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1. INTRODUCTION

Waveney District Council (“**WDC**”) and Southwold Town Council (“**STC**”) fully recognise the importance of the Southwold Harbour Lands and the vital contribution they make to the economic, social and environmental wellbeing of the area.

Recognising the importance of the Southwold Harbour Lands, WDC and STC have established a joint committee (“**Joint Committee**”) to explore options for the future governance of the Southwold Harbour Lands, to safeguard these vital community assets, both in the short and long term.

We are delighted to have been appointed by WDC to provide advice and support to the Joint Committee in exploring governance options.

This is an important and high profile project for both WDC and STC.

It is critical that it is a success.

Key to this success will be any new governance arrangements.

The Joint Committee has established a clear vision on the way forward for the future governance of Southwold Harbour Lands.

This vision has informed every aspect of this governance review.

It is imperative that the future governance and management of Southwold Harbour Lands delivers the Joint Committee’s vision for the Southwold Harbour Lands.

2. EXECUTIVE SUMMARY

Please see WDC and STC's covering report.

3. OBJECTIVES

The Joint Committee has a clear vision with regards to the future of Southwold Harbour Lands.

This vision is encapsulated in a number of key principles which have informed all aspects of the review process.

The principles were first set out in the consultation document issued jointly by WDC and STC in June 2014.

The principles are set out below:

- Local influence and accountability
- Working in partnership
- Discharging statutory obligations
- Financial transparency
- Investment and local reinvestment
- Viability and sustainability (both financially and in terms of governance)

In addition, the Joint Committee has identified a number of additional key legal and commercial issues to be satisfied in any alternative governance model.

These are set out below:

- An open and transparent model that encourages local involvement
- Any competing charitable, local government and harbour authority considerations
- Ensuring legal compliance in the operation of the Harbour Lands
- The need to capitalise on the potential of the Lands and obtain an optimum return on all investments
- Ensuring reinvestment back into the Harbour Lands of all surpluses generated within the Lands
- Addressing the financial sustainability challenge of needing to balance long term large scale investment with ongoing balanced revenue budgets
- Maximising NNDR, tax and VAT opportunities
- Addressing concerns with regards to potential liabilities
- In addition to the above, and in recognition of the parallel review of the future management and operation of the caravan site, a requirement that any future governance option does not in any way prejudice any options for the caravan site and/or campsite.

4. ALTERNATIVE GOVERNANCE OPTIONS

There are a range of legal models which could be considered for the future governance of the Southwold Harbour Lands.

These include:

- Unincorporated association
- Industrial and Provident Society (charitable or non charitable)
- Company limited by guarantee (charitable or non charitable)
- Charitable incorporated organisation (charitably only)
- Community interest company (non charitable only)
- Company limited by shares (non charitable only)

In determining which is the right legal model, there are two key determining factors:

- Incorporation v unincorporation
- Charitable status v non charitable status

4.1 Incorporation v Unincorporation

We set out below the advantages and disadvantages of incorporation:

Incorporation	
Summary	• Creating a separate legal entity.
Advantages	• Clear legal structure • Legal entity which has limited liability • Legal entity will enter into the supply contracts/ leases/ employee contracts. Any debts or liabilities will be those of the company not the individual board members
Disadvantages	• Administration of a company or other corporate entity • Board members will have duties and responsibilities under Common Law or other relevant legislation

We set out below the advantages and disadvantages of unincorporation:

Unincorporation

Summary	• No separate legal entity
Advantages	• Simple structure
Disadvantages	• Individual board members will be personally liable for debts and liabilities of the venture, protected only by relevant insurances • Individual board members must sign contracts in their own name and own property in a personal capacity • Difficulty in borrowing. Board members will, potentially, be required to provide personal guarantees • In relation to a charitable model, any property must be vested in the Charity Commission as Official Custodian.

It is our strong recommendation in relation to an initiative of this nature, which will involve the transfer of significant assets and liabilities, that the Harbour Trust is established as an incorporated legal entity.

This will provide significant protection to the board members of the new entity and greatly assist with dealings with third parties.

4.2 Charitable v Non Charitable

The next key determining factor is charitable or non charitable.

We set out below the advantages and potential disadvantages of charitable status:

Charitable	
Summary	• An organisation which is recognised as a charity in law
Advantages	• The public generally have confidence in charities. • It is a trusted “brand”. • It is increasingly recognised that the public sector and third sector can deliver better outcomes when working collaboratively in a local community. • Charities established as companies limited by guarantee are regulated by the Charity Commission. The Charity Commission is an independent and effective regulator. It requires high standards of governance and compliance. This gives confidence to those dealing with the charities sector. • Charities are exempt from corporation tax. Hence 100% of surpluses can be reinvested back into the charity in furtherance

	of its objects. • Charities are “tax attractive” and there are opportunities to maximise tax giving through: • Gift aid • Corporate donation • Sponsorship • Philanthropic investments • Legacies • Charities can only give to other charities. Therefore, there is an opportunity to lever in additional funding from grant making charities with a particular interest in preserving, protecting and maintaining the Harbour Lands. • Charities are eligible for up to 100% rate relief from National Non Domestic Rates (business rates). • In the event of the winding up of a charity, any assets remaining, e.g. cash at bank, must be transferred to another charity with similar charitable purposes. This is the concept of “asset lock”. Again, giving confidence to all those dealing with the charity that the assets of the charity will not be distributed to “shareholders” but will be used to continually fulfil the objects of the charity.
Disadvantages	• Regulation by the Charity Commission. However, as stated above, this is an advantage as it gives confidence to those dealing with the charity that it is subject to independent regulation. • A charity can only carry out charitable activities. The preservation, protection and maintenance of the Harbour Lands is a charitable activity. The new organisation would, therefore, be eligible for charity registration. • However, any non charitable activities (or high risk activities) would be carried out by a trading subsidiary.

Having regard to the significant advantages of the charitable model for these particular services, it is recommended that the Harbour Trust be established as a charitable entity.

4.1 Charitable Legal Models

The next key decision is which legal model would be most appropriate for the new charitable entity.

The options are:

- Charitable company limited by guarantee
- Charitable industrial and provident society
- Charitable incorporated organisation

For completeness, a full analysis of these three models is included in Appendix 1.

Our recommendation is, however, the charitable company limited by guarantee, for the following reasons:

Company Limited by Guarantee	
Summary	• A legal entity established under the Companies Acts and regulated by Companies House • The company has members rather than shareholders. The members act as the guarantors of the company. The members undertake to contribute to the assets of the company in the event of the company being wound up as a contribution to the debts and liabilities of the company. As this is a charitable entity and there is no intention to expose the members to any risk, this liability will be capped at £1. • Therefore, there is limited liability for the members. • There is also limited liability for the directors
Advantages	• A company operates in a modern regulatory regime. • It is subject to the Companies Acts, which are regularly reviewed and updated to ensure that they are up to date with business law and practice. • A company is regulated by Companies House - an efficient and helpful regulator • Companies can be incorporated very quickly (same day) and registration costs are extremely low (£80) • All company filing can now be done electronically. • All company filings are uploaded onto the Companies Register. This means that key company documents, for example, the annual report and accounts are available on line. This means that companies operate in a transparent regime. This transparency provides significant confidence to all those dealing with the company. • The company model is the model with which third parties are most familiar. This will make dealings with other funding partners, banks and suppliers easier • It is still the recommended model for incorporated charities.

	Although the charitable incorporated organisation (CIO) is now available for use, this is still relatively new and not familiar to the wider public. The prime advantage of the CIO is that it is only registered with and regulated by the Charity Commission and not Companies House. This may, however, be a disadvantage. Registration with Companies House provides a quick and easy way for third parties dealing with a company to confirm its status and financial standing. Further, as a very new legal model, the legal status of this entity may cause some uncertainty/ confusion. • The company model is extremely flexible. It is easy to create subsidiaries/ group structures/ consolidate groups/ special purpose vehicles for new business ventures • The directors will be subject to duties and responsibilities under the Companies Acts. These clearly define the statutory requirements of directors.
Disadvantages	• The company will be required to file annual report and accounts at Companies House. This is not onerous and ensures the company is complying with the rigours of company accounting. • The board members will be directors and have duties and responsibilities under the Companies Acts. Board members will be briefed on these duties as part of the induction process and will, therefore, be confident about these duties and responsibilities.

5. RECOMMENDED OPTION

It is our recommendation, therefore, that the legal model for the new governance arrangements is a charitable company limited by guarantee (referred to here, as the "Harbour Trust"):

5.1 Key Advantages of the New Legal Model

Advantage	Comment
New Governance Model	The Harbour Trust will be a new governance model which combines commercial and charitable benefits
Social Enterprise	The Harbour Trust will be a new social enterprise with a social purpose but commercial drive
100% Reinvestment	The Harbour Trust will be a non profit distributing organisation. This means any profits generated will not be distributed to shareholders but reinvested back into the organisation in furtherance of its objectives. This is the fundamental difference between the private sector share company and non profit distributing organisation. It means that 100% of profits generated by the Harbour Trust be used for the benefit of the Harbour Lands.
100% Exemption from Business Rates	The Harbour Trust will be eligible for 100% exemption from business rates. The Council currently pays business rates in relation to the asset portfolio. Charities are entitled to 80% relief from business rates. In addition, the Council has the discretion to grant additional relief to charities, thus potentially exempting the Harbour Trust from 100% of the business rates otherwise due in relation to the properties included in the Harbour Lands. It is acknowledged that the Council now has to contribute to business rate relief. Nevertheless, this is an operational saving to the current costs of the service thus maximising resources to drive through

Advantage	Comment
	business plan objectives.
100% Exemption from Tax	The Harbour Trust will be tax exempt, including exemption from Corporation Tax. This means that 100% of the profits generated are reinvested in the organisation to achieve the new governance model's business plan objectives. The Harbour Trust will also be tax attractive and be able to maximise opportunities in relation to: • Gift aid • Sponsorship • Corporate donations • Legacies The significance of this is to explore new sources of funding to help finance specific projects/ schemes
VAT Reliefs	As a voluntary organisation, the Harbour Trust will potentially be eligible for VAT reliefs in relation to leisure and cultural activities.
Single purpose	The Harbour Trust would be established with a clear vision and objective – the preservation, protection and promotion of the Harbour Lands. It will have a single focus and purpose and will, therefore, be able to drive forward initiatives identified in the business plan.
Freedom of Operation	The Harbour Trust will be able to make quick decisions to maximise opportunities for the benefit of the Harbour Lands.
Stakeholder Involvement	The new governance model is a real opportunity to secure stakeholder involvement in the strategic direction of the new organisation as well as fostering community engagement at a more local level.
Wider Agenda	The Harbour Trust can act as a key partner for WDC and STC in delivering its objectives for the economic, social and environmental wellbeing of the area.

Advantage	Comment
New Investment Opportunities	The Harbour Trust will be able to access sources of funding not available to the local authority (or the private sector) such as grants from other charities. It can also raise finance through commercial borrowings.
New Strategic Vehicle	The Harbour Trust can act as a new strategic partner for the Council in relation to a range of conservation, preservation and heritage initiatives.

5.2 Potential Disadvantages of the New Legal Model

There are a number of potential disadvantages of the new legal model, although these can all, in our view and experience, be mitigated:

Disadvantage	Comment
Dual Regulation	If the new legal entity is established as a company limited by guarantee (as we recommend) then it will need to be registered with the Charity Commission to achieve charity status. This means the organisation will be regulated by Companies House and the Charity Commission. This does, therefore, require dual regulation and administration. It is our view, however, that registration with the Charity Commission is a positive advantage. The Charity Commission is a well regarded regulatory body whose prime objective is to safeguard charitable assets and ensure that charities operate to the highest standards in terms of corporate governance.
Reversibility	Charities have an asset lock. This means that charity assets can only be used for charitable purposes and can only be transferred to other charitable bodies for similar purposes in the event of the charity winding down. Careful consideration, therefore, needs to be given to the transfer of key assets.
Independence of the charity	To be registered as a charity, the organisation must have exclusively charitable

Disadvantage	Comment
	purposes. It is the Charity Commission's view that it is a "unstated charitable purpose" if the organisation has simply been established to fulfil the wishes of a local authority. It is essential, therefore, when applying for charity registration that we are able to demonstrate that the charity has retained its discretion with regards to the management and operation of the Harbour Lands although acknowledging that this is within a framework agreed with WDC/ STC.
Trustees	It will be critical to the success of this initiative that we recruit trustees of the highest possible calibre. It is essential that the trustees have a range of skills and expertise and who can contribute to the success of this initiative. Whilst this is a potential risk associated with an initiative of this nature, we are confident that a high profile and well run trustee campaign will attract first class trustees.
Charitable Activities	A charity must be established for exclusively charitable purposes. The management and operation of the harbour infrastructure (including for navigation as well as leisure time activities) for public benefit is a charitable activity. As are the following activities (for example): • The protection and preservation of buildings or objects of archaeological, architectural, engineering or historical interest in the vicinity of or connected with the Harbour Lands • The protection and conservation of the natural environment and landscape of the Harbour Lands • The promotion of facilities in the interest of social welfare or other leisure time occupation for the public at large in the interests of social welfare and with the object of improving their conditions of life

Disadvantage	Comment
	In all instances, it is necessary to satisfy the public benefit tests. This means that the benefit must be available to the public at large (or a sufficient section of the public) and any private benefits are entirely incidental to fulfilling the charitable purposes. Some activities currently included within the Harbour Lands are not charitable including private moorings and the caravan site. (It is assumed that the various cafes and restaurants are concessions with the concessionaire paying the Council a rent? If this is the case, any such rent can be treated as primary purpose trading. Clearly, it will be necessary to carry out a detailed examination of each of these types of harbour activities (i.e.hires/ rentals etc) to confirm whether it is charitable/ non charitable). The non charitable activities including the management and operation of the caravan site would, therefore, be undertaken by a wholly owned trading subsidiary of the parent charity. Any profits generated by the subsidiary would be gifted to the parent to maximise tax reliefs. The trading subsidiary can be used for any other non-charitable activities pursued in the future. This is, therefore, an effective way of maximising business opportunities but mitigating any tax liabilities.
Administration	The new organisation will be both a company and a charity and, therefore, will have additional administrative requirements in relation to annual accounts and filing. These are not, however, onerous.
Duties and responsibilities	The board of directors of the company limited by guarantee will be directors and also trustees. They will have duties and responsibilities under the Companies Act and under

Disadvantage	Comment
	Charities Act. These should be taken seriously but are not onerous. There will be a comprehensive induction for all newly appointed directors/trustees to ensure they are fully familiar and comfortable with their role as director/trustees.
Loss of direct control	WDC/ STC will lose direct (day to day) control of the management and operation of the Harbour Lands.

6. KEY PROVISIONS OF GOVERNING DOCUMENT

The governing document for the Harbour Trust will be its Memorandum and Articles. We set out below a summary of the key provisions of the Memorandum and Articles of Association.

Clause/Articles	Proposed Drafting
Name	The proposed name of the new company is to be confirmed. It should be noted that there is no need to include the word “Limited” in the name of the company as this will be a charity and there is an “exemption” under the Companies Acts in these circumstances.
Objects	The objects clause will set out the purposes for which the charity has been established. To be registered as a charity it must be established with exclusively charitable purposes. Further, the Charity Commission recommends that charities use, where possible, “model objects”, i.e. objects which have been approved by the Courts. The objects clause should, also, as far as possible, embrace the diversity of the Harbour Lands and its unique features, which are critical to its future. A proposed objects clause is set out below: “The Harbour Trust is established for public benefit to: • [Maintenance of the Harbour Infrastructure]: preserve, protect, maintain and manage the [Southwold Harbour] for navigation; • [Preservation of sites of Historical Interest]: preserve and protect sites, objects and buildings of archaeological, architectural, engineering or historic interest within the Harbour Lands; • [Conservation of the Natural Environment]: protect and conserve the natural environment and landscape of the Harbour Lands; • [Promotion of Education]: promote awareness, learning and education of the history and heritage of the Harbour Lands; • [Promotion of Sustainable Development]: promote sustainable development within the Harbour Lands; • [Promotion of Recreation]: promote facilities for recreation and other leisure time occupation in the interests of social

Clause/Articles	Proposed Drafting
	welfare with the object of improving the conditions of life; • pursue such other charitable purposes consistent with the Harbour Lands as the Trustees in their absolute discretion shall determine (together the “Objects”) The Harbour Lands themselves can be defined by reference to the plan included in the Harbour Order 1933.
Powers	The articles will set out a comprehensive set of powers to enable the charity to fulfil its charitable objects. The articles will, however, also include some specific and express powers relating to the management and operation of the Harbour Lands, including (for example): • Managing the navigation channel • Maintaining the harbour walls • Maintaining the footpaths • Maintaining the land stations and moorings • Making reasonable charges for use of the moorings by commercial and leisure vessels
Liability	The articles will confirm that the company has limited liability.
Guarantee	The articles will confirm that the members’ liability is capped at £1.
Non Distribution	There will be a prohibition on distributing profits.
Winding up	In the event of the winding up of the company, the articles will provide that any residual assets will not be distributed to members but given or transferred to another charitable organisation with similar objects.
Membership	Membership of the Charity needs careful consideration. Members are equivalent to “shareholders”. In a guarantee company, the members undertake to guarantee the debts and liabilities of the company in the event of an insolvent winding up. The guarantee is capped at £1. However, the members also have residual rights and powers under the Companies Acts, including, for example, the right to approve certain decisions of the Board, for example, changing the objects of the charity. It is common in the charitable company model for the Trustees to also be the members (and, therefore, not to have a wider

Clause/Articles	Proposed Drafting
	membership). Here, it is proposed that consideration be given to WDC and/or STC being Corporate Members of the Harbour Trust. Potential options are, therefore: • Option 1: WDC as sole member • Option 2: STC as sole member • Option 3: WDC and STC as members • Option 4: WDC, STC and the Trustees being the members If Option 4, then it might be necessary to introduce classes of members, e.g. Class A, B and C and then grant specific rights to Class A and/or B to give Class A and/or B the right to approve (or veto) certain decisions of the Company. So, for example, the Company cannot sell, transfer or charge property or assets of the company without the prior consent of Class A and/or Class B members. This would require an equivalent of a "Shareholder's Agreement".
General Meetings	The articles will set out the procedure for the calling and conduct of member meetings. Subject to confirming the board size, it is suggested that the quorum for meetings is fixed at three. It is suggested that to be quorate, there must be a majority of independents in attendance.
Trustees	It is suggested that the board is fixed at a minimum of three and maximum of [nine] and the board composition be as follows: • 2 Trustee nominated by WDC (WDC Trustee) • 2 Trustee nominated by STC (STC Trustee) • Up to 5 Trustees with relevant skills and expertise (Independent Trustees)
Election of Trustees	The WDC and STC trustees will be selected and appointed by the local authority for such period as each of WDC and STC determines. The first "independent" Trustees will be selected following a rigorous trustee recruitment process. Future Independent Trustees should be selected following an equally rigorous selection process.

Clause/Articles	Proposed Drafting
Disqualification and Removal of Trustees	Trustees may resign at any time by giving written notice. Trustees will be automatically disqualified from acting in certain circumstances, e.g. if he or she is incapable due to mental illness or is otherwise disqualified from acting as a Trustee/director. In addition, the Trustees have the power to remove a Trustee in certain circumstances.
Retirement	The Independent Trustees will be required to retire by rotation. This means that every year one third of the board is required to retire. It is suggested that this requirement does not apply for the first three years following the start date of the new arrangements.
Proceedings at Trustee meetings	The Trustees will be required to meet at least four times per year. It is suggested that the quorum is fixed at three. All decisions will be made by a majority vote.
Chair	The chair will be a critical position. It is suggested that the chair should not be a WDC or STC Trustee. Subject to that, it is suggested that the chair be given a second or casting vote in the event of an equality of voted.
Executive	The board will be responsible for developing the strategy to achieve the Harbour Trust's charitable objects. This will be set out in the Harbour Trust's business plan. Day to day delivery of the business plan will be undertaken by the executive team on behalf of the board. The executive will be paid employees of the Harbour Trust. It is anticipated that the Trustees will not receive any remuneration. The trustees can claim reasonable expenses.
Subcommittees	The board can, as required, establish subcommittees with clear terms of reference. The charity might, for example, have an audit committee. In addition, the board can establish working groups to help

Clause/Articles	Proposed Drafting
	progress specific projects/ initiatives. The charity might, for example, establish a working group to focus on encouraging volunteering or to develop an education programme.
Stakeholder Advisory Group	There are a wide range of key stakeholders with an interest in the Harbour Lands. The new governance arrangement is an opportunity to formalise and harness stakeholder involvement. It is proposed that an advisory group be established made up of key stakeholders. ("Stakeholder Advisory Group" "SAG"). The terms of reference of the SAG are to be considered further.

7. RECRUITMENT, SELECTION AND APPOINTMENT OF TRUSTEES

7.1 Skills on the Board of the Harbour Trust

It is essential that the board is made up of individuals with a range of skills and expertise and who can contribute to the success of this new organisation.

This is, therefore, a real opportunity to engage with key stakeholders and harness public, private and voluntary sector expertise.

We would recommend, therefore, that the board includes representation from the following key sectors:

- Marine / major infrastructure
- Business / enterprise
- Tourism
- Leisure
- Events
- Conservation
- Preservation
- Property / development/ redevelopment/ regeneration
- Retail
- Volunteering

Board members should all be committed to the objectives of the new organisation and fully embrace the Joint Committee's vision for the Harbour Lands.

Ideally, board members should also have key specialisms/professional qualifications including:

- Finance
- Legal
- Property
- Marketing
- Fundraising

Achieving the right balance of skills and expertise will be key to the success of this project.

It is, however, a great opportunity to harness private sector expertise in particular.

The recruitment, selection and appointment of trustees is one of the key success factors for an initiative of this nature.

It is essential that trustee recruitment is approached in a professional way.

We have every confidence that an important and high profile project of this nature, will attract high calibre trustees.

It is imperative that we achieve a balance of skills and expertise and, most importantly, the board fully understands and shares the Joint Committee's vision for the Harbour Lands.

We set out below a summary of the key steps for trustee recruitment:

- Prepare Trustee recruitment pack including a person specification (An example person specification is set out at Appendix 9)
- Prepare draft advert to be placed in local, regional, national and specialist press
- Contact press to get some editorial alongside advert
- Place advert and send advert direct to known potential candidates
- Fix deadline for expressions of interest
- Fix date for an open evening
- Hold open evening
- Fix deadline for submissions of CVs and formal application to be a Trustee
- Confirm make up of Trustee selection panel
- Fix date for Trustee interviews (ideally on one day)
- Selection panel to conduct interviews and shortlist shadow board members
- Inform short-listed candidates
- Fix date for first Trustee meeting
- Second phase recruitment campaign/interviews if required

Careful consideration needs to be given to the process for short listing candidates for interview and the makeup of the selection panel. It is assumed that WDC and STC would be involved in this process. It is suggested that other key stakeholders are also involved, both in the short listing process and, also, the formal interview process.

This will give all parties confidence in the process and assurances that the board of trustees have the right range of skills and expertise.

Going forwards, it is critical that future recruitment processes follow a similar rigorous process.

It would be good practice to, also, invite an independent to be part of the selection panel.

8. TAX AND TRADING ISSUES

8.1 Tax and Trading

Profits made by a charity are exempt from corporation tax where the profits are applied solely for the purposes of the charity.

Charities can undertake trading activities which are exempt from corporation tax.

Permitted trading activities are as follows:

- Primary purpose trading
- Ancillary trading
- Trading within the terms of the small scale exemption

Primary purpose trading is trading which contributes directly to one or more of the objects of a charity as set out in its governing document.

Profits from primary purpose trading are exempt from corporation tax on the basis that the profits are applied solely for the purposes of the charity.

Ancillary trading is trading that contributes indirectly to the successful furtherance of the purposes of the charity.

The small scale exemption is an exemption from corporation tax on the profits from small scale non primary purpose trading.

An example would be conferencing events.

The current level of small scale trading exemption is as follows:

Total of all incoming resources in a particular chargeable period of the charity	Maximum permitted annual turnover of the relevant trading in that chargeable period
Under £20,000	£5,000
£20,000 - £200,000	20% of charity's total incoming resources
Over £200,000	£50,000

For the avoidance of doubt, therefore, the relevant threshold for non primary purpose trading is £50,000.

In addition to the above there are tax exemptions for certain fund raising events e.g. fetes, fairs and festivals, exhibitions, jumble sales, dances or concerts.

In the event that the Harbour Trust wishes to carry out significant non primary purpose trading or trading activities which are regarded high risk, then it is recommended that the organisation establishes a trading subsidiary.

The trading subsidiary would be wholly owned by the charity and established as a company limited by shares.

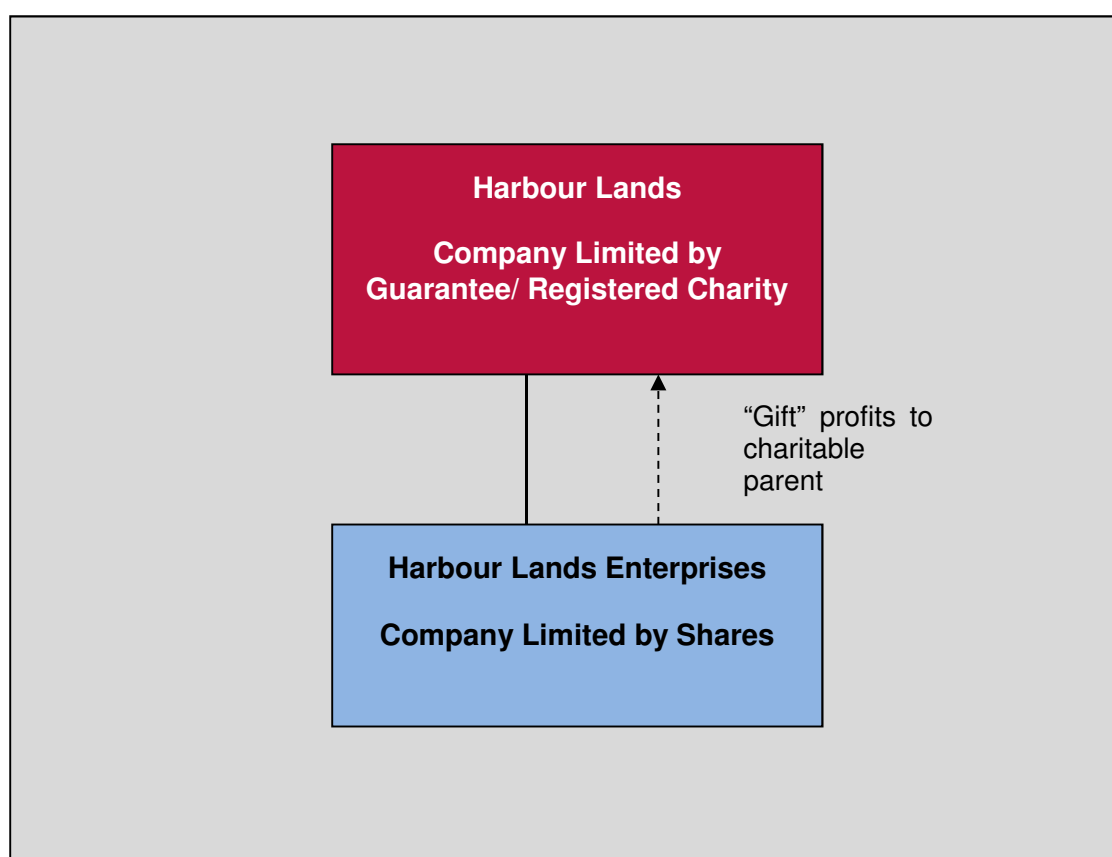
Any profits generated by the trading subsidiary would be subject to corporation tax in the normal way.

To mitigate the corporation tax liability the trading subsidiary would gift aid all or part of its profits to the charity.

In the hands of the charity the profits will be tax exempt as the profits will be applied for its charitable purposes.

This is, therefore, a tax efficient structure.

A summary of the structure is set out below:



9. TRANSPARENCY AND ACCOUNTABILITY

The Harbour Trust will operate in a transparent regime.

All information filed at Companies House and the Charity Commission will be available for public inspection.

In particular, the Report and Accounts will be available for inspection by all key stakeholders.

Notwithstanding, it is suggested that the new governance model gives an opportunity to ensure accountability at all levels.

The Stakeholder Advisory Group will have a key role to play in relation to accountability.

It is suggested that the governing document for the Harbour Trust requires the board of the Harbour Trust to meet with the Stakeholder Advisory Group on a regular basis and to present an annual report to the Stakeholder Advisory Group highlighting achievements during the previous year and proposals for the forthcoming year.

Whilst it would not be appropriate for board meetings to be conducted in public, consideration needs to be given to maximising transparency with regards to the decision making processes.

Therefore, the key agenda items for consideration at board meetings could be published on the Harbour Trust's website, together with key decisions and/or actions.

The Harbour Trust's website would also include the following information:

- Details relating to the Trustees and terms of office
- Details relating to any subcommittees and the members of those subcommittees, together with terms of reference
- Details relating to the Stakeholder Advisory Group, including current members and terms of reference
- Details relating to any special interest groups and how members of the public can get involved in any such groups

10. ROLE OF WAVENEY DISTRICT COUNCIL / SOUTHWOLD TOWN COUNCIL / JOINT COMMITTEE

Further consideration needs to be given to the continued role of WDC and STC as well as the Joint Committee.

The continued role of WDC is inextricably linked to WDC's role as the Harbour Authority.

As set out in Section 14 of this Report, WDC can transfer its statutory function of a Harbour Authority to the Harbour Trust.

This would require the consent of the Secretary of State for Transport pursuant to the 1933 Order.

Alternatively, an application could be made to the Marine Management Organisation for a Harbour Revision Order under Section 14 of the Harbours Act 1964.

If WDC transfers their undertaking then it will not retain any residual liability in relation to the statutory function save to the extent that the Secretary of State imposes any specific conditions on the transfer.

The Secretary of State may, for example, choose to impose a condition on the transfer of an obligation to take back the undertaking or to guarantee the obligations of the Trust.

Subject to that, both WDC and STC will remain key stakeholders with regards to the future of the Harbour Lands.

Both WDC and STC will wish to ensure the Harbour Trust is meeting its charitable objectives and operating to the highest standards in terms of good governance.

WDC and STC will, also, wish to be assured that it is meeting its business plan objectives and is financially viable and sustainable.

It is suggested, therefore, that there should be regular meetings between the Harbour Trust and WDC/STC and/or the Joint Committee.

The purpose of these meetings will be to review the financial and operational performance of the Trust and discuss medium to longer term investment/development proposals.

It is suggested that the Joint Committee could have a continued role with regards to the monitoring and review regime on behalf of both WDC/STC.

This will be for further discussion between both WDC and STC.

11. STAFFING AND PENSION ISSUES

11.1 TUPE

A transfer of the management and operation of the Harbour Lands to the Harbour Trust would include a transfer of staff.

The staff transfer would be regulated by the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**").

In such a case all staff who spent a majority of their time providing the services would transfer on existing terms and conditions and there would be no break in their continuity of service.

Here, those staff affected would be (we understand) the Harbour Master and his team and the Caravan Site Manager and his team.

11.2 Secondments

The Council will be aware of some high profile outsourcing projects that have involved the secondment of staff rather than the TUPE transfer of staff.

This has previously been in the context of an outsourcing of services to a joint venture / "special purpose vehicle". In those circumstances, the Unions argued that the staff were transferring to a non asset holding entity and therefore were prejudiced and potentially at risk.

Long term secondments are potentially at risk of being challenged as a TUPE transfer.

Secondments should only be considered, therefore, on a short term or interim basis.

11.3 Pensions

The Best Value Authorities Staff Transfers (Pensions) Direction 2007 ("the Direction") came into force on 1 October 2007. The Direction was introduced pursuant to sections 101 and 102 of the Local Government Act 2003 ("the Act") and applies to 'best value authorities' as defined in section 1 of the Local Government Act 1999. Sections 101 and 102 confer power on the Secretary of State to require local authorities to deal with matters affecting staff according to directions. The requirements of the Direction set out what has previously been set out in Codes of Practice and guidance. The intention behind the introduction of the Direction is to formalise and give statutory force to the previous Codes of Practice and guidance.

The Direction provides that where a local authority is contracting out services previously provided by the local authority, the contract for those services must secure pension protection for all transferring employees and provide that the pension protection is enforceable by the employee. Pension protection is defined as the right to acquire pension benefits which are the same as or broadly comparable to or better than those rights they had or had a right to acquire as an employee of the authority.

The Direction also provides for subsequent contracting-out situations so that where a local authority is contracting with a subsequent contractor for the provision of services originally provided by the authority, the contract must secure the same level of pension protection for those employees.

The Harbour Trust will, therefore, be required to offer LGPS to the transferring staff (or a broadly comparable scheme).

The Harbour Trust will be eligible to become an Admitted Body within LGPS and, therefore, offer pension protection to the transferring staff.

There are a number of key commercial issues in relation to LGPS pensions which will require careful consideration, including:

- Under funding at outset
- Increases in pension contribution rates during the contract period
- Accrued deficit at exit

Going forwards the Harbour Trust may wish to enter into alternative (non LGPS) schemes for new employees (i.e. not the TUPE staff).

11.4 Consultation

Any organisational change will, of course, be of concern to staff.

It would be essential to consult with the Unions at the outset and to agree a staff consultation protocol.

This will involve a commitment by WDC to meet regularly with the Unions and to regularly communicate with those staff affected by the transfer.

12. PROPERTY ISSUES

Careful consideration needs to be given to the transfer of any land and property associated with the Harbour Lands.

Under Section 123 of the Local Government Act 1972, local authorities are under an obligation to secure best consideration with regards to the disposal of property.

Disposal for these purposes includes both freehold or leasehold disposal.

A disposal for less than best consideration would require consent from the Secretary of State.

General consent is given in relation to disposals for the economic, social and environmental wellbeing of the area, provided the undervalue is less than £2 million.

Consideration will, therefore, need to be given as to whether or not the disposal will be for less than best consideration and if therefore consent will be required from the Secretary of State to the disposal of any property associated with the Harbour Lands.

Subject to that, the next key consideration is whether or not to transfer any such property freehold or leasehold.

A freehold transfer means that legal title to the property will be transferred to the Harbour Trust.

The property would become an asset of the Trust.

In the event that the Harbour Trust got into financial difficulty, there is a risk that the property and other assets of the charity could be seized and sold to settle debts of any creditor.

This is a significant risk with regards to these vital community assets.

If the preferred way forward is to transfer freehold, then it is possible that the asset could be subject to a special trust and, therefore, not corporate property of the charity or, alternatively, held as permanent endowment.

In these circumstances, however, it is suggested that the better way forward would be a long term lease of the assets.

A lease of, for example, 99 years, **[NB CHECK]** would be equivalent to freehold title.

Importantly, however, it would provide significant protection to WDC/STC and thus the local community.

In the event that the Harbour Trust got into financial difficulty, e.g. insolvency, then the lease would automatically terminate and the land and property would revert to WDC and/or STC (as appropriate).

Further, in relation to a lease, the landlord is able to restrict certain actions, thus providing protection as to the use of the property and/or land.

Such restrictions would include:

- Permitted Use

- Prohibition on charging
- Restriction on disposal
- Restriction on subleasing
- Restriction on sharing
- Restriction on development

The proposed restrictions are not in any way intended to limit the activities of the Harbour Trust but, rather, to ensure that these vital community assets are used by the Harbour Trust for the intended purposes.

13. OTHER ASSETS

Careful consideration needs to be given to the transfer of the other assets associated with the operation of the Harbour Lands, including, for example:

- ICT
- Supply contracts
- Intellectual property
- Operational manuals
- Databases

Each asset needs to be identified by reference to a schedule/inventory and the treatment of each asset carefully considered.

If title to the asset is transferred or assigned, then ownership passes.

Therefore, WDC (or STC) would need to consider how they would recover that asset in the event of early termination of the contractual arrangements or insolvency of the Harbour Trust.

To protect WDC/STC's position it might be appropriate to loan or licence this asset. This will, of course, very much depend upon the value on the asset. This issue will not arise, potentially, in relation to low value items

14. STATUTORY OBLIGATIONS

Query	Response
Can Waveney District Council (WDC) transfer the statutory function of a Harbour Authority?	WDC can transfer its harbour undertaking (including statutory powers) under Article 27 of the 1933 Order (or lease it under Article 28) with the consent of the Secretary of State for Transport (but any lease cannot be for a premium). Alternatively authorisation for the transfer or lease could be sought through an application to the Marine Management Organisation for a Harbour Revision Order under Section 14 of the Harbours Act 1964
If the WDC's preferred way forward is to transfer the function of the Harbour Authority to a charitable trust, then please confirm what, if any, consent is required?	The same consent would be required.
Subject to the above, does WDC retain any residual liability in relation to the statutory function?	Not if the whole undertaking is transferred, but the Secretary of State could impose conditions on the transfer (see below).
Subject to the above, can a charitable trust be a Harbour Authority?	Yes it can, but the Secretary of State may take a view that it is inappropriate - that is less likely here than it would be in major commercial harbour
In the event that the charity fails to perform the statutory function and/or goes insolvent, is the statutory function automatically re-transferred to WDC and/or some other public body?	No it is not, but Secretary of State might choose to impose as a condition of the transfer an obligation to take back the undertaking, or to guarantee the obligations of the Trust or to provide a dowry for the new harbour authority (as suggested in the Municipal Ports' review paper) . Similarly such conditions could be imposed by a HRO.
Going forwards, should the 1933 Harbour Act be updated so it is "fit for purpose" with the flexibility you would expect of a modern harbour act?	This could be considered - and would depend on the nature of the operations to be carried on at the harbour. If these are very limited there may not need to be an extensive revision of the legislation. Two respect in which you might want to consider modernising the legislation is first a power to give general directions to vessels using the harbour (as opposed

Query	Response
	to having exercise controls through the laborious process of making byelaws). Modern ports legislation normally includes this - and there is process for ports to apply for such powers to DfT introduced by the Marine Navigation Act 2013 . The second is to include the power to appropriate port land for particular uses, customers or trade (in the absence of such a provision the harbour must remain available for any persons who wished to ship or unship goods at the harbour on that land). This amendment of the legislation would require a harbour revision order.
• Procedure for Secretary of State Consent	There is no formal process for obtaining the Secretary of State's consent to the transfer, but judging from past experience they will probably want some form of consultation and possibly to advertise and invite comments on the proposal. This will, potentially, take up to 3 months.
• Procedure for Harbour Revision Order	As regards a Harbour Revision Order there is a formal process for applying for this, which includes advertisement, notices and a six week objection. If there are no objections it could take about 4 months. If there are objections and public inquiry is required this could take anything up to about 18 months.

15. IMPLEMENTATION

We set out below the key stages for the establishment of a company limited by guarantee / registered charity:

Stage	Key Outputs
Stage 1: Draft Memorandum and Articles	• Prepare key provisions papers • Workshop to discuss / agree key provisions • Prepare first draft Memorandum and Articles of Association • Agree / finalise Memorandum and Articles of Association
Stage 2: Incorporation of the Company	• Prepare Memorandum and Articles of Association for incorporation • Incorporate at Companies House
Stage 3: Recruitment of Trustees	• Draft advert • Prepare Trustee recruitment pack • Open evening for potential Trustees • Deadline for application forms
Stage 4: Selection and Induction of Trustees	• Shortlist Trustees • Formal interview • Selection of Trustees • Formal appointment of Trustees • Induction for all Trustees
Stage 5: Registration of Charity	• Prepare outline application • Finalise and lodge application • Deal with any follow up queries • Secure registration

It is suggested that the time line for the above is between three and six months.

16. NEXT STEPS

For WDC and STC to carefully consider this report, together with feedback from the recent community engagement workshop and confirm the way forward for the future management and operation of the Harbour Lands.

APPENDIX 1 EVALUATION MATRIX

Evaluation Criteria	Comment
Local influence and accountability	The new governance model is an opportunity to embed local influence and accountability.
Working in partnership	The Harbour Trust will be able to establish strategic partners with all key stakeholders involved in the promotion and protection of the Harbour Lands.
Discharging statutory obligations	WDC can, should it wish to do so, transfer its statutory functions as a Harbour Authority to the Harbour Trust or to delegate certain functions of the Harbour Authority to the Trust, thus retaining some residual functions and liabilities.
Financial transparency	The Harbour Trust will operate in a regime requiring financial transparency.
Investment and local reinvestment	100% of any surpluses generated will be reinvested in furtherance of the Harbour Trust's objectives, which will be for the benefit of the Harbour Lands and the surrounding area.
Viability and sustainability (finance)	The Harbour Trust will operate in a tax efficient regime which will reduce both operational costs and assist it to attract external funding. It will, however, need a robust business plan premised on growth and diversification.
Viability and sustainability (governance)	It will be critical to ensure best practice with regards to any future recruitment process for Trustees. In that regard, any future recruitment process should follow the rigorous process recommended for the appointment of the first set of Trustees.
Open and transparent model that encourages local involvement	The new governance model is an opportunity for local involvement at all levels, including as: - Trustees - Members of any working groups - Members of the SAG
Any competing charitable, local government and harbour authority considerations	WDC and/or STC can enter into arrangements with a charitable organisation pursuant to the Local Government Act 2011. Further, WDC can transfer its statutory functions as a Harbour Authority to a charitable trust pursuant to the 1933 Order and/or in accordance with a Harbour Revision

Evaluation Criteria	Comment
	Order pursuant to the Harbours Act 1964.
Ensuring legal compliance in the operation of the Harbour Lands	It is suggested there is an ongoing monitoring and review regime between WDC/STC to ensure the Harbour Trust is fulfilling its charitable objects and business plan.
Capitalise on the potential of the land to obtain an optimum return on all investments	The establishment of the charitable trust does not in any way prejudice opportunities to maximise return on investment. Further, it is hoped that the charitable trust is able to attract sources of funding for continued investment in the Harbour Lands.
Reinvestment of all surpluses	100% of surpluses generated by the Harbour Trust will be reinvested in the Harbour Lands.
Phased transition in relation to WDC's financial support	It is proposed that the Harbour Trust be appointed to manage and operate the Harbour Lands pursuant to a Concession Agreement. The Concession Agreement (and/or Lease) can provide for a payment by the Harbour Trust to WDC for the agreed transitional period.
Financial sustainability	It is critical that the Harbour Trust has a robust and deliverable business plan.
Maximising tax, NNDR and VAT opportunities	As a charity, the Harbour Trust will operate in a tax efficient regime. It will be primarily exempt from tax, including corporation tax. It will, also, be eligible for up to 100% business rate relief. Depending on the range of activities being provided, it may, also, be eligible for VAT relief in relation to, for example, sports and/or cultural activities.
Addressing concerns with regards to potential liabilities	Careful consideration needs to be given to the transfer of any assets and potential liabilities to the Harbour Trust. Any such liabilities need to be clearly identified and either eliminated or mitigated.
Does not prejudice potential management options for the caravan site / campsite	The proposed Harbour Trust does not in any way prejudice any potential options for the caravan site and/or campsite.

APPENDIX 2
TRUSTEE INFORMATION PACK

1. Background to initiative
2. Description of the Harbour Lands and the range of activities / services
3. Duties and responsibilities of a Director
4. Duties and responsibilities of a Trustee
5. Invite to open evening
6. Person specification
7. Application form

APPENDIX 3 TRUSTEE ADVERT

TRUSTEES NEEDED FOR SOUTHWOLD HARBOUR LANDS TRUST

The Southwold Harbour Lands are vital to the social, economic and environmental prosperity of the Southwold area.

Waveney District Council and Southwold Town Council are proposing to transfer the management and operation of the Harbour Lands to a newly established charitable trust.

The new Trust will be responsible for managing the Harbour infrastructure, including:

- []
- []

This is a hugely exciting initiative.

It is recognised, however, it will also be a challenge.

Trustees are needed with knowledge and expertise to support the existing management team.

We would welcome applications from trustees with a connection to the Southwold area who are not only committed to promoting leisure in [] but who also have the following specialist skills and/or experience in the following sectors:

- Finance
- Legal
- Marketing/ PR
- Fundraising
- Property
- Business
- Marine infrastructure
- Tourism
- Events
- Conservation/ preservation
- Volunteering
- Arts/ culture/ leisure/ heritage

All positions are unpaid but expenses are available.

To learn more about this opportunity email [] for a Trustee Information Pack and attend the open evening to be held at [5 p.m.] on [] 2014 at [].

**APPENDIX 4
PERSON SPECIFICATION**

Category	Criteria
Experience	• Proven track record in business or a relevant profession • Involvement in community service (paid or voluntary)
Skills and abilities	• Specialist skill, e.g. ○ Finance ○ Legal ○ Marketing/ PR ○ Fundraising ○ Property ○ Business ○ Tourism ○ Events ○ Volunteering ○ Arts/ culture/ leisure/ heritage ○ Conservation/ preservation ○ Marine infrastructure • Commitment to the objectives of the new organisation and in particular, the promotion and preservation of the Harbour Lands • Communication skills • Analytical skills
Other requirements	• Availability for evening meetings and possibly some daytime meetings • Awareness of local issues and appreciation of the linkage between health and the wellbeing of the area • Appreciation of status and functioning of charitable organisation
Additional skills for chair	• Ambassador for the initiative • Experience of planning and conducting board meetings • Establishing a constructive working relation with and providing support for

Category	Criteria
	Chief executive and management team • Impartiality, fairness and ability to respect confidences • Availability for additional meetings • Media experience

APPENDIX 5 CHARITY ISSUES

It is permissible for a local authority to establish or promote a charity carrying out a public function.

It is critical, however, that the charity is established for exclusively charitable purposes.

A local authority and a charity can work together to deliver common objectives where the objectives of the local authority and the charitable organisation coincide.

The concern of the Charity Commission will be to satisfy itself that the body has not been created for an “unstated non-charitable purpose”.

An “unstated non-charity purpose” would be where the organisation has been established simply to give effect to the wishes and policies of the local authority or its manager.

So, for example, a body with a stated charitable purpose may nevertheless have an “unstated non-charitable purpose” where:

- It is necessarily dependent upon the local authority for the funding it receives
- It receives funding on terms that enable the local authority to make decisions on what services are to be provided and who is to benefit from those services
- In making those decisions the local authority is able to pursue its own wishes and policy

Thus it is essential when establishing a new organisation and presenting it to the Charity Commission for charitable registration, that we demonstrate to the satisfaction of the Charity Commission that it has been established for exclusively charitable purposes.

This can be achieved by demonstrating the independence of the charity, in particular in the determination of its strategy and business plans when negotiating the funding arrangements with the local authority.

This will require arm’s length negotiations between the parties.

This is why it is critical that the Harbour Trust takes its own legal (and, where appropriate, financial) advice.

The Charity Commission provides helpful guidance on the characteristics of an independent charity when negotiating a funding settlement with a local authority.

These characteristics include:

- The trustees draw up their own policies and business plan
- The trustees conduct arm’s length negotiations with the local authority
- Any trustees with a conflict of interest do not participate in those discussions (e.g. local authority nominees)
- The funding arrangements preserve the trustees’ fundamental discretion on the selection of the beneficiaries and provision of services

- The trustees do not simply commit to giving effect to the policies and wishes of the authority without exercising any discretion.
- The trustees do not agree to conditions that undermine the confidentiality of their discussions e.g. the presence at their meetings of an observer from the local authority.
- The trustees are free to make decisions on matters outside the scope of the funding arrangements.

The fewer of these characteristics that a body displays, the more likely the Charity Commission will conclude that it has been established for an “unstated non-charitable purpose” and will not be registered as a charity.

The issue of independence is critical not only at the point of registration of the charity but also in terms of its ongoing governance.