

**Brighton & Hove
City Council**

POLICY & RESOURCES COMMITTEE ADDENDUM

4.00PM, THURSDAY, 16 JANUARY 2014

COUNCIL CHAMBER, HOVE TOWN HALL

ADDENDUM

ITEM	Page
106. BRIGHTON MARINA ACT 1968: APPLICATION FOR A WAIVER REGARDING WATER DEPTH	1 - 16
Joint report of the Monitoring Officer (Head of Law) and the Executive Director for Finance & Resources (copy attached).	
<i>Contact Officer: Bob Bruce</i>	<i>Tel: 29-1528</i>
<i>Ward Affected: Rottingdean Coastal</i>	

Subject:	Brighton Marina Act 1968: application for a waiver regarding water depth		
Date of meeting	16th January 2014		
Report of:	Head of Law and Executive Director of Finance & Resources		
Contact Officer:	Name:	Bob Bruce	Tel: 291518
	Email:	bob.bruce@brighton-hove.gcsx.gov.uk	
Ward(s) affected:	Rottingdean Central		

FOR GENERAL RELEASE

Note: The special circumstances for non-compliance with Council Procedure Rule 19, Access to Information Rule 5 and Section 100B(4) of the 1972 Local Government Act as amended (items not to be considered unless the agenda is open to inspection at least five days in advance of the meeting) are that the application the subject of this report was received on 31st December 2013 and it was not possible to finalise the report before the 9th January 2014. It is considered to be in the interests of the council to consider the application at this meeting rather than delay such consideration until the following meeting.

1. PURPOSE OF REPORT AND POLICY CONTEXT

- 1.1 To agree that consent may be given under section 55(1) of the Brighton Marina Act 1968 to change the depth of water in parts of the harbour to Brighton Marina.

2. RECOMMENDATIONS:

- 2.1 That the Committee, on behalf of the council, agrees to grant consent under section 55(1) of the Brighton Marina Act 1968, in respect of the changes to the depth of the water in parts of the harbour to Brighton Marina associated with the implementation of the planning permissions BH2006/01124/FP and BH2012/04048 and that such consent shall be evidenced by the form of Agreements set out in Appendix 2 to this report.

3. CONTEXT/ BACKGROUND INFORMATION

- 3.1 Brighton Marina is subject to the terms of the Brighton Marina Act 1968 ("BMA"), certain provisions of which are expressly stated to be for "the protection of" the council and capable of being varied if "agreed in writing" between the lessees of

the Marina and the council. One such provision, at section 57(4) BMA, relates to the depth of water at certain locations at the level of “mean low water springs” (“MLWS”). MLWS is the average low tide level, as further explained in Appendix 1 to this report. which sets out the relevant BMA provisions.

- 3.2 In 2006 planning permission BH2006/01124/FP was granted by the council for a scheme at the Marina providing 853 residential units together with retail, office and community uses. A Full Council meeting also gave consent under section 55(1) of the BMA, so that the height of the development could exceed the cliff height restriction referred to at section 59(1) BMA. DEFRA granted licences for these works, but they subsequently expired.
- 3.3 The 2006 planning permission was subsequently implemented (but not built out) so that it did not expire and in 2013 certain design changes, which did not alter the footprint of the development (which reduces the width of the inner entrance from approx 45 to 40 metres) or require a further BMA height consent, were granted planning permission BH2012/04048 by the council. DEFRA’s coastal licensing powers have transferred to the Marine Management Organisation (“MMO”) and they granted a licence for Phase 1 of the development on 19th December 2013.
- 3.4 On 30th December 2013 the lessees’ lawyers contacted the council seeking consent under section 55(1) BMA in relation to the changes to the depth of water associated with the development as those parts of the development which build out into the harbour will displace the water currently there. This consent could have been sought back in 2006, but appears to have been overlooked at the time. The application is set out in Appendix 2. Appendix 2 also contains the wording of the proposed agreements and includes plans provided by the applicant showing the current harbour layout and that proposed after the development referred to in the application.

4. ANALYSIS & CONSIDERATION OF ANY ALTERNATIVE OPTIONS

- 4.1 The Application for consent sets out cogent reasons for granting the statutory consent and entering into the agreements accordingly. These include
 - the protective provision in section 57(4) BMA predates construction of the Marina and its operation; many years later it is clear how the Marina and harbour operates and how navigation is safely managed.
 - when the council granted planning permission in 2006 and 2013, it took into account the environment impact assessment, which concluded that the development would have no deleterious impact on navigational issues.
 - the MMO have granted a marina licence, having considered all relevant considerations, including navigational safety.
 - the Statutory Harbour Authority (Brighton Marina Company Limited) and the marina operator (Premier Marinas (Brighton) Limited), who has a

long sub lease of the harbour area, are satisfied that there are no adverse issues arising from the proposed consent and agreements.

- 4.2 The purpose of section 57(4) BMA is to safeguard navigation and given the circumstances, particularly the granting of planning permission and the MMO licence, the grant of BMA consent should be given and the appropriate agreements with The Brighton Marina Company Limited, The Outer Harbour Development Partnership LLP and The West Quay Development Company Partnership LLP, set out in Appendix 2, entered into.
- 4.3 To grant consent would be consistent with previous decisions of the council and other public bodies and there are no known grounds for refusing the application.

5. COMMUNITY ENGAGEMENT & CONSULTATION

Although there has been no specific community engagement or consultation regarding the consent being sought, there has been significant consultation regarding the planning and MMO licence processes. The Statutory Harbour Authority and the marina operator support the application and make reference to the potential improvement in the wind climate, by virtue of the buildings giving increased protection to the harbour.

6. CONCLUSION

It is considered appropriate to grant BMA consent and enter into the proposed agreements set out in Appendix 3 to this report.

7. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

- 7.1 There are no financial implications arising from this report.

Finance Officer Consulted: Catherine Vaughan

Date: 08.01.14

Legal Implications:

- 7.2 The Act does not set out any criteria for how the council should exercise its statutory discretion. To grant consent in the form sought would be consistent with previous decisions of the council and other public bodies and would represent the reasonable and proper exercise of the council's discretion under the BMA. As with most council decisions, judicial review would be available in the event of a person affected by the decision considering it to be unreasonable.

Lawyer Consulted: Bob Bruce

Date: 07.01.14

SUPPORTING DOCUMENTATION

Appendices:

Appendix 1: Extracts from the Brighton Marina Act 1968.

Appendix 2: Application under the Brighton Marina Act 1968., proposed form of Agreements to evidence consent to the application and relevant plans.

Documents in Members' Rooms

NONE

Background Documents

NONE

APPENDIX 1

RELEVANT EXTRACTS FROM THE BRIGHTON MARINA ACT 1968

The relevant BMA provisions are in sections 55(1) and 57.4 (a), (b), (c) and (e) which are reproduced below.

55.(1) For the protection of the corporation the next following four sections of this Act shall unless otherwise agreed in writing between the Company and the corporation apply and have effect.

57.(4) From and after the opening of the harbour for the use of vessels the Company shall secure at all times when the water is at the level of mean low-water springs –

- (a) the depth of water is not less than 8 feet in the area (other than so much thereof as lies within a distance of 10 yards from any parts of the works) substantially enclosed by the whole or parts of Works Nos. 1, 2, 3, 4, 5 and 6 and by an imaginary straight line drawn from a point on Work No. 6 90 yards measured in a northerly direction from the termination of that work in a direction west (true) for a distance of 100 yards and thence such a line drawn in a direction west-south-west (true) to the breakwater Work No. 1;
- (b) the depth of water is not less than 8 feet in the area within the inner harbour (other than so much thereof as lies within a distance of 10 yards from any parts of the works) substantially enclosed by the whole or parts of Works Nos. 3, 4, 5 and 6 and by an imaginary straight line drawn from a point on Work No. 6 30 yards measured in a northerly direction from the termination of that work in the direction of Work No. 9 for a distance of 170 yards and thence in a southerly direction to the breakwater Work No. 3;
- (c) the depth of water is not less than 8 feet in a channel not less than 200 feet wide lying between the terminations of Works Nos. 2 and 3, and in a channel not less than 80 feet wide lying between the terminations of Works. Nos. 5 and 6;
- (e) the depth of water in the remainder of the inner harbour is not less than five feet at any point.

NB The “level of mean low water springs” is a reference to the lowest level to which spring tides retreat on average over a set period of time. A spring tide is a tide which occurs at or near the time of a full or new moon, when the sea is at its lowest from the mean sea level. Mean sea level is the overall average height of the surface of the sea...

PLANS

The plan at the end of Appendix 2 indicates the current position. The other plan in Appendix 2, which has a hand written note to identify the areas referred to in s57.4(a), (b), (c) and (e), shows the footprint of the development on the Spending Beach and adjoining areas of the harbour.

APPENDIX 2

APPLICATION UNDER THE BMA, PROPOSED FORM OF AGREEMENTS &
PLANS

ADDLESHAW GODDARD

Our reference SECTG/335688-1

30 December 2013

Mr Bob Bruce
Deputy Head of Law
Brighton & Hove City Council
Room 216
King's House
Grand Avenue
Hove BN3 2SR



BY POST AND EMAIL

Dear Sir

Brighton Marina Act 1968 ("the Act") - request for section 55(1) waiver relating to section 57(4) of the Act

Development pursuant to Planning Permissions BH2006/01124/FP and BH2012/04048 ("planning permissions")

The Brighton Marina Company Limited, The Outer Harbour Development Partnership LLP and The West Quay Development Company Partnership LLP (together "the Applicants")

We write on behalf of the Applicants who request the Council provide a waiver to each of them pursuant to the terms of section 55(1) of the Act in relation to the matters set out in section 57(4) of the Act. Draft forms of waiver are appended to this letter at Appendix 1.

As you will know, the Act was enacted "*to authorise the Brighton Marina Company Limited to construct works; and for other purposes*". Sections 56-59 of the Act subsist for the express "*protection*" of the City Council "*unless otherwise agreed in writing*" by the City Council pursuant to section 55(1) of the Act.

Section 57(4) of the Act contains a protective provision for the benefit of the City Council which states that "*from and after the opening of the harbour for the use of vessels the Company shall secure that at all times when the water is at the level of mean low-water springs*" that the depth of water within specific areas shall be not less than expressly stated depths.

The Development consented pursuant to the planning permissions will interfere with the depths stated in section 57(4) insofar as where the Development is to be constructed out into the marina, there will be no depth of water within that footprint. As a matter of good housekeeping the Applicants therefore make this application for a waiver.

The City Council can grant the waiver sought as a formality given the relevant points set out below:

- 1 the protective provision within section 57(4) was inserted in the Act prior to the construction of Brighton Marina and its operation as an active harbour. Subsequently it has become clear how the marina operates and navigation safely managed;

LETTER - MR BOB BRUCE - BRIGHTON MARINA ACT 1968 - REQUEST FOR SECTION 55(1) WAIVER (2).DOC [10-4263438-1/335688-1]

Addleshaw Goddard LLP, Milton Gate, 60 Chiswell Street, London EC1Y 4AG
Tel +44 (0)20 7606 8855 Fax +44 (0)20 7606 4390 DX 47 London
www.addleshawgoddard.com

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- 2 the City Council granted the Development pursuant to the planning permissions in its capacity as local planning authority in 2006 and 2013. On each occasion the application for planning permission was accompanied by a fully reasoned environmental statement which included a report dated 1 August 2004 prepared by the Warsash Maritime Centre addressed to the statutory harbour authority, The Brighton Marina Company Limited. The report concluded that the Development would have no deleterious impact on navigational issues;
- 3 The statutory harbour authority, The Brighton Marina Company Limited, was consulted upon and objected to neither of the applications leading to the grant of the planning permissions;
- 4 previously DEFRA has granted licences for the Development which have subsequently expired. DEFRA's role in coastal licensing has subsequently been transferred to the Marine Management Organisation ("MMO"). The MMO granted a marina licence for Phase 1 of the Development on 19th December 2013 having considered all relevant considerations germane to the grant of that licence, of which navigational safety is one principle factor. A copy of the MMO licence is appended at Appendix 2;
- 5 the application submitted to the MMO was supported by a letter dated 11 November 2013 from the statutory harbour authority, The Brighton Marina Company Limited on the basis that it would not affect navigational safety. A copy of this letter is appended at Appendix 3; and
- 6 the application submitted to the MMO was also supported by a letter dated 11 November 2013 from Premier Marinas which has the benefit of a long lease over the marina. Premier also concluded that the Development would have no adverse effect on navigational issues within the harbour entrance. A copy of this letter is also appended at Appendix 3.

In light of the above considerations relevant to the purpose behind the protective provision in section 57(4), which is to safeguard navigational safety, there is no rational reason for the City Council to do other than grant the waiver sought. The decisions previously effected by the Council in its role as planning authority, the opinion of the statutory harbour authority, and the decision of the MMO, each indicate that the protection afforded to the City Council in section 57(4) can be waived for the Development. Taken together, they represent a compelling case for that course of action by the City Council which can act in full knowledge that navigational concerns have been fully considered by the relevant statutory and consenting authorities.

We trust that the City Council will be able to provide the waiver sought at the earliest possible opportunity so that this mere formality can be addressed.

Yours faithfully



Addleshaw Goddard LLP

Direct line +44 (0)20 7160 3102
Email gary.sector@addleshawgoddard.com

Copy to Oliver Asha - Brighton and Hove City Council
Andrew Goodall

THIS AGREEMENT is made on day of 2013

BRIGHTON & HOVE CITY COUNCIL of Kings House, Grand Avenue, Hove, BN3 2SR ("the Council") of the one part and

THE WEST QUAY DEVELOPMENT COMPANY PARTNERSHIP LLP (number OC 354690) whose registered offices is at Brighton Marina BN2 5UF ("the Partnership") of the second part

WHEREAS

- 1 Whereas the Council is the successor council to the County Borough of Brighton defined as "the corporation" in the Brighton Marina Act 1968 ("the Act")
- 2 Whereas the Partnership has the benefit of the leasehold interest in land and buildings at the Brighton Marina ("the Marina")
- 3 Whereas Section 55(1) of the Act provides that unless otherwise agreed in writing between the Partnership and the Council certain provisions for the protection of the Council as set out in clauses 56 to 59 of the Act shall apply and have effect in respect of the Marina
- 4 Whereas from and after the opening of the Marina for the use of vessels Section 57(4) of the Act provides that the Partnership shall secure that at the level of mean low-water springs the depth of water in defined areas of the Marina shall be not less than the depths therein stated
- 5 Whereas the Council has granted Planning Permission BH2006/01124/FP and BH2012/04048 ("Planning Permissions") for a development of the Marina which will otherwise breach the protective provisions provided by section 57(4) of the Act
- 6 The Council has considered the matter fully and this Agreement is made under section 55(1) of the Act to record the decision of the Council and the Partnership to permit the construction of the development referred to in the Planning Permissions

IT IS HEREBY AGREED AS FOLLOWS

- 1 Pursuant to Section 55(1) of the Act the Council gives consent to the Partnership to its lawful tenants and to their successors in title to implement the Planning Permissions so that any development permitted under the Town and Country Planning Act 1990 by the Planning Permissions which breaches the restrictions prescribed by section 57(4) of the Act is expressly permitted by this Agreement
- 2 For the avoidance of doubt the statutory consent hereby granted is strictly limited to the development described in the Planning Permissions as may be varied from time to time and any further proposals at the Marina which do not arise out of the Planning Permissions as varied from time to time and entail the construction or erection of any work building or structure which breaches the protective provisions prescribed by section 57(4) of the Act shall require the approval of the Council and if so approved shall require a further agreement under Act to be entered into

Executed as a Deed by the Council and the Partnership on the date of this Agreement

Executed as a deed by affixing the common)

seal of **Brighton & Hove City Council** in the)

presence of:-

.....

Authorised Officer

Executed as a deed and delivered by)

The West Quay Development Company)

Partnership LLP acting by two members)

Signature.....

Member

Signature.....

Member

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Authorised Officer

Executed as a deed and delivered by)

The Outer Harbour Development Company)

Partnership LLP acting by two members)

Signature.....

Member

Signature.....

Member

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THE BRIGHTON MARINA COMPANY LIMITED (company number 1720715) whose registered offices is at Brighton Marina BN2 5UF ("the Company") of the second part

WHEREAS

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seal of **Brighton & Hove City Council** in the)

presence of:-

.....

Authorised Officer

The Common Seal of)

The Brighton Marina Company Limited)

was affixed to this Deed)

In the presence of

Director

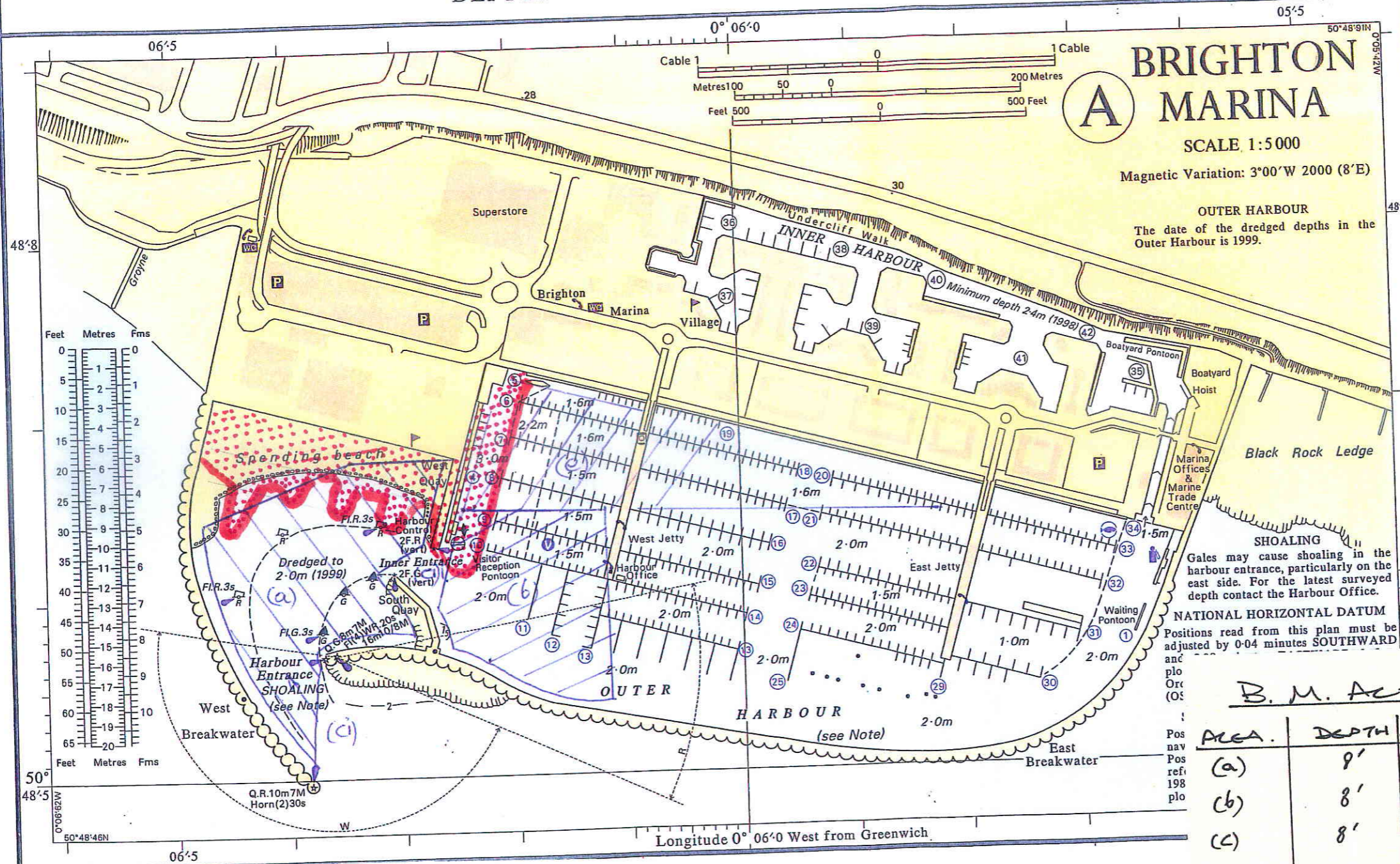
Director/Secretary



HARBOURS ON THE SOUTH COAST OF ENGLAND

DEPTHS IN METRES

Depths are in metres and are reduced to Chart Datum, which is approximately the level of Lowest Astronomical Tide.
 Heights are in metres. Underlined figures are drying heights above Chart Datum; all other heights are above Mean High Water Springs.
 Positions are referred to the WGS 84 compatible datum, European Terrestrial Reference System 1989 Datum (see SATELLITE - DERIVED POSITIONS Note).
 Navigational marks: IALA Maritime Buoyage System - Region A (Red to port).
 Projection: Transverse Mercator.
 Sources: The origin, scale, date and limits of the hydrographic information used to compile the chart are shown in the Source Diagram. Later information has also been included. Depths in upright figures are from smaller scale surveys. The topography is derived chiefly from Ordnance Survey maps.



B. M. ACT. CLAUSE 57.4.

AREA.	DEPTH.	DESCRIPTION
(a)	9'	HARBOUR ENTRANCE.
(b)	8'	OUTER HARBOUR SOUTH WEST.
(c)	8'	(ci) OUTER ENTRANCE 200'
		(cii) INNER ENTRANCE 80'
(d)	6'	OUTER HARBOUR SOUTH EAST.
(e)	5'	OUTER HARBOUR NORTH.

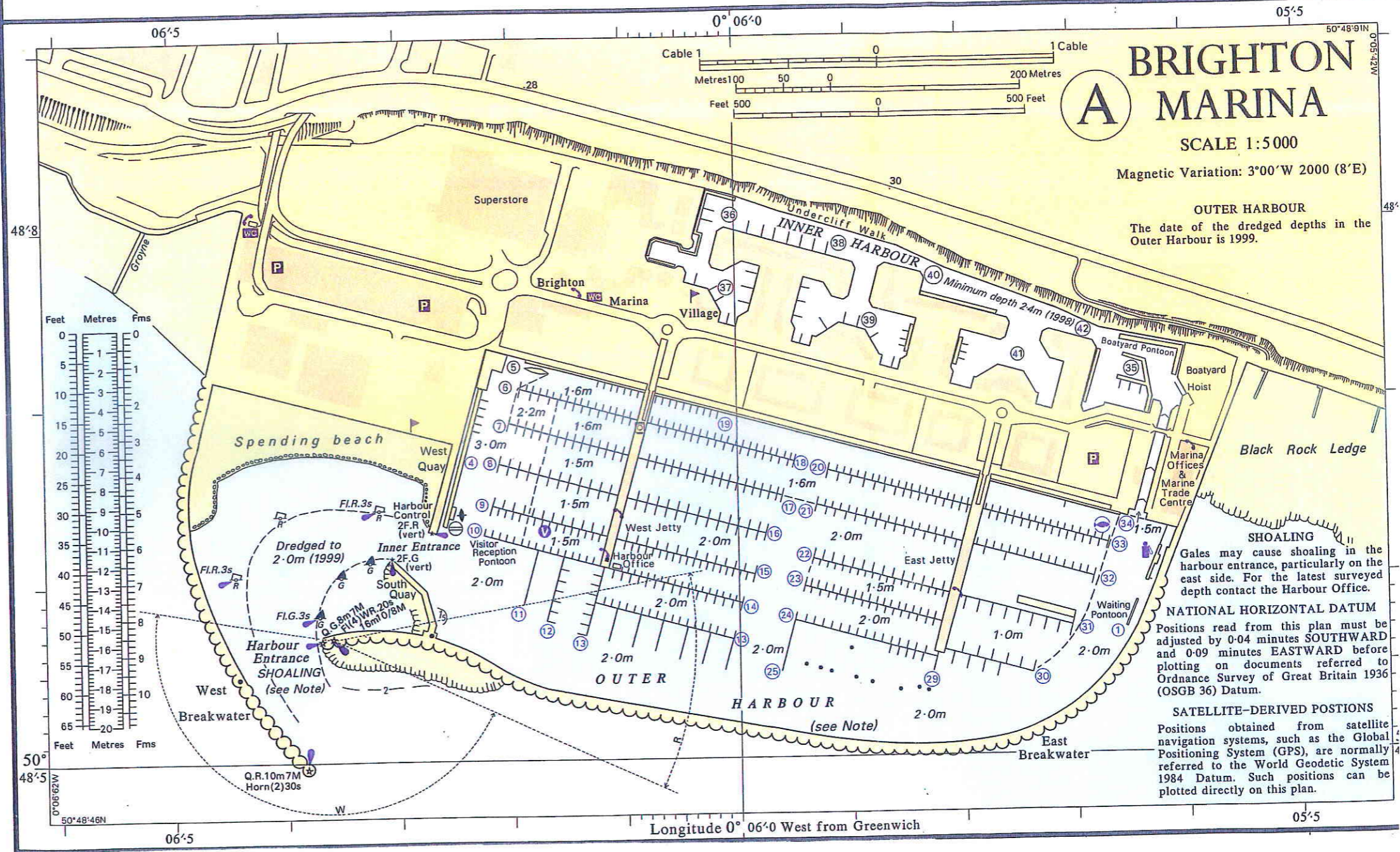
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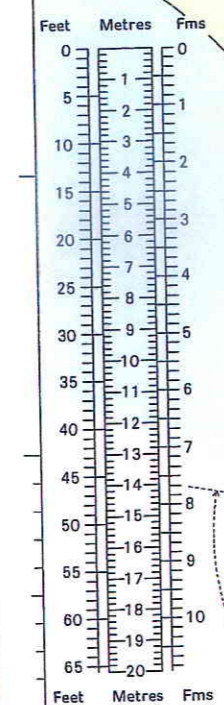
BRIGHTON MARINA
SCALE 1:5000
Magnetic Variation: 3°00'W 2000 (8'E)

OUTER HARBOUR
The date of the dredged depths in the Outer Harbour is 1999.

SHOALING
Gales may cause shoaling in the harbour entrance, particularly on the east side. For the latest surveyed depth contact the Harbour Office.

NATIONAL HORIZONTAL DATUM
Positions read from this plan must be adjusted by 0.04 minutes SOUTHWARD and 0.09 minutes EASTWARD before plotting on documents referred to Ordnance Survey of Great Britain 1936 (OSGB 36) Datum.

SATELLITE-DERIVED POSITIONS
Positions obtained from satellite navigation systems, such as the Global Positioning System (GPS), are normally referred to the World Geodetic System 1984 Datum. Such positions can be plotted directly on this plan.



Longitude 0° 06' 0 West from Greenwich