

**Monitoring Officer report – Decision to release local land charge over Field 81 Pennypot Lane, Chobham, Surrey**

Portfolio:	Non-executive function
Ward(s) Affected:	n/a

**Purpose:**

To report to the Council's Executive that the decision to release a local land charge over Field 81 Pennypot Lane, Chobham, Surrey appears to the Monitoring Officer not to have been taken in accordance with the processes and delegations in the Council's Constitution.

**1. Background**

- 1.1. Field 81 was subject to a local land charge in respect of clearance works undertaken in July 2006. The works were necessary to reinstate the land to its state of repair and condition prior to the occupation by travellers. The charge was registered on 10<sup>th</sup> July 2007. The original valued secured by the charge was £150,400 and in June 2018 the total amount outstanding was £318,756.32 due to accrued interest. Local land charges are binding on successors in title. It seems there was a second charge over the field which related to legal fees incurred by the Council against one of the now displaced former owners of the land. This charge was registered with H.M. Land Registry but was not binding on successors in title because it was personal in nature and, therefore, only enforceable against the former owner's interest in the land.
- 1.2. In January 2018 the Council received notice from H.M. Land Registry of an application for adverse possession of the field and the Council wrote to H.M. Land Registry in January 2018 to provide additional notice of the registered local land charge to the applicants.
- 1.3. The applicants became the new owners of the field and In May and June 2018 the Council wrote to the new owners to confirm the liabilities under the charge and inviting a payment proposal.
- 1.4. In July 2018 the new owners made further enquiries with the Council regarding the charge and clarification was provided on the basis for the charge, namely that the charge was for works undertaken to clear and reinstate the land.
- 1.5. In November 2018 legal services removed the local land charge following reference to a meeting between the Council's Chief Executive, at the time, and the new owners and the new owner's assertion that they had received legal advice that the charge was not enforceable because it was personal to the previous owner of the land.
- 1.6. A request was made to Land Charges on 14<sup>th</sup> November 2018 to remove the local land charge and the charge has been removed.

## **2. Current Position**

- 2.1. The costs of the clearance works have not been recovered.

## **3. Limitations of this report**

- 3.1. The information contained in this report has been ascertained from an electronic file held by legal services. The officers involved in the process to remove the local land charge are no longer employed by the Council. Without the opportunity to interview these officers it may be the case that some details and nuances have not been taken into account.

## **4. Relevant legal considerations**

- 4.1. I have not been able to find any evidence on file to indicate the reasons why it was determined that the local land charge was not enforceable against successors in title. The starting position is that works undertaken pursuant to enforcement action are usually recoverable by the registration of a local land charge. Indeed, costs in relation statutory works undertaken by a local authority are usually secured by registration of a local land charge. In this context, it is not clear why a decision was made to release the charge without taking further advice on the claim made by the new owners.
- 4.2. The Constitution of the Council, in force at the time the decision was made, provided no delegation to legal services to remove land charges. The Constitution provided that land charges were within the functions delegated to the Council's Executive Head of Regulatory. Furthermore the Council's Financial Regulations provided that the Executive Head of Finance (Section 151 officer) would critically review outstanding debts on a regular basis and take prompt action to write off debts no longer deemed to be recoverable. The Financial Regulations also provided that no debt above £5,000 may be written off without Committee<sup>i</sup> approval. It appears to me that removing the land charge left the Council with no effective means to enforce the debt which can be said to be a form of debt write off. However, the fact that such debts are not recorded in the Council's financial statements perhaps helps to understand how a view could have been formed that these are not debts that apply to the Financial Regulations.
- 4.3. Given that the principal sum secured by the local land charge, together with accrued interest, was in excess of £100,000, then proper consideration was also required on whether the decision was a key decision to be taken by the Executive. One view might be that the release of a security without repayment is analogous to expenditure because it crystallizes the costs of the clearance works as actual expenditure. The schedule of key decisions has been reviewed and there is no record of the Executive making any decision to release the charge or delegate authority to an officer or Sub Committee to make the decision. Nevertheless, I consider that a Committee decision was likely required for the reasons set out in section 4.2.
- 4.4. It appears to me that it would have been appropriate to further examine the claim that the local land charge was not enforceable against successors in

title and that the correct process would have been to refer the matter to the Council's Executive Head of Regulatory and Executive Head of Finance for consideration. It is arguable whether the decision to remove the charge was a key decision because this turns on whether or not the removal of a charge can be defined as expenditure. However, on balance, I consider that the decision was a Committee decision as required by the Council's Financial Regulations and legal services had no delegated authority to make the decision. I would comment that the lack of clarity in the Constitution on how to categorise local land charges may have led to some ambiguity on dealing with the release of such charges.

- 4.5. There may have been a rationale for the release of the local land charge however it appears to me that decision did not adhere to the procedures and delegations set out in the Council's Constitution. My conclusions must be read in light of the limitations set out in paragraph 3 of this report and the basis of this report is that I am satisfied that there only appears to have been a decision which may be deemed procedural ultra vires.

## **5. Governance**

- 5.1. Where it appears to the Council's Monitoring Officer that any omission, in the course of the discharge of functions of the council, by or on behalf of the Executive, constitutes, has given rise to or is likely to or would give rise to a contravention, by the relevant authority's Executive or any person on behalf of the Executive, of any enactment or rule of law with respect to that omission, he or she is required by law to prepare a report to the Executive. The relevant statutory provisions are set out in section 5A Local Government and Housing Act 1989.
- 5.2. The Monitoring Officer is required to consult with the Head of Paid Service and Section 151 Officer on the issues raised in this report and such consultations have been undertaken. A copy of this report has also been circulated to all Members.

## **6. Options**

- 6.1. The Executive is required by sections 5A (6) and 5A (8) of the Local Government and Housing Act 1989:
  - 6.1.1 To consider this report at the meeting on the 21<sup>st</sup> July 2020;
  - 6.1.2 As soon as practicable after it has concluded its consideration of this report, to prepare a report which specifies:-
    - (a) what action (if any) the Executive has taken in response to this report;
    - (b) what action (if any) the Executive proposes to take in response to this 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.

6.2. In accordance with section 5A (9) of the Local Government and Housing Act 1989, as soon as practicable after the Executive has prepared its report in accordance with Paragraph 6.1.2 above, it shall arrange for a copy of it to be sent to each member of the Council and the Council's Monitoring Officer.

6.3. To be of assistance in relation to paragraph 6.1, I recommend that paragraph 13.3 (b) (i) of Article 13 of the Council's Constitution is updated as follows, with additional wording highlighted in red.

### **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.

6.4. I further recommend that:

6.4.1 The Council's Section 151 officer gives consideration to whether it is appropriate that debts secured by local land charges should appear in the Council's accounts as assets; and

6.4.2 The Constitution is updated to confirm specifically that no officer may release any security, warranty or guarantee in favour of the Council, unless contractually obliged to do so, without the written approval of the Council's Section 151 officer or relevant Committee.

## **7. Recommendation**

7.1. The Executive is advised to consider the report and recommendations therein and prepare a report in accordance with the requirements of the Local Government and Housing Act 1989.

**Annexes:** None

**Background Papers:** None

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<sup>i</sup> The Financial Regulations refer to a Committee decision and in practice this would be an Executive decision.