

Report of the Interim Monitoring Officer

GOVERNANCE ISSUES ARISING FROM A SALE OF LAND AT REDWOOD CRESCENT1. Purpose of report

To report concerns in respect of several governance issues arising from the way Council officers handled the sale of land at Redwood Crescent, and to make recommendations intended to prevent their recurrence.

2. Detail

The sale of land and garages at Redwood Crescent in Beeston, and the subsequent difficulties with the small housing development there have been the subject of much local controversy and media attention. This report does not repeat such coverage but, instead, focuses on issues which have engaged my statutory role as Monitoring Officer. These are listed below and then dealt with in turn:

- (a) issues arising under the legal framework governing the Council's power to dispose of land (section 123 of the Local Government Act 1972);
- (b) issues arising under the legal framework for Assets of Community Value;
- (c) issues arising under the law, guidance and local constitutional provisions concerning Freedom of Information Act (FOI) requests.

These are now dealt with in turn:

(a) Issues arising under the legal framework governing the Council's power to dispose of land.

Sections 123 and 128 of the Local Government Act 1972 (as relevant) are set out below.

"123(1) Subject to the following provisions of this section...a principal council may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can be reasonably obtained.

(3) A principal council may not dispose under section (1) above of any land consisting of or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them."

“128(2) Where under the foregoing provisions of this part of this Act or under any other enactment, whether passed before, at the same time as, or after, this Act, a local authority purport to...dispose of land, then -

- (a) in favour of any person claiming under the authority, the disposal so purporting to be made shall not be invalid by reason that any...requirement as to advertisement or consideration of objections has not been complied with, and
- (b) a person dealing with the authority or a person claiming under the authority shall not be concerned to see or enquire whether...any such requirement has been complied with.”

Section 123 is a key provision and sets out a basic principle that a Council may dispose of land in whatever manner it chooses but, then, in its own terms places very significant restrictions on this general power. Two such restrictions are relevant to the sale of this land – firstly, the requirement to advertise the intention to dispose of land which forms an open space and, secondly, the requirement to get best consideration in the sale (unless the approval of the secretary of state is obtained).

Turning to the first requirement, it is a matter of fact that the Council did not advertise the proposed disposal of the land before entering into, initially, a legally binding option to sell at a later date. As a result of this failure to comply with this part of section 123, the entering into the option attracted no local concern, simply because there could be no local awareness of it, as it had not been advertised.

The actions of the purchaser, after the option was entered into, in applying for planning permission for housing on the site, raised local awareness of the fact that the Council had committed itself to the disposal of the site. Local residents responded on several fronts: making representations and objecting within the planning process, making an application for the land to be listed as an Asset of Community Value (ACV) (generally, see further at (b) below) and raising concerns about how the disposal had been handled by the Council. In all cases, and notwithstanding the fact that the land was not managed as such by the Council, the value of the land as informal public open space was stressed and evidence in support of this was submitted. The ACV issues will be addressed separately but of relevance here is the fact that the Council’s acceptance of evidence of public user as informal public open space to support its decision to list the land as an ACV also supported the allegation that the Council had failed to advertise the proposed disposal of the land under the duty in section 123. It is unfortunate that the actual use being made of the land was not considered in more detail by the Council before any legal commitment to sale had been made by the Council through the completion of the legally binding option.

In the light of the representations made and internal concerns within the Council, external legal advice was sought upon whether the option was binding upon the Council in circumstances where it had failed to advertise the proposal to dispose of what was now considered to be open space land. The advice received confirmed that, and applying section 128 (see above), notwithstanding the failure

by the Council to comply with the advertising requirement, the option was binding upon the Council and would be enforceable against it. On this basis, when the developer, who held the option, obtained planning permission for the development of 4 houses on the land and then called for the exercise of the option and completion of the purchase, the Council complied with it and completed the sale of the land.

In my view, when the Council became aware of the issue concerning failure to advertise, it acted responsibly in seeking expert specialist advice and its subsequent action, in completing the sale, was in accordance with that advice. This does not, however, take away from the fact that, at the earlier stage, it had failed to advertise the proposal to sell land which included public open space and had, therefore, acted contrary to law, i.e. section 123 of the Local Government Act 1972.

This was not just a case of a breach with no real consequences, as its impact was to prevent any consideration of representations about the open space which the statutory advertisement may have generated and these could have resulted in the proposed disposal being withdrawn.

To mitigate the risk of this occurring again on another site, I have included recommendations to introduce safeguards into the process of identifying sites for potential disposal. These are intended to ensure that individual site inspections take place and are recorded and evidence of any informal local user or characteristics are taken into account.

The other issue of concern under section 123 is whether “best consideration” was obtained for the sale of the land. The circumstances relating to the sale of this land formed part of the wider investigations carried out by and on behalf of the Council, of which councillors are aware. Those investigations have not revealed any evidence that the Council commissioned any valuation of the land. Instead it appears that reliance was placed on a valuation obtained by the eventual purchaser from an independent firm of valuers. This is far from best practice, as the valuer would have a contractual duty towards their client, i.e. the purchaser and would deny having any duty of care towards the vendor. i.e. the Council.

In addition to this, this formed part of an approach taken to this transaction in respect of which there is no evidence (apart from comments from a, now, former senior officer and a response to a FOI request – as to which see (c) below) that the site was advertised openly for sale nor the market canvassed in any other way to encourage interest and bids for it. Subsequently to the completion of the sale and in the light of challenges to whether best consideration had been obtained, the Council approached the same firm of valuers to review the value of the site, this time with the Council as their client. The firm confirmed that the price obtained for the sale of the land, £60,000, was within a range of value which could be considered the “best consideration” for the land in all the circumstances.

Given this factor, I consider I am not able to make a definitive judgement that the Council acted contrary to section 123 in terms of the sale price achieved but I do consider the approach taken by the Council to this disposal placed it in a position

of considerable risk that it may have then acted contrary to law by failing to achieve best consideration. I am firmly of the view that the Council must take steps to ensure that these circumstances do not recur for future disposals. I have, therefore, made recommendations, the detailed implementation of which should provide greater internal and external transparency over future land disposals, and provide audit trails and establish greater personal accountability for individual actions.

Another criticism from local residents was that the opportunity was not taken, in the option or the subsequent transfer, to impose conditions requiring the houses to be used only for affordable housing. Although I do not consider this raises issues for my statutory role, I have made a recommendation to encourage good practice, particularly where a discounted value is involved.

(b) Issues arising under the legal framework for Assets of Community Value (ACV)

This was introduced within the Localism Act 2011. It is intended to enable local community groups to apply to a council to have land or buildings listed as an ACV and, if listed, the main protection is that a temporary moratorium is applied upon a “relevant disposal” before the listed land or buildings can be transferred to another person. This is intended to give the community time to plan to see whether they can raise funds to purchase the site. Significant limitations on the practical use of the law are that: there are a wide range of exceptions to its applicability; that it does not force the owner to sell the land to the community group even if they match or exceed any offer made for the land, and that it does not override previous legal commitments affecting the land.

As stated under (a) above, on the initiative of local residents, an application was made for the land to be listed by the Council as an ACV, with evidence of its use as informal public open space being given in support of this. The Council considered this application, accepted it, and listed the land as an ACV.

Subsequently, the Council received notice of a relevant disposal of the land and acted on this by giving notice to the local residents that the moratorium period had been initiated. No response was received during the moratorium period and, so, when it ended, the Council de-listed the land as an ACV. I am satisfied that these actions were taken by an officer in good faith and were based upon information which they had no reason to doubt at the time. Later, however, information was provided by a local resident which cast doubt upon whether the reported transfer should, in fact, have been treated as a relevant disposal but was, rather, an exempt disposal between associated Precision companies and that therefore the moratorium should not have been initiated. The issues of: whether the Council acted contrary to law in de-listing the land; whether the moratorium and de-listing was a legal nullity and/or whether it could be re-listed were raised and considered briefly but were not addressed in depth as efforts were instead concentrated upon pursuing an alternative and more practical approach to sorting out what had become pressing problems with the site given the appointment of a liquidator for the Precision group company which originally purchased the site from the Council and which had been building the houses under a building agreement with the subsequent purchaser (a Futures Group

company) of the house plots from them. The alternative approach involved the Council re-purchasing the central part of the site from the liquidator of the Precision company in order that its future use as public open space could be secured. This approach is being pursued successfully with the central land having already been re-purchased by the Council.

My conclusion, in relation to the issue of loss of ACV status is that I consider that Council staff acted in good faith when applying the moratorium and de-listing the land and have since acted practically in securing a large part of the site as future public open space. The loss of the ACV status was the outcome of reliance being placed on representations made on behalf of the, then, developer and this approach was in line with accepted practice. In the light of this experience, however, I have made a recommendation that, where legally possible, officers dealing with ACV listings make sure that there is clear evidence, including, if necessary, material from HM Land Registry, to confirm any claims that land should be de-listed as an ACV.

(c) Issues under law, guidance and local constitutional provisions concerning Freedom of Information Act (FOI) requests

The Council has a legal duty to respond to FOI requests accurately and transparently, subject only to the application of available exemptions, most of which are subject to a public interest test before being used.

The disposal of this land resulted in numerous FOI requests on several issues but, notably, including the basis upon which the land was sold to the Precision Group company that was used for the purchase. Although one line of questions concerned whether “due diligence” research had been carried out on the company (or the Group), in my view this does not give rise to issues concerning my statutory role, as it is common practice not to carry out due diligence checks on relatively low value land sales (as the vendor always has the security that the purchase price must be delivered before title passes), but I have, nonetheless, made a recommendation that references be sought from other local authorities where a site’s value is being discounted to achieve affordable housing.

A request which has engaged my statutory role involved a question asking what approaches had been made to developers other than the Precision Group to see if they would bid for the land (and it was clear that the requestor knew that the land had not been openly advertised and was aware of concerns over whether best consideration had been obtained). The question and the eventual response are set out below:

Q. How was Redwood Crescent marketed? Was it advertised? If so, where? I know it was stated that the Director of Housing, Leisure and Property Services, in conjunction with the Director of Legal and Planning Services, were to set out the final terms for disposal, but this does not specify how the land was marketed.

A. An independent valuation had taken place and as a result a number of development companies and social providers were approached.

It is clear from available records and the evidence of the officer co-ordinating the FOI response that the answer given to this request was the direct result of a meeting held between two senior officers (both now former employees), from which the co-ordinating officer was asked to leave but later was given the response as an outcome from the meeting. Subsequently, when these matters were investigated in more detail as part of a wider investigation, no records were found of any contact with other potential purchasers of the land. The only evidence in support of the reply itself are comments of one of the former senior officers, in the subsequent investigation, but he was unable to identify any developer, or other organisation, who may have been approached about the land.

When the recipient of the reply became aware, following subsequent FOI requests for which answers were prepared by different officers, that there was no coherent evidence of wider contacts, he was rightly concerned and considered he had been lied to in the previous response. I cannot categorically confirm that the response was a lie, as there may have been unrecorded contacts where the names of the organisations could not be recalled (as per the position of the former senior officer) and, so, do not conclude that the Council has acted contrary to law in its FOI response, set out above. I can, however, state that the approach taken to preparing this response by that senior officer was unacceptable. I am satisfied that, subsequently, personal responsibility for this action has been dealt with appropriately but I have also made a specific recommendation that officers preparing responses to FOI, and Environmental Information Regulations, requests, should be made aware of their personal accountability in respect of them and that failure to provide accurate information, or the provision of misleading or untrue information may carry serious disciplinary consequences.

RECOMMENDATIONS

Council is asked to accept the following recommendations:

- 1. That the report be noted and the Chief Executive be requested to implement the following recommendations.**
- 2. That when considering sites for disposal, a site visit is carried out by a professional valuer and a record, including photographic, be taken of the land and any buildings and other characteristics including the use actually being made of it.**
- 3. That ward councillors be advised when any site in their ward is being considered for inclusion in a list of sites for potential disposal.**
- 4. That, before disposing of land, other than under short-term let or licence, the Council take professional valuation advice.**
- 5. That the Council introduce procedures to ensure that its duties under section 123 of the Local Government Act 1972 are complied with, including:**

- (a) provision for not disposing of the freehold of any site without the approval of the Chief Executive, in consultation with the Chair of the appropriate committee, unless individual authority for the disposal had already been given by Council or under the delegated authority of a committee;
 - (b) provision for ensuring that there is effective market testing, using template practices, in the interests of achieving best consideration for a site;
 - (c) advertising any land which may be considered to be open space, with a default assumption of advertisement where there is any doubt as to whether a site consists of, or includes, open space.
6. That where a site is sold for housing purposes, any intended limitations on user to encourage affordable housing provision by the purchaser, which may have discounted its open market value, must be reflected in contractual commitments by the purchaser which will run with the title to the land.
 7. That, for sales (other than sales at auction) of sites for housing purposes at any discounted value, the ability of the purchaser to develop the site is tested, by way of references from other local authorities, prior to the Council entering into any legal commitment.
 8. That any notice received for or on behalf of a vendor or purchaser of an Asset of Community Value claiming to be a relevant disposal or otherwise requesting that the asset should be de-listed must be subject to full examination, including, where necessary, inquiries of HM Land Registry, to confirm the claimed transaction will have, or has had, the claimed effect, before any such asset is de-listed.
 9. That officers be reminded of their personal accountability in relation to the accuracy of any information supplied in response to any Freedom of Information or Environmental Information Regulations requests, with standard form internal electronic documentation being prepared or amended to clearly emphasise the seriousness within which any deliberately false, reckless or negligently prepared information will be treated.

Background papers

Nil