

CONFIDENTIAL

Disposal of Millenium House: High level advice on powers and processes.

Further to our previous correspondence in relation to this matter, we now report on the appropriate powers available to the Parish Council.

Executive Summary.

- The offering of a long lease and the provision of a grant to PCA without having undergone any form of valuation or public marketing exercise is extremely likely to be unlawful.
- If the Parish Council wishes to allow a third party to operate Millenium House, it should do so using a transparent and robust process designed to ensure that the Parish Council is obtaining good value for money, complying with all applicable legal requirements, and making a good quality decision.

Project Overview.

It is proposed that the Parish Council offers a long lease (a “Disposal”) of Millennium House (“the Property”) at nominal rent to a local charitable association, Pensilva Community Association (“PCA”). It is envisaged that PCA will be able to operate the Property in a more cost-effective manner than the Parish Council currently is, however the Parish will make available to Millennium House a substantial part of its precept for use over the next five years. The Parish Council is primarily concerned with ascertaining the precise statutory basis on which the envisaged arrangements will operate, with, in particular, focus on:

- Whether the Parish is legally able to provide these sums from its precept; and
- The Statutory authority that must be relied on for this purpose.

The Parish Council is currently unable to take advantage of the General Power of Competence pursuant to the Localism Act 2011.

The Property is the Parish Council’s primary asset and its disposal raises a series of questions not just relating to acting within the Parish Council’s powers, but including ensuring that it complies with:

- appropriate procurement and state aid requirements;
- its own standing orders and financial procedures;
- the requirements of its grant funders; and
- the need to ensure that it is making a good quality decision which enhances the wellbeing of the people of the Parish of St Ive.

To identify an appropriate power, it is necessary to consider what the project entails. In essence, the project represents:

1. A disposal of land to PCA; and
2. A grant of funding to PCA to fulfil it.

This note will consider these aspects separately.

Can the Parish Council dispose of the land to PCA?

Disposal of land. LGA S 127.

First and foremost, the Council needs to be comfortable that it has the statutory ability to sell the land. Section 127 of the Local Government Act 1972 (LGA) sets out that a parish council can dispose of land in any manner as they wish, as long as such disposal is at the best value that can reasonably be obtained. Disposals at an undervalue are only permitted with Secretary of State consent, or where:

1. The Parish Council considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of:
 - i) the promotion or improvement of economic well-being;
 - ii) the promotion or improvement of social well-being;
 - iii) the promotion or improvement of environmental well-being; and
2. the “undervalue” (i.e. the difference between the unrestricted value of the interest to be disposed of and the consideration accepted) is £2,000,000 or less.

Where the disposal does not achieve these requirements, an application to the Secretary of State for a specific consent is required.

In this case, this process does not seem to have been followed as no valuation has yet been undertaken. If the Property is to be disposed of in situations other than representing best value, the reasons for this are carefully identified; this does not seem to have taken place.

Such a valuation would not only serve to assist the Parish Council in meeting its legal obligations but would assist the Parish Council in ascertaining the strength of its bargaining position with regard to disposal of the Property.

It is assumed that no part of this land is public open space or village green.

Conclusion: It is unlawful for the Parish Council to dispose of the Property a peppercorn rent to PCA unless the formal process in LHA S 127 has been complied with.

Can the Parish Council make an award of grant funding to PCA?

It is understood that PCA will need a grant of at least £57,000 over the next five years in order to run the Property. A number of powers exist in relation to this.

Grant to PCA. LGA S 137.

The Parish Council has the statutory ability to incur expenditure not otherwise authorised on anything which in the council's opinion is in the interests of the area or part of it or all or some of the inhabitants. As the Parish Council will be aware, there are a number of limitations on such expenditure, which:

- must be in the interests of, and bring direct benefit to, the Parish Council's area or any part of it or all or some of its inhabitants;
- must be commensurate with the benefit; and
- is not prohibited or otherwise catered for under any other legislation.

The rules also make clear that Parish Councils may incur expenditure on contributions to any charitable funds or public services. However the amount of expenditure that the Parish Council can incur under this section in any financial year shall not exceed the amount produced by multiplying—

- (a) a prescribed “appropriate” sum, (which for 2016-17 is £7.42); and
- (b) the relevant population of the authority's area.

It is envisaged that the assistance to be provided to PCA would exceed these levels. It is therefore suggested that alternative justification is sought. In any event, this power would need to be carefully exercised in a way which did not conflict with any other legal requirements imposed on the Parish Council.

Provision of community centres. LGA 1972 S 133.

This power gives the Parish Council the ability to acquire or provide and furnish buildings to be used for public meetings and assemblies or contribute towards the expenses incurred by any other person in acquiring or providing and furnishing such a building.

This would appear to be a useful power for the Parish Council; however the power to provide the community centre would need to be carefully exercised in a way which did not conflict with any other legal requirements imposed on the Parish Council.

Recreational Facilities: S 19 Local Government (Miscellaneous Provisions) Act 1976

A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit; the A local authority may contribute, by way of grant or loan towards the expenses incurred or to be incurred by any voluntary organisation in providing any recreational facilities which the authority has power to provide. "Voluntary organisation" means any person carrying on or proposing to carry on an undertaking otherwise than for profit.

It is understood that businesses occupy the Property on the basis that they are operating commercial businesses; Further, one of the primary functions of the building is as the Parish hall. It therefore seems unlikely that a grant which supported such businesses could be said to be "recreational facilities". Funding could be provided to support elements of the Property that were purely recreational, however care would need to be taken to ensure that the non-recreational elements were not subsidised.

Are there any other powers that may exist?

Subsidiary Powers. LGA 1972 S111

This gives the Parish Council a broad power to do what is necessary for the advancement (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

Although arguments could be made that this section allows the Parish Council to enter into contracts and incur expenditure to dispose of the centre, it will not prevent the requirement to comply with any other functions and would not allow the Parish Council to circumvent the measures set out elsewhere in this note. It is accordingly of limited value.

Are there any other issues that may prevent the Parish Council lawfully disposing of the land to PCA?

State Aid.

If the occupier is being given an opportunity to use the site in a way which gives it a competitive advantage over its competitors, (For instance it acquires the site on less than

market value) it may be in receipt of unlawful State Aid. However if it can be demonstrated that the occupier is using the Property on market rates, there will be no grant of State Aid. It will be necessary to keep the proposed arrangements under review as the matter progresses to ensure that any potential State Aid is identified. There are a number of ways in which Property can be transferred at an undervalue without representing State Aid, and if it appears that State Aid is present, it will be necessary to consider whether any of these apply.

Public Procurement.

If, under the agreement that the Parish Council is entering into with the occupier, the occupier will be providing a service to the Parish Council, (Which might, for example, include the provision of management services in relation to the Property) it will be necessary to ensure that those arrangements are procured in a way that complies with the Parish Council's standing orders, or if the value of the services is big enough, the full Public Procurement Regime.

Grant Funding.

It is understood that the Property has benefitted from substantial capital grant investment. It is proposed that the requirements of the grant funding agreement that the Parish Council entered into are checked to ensure that the Property can be disposed of. Depending on what the terms say, it may be necessary to obtain permission from the grant funder before the Property is disposed of.

Public Law.

The Parish Council is obliged to ensure that any decision it takes is reasonable. Unreasonable decisions may be challenged by way of Judicial Review.

Conclusion: It is understood that PCA will need a grant of at least £57,000 over the next five years in order to run the Property.

The power under Section 19 of the Local Government (Miscellaneous Provisions) Act 1976 would appear to be a suitable power as it allows the Parish Council to fund the costs of providing such a building. However The Parish Council has not, at this stage, made any independent assessment of whether this represents good value; Until this has been done, it is difficult to see a decision to award such funding, without looking at the wider potential uses of the building or the other solutions available, could be deemed to be "reasonable".

Is the PCA proposal lawful?

The PCA proposal.

On the information provided, the acceptance of the PCA proposal in its current form is extremely likely to be unlawful for a number of reasons.

1. The Parish Council is not able to demonstrate that the price it is receiving (i.e. a nominal sum) is the best that can reasonably be obtained;
2. The Parish Council does not have the ability to make a grant to the extent necessary;
3. The disposal of the Property at a nominal value and the grant funding could, potentially, represent a grant of unlawful State Aid;

4. The imposition of contractual arrangements on PCA could, potentially, represent the grant of a Public Service Contract otherwise than in accordance with the Public Procurement regime or the Parish Council's standing orders or financial procedure rules;
5. In transferring the Property to PCA without considering any of the alternatives, the Parish Council may struggle to show that their decision had been reasonable (ie took into account all factors which a reasonable person would have taken into account) and therefore be potentially subject to Judicial Review.

From a non- legal perspective, it is also difficult to see how offering the property to PCA is a decision that would demonstrate to the residents of St Ives that the Parish Council was making a good quality decision and effectively using the site.

How can the Parish Council lawfully achieve its aims?

Disposing of the Property.

In relation to the disposal of the Property, In order to demonstrate that the disposal of the Property accords with all applicable legal requirements and obtain demonstrably best value, it is strongly suggested that the Parish Council undertakes a fair and transparent process whereby the site is offered to the wider community in order to ascertain the best possible options for the site rather than simply given to PCA. The process should comply with the strict requirements of S 127 PCA.

Making a payment for the upkeep of the Property (at least in the short term).

In relation to the Parish Council's ability to provide grant funding to the occupier of the Property in order to contribute to running costs, it seems to us that what the Council is doing is properly incurring costs necessary for the up keep of the community centre. If the Parish Council undertakes the valuation process as set out above and opens up the opportunity to operate the Property to the wider community, it will be able to demonstrate that it is achieving good value. (It may be the case that having gone through this process, the occupier may not need a subsidy- and potentially may even be able to pay rent to the Parish Council.)

Indicative process.

Once the Parish Council is content that the current arrangements cannot be sustained and that there are no viable alternative arrangements under which it can be retained, it would need to devise a process for offering the Property to the wider market. Such a process would be likely to include the following measures:

1. The Parish Council checks that the Grant Funding agreement allows the disposal of the Property.
2. The Parish Council decides exactly what it wants for the Property by preparing a specification of the attributes that the Property (and its occupier) must have, following exchange; which (for example) might include the following:
 - a. That the Property will remain the parish hall and will need to be made available for parish meetings and business on set times and dates;
 - b. That the site will still need to be available for community business and cannot simply be redeveloped;

- c. That the occupier has sufficient skills and expertise to operate the organisation; (i.e. knowledge of information security, record keeping, safeguarding and the other matters that you would expect someone fulfilling this role to have);
 - d. That the occupier will have a suitable business plan in place to enable it to properly administer the Property;
 - e. That the occupier is sufficiently robust from a financial perspective to be entrusted with a significant public asset and finances;
 - f. Any other aspects that you deem to be appropriate; We note that a risk assessment has been prepared which identifies a number of the risks that will need to be addressed and some of these could potentially be mitigated at this stage.
3. Undertake a valuation of the site which complies with the applicable legal requirements;
 4. Market the Property to the public, inviting organisations to come forward with a proposal for how they will operate the Property in a way which is sustainable and meets the Parish Council's needs in the longer term; Such a process would be designed to:
 - a. Ensure compliance with the Public Procurement Regime (if necessary) and the requirements of LGA S 127;
 - b. Test the solutions that potential occupiers propose against your specification.

This will enable the Parish Council to identify which bidder submitted the best proposals in terms of value and quality. If the PCA decides to bid to become the occupier, the Parish Council will have the opportunity to test how well it is able to perform the brief that the Parish Council has set.

The successful bidder would then lease the Property from the Parish Council. Depending on the Parish Council's identified needs, it may also enter into a service contract. These documents would govern the relationship between the Parish Council and the Occupier.

Assuming this process is properly structured, the Parish Council will be able to comply with the regulatory issues referred to at (1) above, in terms of:

- Complying with the requirements of LGA S127;
- Complying with the Public Procurement Regime;
- Complying with the State Aid regime;
- Not inadvertently breaching LGA S139;

and also demonstrate that it has made a really good quality decision in relation to the main asset of the Parish Council.

Referendum.

It has been suggested that the Parish Council holds a referendum to decide the future of the site. It is entirely within the Parish Council's rights to undertake a consultation exercise and it will be another step that the Parish Council can take to show that they have made a really good quality decision. It is, however, worth carefully considering what it is the Parish Council wants to consult on. This could be, for example, the principle of whether the Property should be disposed of in the first place; or it could be to identify the particular longer term priorities for the site; i.e. whether it is important to have a site available in the community any more or whether it should be developed in an alternative manner.

The Parish Council will need to ensure that the consultation is fair, and that it is undertaken at a stage in the process when the project is still at its formulative stages; and sufficient information must be given to consultees to ensure that an intelligent response is forthcoming. Finally, the Parish Council should not necessarily be bound to follow the outcome of the consultation, but give conscientious consideration to the outcomes of the consultation in developing its plans.

It is also worth thinking about whether, in a relatively small area, a formal referendum is the best way forward; or whether something relatively simple, taking the form of (for example) a public meeting followed an opportunity for attendees to leave their thoughts on a piece of paper may be more appropriate.

Next Steps.

We hope that this advice is of assistance; We appreciate that this is a fairly high- level view of the matters to be borne in mind however if we can be of any further assistance, please do not hesitate to contact us.

We would be happy to discuss further; for example if you wish us to review the grant funding agreement, or work with the Clerk to further develop the process, we would be delighted to assist.

Please note that this advice has been provided for the benefit of St Ive Parish Council only and not for the benefit of any other third party.

Stephens Scown LLP

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