

Briefing Paper
Overview and Scrutiny Committee
10th October 2016

Classification:	OPEN
Wards or groups affected:	Faraday
From:	Director of Law & Democracy and Monitoring Officer to the Council
To:	All Members of the Overview and Scrutiny Committee
Subject:	AYLESBURY REGENERATION DELIVERY – CALL-IN

INTRODUCTION

1. This briefing paper is to assist members of the Overview and Scrutiny Committee (OSC) in their consideration of the call-in of the Aylesbury Regeneration Delivery - Supplemental Report which was agreed by Cabinet on Tuesday 20th September 2016.
2. This briefing paper will seek to clarify the following issues and respond to the grounds for the call-in:
 - i The decision-making process and delegated authority to make an application to the High Court for the Secretary of State’s decision to be reviewed.
 - ii The consultation with legal officers, counsel and senior managers prior to the Cabinet decision on 20th September 2016.
 - iii The continuing advice which has been taken from Leading Counsel in relation to the Judicial Review.
 - iv The extremely tight timelines that the courts impose means that any application to the High Court for a Judicial Review of the Secretary of State’s decision must be filed within 42 days of the decision letter being received, i.e. by 27th October.

BACKGROUND

3. The compulsory purchase order for the Aylesbury Estate was made in June 2014. Such an order needs to be confirmed by the Secretary of State (“SoS”) and the order was submitted for confirmation on 7th July 2014. The compulsory purchase inquiry was commenced at the end of April 2015 and lasted 5 days. It was resumed for several further days in 13th October 2015. In view of the lengthy delay in receiving confirmation of the decision, regular contact has been maintained in recent months with the Department of Communities & Local Government, and officers had been told on 14 September that the decision was imminent.
4. This phase of the Aylesbury Estate originally comprised 566 dwellings. At the time of the inquiry, 16 units were still occupied and at the time of the decision, this had been reduced to just 8. Of these 8, 4 are owned by landlords who are not resident. Planning

permission has been obtained for a redevelopment of 830 dwellings representing an increase of 264.

5. On Friday 16th September 2016 (at 13:02), the council received by way of email the decision of the Secretary of State in relation to the council's application for a Compulsory Purchase Order (CPO) of the Aylesbury Estate Site 1B-1C. The letter stated:
'The Secretary of State has therefore decided to accept the Inspector's recommendation not to confirm the London Borough of Southwark's (Aylesbury Estate Site 1B-1C) Compulsory Purchase Order 2014.'
6. As arrival of the incoming email was being closely monitored, on receipt of the decision letter and Inspector's Report, both documents were immediately passed to the Head of Regeneration South who in turn passed it to the Regeneration Team. The outcome was separately sent to senior officers. Internally, the decision was reviewed by the Head of Regeneration & Development (Legal Services), Jon Gorst, and sent immediately on receipt to counsel Melissa Murphy for an initial opinion. The outcome of the inquiry was clearly a disappointment as it has the potential to delay or derail a significant regeneration scheme, but an early review of the reasons given highlighted the following inconsistencies/inaccuracies by the SoS and/or the Inspector:
 - The perceived failure to negotiate – however arrangements had been made for negotiations for 550 out of 556 of the occupiers by the time of the inquiry. Compensation has been offered in accordance with the statutory limitations and it therefore appears that the SoS has, without warning, introduced a broader policy test concerning the adequacy of compensation.
 - The approach to well-being – which seemed to concentrate on individuals rather than the area.
 - Reference to daylight and sunlight issues which were not discussed at all at the inquiry but which had been considered in detail at the meeting of the Planning Committee.
 - The perceived interference with Human Rights. For a CPO decision to fail on this ground is highly unusual as normally the award of compensation would address any human rights implications, thus enabling a fair balance to be struck between the public interest and the interests of those affected.
 - The contradiction between the finding in the Inspector's report that there was no breach of the Public Sector Equality Duty and the SoS' finding that there would be significant negative impacts on protected groups if the CPO was confirmed. This seems even more surprising when it was the Inspector who heard the equalities evidence and the SoS had many months to ask for further detail but did not choose to do so before disagreeing with the Inspector.
7. Legal officers were aware that the SoS had been overruled in another London regeneration case earlier this year where he had chosen not to confirm the recommendation contained within the Inspector's report. This was the development at Shepherd's Bush Market where local businesses challenged the SoS' ruling and the Court of Appeal quashed his decision on the basis that he had not given adequate

reasons as to why he had chosen not to follow the Inspector's reasoning. The fact that the Aylesbury decision was taking so many months suggested that the decision was not only highly marginal but also that there was concern over a similar reversal. Because of the contradictions and the significant emphasis in the decision on matters which were given little or no attention at the inquiry, it was apparent to legal officers that there were grounds to challenge the SoS decision not to confirm the CPO. Whilst the task of overturning a decision of the Secretary of State will inevitably be a difficult one, there does seem to be a number of clear flaws in the steps that have been taken. Initial discussions with counsel confirmed our assessment that there appeared to be good grounds to challenge the decision.

Consultation and advice to Members and Senior Officers

8. Due to the significant implications of the decision for the council, a meeting was scheduled for Monday 19th September 2016 to discuss the decision of the SoS, consider the legal advice from officers and counsel, and consider the options open to the council. The meeting was attended by Jon Gorst, the Chief Executive, Leader of the Council, Cabinet Member, Director of Regeneration, Strategic Director for Housing & Modernise, the Monitoring Officer and officers from the Chief Executive's Department and Regeneration Team.
9. Following a detailed discussion, consideration of the options available to the council and legal advice from the Monitoring Officer, the following was agreed:
 - A supplemental report would be presented to Cabinet on 20th September 2016 detailing further recommendations in response to the Secretary of State's decision.
 - The council will make an application to the High Court for leave to bring a claim asking that the Secretary of State's decision be reviewed.
 - The council will instruct a leading QC to further advise on the merits of our claim and represent the council in Judicial Review proceedings in the High Court.

Supplemental Cabinet Report and Decisions under the Constitution

10. In accordance with the provisions of the Constitution the Supplemental report to Cabinet provided Reasons for Urgency and Reasons for Lateness.
11. Recommendation 2(d) of the report, that the council should make an application to the High Court, is drafted to clearly suggest that the decision to make such an application to the High Court is a matter for the Council; under the Constitution this is not correct.
12. Paragraph 10.3 of the Constitution explains the functions of the Monitoring Officer:
 - a) **Legal proceedings.** The Monitoring Officer is authorised to institute, defend or participate in any legal proceedings in any case where such action is necessary to give effect to decisions of the council or in any case where he/she considers that such action is necessary to protect the council's interests.

13. Part 30 - Matters Delegated to Officers, provides that **'All matters not reserved to Council Assembly, Cabinet or for a committee for decision are delegated to the appropriate chief officer and/or head of service.'**
14. The decision to institute court action is not reserved to any decision making body of the council and is therefore deemed to be delegated to the Monitoring Officer, the delegation is consistent with the role and function of the Monitoring Officer as noted in 10.3 of the Constitution.
15. In view of the provisions contained in the Constitution there was no requirement for Cabinet to take this decision. The rationale for Cabinet, including the decision in the report, was to be open and transparent with the residents of Southwark and key stakeholders that the decision of the Secretary of State was not the end of the process.
16. It is accepted that the Supplemental Report to Cabinet did not detail the legal advice received from the Monitoring Officer or counsel. Further, the report did not explain the consultation undertaken by the Monitoring Officer with senior officers and Members or contain advice from the Monitoring Officer. In the time available to present the report to Cabinet, there was insufficient time to include this information in the report. Further, as the decision to seek a Judicial Review was not a decision of Cabinet, it was not felt to be necessary to include this information. However, it should be noted that Jon Gorst was present in person at the Cabinet meeting and was expressly asked about the decision to challenge the SoS' finding. In addition, quite apart from the legal grounds, it should be appreciated that the SoS' position, if affirmed, undoubtedly indicates a shift in focus that will be hugely difficult to accommodate within the context of scheme viability and deliverability.

Judicial Review Application

17. The timeline to submit an application for Judicial Review is 42 days from 16th September 2016. Below is the very tight timeline which the Monitoring Officer and her team are working to:
 - Selecting a QC of appropriate experience in planning and compulsory purchase matters to work with the existing counsel in preparation of the claim.
 - Dealing with any errors of fact in the decision letters. The report from the Inspector is 82 pages in length so there are a considerable number of sections to consider. An example is in relation to the findings on daylight and sunlight issues.
 - By 10th October, submitting to the DCLG (and to any interested parties) a letter before claim in accordance with the Pre-Action Protocol set out in the Civil Procedure Rules.
 - Allowing time for the SoS to respond to this letter.
 - After filing the claim at court (and this should ideally be by 21st October so it is not be left to the final week), the claim and all supporting documents need to be served on the defendant and all interested parties within 7 days.
 - The court will then decide whether or not to give leave to proceed with the Claim. This should be known by mid December

- If permission is granted, the Defendant will have until approximately the end of January to submit a defence. A substantive hearing is then likely around April 2017.

The National Context

18. It is fair to say that this decision has been very troubling for both local authorities and developers. The decision not to confirm the CPO gives far more weight to human rights and community issues than has been seen in previous CPO decisions. This will have raised the expectations of residents and the considerations outlined by the SoS are now likely to be a significant factor for future CPOs. The decision also demonstrates some of the difficulties involved for a Government that is promising to prioritise housing and regeneration. If the decision is confirmed, it will be expected that there will be very considerable pressure from developers and Local Authorities for legislation to address the uncertainties which have now been introduced.
19. Leading Solicitors firms, expert commentators and Local Authorities are carefully watching these proceedings due to the significant impact of the decision nationally. The Judicial Review is likely to continue to attract significant media interest:
<http://mypreferences.ashurst.com/reaction/PDF/CPOmailing.pdf>
<https://mxm.mxmf.com/rsp/m/MsH4KerJCTyluS6yWXo5fYkNRTCPdxiNkPVfchtDiyE>

Doreen Forrester-Brown

Director of Law and Democracy

7th October 2016