

ANNEXE 2

ROWLEDGE GOVERNANCE REVIEW

ADVICE

1. I am asked to advise Waverley Borough Council (“WBC”) on an issue that has arisen in connection with the governance review it is conducting under Part 4, chapter 3 of the Local Government and Public Involvement in Health Act 2007. The issue concerns publicity material distributed by Farnham Town Council (“FTC”) during the consultation exercise carried out in the review. There is an allegation that this publicity material, which was extensively distributed to the electors who were being consulted, was an unlawful use of FTC funds and was materially misleading. The practical issue faced by WBC is how to approach these allegations in deciding on the result of the review.
2. The allegation of illegality itself has two aspects. First, it is said that the consultation exercise constituted a “vote” or “referendum” within the meaning of certain statutory provisions containing a prohibition on expenditure in the sensitive period before a vote – commonly known as “purdah”. Second it is said that it constituted a breach of the Code of Recommended Practice on Local Authority Publicity.
3. In my opinion, the starting place for consideration of the issue is the statutory duties placed on WBC in carrying out the governance review under the 2007 Act. The central provision is s93. s93(1) states that the “principal council” (ie WBC) must comply with the duties in s93 when undertaking the review; s93(2) states that subject to those duties, it is for the principal council to decide how to conduct the review. S93(3) states that the principal council “must consult” “the local government electors for the area under review” and “any other person or body (including a local authority) which appears to [it] to have an interest in the review”.

4. The result of the review will arise from the application by the principal council of the criteria contained in s93(4), which states that the principal council must have regard to the need to secure that community governance within the relevant area “(a) reflects the identities and interests of the community in that area; and (b) is effective and convenient.”
5. Accordingly the task of WBC, having carried out the consultation exercise, is to decide whether or not to make a change in the governance arrangements having regard to the s93(4) factors. In making that decision, the results of any consultation exercise are a very important but not decisive factor.
6. On the face of it, WBC are now in a position to decide on the appropriate form of governance arrangements applying the s93(4) factors. They have carried out a consultation exercise under s93(3). No criticism has been made of the conduct of WBC (as opposed to FTC) in connection with this. The question is how WBC should approach the allegations that illegality by FTC has distorted the results of the consultation exercise.
7. I turn then to the allegations. I agree with advice already given to WBC that this consultation exercise is not within the scope of the statutory provisions containing an absolute prohibition on expenditure in the sensitive period before a vote or referendum under particular statutory provisions that are not engaged in this exercise. Having reached that conclusion, it does not seem to me helpful to ask whether the consultation exercise is a “referendum” in the ordinary sense of the term, although I do not think it is – despite the yes/no nature of the question, the second consultation exercise is in law a discharge of the duty to consult contained in s93(3).
8. However, there remains a need to consider the terms of the Code of Recommended Practice on Local Government Publicity. The most material paragraphs are 16 and 19. Paragraph 16 contains the sentence “*Local authorities should not use public funds to mount publicity campaigns whose primary purpose is to persuade the public to hold a particular view on a question of policy*”. Paragraph 19 reads:- “*Where local authority publicity*

addresses matters of political controversy it should seek to represent the different positions in relation to the issue in question in a fair manner.”

9. In the light of these statements, it seems to me that WBC should recognise that there is a powerful argument the FTC was in breach of the Code. The fact that the other statutory provisions are not in play does not mean that the Code is not engaged – and indeed their existence demonstrates that there is a policy perspective in which expenditure by a particular local authority in defending the status quo in connection with local government re-organisation can be seen to be undesirable. And if it be the case that particular statements in the Mayor’s letter are misleading, that perspective is heightened.
10. However, there are two caveats to this position. First, it is not clear beyond argument that there is a breach of the Code or that conflict with the Code rendered expenditure unlawful. The Code is not primarily aimed at this type of situation and there might be sharp arguments about whether different views on governance arrangements were to be treated as a “question of policy” within paragraph 16. The Code of Practice is a Code not legislation. FTC is obliged to have regard to it but can depart from it for rational reasons provided that it accepts it as the valid starting point. The second is that, in any event, WBC is not charged with determining the legality of the actions of FTC.
11. One must also remember that it is legitimate for FTC to form and hold a corporate view on the merits of the review proposals.
12. Accordingly, one returns to the task that is now before WBC. As I have said, it has on the face of it discharged the duty to consult contained in s93(3)(a). It should now move to applying the factors in s93(4). It must take into account the results of the consultation exercise, bearing in mind that there is a powerful argument on the lines set out above that FTC had breached the Code. It does however seem to me inherently difficult to determine the extent to which the numerical outcome of the consultation was influenced by the actions of FTC.

13. In my opinion, it would be open to WBC to decide that the application of the s93(4) factors favoured the status quo despite a recognition of the existence of the argument that the actions of FTC were in conflict with the Code and/or were unlawful.

Richard Drabble QC

Landmark Chambers

10th December 2013.