

**INVESTIGATION REPORT IN
RELATION TO THE DISPOSAL OF
PUBLIC OPEN SPACE LAND AT
LEYFIELDS AND NETHERSTOWE
LICHFIELD**

LICHFIELD DISTRICT COUNCIL

INTRODUCTION

1. This is a report into complaints and concerns raised by members regarding the consultation processes and best value consideration by Lichfield District Council in relation to the disposal of Public Open Space land to Bromford Housing, received in January 2021 to March 2021. This land is at Leyfields and Netherstowe, Lichfield.
2. I am a Legal Director in the firm of Anthony Collins Solicitors LLP where I am Head of Planning in the Local Government team. I qualified as a solicitor in 1992 and have over 25 years' experience providing guidance and support in relation to Local Government law, including 15 years as the lead lawyer advising in all areas of Planning Regeneration, Environmental and Licensing work for Birmingham City Council.

THE COMPLAINTS

3. Complaints were received from 4 residents between 13 and 26 January 2021. These centre on the lack of consultation by the former Cabinet when they were considering making the land available for home building for affordable housing. The complaints suggested that the negotiations entered into with Bromford Housing and contracts drawn up relating to this was done in secret without the knowledge of local residents of Lichfield during 2018 and only in 2020 when Bromford were submitting planning applications to the Council; was consultation undertaken. There was a large number of objections made to the schemes, however the current Cabinet considered that even though many were opposed, they were reluctant to enter a legal battle with Bromford Housing should the contract be withdrawn by Lichfield District Council. The complainants therefore believe that the offer to sell the land in 2018 to Bromford Housing constituted a legally binding contract which the current Council could not override without risking legal action and therefore believes this is malpractice on the part of Lichfield District Council.
4. Further complaints highlighted the financial awards that had been invested in maintaining the open space, and therefore the Council's lack of due diligence when contracting to dispose of the land.
5. In addition the External Auditors, Grant Thornton also received a request for an investigation into the governance processes around the decision and subsequent contract. Overview and Scrutiny Committee, similarly, requested a review of the best consideration aspects of the contract and whether the valuation used was adequate.

6. Therefore, it is considered that the issues to investigate is whether the Council has complied with:
 - 6.1 The relevant law on the disposal of Council-owned land designated for Public Open Space and consultation requirements of this; and
 - 6.2 Whether the necessary consultation and procedural and decision-making processes were properly followed by the Council and Cabinet. Please note that the planning considerations are not included as part of this investigation as at the time of instruction this was still in process.

DISPOSAL OF LAND LEGAL POSITION

7. S. 123 Local Government Act 1972 governs the disposal of land by principal councils. The Council is a principal council under s. 2 and s. 270 of the Act. S.123 sets out that a council may dispose of land in any way they wish so long as they do so for the best consideration that can reasonably be obtained, unless the Secretary of State allows otherwise.
8. There are additional requirements where the land is Public Open Space – the Council must give notice of the intention to dispose of the land advertised in a local newspaper for two consecutive weeks prior to the disposal and consider any consequential objections (Echoed in section 233(4), TCPA 1990 for planning purposes).
9. The evidence suggests that Lichfield District Council complied with the obligations set out under Section 123 Local Government Act 1972:
 - 9.1 Paragraph 3.5 of the Report to Cabinet of 4 December 2018 sets out the District Valuer’s consideration that freehold interest value to Leyfields of £390,000 and at Netherstowe of £226,000 were to be regarded as best consideration being achieved on the basis that a social housing provider could be regarded as a special purchaser given the grant funding they benefit from. The advice provided by the District Valuer should be regarded as the best possible independent advice to be provided on land valuation and what should be regarded as best consideration. The use of the District Valuer for valuating purposes should be regarded as best practice in this area and is employed by many public bodies for this purpose. Firstly, the requirement of disposing of the land for the best consideration that can be reasonably

obtained was fulfilled as according to the Valuation Report (valuation date 8 January 2018):

‘On 5 December 2017 an offer of £470,000 was been made by Bromford for the site at Leyfield and the site at Netherstowe on the basis of the sites being developed for Affordable Housing. The split of these figures has not been made. A previous valuation of £600,000 was provided, but the letter of 6 December 2017 itemises abnormal construction costs which amount to approximately £137,000. The later offer appears to have taken into account these abnormal costs’.

The District Valuer valued Leyfields at £390,000 and Netherstowe at £265,000 both *‘on the basis of Affordable Rent units being constructed and assuming a subsidy of £40,000 per plot being available to a Registered Provider of housing but excluding abnormal construction costs’.*

The District Valuer concludes that the lower amount to be acceptable as:

‘Although the offer figure is below the figure originally put forward, this figure is significantly above both the unsubsidised Affordable Rent figure and Market Value housing figure and hence represents a capital sum that is higher than is likely to be expected from many other potential purchasers.’

The best consideration could be achieved by the disposal to a Registered Social Housing Provider due to the grant funds they receive as a Special Purchaser and therefore would gain a higher amount than on the Open Market. Therefore, I would recognise that the Council complied with this requirement. To ensure best practice is maintained throughout the project where time has elapsed since the original valuation a further valuation should be obtained.

9.2 The report to Cabinet and advice on any future improvements necessary to processes to prevent any future arises dated 12 January 2021 provides an important summary of the timeline for disposal of the areas of open space land and we quote from the relevant paragraphs. In the Executive Summary it states:

1.1 *“This is bought to Cabinet as a matter for urgent consideration in order to ensure that the decision on the sale of land in question is determined prior to any consideration of the planning applications submitted on the sites”;*

1.2 *“At the Cabinet Meeting of 4 September 2018 approval was granted, subject to securing planning consent, to the disposal of two pieces of Land at Leyfields and*

Netherstowe Lichfield to Bromford Housing Association for the provision of affordable housing”;

1.4 *“Following Cabinet approval the Council entered into a conditional contract to dispose of the sites to Bromford Housing Association”;*

1.5 *“Bromford has subsequently submitted planning applications for the provision of 16 affordable homes at Leyfields, and 9 affordable apartments at Netherstowe. Both planning applications are currently under consideration”.*

1.6 *“Under the provisions of the local Government Act 1972, before disposing of public open space, the local authority must give notice of its intention by advertising in a newspaper circulating in the area in which the land is situated, for two consecutive weeks, and consider any objections to the proposed disposal which may be made. Ideally this process should have been done before the contract was entered into with Bromford, but once it was identified that this process had not been carried out it was immediately addressed under the instruction of the Leader of the Council”.*

9.3 This process should have been carried out prior to Cabinet considering whether to dispose of the two areas of open space land on 4 September 2018. The draft Report to Cabinet of 4 September 2018 would have been reviewed and discussed at Leadership Team where a legal officer was present at the meeting. Council practice is that when a report is reviewed at Leadership team it is as part of that discussion signed off by the S151 Officer and the Monitoring Officer. The minutes from the meeting record any amendments requested and the emails are confirmation of the final version of the report. This point should have been noted and advice provided that any decision to dispose of the two sites of open space should only have been taken following appropriate consultation pursuant to the Local Government Act 1972.

1.7 *“Notice was published in the eastern edition of the Express & Star Newspaper on 18 and 25 November 2020 seeking representations on the proposed disposals by no later than 12 noon on Wednesday 2 December 2020”.*

9.4 It is acknowledged that consultation did take place under the provisions of the Local Government Act 1972, but this was clearly after the decision to sell the open space land to Bromford Housing Association.

1.8 *“The placement of these advertisements provided notice of the proposals, giving local people an opportunity to submit their comments, and ensured compliance with the legislative requirements, the Council also included details on the Council’s website”.*

- 9.5 Although it is noted that the placement of advertisements took place and this was also evidenced on the Council website, this process should have taken place before the decision made by Cabinet on 4 September 2018.
- 9.6 In the background to this report the following points are also noted:
- 3.2 *“The Council has subsequently entered into a conditional contract to dispose of the sites to Bromford Housing Association for the purpose of redevelopment of land for affordable housing, but it is noted that this contract has not to date been sealed”;*
- 3.3 *“Because both sites are defined as public open space, it is a requirement of the Local Government Act 1972 that disposing of such land and the intention to dispose should be advertised for two consecutive weeks in a newspaper circulating in the area in which is situated, and any objections to the proposal must be considered”;*
- 3.4 *“This requirement to advertise the public open space is distinctly separate from any notification/consultation undertaken as part of the application process”.*
- 9.7 As a consequence, public consultation should take place in relation to the disposal of the public open space land and a separate consultation process would then need to be followed through the planning process for the planning decisions to be properly considered and made.

THE COUNCIL’S CONSULTATION AND DECISION-MAKING PROCESSES

10. The Cabinet made the decision to sell the land at Leyfields and Netherstowe on 4 September 2018 detailed in the Cabinet Report of the same date. This states that the Council agreed to dispose of the land at both sites to Bromford Housing for the provision of affordable housing on terms stated by the District Valuation Report, which dated valuation on 8 January 2018 (however the report itself is dated 22 December 2018).
11. The Cabinet outlined Bromford’s plans for the land and that a pre application process had been undertaken by Bromford that acknowledged a potential issue to be the loss of Public Open Space. The Council regarded that this would be dealt with through the planning application process, whereupon objects would be considered, and highlighted the risk for Bromford of this being rejected. In paragraph 3.3 of the report to Cabinet it

states the following: *“The sale is dependent upon planning consent being forthcoming for the development. The implications of the loss of public open space will be dealt with as part of the planning application process”*. It is evident from the officer’s report to Committee of 4 September 2018 that the requirement to publicly consult on the disposal of open space land pursuant to the Local Government Act 1972 was not set out and this process was not set out as a requirement in the recommendations to Cabinet. The report simply indicated *“the implications of the loss of public open space will be dealt with as part of the planning application process”*. It would seem it is envisaged that the only public consultation for the disposal of public open space land would be supported through the planning application consultation process.

12. Consultation conducted by the Council included the following (Cabinet Report 12 January 2021):

12.1 *The required Newspaper advertisements advising of the Council’s intention to dispose of Public open space have been placed, and objections / representations received. This advertisement process is distinctly separate from the planning process;*

12.2 *Consultation was undertaken with the then Ward Members and the Asset Strategy Group areas as part of the original Cabinet Report process, and that report was a publicly available document.*

12.3 *Bromford Housing Association has submitted Planning Applications for the proposed provision of affordable housing at sites at Leyfields and Netherstowe. Interested parties have also been able to make representations on the proposals as part of the planning consultation process.*

12.4 As a consequence, any consultation that took place after the recommendation to dispose of the areas of open space land which was agreed by Cabinet on 4 September 2018 was meaningless. From our review of the proposed sale of the two areas of open space land, it is clear that consultation did take place; but consultation pursuant to the Government Act 1972 did not take place until after the contract to dispose of the land was signed.

CONTRACT BETWEEN BROMFORD HOUSING ASSOCIATION AND LICHFIELD DISTRICT COUNCIL

13. We note that in one of the complaints received by the Council there is the suggestion that there is a legally binding contract between Bromford Housing and Lichfield District Council. We have seen a copy of the contract and although the contract has been signed it has not been dated. It is our opinion, in line with Counsel's opinion that we have seen, there is still a binding contract between Lichfield District Council and Bromford Housing. As a consequence if Bromford were to pursue this matter they could obtain compensation from the Council for the cost and expense of negotiating and also submitting the planning application to the District Council for the two areas of open space land.

FINDINGS AND RECOMMENDATIONS

14. I find that:

- 14.1 When Cabinet made the decision to sell the land on 4 September 2018 they did not have before them all of the relevant information to make a proper decision in that the public consultation required for the disposal of the public open space land under the provisions of the Local Government Act 1972 had not taken place.
- 14.2 Cabinet in making its decision to dispose of the open space land on 4 September 2018 did have before them appropriate evidence as to the best consideration, please see paragraph 8.1 of the report.
- 14.3 The public open space consultation process should have taken place and appropriate notices put in the press prior to the decision being made by Cabinet of the sale of the two areas of public open space land.
- 14.4 There is sufficient evidence to suggest that the decision made by Cabinet on 4 September 2018 should be regarded as unsafe and should not be relied upon to authorise the sale of the open space land; further that the report to Cabinet dated 4 September 2018 failed to set out the requirements to Cabinet members that it was necessary to place notices in the press and allow for public consultation for the disposal of the open space land.
- 14.5 It is not sufficient although it is recognised that the Council in subsequent Cabinet reports and decisions recognised the failure to carry out an open space consultation, to remedy the lack of appropriate advice and information in the report of 4 September 2018 to ensure that the decision was lawful.

- 14.6 One of the complaints highlighted was that the Council did not follow appropriate financial due diligence in consenting to dispose of the land. This point has been reviewed and it would seem that all of the professional fees were required and seemed of a reasonable sum and appropriate evidence to support the disposal of the two areas of open space land was sought from the District Valuer. Objections to the disposal of the open space land were considered by Cabinet on 12 January 2021. Cabinet on the 4 September 2018 did not have all of the appropriate information for it to make a proper decision.
- 14.7 It is our opinion that there is a legally binding contract between Bromford and the Council; it is noted that it was signed but not dated and as a consequence completion was not agreed.
15. It is recommended that:
- 15.1 To ensure best consideration in all future contracts that reference should be made where time has elapsed to the need for a fresh valuation report being obtained.
- 15.2 To have in place a check list for the disposal of land. It is noted that there is now a new draft disposal of land and property assets policy in place and paragraph 5 specifically deals with open space land.
- 15.3 To have a checklist for land disposal that provides an audit trail of decision making and actions that are required to be taken.
- 15.4 To put in place an appropriate document signing process and sealing system that provides evidential proof that contracts have been appropriately signed and sealed where required and that signing of all procurement documentation should be supervised by a legal officer/monitoring officer.
- 15.5 To review whether there is a need for a decision review trigger to be written into the Constitution when there is either a period of time between Cabinet sign off and the implementation of that decision or a change in Cabinet membership. This would deal with the issue where, for example, there has been a change in land value or central government policy on a particular matter. These are only examples and further examples exist.
- 15.6 Relevant professional input into the signing off of all reports and all decisions; that all Cabinet reports are signed off by the section 151 officer and monitoring officer.

- 15.7 Training is provided to members and officers setting out the importance of public consultation in such disposals and the statutory obligations to consult as detailed in the Local Government Act.
- 15.8 The decision of the 4 September 2018 should not be relied upon to authorise the sale of the two areas of open space land to Bromford Housing Association.
- 15.9 If the sale is now to take place it is recommended that a fresh process is commenced with district valuation reports and appropriate notices in the press and proper consultation prior to a decision being made by Cabinet to sell the open space land if it is considered this is the appropriate way forward.

Stuart Evans

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