to the harbour may or may not be considered to be harbour estate at different points in their life cycle. The main determining factor being whether they are used for harbour related purposes.
11. A list of assets that should be considered as the current Newport harbour estate is proposed at Appendix 3 (including a location plan for the benefit of the reader). It should be noted however that any land and assets owned by the council would be considered part of the harbour estate if they were being used to support the operation of the harbour but would only be part of the council's general land holding if they were not being used for harbour related purposes.
12. This is an important distinction as it allows the council to bring its other land holdings and assets into the harbour estate in support of any development and improvement

opportunities that it may identify for the harbour. Appendix 4 identifies areas of council owned land that could be used in this way.

13. There are a number of properties within the current harbour estate which have been leased to third parties by the council for periods of three years or longer. This is in breach of the council's powers to manage the harbour estate. These leases are shown in detail in Appendix 5a which is confidential, the information that can be published about these leases is shown in Appendix 5b for purposes of transparency.
14. Whilst the council (and its predecessor bodies) have acted ultra vires in granting these leases there is no evidence to suggest that any party has been materially disadvantaged by this action. There is evidence however, as shown in Appendix 6, that the existing tenants would consider themselves financially and materially disadvantaged were the council to take action to reduce their leases to the maximum term allowed. This would be likely to result in a significant financial cost to the harbour account incurred without good reason. It could also be considered a breach of the council's wider powers of financial responsibility to the Island's council tax payers were it to take this action in full knowledge of the likely outcomes that would result from them. One of the leases identified in Appendices 5a and 5b however is the subject of a break clause that would allow it to be terminated after three years without penalty to the council.
15. Council owned land that is no longer being used for harbour purposes is able to be disposed of under the council's ordinary powers as a local authority. The council has suggested that in order to make it abundantly clear an asset formerly used for harbour related purposes is being disposed of under its general powers it will formally declare that the asset is no longer required for use by the harbour prior to its disposal. There is no legal requirement for the council to do this. The process would have applied to the long leasehold disposals of the Premier Inn and Medina Quay sites and Jubilee Stores (including car parking).

STRATEGIC CONTEXT

16. Confirming the entirety of Newport Harbour and the disposal processes of land previously used to support the operation of the harbour are an important precursor to being able to develop a robust plan for improving the use of the harbour as a whole. If this can be achieved it will contribute to the economic well being of the town and the council's key strategic corporate priority of *Regeneration and the Economy*.
17. Improving the use of the harbour will also lead to an increase in earned income therefore contributing to the key strategic corporate objective of *Delivery of Budget Savings through Changed Service Provision*.

CONSULTATION

18. Advice and direction received from the District Auditor (Audit Commission) following its review of the harbour accounts has been reflected in the recommendations made in this report.

FINANCIAL/BUDGET IMPLICATIONS

19. Confirming the entirety of Newport Harbour will protect the council's current financial position in respect of the harbour estate and help improve its management of it to the benefit of the harbour accounts.
20. If the council decided to terminate the current leases for terms exceeding three years and replace them with new leases for a maximum of three years the council is likely to face substantial compensation claims, which would adversely impact on the harbour accounts.
21. If any harbour estate land is declared surplus to requirements as a result of the clarification to the extent of the harbour estate there is the potential for regeneration and investment which could result in future capital receipts to the council and in the interim there is the potential for letting existing buildings for terms longer than three years that could result in improved revenue income.

CARBON EMISSIONS

22. Clarifying the extent of Newport Harbour estate is unlikely to directly impact upon the council's carbon emissions. However, if this enables regeneration of the harbour, with land and buildings incorporating modern carbon reduction technology this may reduce such emissions in the future.

LEGAL IMPLICATIONS

23. The predecessors of the Isle of Wight Council became responsible for Newport Harbour in 1852 by virtue of the River Medina Navigation Act. The council's powers and duties are contained in a number of statutes and harbour revision orders ranging from the Harbour, Docks and Piers Clauses Act 1847 to the Newport (Isle of Wight) Harbour Revision Order 1988.
24. There is a significant amount of local legislation specific to Newport Harbour, including the River Medina Navigation Act 1852, the River Medina Navigation Order 1898, the Newport (Isle of Wight) Harbour Revision Orders 1968 and 1988. In addition to these there are other statutory provisions affecting Newport Harbour relating to harbours in general, such as the Harbour, Docks and Piers Clauses Act 1847, the Harbours Act 1964 and the Docks and Harbours Act 1966.
25. Legal advice has addressed a number of issues on behalf of the Isle of Wight Council, including the duties and powers of the council in relation to the harbour and, specifically, what constitutes the harbour estate and whether the council can dispose of harbour estate.
26. This advice is that the disposal of harbour estate can be achieved by use of the council's general powers as a local authority. The council has undertaken to improve the process further by making a formal resolution that assets are no longer required for harbour related purposes before a disposal process begins. This matter was also considered in some detail by the Audit Commission in its response, of August 2011, to the objection to the harbour accounts and, after taking its own legal advice, the Audit Commission confirmed that the council's position was correct. It also confirmed that the

capital receipt generated from any disposal in this way could be paid into the council's corporate account and not the harbour account.

27. Should any land be determined to no longer be needed for harbour purposes it can be disposed of for best consideration under Section 123 of the Local Government Act 1972 which provides specifically for the disposal of land in local authority ownership. Section 122 of the same Act also confers a power on the council to "appropriate for any purpose for which the council is authorised by this or any other enactment to acquire by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation".
28. Legal advice has also identified the restriction under the 1847 Harbour, Docks and Piers Clauses Act against granting occupation of any premises within the harbour estate for a term in excess of three years. However, such leases have been granted over the years in good faith and in accordance with the council's (as local authority) general powers and processes. They are also valid under the terms of the 1954 Landlord and Tenant Act.
29. In granting leases of over three years in relation to harbour estate, the various councils responsible for the harbour have technically acted beyond their powers, in that they did not have the authority to do so given that the 1847 Act specifically restricts the length of time a lease can be granted for. The leases however are deemed in law to be valid unless declared otherwise by a court. A court would, in considering whether the leases are valid, have regard to the tenants' rights, and whether it would be proportionate to interfere with their rights granted under the leases as compared to the public interest in ending the leases.
30. The Audit Commission has also taken legal advice on the 1847 Act restrictions and recognises that the council accepts the limits on its powers and confirmed that it will not grant further leases in excess of three years. The Auditor, "considers that the council's explanation of why it has not taken any action in relation to the ongoing leases of harbour estate that have been granted for longer than three years is reasonable".

PROPERTY IMPLICATIONS

31. As this is principally a property based report there are not considered to be any additional property implications that require highlighting in this section.

EQUALITY AND DIVERSITY

32. The council as a public body is subject to general and specific duties under equality and diversity legislation and as such has a duty to impact assess its service, policies/strategies and decisions with regards to diversity legislation and the nine "protected characteristics" (e.g. age, gender, race, religion). None of the identified groups are likely to be adversely discriminated against by the recommendations in this paper. Any subsequent decisions in respect of regeneration or specific disposals will have equality impact assessments undertaken on a case by case basis at the relevant time, as necessary.

SECTION 17 CRIME AND DISORDER ACT 1998

33. There are not believed to be any adverse crime and disorder issues relating to this report, although surplus properties that remain vacant (such as the Vectis Building within the harbour) can be prone to vandalism, particularly if the surrounding area appears partially run down. It is therefore in the council's best interest to clarify its position in respect of the harbour and to enable redevelopment or regeneration as soon as practicable.

OPTIONS

- (i) To confirm the assets that currently make up the Newport Harbour Estate are as shown in Appendix 3 and that there is no compelling public interest in terminating the existing leases granted for longer than three years (as shown in appendices 5a and 5b) and therefore to allow these leases to continue but to exercise the break clause in the single lease that can be restricted to the three year limit.
- (ii) To recognise the fluid nature of the harbour estate by reviewing every two years the portfolio of assets that make up the estate.
- (iii) To terminate all of the leases shown in appendices 5a and 5b and reissue them for a period of no more than three years.
- (iv) Not to confirm the assets of the Newport Harbour Estate as set out in Appendix 3

RISK MANAGEMENT

34. There is a high risk that the council will be unable to develop robust plans for improving the operation and use of the harbour without agreement as to what constitutes the harbour in its entirety. The production and regular review of a current asset list as set out in Appendix 3 to this report mitigates against this risk and recognises the transient nature of the harbour estate on the basis of its legal definition. It also reduces the risks of the council having to defend further expensive challenges to its management of the harbour. For as long as the council has to direct its energy and resources to defending such challenges the potential for the harbour to make a positive contribution to the economy of Newport decreases.
35. Previous formal decisions taken by the relevant committee, executive or portfolio holders of local authorities responsible for the harbour in respect of the disposal land adjacent to the harbour have been taken under the general powers to dispose of land available to all local authorities. Any further decisions to dispose of the harbour estate may still be subject to further challenge. The council's amended process to declare land no longer required for harbour use prior to its disposal will allow the opportunity for challenge by interested parties before any disposal is achieved.
36. There is a high financial risk of the council terminating the current leases of harbour estate that exceed three years; the cost could be substantial and would reflect directly against the harbour accounts. This would negatively impact on the viability of the harbour as a whole. The financial risk is also high in that the council will not be able to grant a lease for longer than three years at the point of renewal, even though they

benefit from the protection afforded by the Landlord and Tenant Act, resulting in potential compensation claims.

37. There is also a high risk of the council being challenged that it has breached its fiduciary duty to all of the tax payers of the Isle of Wight should it choose to initiate action to remedy the position in respect of the leases that have been granted for longer than three years in the knowledge that it would face significant claims for compensation and legal costs. The outcome of such a challenge to the council could also lead to it incurring significant costs.
38. If the council can not agree the entirety of Newport Harbour there is a high risk that the harbour will continue to decline both in appearance and maintenance to such an extent that it is no longer fit for purpose leading to the council having to restrict its use altogether.

EVALUATION

39. The three year limitation on occupation of the harbour estate is considered to be a major barrier to the occupation, development and improvement of the harbour. It is likely that it prevents investment in the harbour by commercial operators who would not see sufficient return on any investment in such a short period of time (three years) to make their occupation worthwhile. On the same basis, regeneration of the harbour as a whole would only be likely to be achieved over a significant period of time and could not reasonably be completed in three years.
40. It has been the council's practice over many years to align its activities as harbour authority and local authority into a single coordinated management and governance function. Whilst this provides the most effective way of managing Newport Harbour as part of the council, it has led to ambiguity regarding which land is allocated by the council to support the harbour's activities and therefore should be managed in accordance with its powers to provide and manage a harbour.
41. Central to removing the ambiguity in respect of the harbour is the identification of which land and property the council considers to be harbour estate and therefore subject to the provisions of various statutory requirements, but especially the Newport (Isle of Wight) Harbour Revision Order 1988. The council may consider a wide ranging consultation exercise in this regard but ultimately it is the council's responsibility to act reasonably in producing the list of assets which it considers to be the harbour estate for the present. The production of such a list, reviewed regularly, will reduce future officer time in establishing whether a particular building or parcel of land is part of the harbour estate and will also reduce the potential for challenge on the same basis.
42. The defining asset list proposed in Appendix 3 has been objectively produced by reviewing historic plans of the harbour area alongside the statutory definition, to establish the pattern of use with particular reference to what is occurring at present and the usage of various areas in recent memory. The intention in producing the list is to provide a clear indication of the land and property that will in the future be considered by the council to be the harbour estate. The land and property shown in Appendix 4 is considered to be land held for local authority purposes and subject to the council's agreed processes for disposal or development. It also has the potential to become harbour estate if the council is able to put it to use for harbour related purposes now or sometime in the future. In the same vein the council is also able to declare, at some

future date, that any of the assets in Appendix 3 are no longer being used for harbour purposes and therefore would move from the harbour estate to the council's ordinary property portfolio. In reality this is no different to the systems operated by the council that require a service to declare an asset surplus to its requirements before the council would consider undertaking its disposal.

43. Previous decisions in respect of the freehold and long leasehold disposals of land and property that some may consider to be harbour estate have been achieved following formal decisions by the relevant committee, executive or portfolio holders of the council. These assets were no longer being used for harbour related purposes and by definition could not have been considered to be harbour estate. The council has already committed to making formal decisions in the future to declare land and assets no longer part of the harbour estate and will regularly review the harbour estate to aid this process.
44. The District Auditor has determined that the income from leases exceeding three years will not be declared unlawful as the council has recognised its error and implemented a process to prevent future breaches; termination could result in successful compensation claim and the expense of making a claim to court to declare the income unlawful is high and would be borne by the taxpayer.
45. It could be argued that a maximum lease period of only three years is a considerable disadvantage to the council in seeking to secure harbour related uses of the harbour estate. It acts to discourage most commercial uses as very few parties would be prepared to invest in a business venture when they have occupation for such a short period of time giving little opportunity to achieve a return on their investment and no security of tenure to renew the lease under the Landlord and Tenant Act 1954. Future improvements to the management and maintenance of the harbour are, therefore, likely to require consideration as to whether any further land or buildings should be explicitly declared surplus to requirements to enable such long term investment and redevelopment. However, any such declarations would be subject to further reports.
46. There is a strong need for certainty and clarity regarding the extent of the harbour estate given the ambiguities that exist and the challenges made. Considerable research has therefore been undertaken to inform the recommendations made within this report. It is not believed that further investigation or research will provide any greater clarity in defining the harbour estate than is set out in this paper. Further delays in coming to a conclusion about the extent of the estate (to undertake more research and/or consultation) would therefore not be beneficial and may lead to further scope for challenge and delay in seeking opportunities to secure the future of the harbour area.
47. Likewise, retaining the status quo by taking no decision will only continue the current ambiguity and lack of clarity, and it will not enable any improvements to the harbour particularly as the council is not in a position to undertake this itself. Any upgrading of the harbour in this way would require significant funds in order to improve and make good much of the land and property that could be considered to be part of the harbour. This work has not been formally costed but is thought likely to run into millions of pounds. The current financial pressures impacting the council and the need for it to prioritise resources towards its key corporate priorities and core business mean that the council is not in a position to provide such a level of investment into the harbour, more especially when there is no strong business case to suggest that significant commercial activity would be achieved through the investment.

RECOMMENDATION

48. It is therefore recommended that the council adopts option (i) and (ii):

- (i) To confirm the assets that currently make up the Newport Harbour Estate are as shown in Appendix 3 and that there is no compelling public interest in terminating the existing leases granted for longer than three years (as shown in appendices 5a and 5b) and therefore to allow these leases to continue but to exercise the break clause in the single lease that can be restricted to the three year limit.
- (ii) To recognise the fluid nature of the harbour estate by reviewing every two years the portfolio of assets that make up the estate.

APPENDICES ATTACHED

- [APPENDIX 1](#) - Written Public Questions submitted to cabinet on 13 December 2011
- [APPENDIX 2](#) - Discussion of the council's powers to provide and manage Newport harbour
- [APPENDIX 3](#) - Proposed List of assets currently within the Newport harbour estate.
- [APPENDIX 4](#) - Plan of council owned assets that may form part of the Newport harbour estate in the future.
- APPENDIX 5a- List of current leases exceeding three years on Newport harbour estate
PROTECT – COMMERCIAL. (Not for publication by virtue of paragraph 3 of Schedule 12A of the Local Government Act 1972 (As Amended) because it “relates to financial or business affairs of any particular person” (including the authority holding that information)
- [APPENDIX 5b](#) - List of current leases exceeding three years on Newport harbour estate
- [APPENDIX 6](#) - Comments of tenants having leases exceeding three years

BACKGROUND PAPERS

- Isle of Wight Council Unitary Development Plan
- Newport Harbour Supplementary Planning Guidance
- Island Plan Core Strategy
- 1988 Revision Order Newport Harbour Plan
- District Auditor's letter, 23 August 2011

Contact Points:

Barry Cooke, Strategic Manager: Assets, ☎ 01983 821000 e-mail barry.cooke@iow.gov.uk
John Metcalfe, Deputy Director, ☎ 01983 821000 e-mail john.metcalfe@iow.gov.uk

STUART LOVE

COUNCILLOR GEORGE BROWN

Strategic Director of Economy & Environment

*Deputy Leader and Cabinet Member for the
Economy and the Environment*