

Confirmation of Urgent Action regarding Use of Reserves for dispute resolution – Part 1

These papers have been written partly on the Part 1 Agenda and partly on the Part 2 Agenda to comply with both Local Government law and the terms of the Settlement Agreement referred to in both reports. It has been so written in the interests of openness and transparency to ensure that as many of the background issues as possible can be placed in the public domain, whilst recognising that certain key details need to be reserved to the Part 2 paper and if they are to be discussed by Members this will need to be done in the Part 2 agenda of the meeting.

Report by the Chief Executive

1.0 Summary

- 1.1 The report outlines the action taken by the Chief Executive and other officers in the settlement of a dispute with National Car Parks Limited (NCP).
- 1.2 The report seeks the noting by Council of the action of the Chief Executive in settling the dispute and the authorisation of the use of the Special and Other Emergency Reserve to fund the settlement figure.

2.0 Background

- 2.1 The Council signed a contract for the management of off-street car parking with NCP dated 23 December 2003. The contract was in the form of a Management Agreement, with a commencement date of 1 April 2004. The term of the Management Agreement was for 10 years with a termination date of the 31 March 2014.
- 2.2 In July 2009 at a regular monthly meeting between the parties it was agreed that WBC would look at various models provided by NCP for reducing tariffs (at the multi-storey car parks only) in line with a decision of the Worthing Cabinet on 8th April 2009 and would further agree with NCP how any resulting revenue losses would be shared. The purpose was to trial discounted parking charges in the attempt to drive increased usage, thereby promoting the development of the town centre economy.
- 2.3 On the 5 October 2009 the Worthing Cabinet authorised Officers to negotiate with NCP on the share of the financial risk (following consultation with the Cabinet Member for Clean and Green Environment) and formalise an agreement with NCP which would see, for a 12 month trial period, the introduction in the 3 main multi storey car parks (High Street, Grafton and Buckingham) of a new tariff structure designed to provide for shorter stays and to encourage greater use of the car parks.

The Council, on the 13th October 2009, agreed that any consequent income shortfall (of up to £152,500) would be met from the Capacity Issues Reserve. A further report was requested 6 months from the implementation of the new tariff to review how the change in charging was progressing. (It appears that there were no further reports to the Cabinet or the relevant Cabinet Member on this matter after 6 months and the next formal report was not considered until 14 May 2013).

- 2.4 Negotiations between Officers from the Council and NCP over the next few weeks resulted in a Deed of Variation (to the original contract) being signed on the 26th November 2009 so that the new charges could be implemented ahead of the busy pre-Christmas shopping period.
- 2.5 After the 12 months had elapsed (during late 2010 and early 2011) Officers became aware that the Deed of Variation which had been signed on behalf of the Council did not contain specific provisions regarding the trial period being limited to 12 months or any cap on the financial impact of the new tariffs. In May 2011 the Council received an invoice for the first year's amount, and eventually paid the sum of £95,980, after disputing previous figures with NCP, as the cost of the trial for the first year. At the same time NCP raised invoices for the subsidy resulting from continuing with the agreed tariffs for the following two financial years.
- 2.6 The Council continued to contend that whilst duly signed by it, the Deed of Variation was incorrect and should only have covered the charges in the 3 main multi-storey car parks and should have been limited to a trial period of 12 months from November 2009. NCP disputed this and after protracted discussions NCP instructed solicitors. Given the commercially confidential nature of the dispute, the requirements of Local Government law and the ultimate settlement agreement the passage of the dispute from this point is set out in the Part 2 paper to this meeting.
- 2.7 In short, in early February 2014 the Council found itself days away from a High Court trial of the claim brought by NCP and, following negotiation, a settlement between the parties was signed by NCP and the Chief Executive of WBC on 21st February 2014. The precise details of that settlement are as set out in the Part 2 paper.

3.0 Action taken

- 3.1 In view of the rapid need to negotiate and settle the claim ahead of the court date the Chief Executive used his urgency powers contained in the Constitution. In effect there are two decisions involved here, first the decision to settle legal proceedings brought against the Council and second the decision to incur expenditure which was not provided for in the budget.
- 3.2 These powers are contained in the Council's Scheme of Delegations made under Local Government Act 1972, Local Government Act 2000 and The Local Authorities (Functions and Responsibilities) (England) Regulations 2000. Paragraph C3 of the Council's Scheme of Delegations provides a power to the Chief Executive to "*take urgent action on behalf of the Council*" and any such exercise of the Chief Executives urgency powers should be reported to the next available meeting of the Council.
- 3.3 Paragraph A3 ii) states that an officer exercising a delegation in cases of emergency "*may, if justified by all of the circumstances, exercise delegations in a manner which*

is not in accordance with Council policies or procedures and/or where provision has not been made in any budget". Paragraph A3xi) states that "when an officer is taking any decision which could attract to the Council legal liability he shall consider whether or not the nature of the decision justifies it being taken in consultation with the EHLDS" (now Executive Head of Corporate and Cultural Services; Jeremy Cook). Paragraph A3xii) states that "any decision which has financial implications other than those budgeted for shall be taken in consultation with the Executive Head of Financial Services" (Sarah Gobey).

- 3.4 Therefore, in view of the urgency of making the decision, and the fact that the expenditure to be incurred by the Council was not provided for in any approved budget, the Chief Executive made the decision to settle the claim in the terms set out in the Part 2 Report, and is now reporting that action to the Council. This Report also seeks authority to confirm that the expenditure incurred in settling the claim is met partly from accrued amounts already put aside in previous years accounts and the balance from the Special and Other Emergency Reserve Fund. The amounts involved in the settlement agreement are as set out in the Part 2 Report.

4.0 Legal

- 4.1 Section 222 of the Local Government Act 1972 gives the Council the power to defend legal proceedings.
- 4.2 The Local Government Act 2000 and the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 provide for the powers to settle proceedings to be with the Executive.
- 4.3 Section 9E and 9EB of the Local Government Act 2000 and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2012 provide for delegations to Officers.
- 4.4 The relevant paragraphs in relation to the urgency powers in the Scheme of Delegations to Officers are set out above in the report.
- 4.5 Delegation C 44 c authorises the Executive Head of Corporate and Cultural Services "To defend or settle any proceedings brought against the Council." This authority was delegated to the Chief Executive by the Executive Head of Corporate & Cultural Services
- 4.6 The terms of the settlement agreement include a clause preventing disclosure of the details of the claim and settlement, save for the fact that the claim has been brought and there has been a settlement, which are not already in the public domain. A breach of this clause of the agreement could lead to NCP applying to continue with the matter in the Courts and put the Council at risk for further financial cost.

5.0 Financial implications

- 5.1 The Council has two funds which it can call upon to settle this dispute. There is a specific provision of £262,000 on the balance sheet set aside to fund this risk and the Special and Other Emergency Reserve of £642,000 which has been set up to help the Council fund uninsured losses and any other strategic or unforeseen one-off expenditure which may arise. The provision and the reserve are more than adequate to cover the settlement sum as set out in the Part 2 report.
- 5.2 The settlement payment to NCP was made on the 28th March 2014 in compliance with the terms of the settlement. This was funded by the provision specifically set up to manage this risk and the remaining balance was funded from the Special and other Emergency Reserve as set out in the Part 2 report.

6.0 Lessons Learned

- 6.1 The contractual arrangements and the litigation that arose from them revealed serious shortcomings in the way that WBC dealt with the variation agreement and subsequent matters. An audit of contract variations was commissioned by the previous Chief Executive and reported in December 2012. Amongst the changes to Council operations were specific amendments to Contract Standing Orders and a new training programme rolled out to relevant staff across the workforce.

7.0 Recommendation

- 7.1 The Council is recommended to note the contents of this report and the Part 2 Report and
- 7.2 The Council is recommended to confirm the use of the Council's Special and Other Emergency Reserve in the sum as set out in the Part 2 Report.

Local Government Act 1972 Background Papers: Exempt

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Schedule of Other Matters

1.0 Council Priority

1.1 Matter considered and no issues identified

2.0 Specific Action Plans

2.1 (A) Matter considered and no issues identified
(B) Matter considered and no issues identified

3.0 Sustainability Issues

3.1 Matter considered and no issues identified

4.0 Equality Issues

4.1 Matter considered and no issues identified

5.0 Community Safety Issues (Section 17)

5.1 Matter considered and no issues identified

6.0 Human Rights Issues

6.1 Matter considered and no issues identified

7.0 Reputation

7.1 The settlement of this claim ahead of the hearing in a public court of law was potentially beneficial to both parties in terms of limiting reputational damage. However, these reports are so drafted to enable as much transparency on the issue as can be properly provided.

8.0 Consultations

8.1 The Chief Executive consulted with leading Members across the Chamber prior to determining to exercise his urgency powers in this matter.

9.0 Risk Assessment

9.1 In this case the commercial risk assessment of settling a claim at a sum considerably less than the likely outcome of litigation was the primary factor in the Chief Executive exercising his urgency powers.

10.0 Health & Safety Issues

10.1 Matter considered and no issues identified

11.0 Procurement Strategy

11.1 The original procurement was carried out in accordance with Council procedures.

12.0 Partnership Working

12.1 Matter considered and no issues identified