

This Report will be made public on 15 June 2021

Report Number **C/21/14**

To: CABINET
Date: 23 June 2021
Status: Non key
Responsible Officer: Ewan Green, Director of Place
Cabinet Member: Councillor David Monk, Leader of the Council

SUBJECT: OTTERPOOL PARK PLANNING APPLICATION -
HANDLING ARRANGEMENTS

SUMMARY: This report sets out for approval, proposed updates to the administrative arrangements for the handling of the planning application for Otterpool Park Garden Town following a recent court case and makes a recommendation for future handling arrangements.

REASONS FOR RECOMMENDATIONS:

In order to ensure that the administrative arrangements for handling the Otterpool Park Garden Town application are updated to meet the requirements as recently set out in a court judgement Cabinet is asked to approve the appended arrangements.

RECOMMENDATIONS:

1. To receive and note report C/21/14.
2. To approve the updated handling arrangements contained in appendix 1 for the Otterpool Park Garden Town application (and all post application matters);
3. The Monitoring Officer be authorised to make minor or consequential amendments to the arrangements if necessary to keep it up to date;
4. The Director of Place be authorised to approve future handling arrangements in the same or similar form where the Environmental Impact regulations apply and the Council is both the applicant and the Local Planning Authority.

1. BACKGROUND

- 1.1 Members will be aware of the Council's proposals for Otterpool Park Garden Town. A planning application (Y19/0257/FH) for outline permission for the Garden Town has been lodged with the Council and is currently being processed.
- 1.2 The Council is both the promoter of the scheme and the local planning authority (LPA). As the LPA the Council has an obligation to determine planning applications in accordance with planning legislation, guidance and planning policies. The non – planning interests of the Council in the application must be disregarded.
- 1.3 Protocols for both councillors and officers have been agreed to avoid any conflict of interest. However a decision in a recent legal case (below) means that it is appropriate to bring together the handling arrangements into a single document in order to provide clarity and aid in ease of reference to the relevant processes.

2. RECENT LEGAL DEVELOPMENTS

- 2.1 The case of London Historic Parks and Gardens Trust v Secretary of State for Housing Communities and Local Government was decided on 2 October 2020. In brief the Secretary of State was both the planning applicant for the National Holocaust and Learning Centre at Victoria Tower Gardens, Westminster and through a call-in the determining authority.
- 2.2 The application was subject to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 as an application for a proposal that would have significant environmental effects.
- 2.3 The challenge to the Secretary of State partly succeeded because the administrative arrangements for handling the application to avoid a conflict of interest were inadequate. This requirement to have such administrative arrangements is set down in the regulations and applies whenever a body is both the applicant and the determining authority in respect of an application to which the Environmental Impact regulations apply.
- 2.4 The regulations do apply to the Otterpool Park Garden town and accordingly the Council needs to set out its arrangements to ensure it performs its duty under the Regulations in an objective manner and so as to avoid a situation giving rise to a conflict of interest. The proposals are set out below in the proposed handling arrangements.

3. PROPOSED HANDLING ARRANGEMENTS

- 3.1 Appended (1) are the proposed handling arrangements for the Otterpool Park planning application. It also applies to all post application matters (see paragraph 23).

- 3.2 The proposals are self – explanatory and seek to establish the appropriate functional separation between those making the application and those responsible for considering and determining the application. This obviously has implications for members and officers.
- 3.3 The two officer and consultant teams working on the distinct functions are identified (paragraph 9 and 10) as is how cross working will be dealt with (paragraph 14).
- 3.4 Guidelines on processing the application are contained in paragraph 14 and seek to ensure that the roles of applicant and LPA are not confused and are separate.
- 3.5 Paragraphs 15 – 22 deal with the determination of the application and again sets out the clear separation of roles. Members’ attention is drawn in particular to paragraph 16 which requires that as part of these arrangements, Cabinet members, in conjunction with the Monitoring Officer, will keep under regular review, the need, or otherwise, for any member to recuse him or herself from participating in determining the Application to ensure functional separation is maintained. Members of cabinet who have an interest under the Council’s code of conduct for councillors would, in any event, have to withdraw from any meeting discussing the application.
- 3.6 The handling arrangements are therefore recommended for approval. It is also recommended that the Monitoring Officer be delegated to make minor or consequential amendments to reflect, for example, changes in personnel or job titles, to keep it up to date as part of her three monthly review.

4. FUTURE ARRANGEMENTS

- 4.1 The Council will need to establish handling arrangements whenever it is considering as the LPA an application to which the Environmental Impact Regulations and where the Council is also the applicant.
- 4.2 Accordingly it is recommended that in the circumstances described in paragraph 4.1 above the Director of Place be authorised to approve, where required, handling arrangements in the same or similar form to those appended to govern the handling of future applications.

5. RISK MANAGEMENT ISSUES

5.1

Perceived risk	Seriousness	Likelihood	Preventative action
Challenge to the Council’s administrative arrangements to ensure there is no conflict of interests	Medium	Medium	Approve the handling arrangements appended at appendix 1.

6. LEGAL/FINANCIAL AND OTHER CONTROLS/POLICY MATTERS

6.1 Legal Officer's Comments (NM)

The report clearly sets out recent legal developments and the need for independence and objectivity in the discharge by the Council of its duties regarding environmental impact assessment of its own projects.

It is therefore essential in order to avoid a challenge to the Secretary of State that arrangements are put in place to ensure that the Council performs its duty under the Regulations in an objective manner to avoid a conflict of interest.

6.2 Finance Officer's Comments (LW)

There are no financial implications arising directly from this report

6.3 Diversities and Equalities Implications (GE)

There are no equalities implications directly arising from this report.

7. CONTACT OFFICERS AND BACKGROUND DOCUMENTS

Councillors with any questions arising out of this report should contact the following officer prior to the meeting

James Farrar
Telephone: 07711 188310
Email: James.Farrar@folkestone-hythe.gov.uk

The following background documents have been relied upon in the preparation of this report:

Otterpool Park Protocols for Councillors and Officers
<https://www.folkestone-hythe.gov.uk/article/1559/Background-documents>

Appendices:

Appendix 1: Proposed Handling Arrangements

APPENDIX 1

Otterpool Park (“OP”) – Handling Arrangements for LPA functions

Introduction and context

- 1 Folkestone & Hythe District Council (“FHDC”) and Cozumel Estates Ltd submitted an outline planning application (reference Y19/0257/FH) for a comprehensive residential led mixed use development (“the Application”). The development is known as Otterpool Park (the “Project”).
- 2 In May 2020 FHDC’s cabinet approved the establishment of a delivery vehicle, Otterpool Park LLP (“LLP”) to act as the master developer for the Project, to secure delivery of FHDC’s objectives for the Project. As a result of this and the purchase of land from Cozumel Estates Ltd the LLP will become the sole applicant for the Application. The LLP is owned by FHDC and the Otterpool Park Development Company Limited (“the Limited Company”) which is itself wholly owned by the Council. The LLP is staffed by officers of FHDC who are seconded to it. A Members’ (or Owners’) Agreement between FHDC, the Limited Company and the LLP is the governing document of the LLP.
- 3 The Application falls to be determined by FHDC in its capacity as local planning authority (“LPA”). FHDC will therefore be exercising both:
 - its statutory functions as LPA and decision maker on the Application, and
 - its role as landowner and promoterin each case in respect of the Project.
- 4 By its nature, the Application is for a development likely to have significant effects on the environment; The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“Regulations”) will therefore apply.
- 5 Regulation 64(2) of the Regulations has effect where, as here, the relevant local planning authority is also the same legal person “*bringing forward the (relevant) proposal for development*”. In these circumstances, the authority is required to “*make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal*”.
- 6 This note updates previously advised handling arrangements.¹ Protocols have been in place since the start of the plan-making process in 2016 to establish clear working practices and functional separation through governance structures to address the dual roles. Separate protocols have been in place for both Members and officers. In addition, whilst not directly relevant, a Planning Performance Agreement has been in place since 2017 to clarify practical project management and working arrangements between the LPA and applicant and to ensure FHDC is not fettered in exercising its statutory duties as LPA. These protocols and arrangements have been kept under review by senior management to ensure functional separation has been maintained throughout. The protocols have been published on the FHDC’s website.

¹ previously referred to as protocols

- 7 With the establishment of the LLP and following the decision in *London Historic Parks and Gardens Trust v Secretary of State for Housing, Communities and Local Government*, along with FHDC's commitment to keep the protocols under review, it is appropriate to bring together the handling arrangements into a single document in order to provide clarity and aid in ease of reference to the relevant processes.
- 8 The processes set out in these handling arrangements must be followed to ensure that a proper and fair decision under the relevant planning legislation can be taken. These arrangements are not guidance, but are necessary in order to meet legally enforceable requirements in the Regulations; it is vital the processes are followed.

Pre-Committee Consideration

- 9 Throughout pre and post Application submission stages the LPA has established a project team to process the Application. The team of officers who will handle the Application for the LPA and will advise the LPA on the Application include:
 - 9.1 Llywelyn Lloyd (Chief Planning Officer); James Farrar (Senior Planning Lead – Otterpool Park); Sue Head (Principal Planner, Special Projects); James Hammond (Strategic Policy Officer); Wai Tse (Environmental Health Specialist);
 - 9.2 Seijo Associates (Green Infrastructure); Lichfields (Retail, leisure and economic development); Gerald Eve LLP (viability); Alan Baxters (Heritage and Archaeology) Temple Group (Environmental Impact Assessment); Arboriculture adviser (TBC); Mills & Reeve LLP (Legal Advisors).
- 10 The team of officers and consultants who will handle the Application for the applicant and who will address the relevant committee on the Application from the promoter/applicant perspective include:
 - 10.1 John Bunnett (Managing Director – Otterpool Park LLP); Andy Jarrett (Planning Director – Otterpool Park LLP); Julia Wallace (Project Manager – Otterpool Park LLP); Dave Shore (Project Manager – Otterpool Park LLP).
 - 10.2 Quod (Planning Consultants and agent for the Application); Arcadis (EIA, Project Manager and technical input); Tibbalds (Masterplanning and Design); WSP and Andrew Cameron Associates (Transport and Movement); Mark Hanton (Landscape and Urban Design); Purcell (Heritage); Pillory Barn (Communications and Public Relations);
 - 10.3 Knights Professional Services Limited t/a Knights plc (legal advisors on land transactions and related matters) Browne Jacobson (legal advisors on S106 matters) and Kreston Reeves LLP (accountants and financial advisors).
- 11 The roles undertaken on behalf of the applicant in progressing the Application are entirely separate from the role of FHDC as LPA with responsibility for determining the Application, and where FHDC as LPA is engaging with the LLP or FHDC as owner of the LLP it will do so in the same way as it would any other third party developer/applicant. The role of FHDC as owner of the LLP in delivering the Garden Town is as described in the LLP's Business Plan (December 2020)².
- 12 There will be instances, where, due to the nature of FHCD being a relatively small district council, some specialist skills are contained in small teams and it will therefore be necessary for those teams to act in support of the LLP as master developer; this will include activities across development delivery including leading and coordinating development activity at the project site, facilitating partnership

² The Business Plan submitted by the Board of Otterpool Park LLP was approved by Cabinet on 20th January 2021. <https://folkestone-hythe.gov.uk/moderngov/mgAi.aspx?ID=14249>

development arrangements to bring forward housing and employment opportunities as well as in some cases acting as the manager of the community infrastructure.

- 13 It is anticipated that this cross-working will include but not limited to tasks set out below and examples of how the planning team will interact in these areas include:

Table 1 OP Areas of Work

Area of Work	Role of FHDC as LPA
<p>Housing, civic and employment development projects within OP and estate management support</p>	<p>If officers from the Council are required to support the LLP side in these areas of work such as estate management or a particular project, this should be identified and agreed at an early stage, e.g. proposals for a relocated Civic Centre. For these projects, the officer would not be able to take part in any LPA side activities associated with that project. Where there is only one officer the LPA will seek independent external advice. Officers from the LPA side will only input into this work through the formal pre-application and planning application process. This is important to ensure FHDC as LPA does not fetter its ability to take an open, transparent and unbiased planning decision.</p>
<p>Technical input into a range of LLP activity including the preparation and submission of planning application material:</p> <ul style="list-style-type: none"> • Economic development • Housing Strategy including Council house building programme • Health, community and wellbeing strategy • Accountancy, legal and finance support. 	<p>If officers from the Council are required to support the LLP side in these areas of work or a particular project, this should be identified and agreed at an early stage. For these projects, the LLP should make the officer aware of the role in which advice is being sought and the officer would not be able to take part in any LPA side activities associated with that advice. Officers from the LPA side will only input into this work through the formal pre-application and planning application process. This is important to ensure FHDC as LPA does not fetter its ability to take an open, transparent and unbiased planning decision. Where necessary, the LPA will seek independent technical advice from external advisors in respect of material submitted as part of planning documentation.</p>
<p>Wider corporate activity:</p> <ul style="list-style-type: none"> • Corporate plan activity including resourcing for the LPA; • Funding and financing (e.g. MHCLG Garden Communities, Housing Infrastructure Fund or other Infrastructure bids); • Infrastructure Strategy and planning (such as 	<p>Officers from the LPA side will support these areas of work where necessary. This work is not directly about the land assembly and/or securing planning permissions and will not fetter the LPA's discretion. Input from the LPA will support the Council in achieving its overarching Corporate objectives of securing comprehensive, well planned new homes and employment opportunities across the district. It will include work in partnership with Otterpool Park LLP, where necessary, to secure public sector funding for key infrastructure such as high speed rail or inward investment to support the Council's Economic Development Strategy.</p>

rail strategy or lobbying for high speed services).	
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Processing the Application

13.1 FHDC has put in place the following practical arrangements to maintain functional separation during its processing and consideration of the Application:

FHDC as LPA:

- Will consider and reach a recommendation on any planning application submitted by the LLP in line with the Development Plan and all relevant material considerations. The LPA will (as with all applications) disregard any financial or other benefits to the LLP or FHDC as owner of the LLP;
- Will not be party to the work of the LLP as master developer or FHDC as owner of the Limited Company. Significant decisions as to the terms of acquisitions, Business Plan, disposal of land interests, development partnerships, matters relating to the Members' Agreement or related land issues will all be the subject of separate reporting lines to the LLP Board and Cabinet/ Senior Officers;
- Where necessary, the LPA will liaise with the Council in respect of wider corporate activity and resourcing matters relating to Otterpool Park where it will support the LPA in discharging its statutory functions and not fetter its discretion. The LPA will liaise with FHDC as owner of the LLP and the LLP itself in line with the Otterpool Park related activities outlined in Table 1 to guard against any perception or reality of relevant officers holding any 'hierarchical superiority' over another;
- Officers identified in paragraphs 9.1 – 9.3 will not engage in any discussion or communication in relation to the Application with other officers or Members in respect of the Application save:
 - those officers identified in paragraph 9.1-9.3 shall be entitled to communicate with the officers identified in paragraphs 10.1-10.4 for the purposes of progressing the Application and only in the same way as they would any other third party developer/applicant; and
 - when officers identified in paragraphs 9.1-9.3 are conducting formal consultation on the Application
 - when officers identified in paragraphs 9.1-9.3 are engaging in pre or post application member briefings as they would any other third party developer/applicant.
- Will establish project management arrangements in accordance with the agreed and published Planning Performance Agreement which will be kept under regular review;
- Will act in accordance with the required standards of practice and ethics set out in the RTPI Code of Professional Conduct;
- Communication with the applicant:
 - The LPA will communicate as would be the case with any other application and commensurate with the project's scale and nature;
 - The LPA and the applicant will not share the same office to maintain functional separation – the LLP will have a separate on-site project office;
 - The LPA and the LLP will not share a 'post in/post out' box for written correspondence;

- The LPA will store all documentation in separate filing systems and regard it as confidential – documentation will only be disclosed in the usual course of business between the respective teams;
- The LPA will use separate consultant teams to advise it on its work;
- The LPA will be clear at the outset of all meetings as to individual officer's roles in the meeting (i.e. as LPA or applicant);
- Records will be kept of all meetings between the LPA and the LLP relating to the Application³
- Officers should leave a meeting if discussions move on to matters that should not be shared between those acting for the LPA and those acting for the LLP.

FHDC as owner of the LLP and the LLP itself:

- Will not seek to unduly influence FHDC as LPA - persons involved in promoting or assisting in the promotion of the Project or the Application must not give any instructions to, or put any pressure on, any person acting or assisting in the discharge of the functions of FHDC as LPA - or attempt to do so;
- Where necessary, the Council will liaise with the LPA in respect of wider corporate activity and resourcing matters relating to Otterpool Park where it will support the LPA in discharging its statutory functions and not fetter its discretion. FHDC as owner of the LLP and the LLP itself will liaise with the LPA in line with the activities described in Table 1 to guard against any perception or reality of relevant officers holding any 'hierarchical superiority' over another;
- Will not look to access confidential information submitted to the LPA by other applicants in the area;
- Will not share information (such as commercial agreements and other confidential bidder/developer information) with the LPA unless it is of a nature a third party applicant would normally expect to share with a local planning authority and it is clear any necessary third party agreement has been obtained.
- Communication with the LPA:
 - LLP and the LPA will not share the same office to maintain functional separation – the LLP will have a separate on-site project office;
 - The LLP and the LPA will not share a 'post in/post out' box for written correspondence;
 - The LLP will store all documentation in separate filing systems and regard it as confidential – documentation will only be disclosed in the usual course of business between the respective teams;
 - The LLP will use separate consultant teams to advise it on its work;
 - The LLP will be clear at the outset of all meetings as to individual officer's roles in the meeting (i.e. as LPA or applicant);
 - Officers should leave a meeting if discussions move on to matters that should not be shared between those acting for the LLP and those acting for the LPA.

13.2 Community and Member consultation exercises will be handled in the same way as they would for similarly sized development proposals and in line with

³ meeting records are disclosable under Freedom of Information Act/Environmental Information Regulations requirements unless statutory exemptions apply

best practice. Members of FHDC will be encouraged to engage openly and appropriately with the development of the project through All Member Briefings, whilst ensuring that their decision making functions and other statutory functions are not compromised. Members will be reminded by officers that these topic based briefings are not to discuss or debate the merits of any planning applications. Proposals for community and/or Member consultation led by the LLP will be discussed and agreed with the LPA in advance as is normal practice.

- 13.3 Should an individual or organisation have any concerns regarding an actual or potential conflict relating to the separation of functions, they should raise it immediately to FHDC's Monitoring Officer.

Determining the Application

- 14 The Application will be determined by the Planning and Licensing Committee in accordance with the Constitution, Code of Conduct, Planning Code and normal practice.
- 15 Cabinet and Senior Officers acting under delegated powers will be responsible for land matters and other issues relating to the function and operation of the LLP in accordance with the Members' Agreement and Business Plan.
- 16 As part of these arrangements, Cabinet members, in conjunction with the Monitoring Officer, will keep under regular review, the need, or otherwise for any member to recuse him or herself from participating in determining the Application to ensure functional separation is maintained.
- 17 Officers and Members shall comply with the Planning Code. Regular staff and Member training will be provided to remind Members and officers of these handling arrangements and wider guidance including the LGA Guidance 'Probity in Planning'⁴. Copies of these Handling Arrangements will be circulated to all persons identified at paragraph 9.1-9.3 and 10.1-10.4 above and to relevant Members, and recirculated following any amendments.
- 18 The applicant will only be able to address the Planning and Licensing Committee in the same way as other third party/applicants would, in accordance with the FHDC's speaking scheme.
- 19 The drafting and finalisation of the officer's report will be the responsibility of the LPA (and its advisors). In accordance with normal practice for large scale developments a final draft of the report shall be shared with the applicant 48 hours prior to publication for fact check purposes only.
- 20 The drafting and finalisation of the planning conditions will be the responsibility of the LPA (and its advisors). Planning conditions will be prepared based on National Planning Practice Guidance to establish early in the process what may need to be the subject of conditions. The LPA will comply with the Town and Country Planning (Pre-commencement Conditions) Regulations 2018 which provides that planning permission may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition.
- 21 All section 106 matters will also be dealt with in the same way as would any other third party applicant with separate legal representation for the LPA and applicant.

⁴ 'Probity in Planning: Advice for councillors and officers making planning decisions', LGA, December 2019

Post Outline Planning Permission

- 22 All post Application matters such as the discharge of conditions or reserved matters applications (Tier 3) will be dealt with in accordance with the published Scheme of Delegation.

Reviewing the arrangements

- 23 These handling arrangements will continue to be kept under review with an informal review by the Monitoring Officer every 3 months and a formal review every 6 months agreed by Corporate Leadership Team. Each 6 monthly review will be reviewed by an independent legal advisor to the LPA.

Publication

- 24 The handling arrangements will be published on FHDC's website and will be included within the publically available planning application documents in respect of the Application.