

REPORT TITLE: DETERMINATION OF CALL-IN REQUEST

14 JUNE 2022

REPORT OF MONITORING OFFICER: Lisa Kirkman, Strategic Director, 01962 848 501, lkirkman@winchester.gov.uk

WARD(S): ALL

PURPOSE:

The Council's [Constitution](#) (Part 4.3 – Overview and Scrutiny Procedure Rules, paragraph 15) details the operation of the council's "Call-In" process. This includes the following requirement "*Where a Call-In Notice is not accepted the Monitoring Officer will submit a report to the next available meeting of The Scrutiny Committee giving details of the request and the reasons for not accepting it.*"

The Monitoring Officer (MO) received a call-in request accompanied by 5 electronic signatures on 17 March 2022, regarding a decision taken at [the Cabinet meeting](#) on the 9th March 2022, (report reference CAB3342 "A land transaction in respect of the River Park Leisure Centre (RPLC) site and associated parking area, bowls club and skate park"). The MO reviewed the contents of the call-in request and assessed it against the grounds for call-in specified within the constitution.

The call-in request was not accepted, and this was communicated to the call-in signatories via email on the 18th March 2022 with a detailed breakdown of the reasons. In line with the constitutional requirement outlined above, that email is attached to this report in full.

RECOMMENDATIONS:

It is recommended that scrutiny committee note the contents of this report.

From: Lisa Kirkman
Sent: 18 March 2022 17:05
To: Caroline Horrill (Cllr) <CHorrill@winchester.gov.uk>; Linda Gemmell (Cllr) <LGemmell@winchester.gov.uk>; Susan Cook (Cllr) <susancook@winchester.gov.uk>; Stephen Godfrey (Cllr) <SGodfrey@winchester.gov.uk>; Frank Pearson (Cllr) <FPearson@WINCHESTER.GOV.UK>
Subject: Call-in 17/03/22 - MO outcome
Importance: High

Good Afternoon Councillors,

Further to my email this morning I can confirm I have concluded my assessment, with input from the S151 Officer and his team where necessary, on your call-in. I have expedited this thorough assessment today due to the pre-election period beginning on Sunday at 23:59. I was also made aware that a call-in was to be expected and had confirmed the relevant deadline.

It is not my role to defend the decision made by Cabinet nor to find other reasons to allow a call-in. My role is to assess the merits of the points made to me by you as the signatories and whether it is reasonable to put those points that may be considered valid before the Scrutiny Committee. I therefore conclude each of your points with whether I consider it to be valid or not valid. My response is set out in red under each of your points on the attached word document.

In accordance with the relevant procedure rules I can confirm I have discussed this determination with the Chair of Scrutiny. They further state that "where a Call-In Notice is not accepted the Monitoring Officer will submit a report to the next available meeting of the Scrutiny Committee giving details of the request and the reasons for not accepting it." This email and attachment will therefore be reported to the next meeting of the Scrutiny Committee.

Best wishes,

Lisa

Lisa Kirkman
Strategic Director and Monitoring Officer

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Appendix A

CALL-IN REQUEST FORM

The Call in procedure is relevant to a key decision taken by or on behalf of the Cabinet within 5 working days from publication of the Decision Record Form from the following decision making bodies:

1. Key decisions by the Cabinet
2. A Committee of the Cabinet or an individual Cabinet Member
3. Key decisions made by an officer with delegated authority from the Cabinet

We the following request that the following key decision be called-in in accordance with Part 4.3 of the Council's Constitution as we have evidence which suggests that the Executive decision was not taken in accordance with the principles set out in Part 2 of the Constitution (Decision Making).

Topic:

A land transaction in respect of the River Park Leisure Centre (RPLC) site and associated parking area, bowls club and skate park (less exempt appendix) made at the Cabinet meeting on Wednesday 9th March 2022.

Decision:

1. That having considered the objections received as a result of the public notice under s123(2A) of the Local Government Act 1972, approval is given to enter into an agreement to dispose of the land known as River Park Leisure Centre, Gordon Road, Winchester, as identified by the red line on the plan at Appendix A ("the Site") of CAB3342, to the University of Southampton on a 150 year lease.
2. That the Heads of Terms are agreed as set out in Appendix B of CAB3342, subject to an amendment in order to ensure that the skate park is leased back to the council. The Heads of Terms include a five year 'longstop date' during which period the University of Southampton will investigate and apply for planning consent, with the usual public notices, for their proposed development.
3. That authority be delegated to the Corporate Head of Asset Management to enter into an Agreement for Lease with the University of Southampton in keeping with the Heads of Terms and the above amendment in respect of the skate park, including authority to agree the purchase price with The University of Southampton on terms that satisfy S123(2) of the Local Government Act 1972.
4. That subject to further decisions by the council as to the grant of planning permission for the University of Southampton's proposed campus scheme and as to the appropriation of those parts of the Site required for the scheme, authority be delegated to the Corporate Head
5. University of Southampton in accordance with the above-mentioned Agreement for Lease.
6. That authority be delegated to the Service Lead Legal the drafting of the Agreement for Lease and the lease, and any relevant ancillary agreements as are necessary to implement the recommendations above.

Five signatories requesting call-in

Signatory 1: Cllr Caroline Horrill

Signatory 2: Cllr Linda Gemmell

Signatory 3: Cllr Sue Cook

Signatory 4: Cllr Frank Pearson

Signatory 5: Cllr Stephen Godfrey

In calling in this decision we have had consideration of the following:

Please tick paragraph(s) which are relevant:

- i) The decision is outside the terms of reference of the Cabinet, or delegated powers of the decision-maker; or
- ii) The decision appears to be contrary to, or not wholly consistent with, the Council's Budgetary and Policy Framework or other Council Policy: or
- iii) The information contained within the report, and/or considered by the Cabinet (or other decision-maker) was incomplete or inaccurate: or
- iv) New information has come to light which might cause the decision to be changed; or
- v) The decision was not made in accordance with the 'Principles of Decision making' set out in Article 11 of the constitution or in some other way appears to give rise to significant legal, financial or propriety issues.

Our rationale is as follows:

1. **The authority has not followed the Best Value Statutory Guidance as provided by the Department for Communities and Local Government**, which states ...To achieve the right balance - and before deciding how to fulfil their Best Value Duty – authorities are under a Duty to Consult (Section 3(2) of the Local Government Act 1999) representatives of a wide range of local persons; this is not optional. Authorities must consult representatives of council tax payers, those who use or are likely to use services provided by the authority, and those appearing to the authority to have an interest in any area within which the authority carries out functions. Authorities should include local voluntary and community organisations and small businesses in such consultation. The River Park site is a Winchester District asset and as such the wide range of local persons should be consulted, which self-evidently has not happened and therefore renders the decision unsound.

MO Response: There was no obligation to consult under Best Value legislation and therefore the guidance stated does not apply. Cabinet Report 3342 states at 4.23:

"Under S3 of the Local Government Act 1999, a best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness. For the purpose of deciding how to fulfil this duty, an authority must consult specified representatives. Case law establishes that the duty to consult is triggered by decisions about high-level issues concerning the approach to the performance of an authority's functions, and it is about those and not about particular implementation that consultation is required. It is not considered that the proposed decision falls into the category requiring such consultation."

The leading case is *R (Nash) v Barnet LBC* [2013] PTSR 1457, on which the above legal advice in the Cabinet report was based. The judgment of Underhill LJ in this case stated;

"I fully accept that it cannot have been the statutory intention that every time that an authority makes a particular operational decision, by way of outsourcing or otherwise, it is required by s3 to consult about that decision simply because that could be said to be part of 'the way in which' it performs its functions. As I have said above, in this context that phrase connotes high-level issues concerning the approach to the performance of an authority's functions, and it is about those and not about particular implementation that consultation is required."

MO consideration: this ground is invalid.

- 2. The Cabinet has not followed Financial Procedure Rule 7.4 which requires schemes over £2m to be fully appraised by Cabinet.** The demolition of the River Park building is included in the capital plan but there is no financial appraisal provided or report set out by the S151 officer to support this activity and it is our claim that this activity is therefore not properly authorised at this time and a business case has not been presented as per 8.11 of the financial rules.

Section 151 Officer response: A capital scheme for the demolition of the former leisure centre at River Park was approved by Council at its meeting in February 2022 as part of the Capital Programme (appended to the Capital Investment Strategy, CAB3332). £2m has been included to fund demolition (estimated at £1m) and to provide for any remediation works required. It is anticipated that final costs will be well within this provision.

It would however be inappropriate to seek approval under FPR 7.4 (i.e. to spend and proceed with works) until detailed cost estimates and specific works required have been established. Only at this stage would it be possible for a detailed appraisal to be produced to enable Cabinet to authorise expenditure. In this case, approval of the business case by Cabinet under FPR 8.11 will be sought alongside the authority to spend under FPR 7.4 only once the timing and final detailed specification for both demolition and required remediation works have been determined.

MO consideration: On the advice of the S151 Officer this ground is invalid.

- 3. Before entering into any leasing agreement the S151 must be consulted** (Financial Procedure Rule 18) in order that the nature of the proposed lease can be determined as to whether it is a finance lease with Prudential Code implications or an operating lease and so that details can be recorded correctly for inclusion in the statutory Statement of Accounts. The decision has delegated authority to the Corporate Head of Asset Management and not the S151 officer and we contend this a flaw in the decision-making process.

This is particularly relevant now the leasing decision includes the lease and 'lease-back' of the skate park which occupies a substantial part of the site and so fundamentally impacts the value of the site. The expected lease value detailed in the exempt appendix did not take into account the lease and lease back arrangement for the skate park and therefore did not provide a sound financial basis for the decision. In addition, if the final lease value is outside of the range in the exempt appendix this would render the decision unsound.

Section 151 Officer response: The purpose of this FPR is to ensure that any leases entered in to are accounted for correctly. A final assessment of whether any lessee or lessor arrangement is an operating or finance lease would be made at the point at which the lease was entered into and would be based on the International Financial Reporting Standards (IFRS) applicable at the time.

All decisions must adhere to the FPRs and it is therefore unnecessary to explicitly restate all steps taken to ensure compliance (such as consultation with the s151 regarding leases).

It should be noted that if the final value is outside of the range in the exempt appendix, the lease will not be agreed.

MO consideration: On the advice of the S151 Officer this ground is invalid.

- 4. Mistaken guidance was given by the QC to Cabinet** when he advised alternative River Park schemes could be considered when the planning application for River Park is presented to the Planning Committee. All planning applications must be considered on their individual merit against the Local Plan policies and so such a comparison is not valid under planning legislation.

MO response: The advice given to Cabinet was correct. The advice given to Cabinet was set out in the Cabinet Report 3342 at 4.6 as follows:

"Prior to the grant of the lease there will be substantial further opportunities for the public and stakeholders to express their views in relation to the future use of the whole Site insofar as it is affected by the proposed campus scheme, both in response to the university's application for planning permission and in response to a

proposed appropriation of those parts of the Site required for the proposed campus scheme."

This was expanded upon in the update circulated to Cabinet members following the Scrutiny Committee meeting as follows:

"In addition, there was discussion about the extent to which members of the public and stakeholders would be able to put forward proposals under which the Council could retain the current use of the Site for public recreation, both as part of the planning process and leading up to an appropriation decision by Cabinet.

In relation to the planning process, Policy CP7 in the Local Plan states that there will be a presumption against the loss of any open space, sports or recreation facility (including built facilities), except where it can be demonstrated that:-

- alternative facilities will be provided and are at least as accessible to current and potential new users, and at least equivalent in terms of size, usefulness, attractiveness and quality; or
- the benefit of the development to the community outweighs the harm caused by the loss of the facility.

Before the Council made the appropriation decision, there would be further advertisements in local newspapers inviting objections, as required by section 122(2A) of the Local Government Act 1972. Furthermore, officers have clarified that the advertisement will carry a plan showing all parts of the Site that were proposed to be appropriated to a new use as part of the University's development (including the closed leisure centre), regardless of whether or not they are currently used as open space. This would meet criticisms made by the Friends of River Park that the earlier plans in relation to the advertisements preceding this disposal decision were confusing for members of the public.

As stated above, appropriation requires a decision there is a greater public need for development for the proposed new use than the current use. It would be open to members of the public or stakeholders to argue that the current use for public recreation should continue."

MO consideration: this ground is invalid.

5. **We can confirm that a conversation has taken place with the Portfolio Holder for assets** in accordance with Overview and Scrutiny Procedure Rule 4.3 15, to review if the Cabinet would consider delaying the decision to enable further consultation and financial decisions to be reviewed. This was refused by the Portfolio Holder.

MO consideration: this procedural rule, as set out in the constitution, has been complied with fully.

