

REPORT TO EXECUTIVE

Date of Meeting: 1 November 2022

REPORT TO COUNCIL

Date of Meeting: 13 December 2022

Report of: Director Net Zero and City Management

Title: Legal Obstacles to Port Marine Safety Code Compliance

Is this a Key Decision?

No

Is this an Executive or Council Function?

Council

1. What is the report about?

The options to meet the requirement to obtain appropriate legal powers to achieve Port Marine Safety Code compliance

2. Recommendations:

That Executive recommends, and Council approves:

2.1 The commencement of work on obtaining a Harbour Revision Order, to continue progress towards Port Marine Safety Code compliance.

2.2 The allocation of a one off budget of up to £150k to allow for the Harbour Revision Order process and to provide contingency in case of a public enquiry.

3. Reasons for the recommendation:

3.1 To continue our route towards full compliance with the Department for Transport's Port Marine Safety Code as previously approved at Executive (10/03/20) and Council (21/04/20).

3.2 To give the Council powers to take action against dangerous activities or speeding vessels such as jet skis and in emergency situations to help ensure safety of water users

3.3 To reduce the liability to the Council and the risk of parties taking action against the Council should an accident occur.

3.4 To generate income streams through harbour dues which will help to partially offset the revenue costs of running a harbour team and maintaining navigation.

3.5 To give the Council the ability to prevent hazardous vessels, that may cause harm to the estuary environment, from entering the river.

3. What are the resource implications including non financial resources?

3.1 Previous estimates for the HRO process were in the order of £150K but were based on the potential for a full public enquiry, due to the contentious nature of those proposals. Our future bid would be far less contentious and largely delivering what the users of the

harbour want to see. The costs of our proposed HRO are therefore estimated to be an £18K application fee and an estimated £70K in legal fees. In light of the risks highlighted by the Monitoring Officer in section 6, we propose to set aside a budget of £150k to allow for contingencies in the event of a public enquiry.

3.2 To offset these costs, the new powers would enable the Council to potentially levy harbour dues on recreational vessels and issue fines to speeding vessels (including jet-ski users). Based on an annual levy of £10.00 per metre for each vessel moored within the Exe an anticipated regular yearly income of £100K could be achieved. This would be used to help offset our revenue costs associated with Port improvements and maintenance (e.g. navigational buoys and dredging).

4. Section 151 Officer comments:

4.1 Given the Council's financial challenges, it is essential that all opportunities for additional income are explored. There would be a maximum payback of 18 months based on the figures set out in the report. It is essential that proper consideration is given as to how the income would be collected, managed and reconciled. The team must also be aware that this is funding to cover existing costs of the Harbour and does not allow for additional expenditure. Based on the current MTFP, there is just sufficient funds available in the General Fund Balance to provide the £150,000 budget.

5. What are the legal aspects?

Please see Monitoring Officer comments below.

6. Monitoring Officer's comments:

Harbour Orders are a form of delegated legislation made under the Harbours Act 1964 (The Act). A harbour is defined by the Act as any natural or artificial harbour, any port, haven, estuary, tidal or other river or inland waterway navigated by sea going ships. It also included docks and wharves.

Harbour authorities are responsible for the management and running of the harbour. The powers and duties are set out under the Act or under a Harbour order. Harbour orders are made by way of statutory Instrument under the Act and confer powers on the Harbour authority for the purpose of improving, maintaining or managing a harbour.

Applications for Harbour orders were processed by the Department of Transport until 2010 but are now dealt with by the Marine Management Organisation (MMO). Extensive pre application consultation with the MMO is recommended before the application, including a statement in support showing the need and justification for each provision of the order, is required.

The Harbour must advertise its Application and 42 day period for objections and representations must follow. Where there are any outstanding objections to the proposed Order, a Public Inquiry may follow. The cost of the Inquiry is payable by the Applicant as these costs are not included as part of the application fee. In event that members are minded to approve the recommendation, members should note that where an Inquiry is held the cost to the Council will be significantly more than is indicated in the financial implication of this report.

There is no right of appeal against a refusal to make an Order. An order however, may be challenged within 6 weeks from the date it becomes operative by application to the High Court.

7. Report details:

8.1 The Council is the Port Authority for the Exe Estuary from Blackaller Weir (outside Mill on the Exe) to the 'Safe Water Mark', one mile out to sea off Exmouth beach including the Exeter Ship Canal.

8.2 As such, the responsibilities include:-

- a) Providing and maintaining lights and buoys to ensure safe navigation (there are over 50 navigation aids in the estuary which we have provided and maintain).
- b) Exercising functions with regard to nature conservation and other environmental considerations
- c) Conserving the harbour so that it is reasonably fit for use as a port and in such condition for a vessel to utilise it safely
- d) Complying with the Port Marine Safety Code
- e) Complying with Environmental Protection legislation
- f) Keeping the canal open, maintained and navigable for commercial vessels

At the moment users of the estuary or canal do not pay anything towards any of the responsibilities above.

8.3 We are currently pursuing Port Marine Safety Code (PMSC) compliance. Although the PMSC is not mandatory, all Harbour Authorities are expected to comply and failure to do so can lead to prosecution under other relevant legislation, such as the Health and Safety at Work Act (maximum penalty 2 years imprisonment and/or unlimited fine), in the event of serious incident or accident.

8.4 An obstacle to compliance is that of legislation, with the Council not possessing the appropriate powers to enable adequate management of the Port by General and Special Directions.

8.5 This is an historical anomaly resulting from the Council not incorporating the Harbours, Docks and Piers Act in 1847. As such the Council cannot exercise the powers of Special Direction which is a major concern in relation to ensuring navigational safety and compliance with the Code.

8.6 These Directions would allow the Council to take action against dangerous activities or speeding vessels such as jet skis and in emergency situations to help ensure safety of water users. In order to now obtain the appropriate powers the Council would need to pursue a Harbour Revision Order to incorporate the 1847 Act mentioned above. The HRO would enable ECC as Harbour Authority to:-

- a) Generate income streams through harbour dues which will help to partially offset the revenue costs of running a harbour team and maintaining navigation;

- b) Prevent hazardous or vessels that are potentially going to cause harm to the environment from entering the river;
- c) Restrict use of the river by certain craft if required;
- d) Licence and regulate waterborne businesses in the river and canal in areas such as ensuring compliance with health and safety best practice; and
- e) Allow the Council to deal with the owners of abandoned boat more effectively.

8.7 Pursuing a HRO would be a lengthy and relatively expensive process, which could take 12 months and cost approximately £90,000. Without doing so it will be impossible to meet, both in principle and practice, the requirements of the Port Marine Safety Code.

8.8 The alternative options are set out in the table in Appendix A.

8. How does the decision contribute to the Council's Corporate Plan?

This would help demonstrate a well-run Council and contribute greatly towards public safety within the Port of Exeter.

9. What risks are there and how can they be reduced?

The risk of public and stakeholder objections can be reduced by early informal discussions with the Port User Group and Exe Estuary Management Partnership

10. Equality Act 2010 (The Act)

11.1 No direct equality impacts arising from the recommendations.

11. Carbon Footprint (Environmental) Implications:

Generally positive as the HRO will allow the Council to create a regulatory framework to reduce carbon emissions within the port

12. Are there any other options?

Please see the table in Appendix A for the pros and cons of all the options considered.

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Local Government (Access to Information) Act 1972 (as amended)

Background papers used in compiling this report:-

None

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