

From: Peter Oldham <Peter.Oldham@11kbw.com>
Sent: Tue, 1 Apr 2025 13:07:48 +0100
To: Attieh
Subject: FW: New Enquiry - public law
Categories: LEAP

Dear Attieh

I hope you are well. Thank you very much for your instructions. As discussed between yourself and Thomas my clerk, I am setting out my views. As also discussed, I can't advise on land matters, such as planning, village green matters, open land protections, environmental matters, covenants and easements.

I will set out my views on various points that fall to be considered.

Working party decision

Disposal of land, and matters ancillary to disposal, is normally an executive function. Under s 9E of the Local Government Act 2000, executive functions can be discharged by the senior executive member (i.e. here the leader) or by the executive, a member or committee of the executive, an area committee, or an officer. Here a working party decided to market the land. As I will explain in the next paragraph, that was in my view probably a discharge of "functions" for these purposes, given that "functions" means all the powers and duties of a local authority: Hazell v LB Hammersmith and Fulham [1992] 2 AC 1. If the working party had been, despite its name, one of the authorised means by which executive functions can be discharged under s 9E, the fact that it was called a working party would not have mattered: R v Warwickshire CC, ex p Bailey [1991] COD 284. But as I understand it, it was not one of the authorised means: it was I think a group of members and officers: R v Eden DC ex p Moffat Times, November 24, 1988. Indeed, Part 4, section D of the constitution (as you have pointed out in correspondence with the Council) provides for working groups as something different from the executive and its committees. The fact that para 26 on pages 168-169 says that members of the public may never attend working party meetings again demonstrates that a working party is different from bodies which are authorised to discharge functions, because the Local Government Acts (for non-executive functions) and the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 ("the Regulations") (or executive functions) provide an elaborate scheme for rights of attendance at meetings at which functions are discharged.

The Council appears to argue that marketing the land was not a function, and as stated in the paragraph above I come back to this issue. In Moffat it was held that a working party was not discharging functions since it was set up only to consider ways of improving the structure and efficiency of the council. It was (in the Court's words) having "a think about the best ways" of discharging its functions efficiently. The Council might say that similarly marketing land was "thinking about" selling land, and so not a function required to be carried out by one of the groups/people in s 9E. However, I don't think that's right. It seems to me that there is a difference between thinking about decision making structures, which does not involve any decision affecting the Council's provision of services or the disposition of its assets, and taking a step, even if a first or preliminary step, to dispose of assets.

Consequently in my view the decision to market the land was probably the discharge of a function, and could not be taken by the working party, so that the decision was not taken lawfully.

Key decision

You have raised the further point as to whether the decision to market the land was a key decision. If it's right that the working group had no power to decide to market the land, as set out above, then this is a secondary point but I set out my thoughts on it.

The Regulations define certain executive decisions as "key decisions", as follows

8 Key decisions

(1) In these Regulations a "key decision" means an executive decision, which is likely—

(a) to result in the relevant local authority incurring expenditure which is, or the making of savings which are, significant having regard to the relevant local authority's budget for the service or function to which the decision relates; or

(b) to be significant in terms of its effects on communities living or working in an area comprising two or more wards or electoral divisions in the area of the relevant local authority.

(2) In determining the meaning of “significant” for the purposes of paragraph (1) the local authority must have regard to any guidance for the time being issued by the Secretary of State in accordance with section 9Q of the 2000 Act (guidance).

The Regulations impose certain duties of publicity in relation to key decisions.

The statutory definition allows authorities to fashion their own approach to what amounts to a key decision. The Council’s constitution defines a key decision in Part 2, Article 13 as follows:-

13.3 (b) Key Decisions

(i) Key decisions are those:

- likely to result in expenditure, release of any securities (except where any release is pursuant to a contractual obligation), or savings of at least £100,000 or £100 million if it relates to treasury management matters, or there may otherwise be an impact on the Council’s financial standing; or*
- likely to have a significant impact on people or organisations in two or more wards within the Borough*
- which are made in the course of developing proposals to the Council to amend the policy framework.*

(ii) A decision taker may only make a key decision in accordance with the requirements of the Executive Procedure Rules.

The first bullet point is rather obscure, but very arguably captures sales of assets worth £100K or more. Your instructions are to the effect that, regardless of the value of the assets, the second bullet point may also be satisfied. (I have no instructions on the third bullet point and say nothing about it). However, the applicability of the first and second bullet points is subject to the decision being “likely” to result in the expenditure/impact. Whilst the matter is not clear, I doubt that a decision to market the land could be said to be “likely” to have these results, because the decision is aimed seeing if there is demand for the land, and at what price, and does not commit the Council to selling the land. Further, if there were a decision to sell, then there would be an opportunity at that stage for the operation of the “key decision” provisions in the Regulations and the constitution,

Consultation

In R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662, the Court summarised the circumstances when a local authority is under a duty to consult as follows

“98 ... (2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult”

There may be a statutory duty to consult arising out of a land related statute (as to which I am not advising), but I am not aware of any other statutory duty which applies here.

As to whether there has been a promise or practice of consultation, that is a factual matter on which I have no instructions.

The “conspicuous unfairness” category is often difficult to apply. Generally speaking this will not arise unless there is a well defined group who are being deprived of a benefit. A typical example might be when a local authority proposes to close or change a school transport service, or a day-care facility etc: the impact is on a clearly defined group of people, and is very significant for them. There are three pieces of land here – I don’t know about how they are all used. But for example, I note that churchgoers use the car park. If the sale of the car park made it impossible or very difficult for numerous members of the congregation to attend, that might amount to a situation giving rise to a duty to consult, but I somewhat doubt it since I would imagine there would probably be other means for them to attend, albeit with difficulty. Further, the sale of land does not generally attract ancillary public law duties such as the duty to consult, but will normally be regarded as a private law matter: R. v Bolsover DC, Ex p. Pepper [2000] 3 LGRL 20. I can’t say anything about the other pieces of land since I have little information about them.

Public sector equality duty

I wonder whether this might give rise to a further point. Under s 149

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

When it applies, this duty requires a public body to consider (have “due regard” to) the matters in (a)-(c) before taking a decision. S 149 doesn’t prevent a decision being taken which adversely affects people with protected characteristics” but it is aimed at getting public bodies to think about their interests before taking the decision. “Protected characteristics” are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. I wonder if the sale of the three pieces of land could be said to have a particular impact on people with some of these characteristics. For instance, I understand that the car park is used by people attending church, so engaging the protected characteristic of religion and belief; and the posts at 436 of the bundle shows that some green space proposed for sale has been used by families/children, possibly engaging the characteristic of age, and maybe also pregnancy/maternity and sex, given that women do more childcare than men.

[REDACTED] it is a point which those affected should raise (regardless of any other action they may take) since it is a good way of flagging the practical impact of the proposed sale on people, and in a way which may add a different dimension to the thinking that the Council has adopted so far.

Prospects of success in a judicial review claim (a) as matters stand and (b) if a decision to market/sell was taken by the executive

In my view the Council has acted unlawfully as matters stand because the working party had no power to decide to market the land. In principle a judicial review claim should therefore succeed. However, judicial review claims often fail because they are not brought quickly enough. They have to be brought promptly and in any event within 3 months of the decision challenged (CPR 54.5). What is prompt will depend on the circumstances. Frequently 3 months is not prompt. I don’t know when the land was first marketed, but it may be that a challenge now would be too late, and the claim would be dismissed for delay.

As part of the claim the claimants would have to seek an interim injunction to prevent further steps being taken in the marketing/sale of the land, and it is particularly in such cases, where the claimants are seeking relief to prevent a decision maker taking further steps, that the Court expects a claimant to act quickly.

Further, many – perhaps most – judicial review claims make no difference, even when they succeed, because the decision maker retakes the decision in a way which corrects the error but with the same outcome.

Ways of stopping the sale otherwise than through judicial review

As stated, there may be land related remedies on which I cannot advise. Otherwise, those affected can consider

- contacting members, in particular relevant ward members;
- using any complaints procedure the Council may have;
- making a complaint to the Local Government and Social Care Ombudsman;

- writing to the Council's monitoring officer (who I think is Natalie Boateng, with whom you are already in a contact) saying that the Council has made a legal error/errors in marketing the land, and that she is therefore required to write a report to the executive under s 5A of the Local Government and Housing Act 1989 requiring them to take no further action until they consider her report. S 5A provides

5A Reports of monitoring officer—local authorities operating executive arrangements

(1) Where a relevant authority are operating executive arrangements, the monitoring officer of that authority shall be responsible for performing the duties imposed by this section.

(2) It shall be the duty of the monitoring officer of a relevant authority that is referred to in subsection (1) above, if at any time it appears to him that any proposal, decision or omission, in the course of the discharge of functions of the relevant authority, by or on behalf of the relevant authority's executive, constitutes, has given rise to or is likely to or would give rise to any of the events referred to in subsection (3), to prepare a report to the executive of the authority with respect to that proposal, decision or omission.

(3) The events referred to for the purposes of subsection (2) are—

(a) a contravention, by the relevant authority's executive or any person on behalf of the executive, of any enactment or rule of law; or

(b) any such maladministration or failure as is mentioned in Part III of the Local Government Act 1974 (Local Commissioners) ...

(5) It shall be the duty of an authority's monitoring officer—

(a) in preparing a report under subsection (2) to consult so far as practicable with the person who is for the time being designated as the head of the authority's paid service under section 4 above and with their chief finance officer [or, in the case of a council of a county or county borough in Wales, with the person who is for the time being the authority's chief executive and with their chief finance officer]; and

(b) as soon as practicable after such a report has been prepared by him or his deputy, to arrange for a copy of it to be sent to each member of the authority and, where the authority has a mayor and council manager executive, the council manager.

(6) It shall be the duty of the authority's executive—

(a) to consider any report under this section by a monitoring officer or his deputy at a meeting held not more than twenty-one days after copies of the report are first sent to members of the executive; and

(b) without prejudice to any duty imposed by virtue of section 115B of the Local Government Finance Act 1988 (duties of executive as regards reports) or otherwise, to ensure that no step is taken for giving effect to any proposal or decision to which such a report relates at any time while the implementation of the proposal or decision is suspended in consequence of the report.

(7) For the purposes of paragraph (b) of subsection (6) above the implementation of a proposal or decision to which a report under this section, by a monitoring officer or his deputy, relates shall be suspended in consequence of the report until the end of the first business day after the day on which consideration of that report under paragraph (a) of that subsection is concluded.

(8) As soon as practicable after the executive has concluded its consideration of the report of the monitoring officer or his deputy, the executive shall prepare a report which specifies—

(a) what action (if any) the executive has taken in response to the report of the monitoring officer or his deputy;

(b) what action (if any) the executive proposes to take in response to that report and when it proposes to take that action; and

(c) the reasons for taking the action specified in the executive's report or, as the case may be, for taking no action.

(9) As soon as practicable after the executive has prepared a report under subsection (8), the executive shall arrange for a copy of it to be sent to each member of the authority and the authority's monitoring officer.

I hope this is helpful.

Kind regards

Peter

Peter Oldham KC
Regulated by the Bar Standards Board

From: Attieh <attieh@fardsolicitors.com>

Sent: 12 March 2025 13:03

Subject: New Enquiry - public law

External Email

Dear Clerks

We need initial advice from a barrister with expertise in public law and administrative law at a conference. Those instructing will be residents in Surrey Heath affected by a possible sale of a local car park. Therefore, any concession on fees would be much appreciated. A free 10 minute phone call with any of your recommended barristers and us before the conference would also be welcomed.

Background

Surrey Heath Borough Council's Economic Development Working Group had a meeting whereby a decision was made to market 3 pieces of lands. The minutes of that meeting is confidential and we are not sure if a decision was also made that those lands should have been sold.

The working group based on the constitution doesn't have any decision making power. Legal officers can sell assets of less than £25k though.

One of the marketed lands is Deepcut car park; its red book value is £200k.

Any key decision should be made by the Executive. Key decision is defined as follows:

Key Decisions (i) Key decisions are those: • likely to result in expenditure, release of any securities (except where any release is pursuant to a contractual obligation), or savings of at least £100,000 or £100 million if it relates to treasury management matters, or there may otherwise be an impact on the Council's financial standing; or • likely to have a significant impact on people or organisations in two or more wards within the Borough • which are made in the course of developing proposals to the Council to amend the policy framework. (ii) A decision taker may only make a key decision in accordance with the requirements of the Executive Procedure Rules.

Residents want to know if they can stop the marketing of the land at this stage and thereafter stop its sale.

I exhibit:

1. My initial letter to the Council
2. Their response
3. My second letter to the Council
4. My email to the monitoring officer

Residents want initial advice to ascertain if:

1. The Council's Working Group had unlawfully decided to market these assets.
2. If so, whether any applications for judicial review (JR) can be made and the prospects of success.
3. If there are any prospects of success in a JR if the Executive or even the Full Council subsequently decides to sell these lands.
4. Whether there are grounds for a JR on the basis that a public consultation should be conducted before marketing these properties.
5. If there is any other way to legally stop the Council from selling these assets

One argument is that the working group didn't have a power to market the property and the property should be removed from the market; that as it's of high value to the community and based on the constitution the Full council should consider its sale rather than the Executive and that a public consultation should be carried out. I now understand that it is the Executive that should decide about its sale and not the Full Council. The Council has refused to take it off the market, the deadline for registration of interest is 21st March; the leader of the council has also stated that the decision for sale will be made by the Executive.

Please note that members of the public are registering their interests in the marketed properties.

Below is a link to a copy of the constitution.

[Pack 16032021 1031 Constitution of Surrey Heath Borough Council.pdf](#)

Please confirm if there are any barristers who would be willing to assist with the above and have the expertise to review the constitution and advise at an initial conference on the above mentioned issues and if so what would be the fees.

Please note that we are acting on a pro bono basis and that there will have to be some fundraising amongst local businesses and residents towards counsel's fees. Therefore, any concession on fees would be much appreciated.

Kind regards

Attieh Fard

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