

Report to: Cabinet



Date of Meeting 17 March 2021

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Exemption applied: None

Review date for release N/A

Impropriety in relation to three Cabinet decisions

Report summary:

To report, under S.5 of the Housing and Local Government Act 1989, that certain decisions that have been taken were not in accordance with legal requirements and the Constitution. One of those decisions is being returned to Cabinet for it to appropriately recommend the matter to Council for decision.

Is the proposed decision in accordance with:

Budget Yes No

Policy Framework Yes No

Recommendation:

1. That Cabinet;
 - a. accept the content of the report in relation to the issues identified and remedial actions being taken to prevent a reoccurrence, and
 - b. review their decision in relation to Hayne Lane (Minute 328 of 3rd February 2021 meeting) and recommend the required funding (Resolutions 1 & 2) to Council for approval.
2. That Cabinet recommend to Council the recruitment of an additional lawyer (Grade 9) to support the work of the Monitoring Officer.

Reason for recommendation:

So that members are appraised of three decisions that were ultra vires and to take steps to ensure that one of those decisions is rectified.

Officer: Henry Gordon Lennox, Monitoring Officer

Portfolio(s) (check which apply):

- Climate Action and Emergencies
- Coast, Country and Environment
- Council and Corporate Co-ordination
- Culture, Tourism, Leisure and Sport
- Democracy and Transparency
- Economy and Assets
- Finance
- Strategic Planning
- Sustainable Homes and Communities

Equalities impact Low Impact

Climate change Low Impact

Risk: Medium Risk;

Clearly decisions which are *ultra vires* place the Council at risk in terms of judicial review challenge. In these specific instances there is minimal risk given the historic nature of two of the decisions and given that the more recent one is capable of being corrected. The risk is identified as medium due to the fact that it has happened a number of times and because of the possible consequences of *ultra vires* decisions.

Links to background information

[Cabinet – 3rd February 2021](#)

[Standards – 19th January 2021](#)

[Cabinet – 25th November 2020](#)

[Cabinet – 6th March 2019](#)

[Cabinet – 5th September 2018](#)

Link to [Council Plan](#):

Priorities (check which apply)

- Outstanding Place and Environment
- Outstanding Homes and Communities
- Outstanding Economic Growth, Productivity, and Prosperity
- Outstanding Council and Council Services

Background

1. This report has been written by the Monitoring Officer and is issued pursuant to s.5 Local Government and Housing Act 1989. That section imposes a duty on the Monitoring Officer to prepare a report where they believe that any proposal, decision or omission by the Council (acting through the Executive or any other committee or indeed the Council itself), has given rise to or would give rise to a contravention by the Council of 'any enactment or rule of law'. Such a report is to be considered within 21 days of circulation to members and the decision to which the report relates is effectively suspended pending conclusion of consideration of the report.

Reason for Section 5 report

2. The Cabinet (the Executive) is precluded from taking decisions which are contrary to the Policy Framework and / or which are contrary to (or not wholly in accordance with) the Budget. This is set out in law within The Local Authorities (Functions and Responsibilities) (England) Regulations 2000, Schedule 4, and further detailed in the Constitution – see for example Article 4.02 and Part 4.3 (Budget and Policy Framework Procedure Rules) paragraph 3.
3. What this means in simple terms is that Cabinet must recommend any decision which would be contrary to or not in accordance with the Policy Framework or the Budget to Council for decision. If it were to take the decision itself (i.e. resolve the matter) then this would be *ultra vires* (outside its powers) as it would contravene the above mentioned regulations and our Constitution.
4. In terms of 'the Budget' this includes '*the allocation of financial resources to different services and projects, proposed contingency funds, setting the council tax and decisions relating to the control of the Council's borrowing requirement, control of investments, the control of its capital expenditure, and the setting of virement limits*'.

5. A budget gives the financial resources required to deliver / pay for a service or a project. If something to be done has a cost then it is necessary to have a budget to pay for it and Council allocates a budget to do that. The Council requires Reserves and Balances whether as contingency against the unknown or as a way of funding specific activities and Council approve the creation, the value and when they can be used. However, Reserves and Balances are not specific budgets. When a budget is agreed it might result in money being taken from a specific Reserve or Balance.
6. This is confirmed in the Financial Regulations (Part D paragraph 1.1 - Principles) which confirms that '*the Council's approval of revenue estimates constitutes authority to incur expenditure*', thereby endorsing that expenditure may only be incurred where budgetary provision is available.
7. It has been brought to the attention of the Monitoring Officer that there are a small number of decisions that have been taken (resolved) by the Cabinet that should have been recommendations to Council because they were outside of the Budget. This is because there was no revenue budget available but rather they erroneously relied on a contingency / reserve, namely the Transformation Fund in two cases and the Business Rate Pool Reserve Fund in the other.
8. The three decisions that have been identified are;

- (1) A resolution by Cabinet on 5th September 2018 in relation to supporting Crowdfunding the relevant part of the decision being recorded as follows;

Minute 58

Resolved

...

2. that £50,000 of the Transformation Fund be spent on community projects using the scheme with funding to be awarded on the basis of the criteria set out in Appendix A.

This was seen as an 'invest to save' approach hence why it was considered appropriate to use the Transformation Fund. However, there was no approved budget for the £50,000 spend out of the Fund.

- (2) A resolution by Cabinet on 6th March 2019 in relation to the funding for mobile phones for Streetscene frontline staff the relevant part of the decision being recorded as follows;

Minute 177

RESOLVED:

...

2. that a request to use £34,000 of the Transformation Fund to replace 95 Streetscene frontline staff mobile phones, be agreed.

This was seen as an 'invest to save' approach hence why it was considered appropriate to use the Transformation Fund. However, there was no approved budget for the £34,000 spend out of the Fund.

- (3) A resolution by Cabinet on 3rd February 2021 in relation to a masterplan exercise at Hayne Lane the relevant part of the decision being recorded as follows;

Minute 328

RESOLVED:

1. that the Business Rates Pool Reserve Fund was utilised to provide 50% of the funding for a sum of up to £20,000, for the commissioning of a masterplan study for the Hayne Lane site in Honiton be approved,
2. that delegated authority be granted to the Service Lead for Place Assets & Commercialisation in consultation with the Portfolio Holder for Economy and Assets and the Strategic Lead for Finance to agree to additional funding towards the cost of the masterplan, if required, so that the total contribution would be up to £40,000.

...

There was no approved budget for the initial £20,000 (Resolution 1) nor the additional £20,000 (Resolution 2) spend out of the Business Rates Pool Reserve Fund.

9. All three decisions, as they were unbudgeted, should have been recommendations to Council.

Impact and status

10. Thankfully the impact of these errors has been negligible. Firstly, in relation to the Crowdfunding decision (£50k), this money has not been spent as funding was secured from more efficient alternative sources (both existing budgets and external funding). Secondly, in relation to the mobile phones for Streetscene, this approval was not required as funding was ultimately secured from within existing budgets (Streetscene equipment budget) within the year. These decisions are effectively spent and therefore are no longer capable of being implemented.
11. In relation to Hayne Lane, this has not yet been actioned and no money has been spent. In accordance with the legal position identified above the decision is suspended pending consideration of this report. Given the foregoing, the suggested approach to remedying this is for Cabinet to acknowledge that their previous decision was impermissible and to recommend (what were recorded as) Resolutions 1 & 2 in Minute 328 to Council for it to approve.

Remedial steps

12. Members will no doubt appreciate the process that reports go through before appearing on agendas. Report writers write the report and it is then provided to the Legal and Finance Teams for legal and finance observations to be included. There is a collective responsibility for the report writers and those commenting on reports to ensure that the recommendations are framed accurately and appropriately. It has been impressed on report writers the need for clarity on what is being asked for and who is being asked to do it to seek to ensure that recommendations come through to Legal and Finance in the correct way. Legal and Finance should double check the framing to ensure compliance with legal and financial requirements. There is also a need as a collective responsibility to ensure minutes of meetings reflect the intended treatment. In the three instances identified above the process did not pick up that the recommendation should have been a recommendation to Council.
13. As a consequence of this issue being highlighted, the report template has been revised to include a section that requires report writers to ask the question whether what is proposed is in accordance with the budget and / or policy framework (see top of this report). There is then informative text that helps report writers consider how the recommendations should be framed with an express reminder that if they have ticked 'no' in relation to whether the decision is in accordance with the budget and / or policy framework then this must be a recommendation to Council.

14. The Monitoring Officer has emailed SMT+ and all report writers to remind them of their responsibilities in terms of framing recommendations correctly and also has organised a meeting with Legal and Finance teams to reiterate the key importance of double checking recommendations and challenging if there is any doubt about who the appropriate decision maker is.
15. The Monitoring Officer is also going to undertake greater scrutiny of reports to all the various committees going forward to seek to improve further the reporting approach generally but also increase the sample checking of reports.

Resourcing for the Monitoring Officer

16. It has been identified in a report to Cabinet on 25th November 2020 (which sought an additional Democratic Services officer) that there has been an increase in the number of meetings that are being held which has had an impact on the work of Democratic Services. This has also necessitated additional work for the Monitoring Officer and the Legal Team (amongst others). It should also be noted that the work of the Monitoring Officer has increased in terms of general governance / compliance work since May 2019 as a consequence of the evolving / changing political circumstances. Even small changes – such as having to comment on proposal forms for Overview and Scrutiny committees for example – have an increased burden in terms of workload. In addition, there is an increasing amount of standards work currently and there is also likely to be a change to the standards process that will necessarily increase the work of the Monitoring Officer in dealing with Code of Conduct complaints – see report to Standards Committee of 19th January 2021.
17. In order to deal with this and to ensure that the Monitoring Officer is able to carry out the responsibilities of the post, there is a request for an additional lawyer to be recruited to the Legal team. By recruiting an additional post, it will free up the Deputy Monitoring Officer to spend more time assisting with the governance and standards related work. The exact scope of the additional post and areas of responsibility (in terms of work areas) will be left to the Strategic Lead (Governance and Licensing) and Principal Solicitor to determine. However, an additional lawyer will also provide further resilience in terms of assisting with resourcing meetings and dealing with reports in addition to dealing with their specific areas of responsibility.
18. It should be noted that the Council is under a legal obligation '*to provide [the Monitoring Officer] with such staff, accommodation and other resources as are, in his opinion, sufficient*' for the performance of his duties. It is the opinion of the Monitoring Officer that this additional post is required to enable continued performance of his duties going forward. Should the Standards Committee subsequently resolve to amend the complaints procedure, there would be no need for a further recommendation in relation to staffing. Even if there isn't a recommendation to change the process, the current level of standards work in conjunction with the governance work continues to justify the post.

Apology

19. On behalf of officers the Monitoring Officer would like to apologise to Members for not correctly identifying the need for an onward recommendation to Council in the cases identified.

Consultation with Head of Paid Service and S.151 Officer

20. It is a requirement that the Head of Paid Service and the S.151 Officer are consulted prior to the issue of a S.5 report. This has been done and they are both content with the content of the report.

Financial implications:

The report sets out important principles relating to Governance. The financial implications of the incorrect decisions are identified in the report, they have not led to material areas of concern but clearly highlight improvements in process is required as detailed in the report. There is a budget request asking Cabinet to recommend to Council a new post of a Grade 9 Solicitor with a budget required of between £49,252 at the bottom of the grade to £54,445 at the top of grade (including on costs). From a financial perspective this ongoing cost adds to the Council's Medium Term Financial Plan budget gap that will be required to be found in future budget proposals. In the current year, if approved, this will be met from the General Fund Balance.

Legal implications:

The legal implications are identified in the report.