

Draft MoU

Dated

20[]

(1) South Hams District Council (Executive)

(2) Salcombe Harbour Board

**MEMORANDUM OF UNDERSTANDING
IN RESPECT OF SALCOMBE HARBOUR**

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MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is made on the day of 2022

Between

The Executive of South Hams District Council whose principal place of business is at Follaton House, Plymouth Rd, Totnes, TQ9 5NE (hereinafter referred to as 'the Executive')

and

Salcombe Harbour Board (an advisory Committee of the Council) whose principal place of business is at Follaton House, Plymouth Rd, Totnes, TQ9 5NE (hereinafter referred to as "the HMC")

Who are jointly referred to in this Memorandum of Understanding as 'the Parties'

WHEREAS:

- South Hams District Council ("the Council") is the Owner and Statutory Harbour Authority for Salcombe Harbour ("the Harbour");
- The Council which operates a Leader and Executive model of governance arrangements, has agreed that as part of a review of its governance arrangements, the Executive should exercise the Council's functions as Harbour Authority insofar as such functions were not already Executive Functions within the meaning of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000
- The Salcombe Harbour Board (hereinafter referred to as "the Harbour Board") is a Committee of the Council. The Harbour Board is advisory in nature and has been established to assist with improvement of the governance of the Harbour having regard to the recommendations for governance changes made in the Ports Good Governance Guidance ('PGGG') published by the Department for Transport in March 2018;
- The MOU is made pursuant to the recommendations made in the PGGG. The Parties wish to set out their commitment to implementing the recommendations contained in the PGGG relevant to the establishment of the Harbour Board.

1) Definitions and Abbreviations

For the purposes of this MOU the following definitions and abbreviations shall apply;

- a) The "Assets" shall mean the property, equipment and all other matters set out in the Asset Register at **Annex 3** annexed hereto.
- b) The "Constitution" shall mean the constitution of the Council as amended from time to time.
- c) The "Council" shall mean South Hams District Council.
- d) The "Executive" shall mean the Executive of the Council.
- e) The "DfT" shall mean the Department for Transport.

- f) The “Harbour” shall mean Salcombe Harbour, the limits of which are established under the 1954 Order.
- g) The “Harbour Board” shall mean Salcombe Harbour Board.
- h) “Harbour Board Guidance Notes” shall mean the guidance notes contained in Annex 4 of this MoU
- i) The “Harbour Business Plan” shall mean the Harbour Business Plan for the relevant period as approved by the Executive.
- j) The “Harbour Revenue” shall include the charges dues rates tolls and other moneys and receipts which may be taken and received by way of income from or in respect of the harbour undertaking under the authority of the 1954 Order, the Harbours Act 1964 or the Harbours, Docks and Piers Clauses Act 1847.
- k) “MoU” shall mean this Memorandum of Understanding.
- l) The “Parties” shall mean the Executive and the Harbour Board.
- m) “PGGG” shall mean the report published by the Department for Transport in March 2018 called *Ports Good Governance Guidance*.
- n) “Terms of Reference” shall mean the matters incorporated into the Constitution under Table 3B.
- o) “1954 Order” means the Salcombe Harbour Order 1954 (contained in the Schedule to the Pier and Harbour Order (Salcombe) Confirmation Act 1954), as amended from time to time.

2) Purpose of MoU

- a) Subject to the requirements of the Constitution the purpose of this MoU is to
 - (i) Provide a clear framework for the decision making, accountability, and financial management of the Harbour to enable the Harbour Board (in exercising its advisory role to the Executive) to assist the Executive in addressing the needs of the Harbour as a business and an environmental and community asset, which takes full account of the commercial realities of municipal port operations; and
 - (ii) Assist in clarifying the role of the Harbour Board to carry out its functions as an advisory body to the Executive in respect of the Harbour under its Terms of Reference
- b) The statutory role and functions of the Council and the Parties are not affected by the requirements of the MoU.
- c) This MoU is a statement of the understanding between the Executive and the Harbour Board. The MoU is not, and is not intended to be, legally binding to either Party. The detailed working arrangements may change over time by the agreement of the Executive.
- d) The MoU provides that the Harbour will be governed according to best practices as set out in the PGGG.

3) Ports Good Governance Guidance 2018.

- a) The PGGG was published by the DfT in March 2018, following extensive consultation with Industry. It sets out a number of recommendations for the accountability, governance, and finance of statutory harbour authorities and Part C applies specifically to Ports and Harbours within the Municipal Sector.
- b) The PGGG is based on a number of other documents, particularly the UK Corporate Governance Code (UKCGC). It replaces that in previous documents such as Modernising Trust Ports (MTP), published by the then DETR in 2000, its second edition Modernising Trust Ports (MTP2), published by DfT in 2009, and Opportunities for Ports in Local Authority Ownership, published by DfT in 2006. The guidance also reflects the recommendations of the Department's Trust Port Study, published in May 2016.
- c) The PGGG does not have force of law and is not legally binding. It does not replace any legal duties or obligations that SHAs might have in their own legislation or general acts of Parliament, such as the Harbours Act 1964 or the Companies Act 2006. Where such legal duties conflict with the PGGG, the legal duties take precedence.
- d) Whilst the guidance is advisory, the DfT expects all SHAs to carefully consider it and to implement its principles if these are not already in place, where practical and appropriate to the circumstances of the SHA.
- e) It has been agreed by the Executive that this MoU is drawn up to address the recommendations contained in the PGGG. An extract from the PGGG related to the establishment of Harbour Management Committees is set out at **Annex 1**.
- f) This MoU is prepared on the basis of the findings of the PGGG. However, it is recognised by the Parties that the PGGG deals with short, medium and long-term issues. It is fully appreciated that circumstances may change and for this reason a review and monitoring mechanism is essential to underpin this process.
- g) On this basis it is intended that a report will be put to the Harbour Board annually to allow the Harbour Board to review and monitor this MoU and recommend to the Executive any changes to it as are required by amendments to the PGGG or developments in respect of the PGGG.

3) General Commitments of the Executive and the Harbour Board

- a) This MoU records that the Executive and Harbour Board have considered the guidance of the PGGG and records the commitment of the Executive and the Harbour Board to implement the recommendations contained therein; and
- b) This MoU further records that Executive and Harbour Board shall take all reasonable steps to work together constructively to mutually facilitate the implementation of the recommendations contained in the PGGG.

4) Agreements of the Executive and Harbour Board

The Executive and Harbour Board agree that:

- a) The reporting lines relevant to an advisory Committee of the Council advising the Executive pursuant to the provisions of section 102(4) of the Local Government Act 1972 and having regard to the recommendations of the PGGG will be maintained to assist the Harbour Board to carry out its functions under its Terms of Reference.

- b) The Harbour Board will be required to exercise an advisory role to the Executive in respect of the Harbour.
- c) The Executive will exercise the functions of the Council and make decisions in respect of the Harbour under and in accordance with the Harbours Act 1964, the 1954 Order and the Harbour Docks Piers and Clauses Act 1847 (as incorporated).
- d) **Annex 4** sets out the organisational structure that is to be put into place defining the reporting lines between the Parties; and
- e) **Accounts:** It is the intention of the Parties that the Council will keep separate accounts for the undertaking with capital distinguished from revenue in accordance with article 34 of the 1954 Order and for the Harbour Revenue to be applied in accordance with article 35 of the 1954 Order.
- f) The Accounts are to include any monies in any reserve fund established under article 35 of the 1954 Order.
- g) Companies Act accounts are to be established and maintained for ease of understanding for the Harbour Board, and to fulfil statutory obligations under the Harbours Act 1964.

5) **Agreement of the Executive**

The Executive agrees that:

- a) The Assets (including land, buildings, infrastructure, plant and machinery) of the Council that are utilised for the running of the Harbour as listed in **Annex 2** form part of the Harbour and that the Harbour Board may advise the Executive in relation to them in accordance with its Terms of Reference, the Harbour Business Plan, the Council's plans and policies and the provisions of this MoU; and
- b) An annual budget including all harbour rental charges and central re-charges will be recommended by the Harbour Board and will then be reviewed and determined by the Executive annually; and
- c) The annual charges and dues for the Harbour will be recommended by the Harbour Board at the same time as the annual budget and will be reviewed and determined by the Executive annually; and
- d) The Harbour Board shall not be permitted to obtain specialist services from external sources, but can recommend to the Executive that they should take such action; and
- e) The Executive will ensure that its aims and objectives regarding the advice and recommendations it seeks to receive in relation to its management of the Harbour are agreed and clearly set out between the Parties in policies and plans; and
- f) The Council's policies and plans for the Harbour are stated by the Executive to be:
 - (i) [the Environmental Policy]; and
 - (ii) [the Harbour Business Plan].

- g) It is the intention of the Parties that these policies and plans will support the Harbour as a financially self-sustainable body, without the need to call upon the Council's General Fund; and
- h) The Executive will consider for approval updated policies and plans proposed by the Harbour Board from time to time, and utilise the skills and experience of the Harbour Board to its best advantage; and
- i) Borrowing facilities may be recommended to the Executive by Harbour Board to fund revenue generating projects in the Harbour if the Harbour Board can demonstrate that such borrowing facilities are consistent with the Council's policies and plans and the 1954 Order; and
- j) The Executive will make payments to Harbour Board members in accordance with the Council's Members' Allowances Scheme set out in Chapter 7 of the Constitution.

6) Agreement of the Harbour Board

The Harbour Board agrees that:

- a) The Harbour Board is a committee of the Council constituted by virtue of section 102(4) of the Local Government Act 1972 and is therefore an advisory body and can only make recommendations to the Executive in respect of the management of the Harbour.
- b) In accordance with the PMSC, the Executive as duty holder cannot delegate its accountability for compliance with the PMSC to the Harbour Board.
- c) In advising and making recommendations to the Executive the Harbour Board will ensure to address the needs of the Harbour as a business and an environmental and community asset, which takes full account of the commercial realities of harbour operations; and
- d) The Harbour Board shall, subject to Clause 7(e) and (f), make recommendations to the Executive regarding the management, acquisition and disposal of assets.
- e) Recommendations made to the Executive in respect of the management, acquisition and disposal of assets must be made in accordance with the Council's acquisitions and disposals policy, financial procedure rules and contracts procedures rules; and
- f) The Harbour Board shall not make recommendations to the Executive on the disposal or acquisition of property assets unless the recommendation(s) accords with the provisions of the 1954 Order and Council's plans, policies and strategies and in particular the Harbour Business Plan;
- g) The Harbour Board will review and then recommend an annual budget, (including rental charges and central re-charges) to the Executive and an annual schedule of charges and dues for the Harbour and these will be determined by the Executive; and
- h) The Harbour Board will monitor performance against approved budgets and recommend appropriate action to the Executive where this is required; and
- i) The Harbour Board make a six monthly and annual report to the Executive reporting on performance against budget; and

- j) The Harbour Board will produce a Harbour Business Plan and any other plan required from time to time and recommend its contents to the Executive for publishing; and
- k) The Harbour Business Plan and other plans should promote the Harbour to be a financially self-sustainable body in the long term; and
- l) The Harbour Board will discharge its role in accordance with its Terms of Reference, the Harbour Board Guidance Notes contained in **Annex 3** of this MoU, this MoU and with consideration of other relevant policies and plans such as the Port Marine Safety Code, PGGG, Health and Safety at Work legislation, Harbour Byelaws and any other appropriate policies, plans and legislation; and
- m) The Harbour Board will provide an annual report to the Executive on how it is advising and making recommendations in relation to the Harbour in a manner that is consistent with relevant policies plans and legislation; and
- n) Borrowing facilities may be recommended by the Harbour Board and considered by the Executive to fund revenue generating projects in the harbour where the Harbour Board can demonstrate that such borrowing facilities are consistent with the terms of the 1954 Order and the Council's policies and plans including the sustainability of the Council's budget; and
- o) The Harbour Board will take all reasonable steps to engage appropriately with the stakeholder community. It will maintain formal links with stakeholder forum(s) as appropriate; and

7) General

- a) This MoU neither expands nor is in derogation of those powers and authorities vested in the participating Parties by applicable law.
- b) For the avoidance of doubt, the Harbour Board is neither the Designated Person nor the Duty Holder under the Port Marine Safety Code. The Duty Holder is the Executive.

8) Term

- a) This MoU in this form or such amended form as agreed between the Parties shall remain effective for as long as the present governance arrangements are in place.
- b) The Parties shall review this MoU at periods of 12 months, or such earlier period as appropriate should the need arise. The Executive may agree to amend this MoU if circumstances dictate.
- c) The MoU may be terminated by resolution of the Executive.

9) Data protection and information

- a) The Parties agree to comply with the Data Protection Act 2018, the General Data Protection Regulation, the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and other statutory information regimes.

Signed for and on behalf of

The Executive of
South Hams District
Council

.....

Cllr Judy Pearce, Leader of the Council

Signed for and on behalf of

Salcombe Harbour Board

.....

Chairperson of Salcombe Harbour Board

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Annex 1
Extract from Part C PGGG – Harbour Management Committees

Harbour Management Committees

4.6 Some LAs have established Harbour Management Committees (HMCs) as a means of governing their harbours. These have some of the features of a trust port board or board of a private SHA and are a good example of how corporate governance best practice principles can be applied in the context of local authority harbours.

4.7 The establishment of an HMC (which would be constituted as a committee within the current LA system) can bring openness and additional accountability to port decisions, along with more expertise and experience (as a skills audit will be carried out prior to HMC members being decided upon).

4.8 LAs may wish to consider formally establishing HMCs by legislative routes. The BPA has produced guidance for LAs that have or are planning to put in place HMCs.

Key points are set out in the box below.

Harbour Management Committees

The formation and membership of the committee is critical. It should be strategic and aware of the commercial and legal framework within which ports operate. Based on particular experiences the Committee should ideally comprise:

- approximately 50% LA elected members of a constituent authority. These do not all have to be LA councillors, but can be co-opted representatives who are appointed by the LA or provide specific skills in support of port management;
- the port chief executive/harbour master should have access to the HMC in an advisory role, but as an officer of the Council they cannot serve on the committee or have voting rights;
- external appointees who are stakeholder representatives or individuals with valuable skills and experiences;
- a Chair appointed on merit, skills and suitability;
- external members should be appointed by public advertisement using the guidance applicable to public appointments, in line with the advice given above.

The HMC Chair should ideally be an elected representative of the LA as this will automatically maintain reporting lines and accountability to the Council. Should the LA favour the appointment of an independent Chair, it is important that reporting lines and voting arrangements are clear and in line with LA corporate governance practice.

Before recruiting, local authorities should undertake a skills audit to assess the balance of skills required to effectively govern the port and deliver against the business plan. These skills should be considered for all committee members.

In order for the HMC to operate effectively a formal memorandum of understanding could be established between the harbour committee and the local authority. The memorandum of understanding could set out the recommended ground rules for a framework between the port and its authority.

Annex 2 – Asset Register

To be completed by the Executive and then reviewed by the Harbour Board before the MoU is signed by both parties.

Annex 3 – Harbour Board Guidance Notes

Harbour Board Guidance Notes

A Establishment of the Harbour Board

1. The functions of the Executive conferred under the Constitution: Functions within the definition of a Harbour Authority in Section 57(1) of the Harbours Act 1964 and the Salcombe Harbour Order 1954 and the Harbour Docks and Piers Clauses Act 1847 (as incorporated).
2. Functions arising out of any Byelaws of Harbour Directions made under the above Acts.
3. That the Harbour Board will provide advice to the Executive in relation to the discharge of these functions within any policy and budget approved by the Council as set out in the Terms of Reference and Memorandum of Understanding between the Executive and the Harbour Board.
4. All Meetings of the Harbour Board shall be conducted in accordance with the Council's Procedure Rules as set out in the Council's Constitution.

B Membership of the Harbour Board

1. The Harbour Board shall consist of 10 members, 6 Members of the Council and 4 Co-opted Members. Each Co-opted Member, as far as it is achievable, will be appointed on a 'fit for purpose basis' through assessment of each nominee's skills, knowledge, experience and commitment on matters identified from time to time by a skills audit as being the main skills requirements for the Harbour Board.
2. All Members of the Harbour Board, including any Co-opted Members, will be bound by the South Hams District Council Code of Conduct as set out in the Council's Constitution and will be required to sign the declaration of acceptance of office (contained in Schedule 1) as required by law in any event within 14 days of their appointment. A Co-opted Member is under the same obligations as Members of the Council that appoints the Co-opted Member, and that member must observe the Council's Constitution and most importantly comply with the statutory rules relating to conduct and the disclosure of interests.
3. No Co-opted Member shall act as a Member until that person has made the declaration of acceptance of office (contained in Schedule 1); and a Co-opted Member shall cease to be a Member of the Harbour Board if that person fails to make that declaration within three months of his / her appointment.
4. The Chairperson and Vice Chairperson of the Harbour Board shall be elected in accordance with the Council's Constitution. Only Council Members shall be the Chairperson and Vice Chairperson of the Harbour Board.
5. As the harbour authority function rests with the Executive, the Harbour Board is constituted as a Committee of the Council by virtue of s102(4) of the Local Government Act 1972. The formation of the Harbour Board under this provision permits the appointment of Co-opted member to an advisory Committee. Council member appointees must accord with the political representation requirements in s15 of the Local Government and Housing Act 1989 (unless in this requirement is disapplied by the Council in accordance with section 17(1) Local Government and Housing Act 1989) and all decisions in respect of the Harbour must be taken by the Executive or in accordance with the other arrangements permitted in section 9E of the Local Government Act 2000.
7. In the event that a Harbour Board Member other than a Council Member does not attend any meetings of the Harbour Board for a period of six months from the date of his or her last attendance, that Member ceases to be a Harbour Board Member, unless within the period of absence the Council gives approval for this absence. This shall not apply to Council Members whose attendance is regulated by Statute.

8. (i) All Harbour Board Members will attend relevant training to be determined by the Chairperson on the basis of appropriate advice, which shall be founded on best practice.

(ii) All Harbour Board Members will be required to attend Code of Conduct Training.

C Appointments Process

As an advisory committee, members of the Harbour Board shall be appointed in accordance with section 104(2) of the Local Government Act 1972.

The Harbour Board shall consist of 10 members, 6 Members of the Council, and 4 Co-opted members. Each Co-opted Member, as far as it is achievable, will be appointed on a 'fit for purpose basis' through assessment of each nominee's skills, knowledge, experience and commitment on matters but not limited to the following:

- management of harbours;
- shipping and other forms of transport;
- local industrial, commercial, financial or legal matters;
- management of marine leisure activities;
- safety or personnel management;
- community issues;
- environmental matters;
- knowledge of port/maritime or other nautical experience;
- any other skills and abilities considered from time to time by the Appointments Panel to be relevant to the discharge by the Harbour Board of its functions as an advisory body;

1. Council Members shall be appointed to the Harbour Board by the Council and a Council Member's term shall expire on the fourth day after the date of the next regular election or from the date of their resignation. Council Members' appointments will be governed by the Council's Constitution.

2. The Council shall secure, so far as reasonably practicable, that the Council Committee Members appointed by them will, between them, have special knowledge, experience and ability in a broad and complementary range of matters relevant to the efficient, effective and economic discharge by the Harbour Board of its function as an advisory body.

3. A Co-opted Member's term of appointment shall be three years from the date of appointment unless the Member shall die, resign or be disqualified;

4. Co-opted Harbour Board Members shall be appointed by the Council for up to 2 full terms, and exceptionally 3 full terms.

5. A Co-opted Member may be appointed to a second three-year term without recourse to open competition, subject to the agreement of both the Chairperson and the Member, and the Harbour Board's assessment that the Member has performed satisfactorily during the first term (all Membership of the Harbour Board is subject to ratification by the Council);

7. Re-appointment of a Co-opted Member for a third term shall involve competition with other candidates;

8. Appointments will usually be made by an Appointments Panel consisting of the Chairperson of the Harbour Board, a Co-opted Member of the Harbour Board, [and an independent external technical advisor with a thorough understanding of harbour/port governance issues].

9. The Appointments Panel shall secure, so far as reasonably practicable, that the Co-opted Members appointed by them will, between them, have special knowledge, experience and ability in a broad and complementary range of matters relevant to the efficient, effective and economic discharge by the Harbour Board of its functions. The decisions of the Appointments Panel are subject to ratification by the Council.

D Resignation of Members

1. A Harbour Board member, including the Chairperson, may resign his or her office at any time by Notice in writing given to the Council's Monitoring Officer.

E Meetings

1. The Harbour Board shall meet at least [6] times a year and be governed by the Procedure Rules as set out in the Council's Constitution;

2. The quorum for meetings of the Harbour Board shall be [5] save that at no time shall there be less than [2] Council Members present at the Meeting.

3. The Harbour Board shall consider the following business:

- i. Approval of the Minutes of the previous meeting;
- ii. Declarations of Interest, if any;
- iii. Report and feedback from Stakeholder Forums;
- iv. The business otherwise set out on the Agenda for the meeting;

4. Agendas

(i) a copy of the agenda including the item, or a copy of the item, shall be open to inspection by members of the public at least [5] clear working days before the meeting or, where the meeting is convened at shorter notice, from the time the meeting is convened; unless

(ii) by reason of special circumstance, which shall be specified in the Minutes, the Chairperson of the meeting is of the opinion that the item should be considered as a matter of urgency.

5. Annual Meeting

An Annual Meeting of the Harbour Board will take place during the year. This will be an informal meeting and include invitation to all members of Stakeholder Forums.

F Declaration of Interests

1. A Co-opted Member shall be under the same obligations as Members of the Council that appoint that person and that person must observe the Council's Standing Orders and comply with the statutory rules relating to the disclosure of interests.

2. All Harbour Board members will be governed by the South Hams District Council Code of Conduct which details interests which need to be declared.

3. The Council maintains and regularly updates a register of interests declared by Members, and shall make the register available for inspection by members of the public at all times during usual office hours.

G Payments to Members

1. The Chairperson of the Harbour Board shall receive a Special Responsibility Allowance in accordance with the Local Authorities (Members' Allowances) (England) Regulations 2003 (as amended).

2. The Harbour Board may pay to Co-opted Members such expenses for travelling allowances on the same basis as Members of the Council.

H Stakeholder Forums

1. To ensure that the Harbour Board has strong and direct links with both harbour users, local communities and other external organisations with an interest in the Harbour Board area, a formal consultation mechanism will be established by the Executive. This will enable Stakeholder Forums to formally make representations to the Harbour Board;

2. No Member of the Harbour Board will have a position on the Stakeholder Forums. The Harbour Master (or authorised deputy) and an Harbour Board Member may attend as observers.

3. The Harbour Board may recommend to the Executive to appoint other Stakeholder Forums.

Schedule 1 : Declaration of Acceptance of Office – Co-opted Members of the Committee

I.....being a Co-opted Member of the Salcombe Harbour Board of South Hams District Council ('the Council'), declare that I will duly and faithfully fulfil the requirements of this role according to the best of my judgement and ability.

I undertake to observe the South Hams District Council Code of Conduct as to the conduct which is expected of Members and Co-opted Members of a Committee of the Council.

If I have an interest, direct or indirect:

(a) in any contract or proposed contract to which the Council as statutory harbour authority is or would be a party or I am a director of a company or body with which the contract or proposed contract is made or proposed to be made; or

(b) in any other matter with which the Council as statutory harbour authority or Salcombe Harbour Board are concerned,

I will declare that interest.

I have disclosed details of every financial and other interest as is mentioned in (a) and (b) above, and I will in future notify as soon as reasonably practicable any alteration to those interests, or any new interest such as is mentioned in (a) and (b) above, which I may acquire.

Signed Date

Signed Date
[Monitoring/Deputy Monitoring Officer]

Annex 4 – Organisational Structure

To be inserted