

**Council Meeting**  
**4 November 2008**

REPORT OF THE DEPUTY CHIEF EXECUTIVE  
AGENDA ITEM 13.1

**Audit of the Council's Accounts for the year ended 31 March 2002:  
Final Report of the External Auditors into the sale of land at Underhill:**

**1. BACKGROUND**

- 1.1 On 27 February 2002 the London Borough of Barnet sold the freehold of the land at Underhill to Barnet Football Club (Holdings) Limited for the sum of £10,000. Barnet Football Club had a 99 year lease on their Underhill Stadium dating from the 25 December 1985.
- 1.2 Three local electors issued notices of objection to the Council's Accounts for the year 2001/2002 in November 2002, and subsequently the Council's then external auditors, PriceWaterhouseCoopers (PWC) accepted formal notices of objection from September 2003 onwards.

The Auditor's report is appended.

The Council is required to consider the Auditor's report and produce a response to his recommendations at paragraphs 458 and 459. This report addresses those recommendations.

Amongst other things, the Auditor has asked the Council to consider publishing the report on its website (this was done on 8 October 2008) and give notice of its intention to publish the report at a future public meeting (this was done via an advertisement in the local papers published on 15 and 16 October 2008), and finally to publish the outcome of the Council's considerations – this will be done following the Council meeting.

**2. THE AUDITOR'S RECOMMENDATIONS**

- 2.1.1 PricewaterhouseCoopers (PWC) set out five recommendations at paragraphs 458 of their report, and also asked the Council to consider six recommendations originally made in the Independent Panel Report conducted by an Ad Hoc Scrutiny Committee in 2003, (often referred to as the "Harbord Report") contained in paragraph 459 of PWC's report. The recommendations are set out below in italics, with the Council's response in standard font.

*458(a) Delegated Powers reports*

*The Council should reconsider the process through which it determines whether it is appropriate to employ a delegated powers route in any particular case.*

Council, on 9 September 2003, considered recommendations made by the Ad Hoc Scrutiny Committee consequent to the findings of the Independent Panel on the sale of the freehold of Barnet Football Club at Underhill. Council amongst other things recommended Cabinet to consider a number of issues including the delegated powers processes which led to the decision relating to the sale. The Independent Panel also had requested Council to

“ consider reviewing its process for determining those decisions which, although capable of being taken by officers, are controversial and should be taken by Members and subject to the call-in process.”

As a consequence of this, the Leader amended his scheme of delegation so that it provided “ that before any delegated powers report is signed consideration is given as to whether the issues involved are likely to raise significant levels of public concern or comment or give rise to policy considerations. If they do so the matter must be referred to the appropriate Cabinet Member as to whether or not it is appropriate to use the delegation. All delegated powers reports will also have to indicate that this process has been undertaken.”

Council was formally asked to agree the necessary amendments to the Council’s Constitution in July 2004 although the arrangements themselves were implemented prior to that date. Since that time all delegated powers reports dealing with Executive functions have included a statement of “Public Concern”.

Although Officers do consider that processes are more robust now than in 2002, at the request of the Democratic Services Manager and the Director of Corporate Governance, the Special Committee (Constitution Review) at their meeting on 7 October 2008 agreed further to review the Delegated Powers process and will be receiving a report on the issues at their next meeting. The issues raised by PWC will be included in that report. Any recommendations for changes to the Constitution will be reported to the Council in April 2009.

#### *Paragraph 458 (b)*

##### *Publicity for Delegated Powers Reports*

*The Council should review its procedures for publicising the use made of delegated powers reports to ensure that they now provide an appropriate level of accountability and transparency.*

Since June 2004 the Council’s processes for publishing delegated powers reports has vastly improved. Nevertheless, these comments will be taken into consideration in the report to the Special Committee (Constitution Review) referred to above.

#### *Paragraph 458 (c)*

##### *Use of the Council's Seal*

*The Council should consider using provisions in its Constitution so that in those instances where either the Mayor or Deputy Mayor has declared any form of*

*interest in any transaction he or she is not involved in the use of the Council seal and any subsequent stage of that transaction.*

Arising from these recommendations which are accepted in principle, there are various options and implications to be considered. In these circumstances, it is recommended that the Council accept the need to consider the implications of PWC's recommendation and instruct the Special Committee (Constitution Review) to consider this and make appropriate recommendations as necessary, for change to the Constitution, to the Council in April 2009.

#### *Paragraph 458 (d)*

##### *Retention of Records*

*The records of Members and Officers generated whilst in office and pertaining to Council business, should be retained for an appropriate period commonly applied by statute (six years).*

All records pertaining to Council business are covered by the Council's Freedom of Information Records Retention and Disposals Policy. The policy prescribes varying periods for the retention of specific classes of Council documents. In addition to this, a leaflet "Freedom of Information- Guide for Members" is made available to all new councillors in their new starter packs

It is suggested that Council requests that the Deputy Chief Executive make arrangements as expediently as possible for the review of the "Records Retention and Disposals Policy" and "Guide for Members Leaflet" in light of PWC's recommendation and to arrange for the re-issue of any amended documents to all Members and Officers and publication on Barnet's intranet.

#### *Paragraph 458 (e)*

##### *Monitoring of Performance*

*Consideration should be given to improved monitoring of performance by Members and Officers, to ensure that individuals have the appropriate capacity to discharge their responsibilities effectively.*

Appraisal arrangements to monitor performance by Officers have been in place for a number of years, but these arrangements were not applied consistently. Over recent years there has been robust training and regular monitoring of the appraisal arrangements. All managers are aware that the conduct of appraisals is one of their key responsibilities.

As far as performance by Members is concerned, since the introduction of the Executive arrangements, Members of the Executive are held to account on their decisions by the Cabinet Overview and Scrutiny Committee and any exemptions to the call – in arrangements are reported to Council. Other Overview and Scrutiny Committees review the performance of service areas within their terms of reference and correspondingly the performance of members and officers responsible for those areas. The Council on an annual basis reviews the performance of the Overview and Scrutiny Committees when considering the work programme for the coming year.

There are other mechanisms for monitoring performance, for example, the Corporate JNCC to a large extent is a monitoring tool for the ways in which members agree industrial relations policies and officers implement them. By the very nature of its work, the Audit Committee monitors performance of systems and deals with External Audit comments.

Monitoring of financial performance is carried out by the Cabinet Resources Committee who not only closely monitor revenue but also capital income and expenditure and the implementation of the capital programme.

In recognition of the importance of performance, the Leader has appointed a Cabinet Member for Policy and Performance whose responsibilities include:

“To lead on budget and policy formulation and implementation in relation to:

- Policy and Performance (including Partnerships)
- CPA and Best Value
- Corporate Governance
- Customer Service

In particular, the effectiveness and value in performance of council services, the development of partnerships to further the Council’s Corporate Plan and the Sustainable Community Strategy, and an effective consultation structure.

All aspects of performance and delivery of council services, and to instigate such interventions as required, including consultation with the Leader, as necessary, to secure best value.....”

Members will also be aware that in 2002 Barnet Council was assessed by the Audit Commission to be a 2\* authority. In February 2008 the Audit Commission revised that score to the top rating of 4\* and ‘improving well’.

Therefore, since the commencement of the Underhill enquiry, the Council have moved considerably in the way it monitors performance and is constantly considering and implementing ways of driving up standards and performance.

#### Issues raised in the Harbord Report

The Council has also been asked to consider and confirm that it has addressed the following recommendations made in the Harbord Report of 2003:

*459 (i) Council needs to ensure that all officers involved in the decision making process are aware of the procedures to be followed under the Constitution.*

The Deputy Chief Executive was instructed by the Council on 9 September 2003 to report on these matters which he did to Cabinet on 1 June 2004. He subsequently confirmed that action had been taken in a follow-up report to Cabinet on 4 January 2005. Specifically:-

- every new Director and Head of Service is informed during their induction process of the need to comply with the Council’s Constitution during the decision making process;
- regular presentations are made to service areas on the requirements of the Constitution by Democratic Services;

- ongoing training for Officers and Members takes place;
- a Member/management decision making tool kit has been produced for Officers;
- the process for publishing delegated powers reports is regularly reviewed. As mentioned previously, it is proposed that the Special Committee(Constitution Review) reviews the situation again at their next meeting.

It should also be noted that since the Cabinet report of 1 June 2004 every new Director or Head of Service is informed during their induction process of the need to comply with the Council's Constitution during the decision making process. Further, a Member/Management decision making tool kit is distributed to Officers. Report writing guidance and guidance relating to the Delegated Powers process are also made available to officers via the intranet and the Constitution is published on the website, and is regularly updated.

*459 (ii) It should be made clear to all staff that ignoring decision making processes or statutory officers' comments will be regarded seriously*

This has been routinely done since 1 June 2004.

*459 (iii) The Statutory Officers need to consider the kind of comments they make on reports*

Report formats were changed for all Committees after 1 December 2004. From this date, statutory officers were not required to comment on reports (this has never been a statutory requirement). Instead, officers from various services will be required to vet reports for risk, financial, staffing, ICT and property implications, and legal and constitutional issues. Officers, in vetting these reports raise matters of probity, illegality, maladministration, or financial impropriety with the statutory officers concerned.

*459 (iv) Draft reports should set out all relevant information and be clear about implications*

Two major sessions took place with all of the Council's report writing staff on 30 April 2004 and on 21 September 2004. It is now officers' belief that the quality of reports is immeasurably better than when the Underhill Delegated Powers Report was written in 2001/2002.

Since 2004 all draft reports for any Committee or for action under delegated powers have an extensive clearance process, referred to above which ensures that all relevant information is included and options and implications of proposals are properly analysed. Cabinet Members, of course, personally clear all reports issued in their names, but in accordance with the Chief Executive's instructions, drafts are submitted to Members only after the internal officer clearance processes have been completed so that the Member may be assured that should the recommendations be approved they are capable of withstanding challenges on legal, financial, and other grounds.

*459 (v) The Council may wish to review its procedures for ensuring that the Leader or appropriate Cabinet Members are fully advised of the implications of decisions*

The action taken and detailed above to improve the quality of reports and ensure that objectives are continually reviewed has reduced the risk of the Leader or appropriate Cabinet Members being unaware of the implications of decisions.

*459 (vi) The Council may wish to review its procedures .... including the greater use of independent valuations.... to ensure it maximises the income from the sale of assets*

The use of independent valuations is now much more common: Appendix 1 contains a list of recent independent valuations.

#### Recommendations

1. That Council note and accept the recommendations contained within the PWC report. However, in taking on board in full the recommendations of PWC note that since the commencement of the PWC external investigation, many actions, as outlined in the Deputy Chief Executive's report, have already been taken which would mitigate against a repetition of the issues relating to Underhill today.
2. That the Special Committee(Constitution Review) :
  - (i) when considering the Director of Corporate Governance's report on the review of the delegated powers processes, should also note that the Council expect following that review, the Director of Corporate Governance to arrange a programme of refresher training on the delegated powers processes for Members and Officers:
  - (ii) consider the various options and implications arising from PWC's recommendation on the use of the Council's seal and make appropriate recommendations as necessary, for change to the Constitution, to the Council in April 2009.
3. That the Deputy Chief Executive make arrangements for the review of the "Records Retention and Disposals Policy" and "Guide for Members Leaflet" in light of PWC's recommendation and to arrange for the re-issue of any amended documents to all Members and Officers and publication on Barnet's intranet.
4. That the Deputy Chief Executive send to PWC a copy of this report and advise PWC of the outcome of Council's decisions.

**Brian Reynolds**

**Deputy Chief Executive**

## APPENDIX 1 – External Valuations

<b>Barnet House</b> Rent Review	Savills
<b>Watling Car Park Site</b> Valuations	Donaldsons
<b>Hendon Football Club</b> Valuations	Savills, CBRE
<b>Pinkham Way</b> Valuation, marketing and Disposal	Drivas Jonas
<b>Barnet Football Club</b> Valuations	Savills
<b>Hendon Town Hall Complex</b> Development Appraisals Valuations	Donaldsons District Valuer
<b>Business Rates</b> Rating Appeals	CBRE
<b>Agricultural Estate</b> Rent reviews	Savills
<b>Pardes House School</b> Valuations	District Valuer
<b>Totteridge Library</b> Disposal	Savills
<b>North Finchley Library</b> Valuations	Gerald Eve
<b>Spencer House</b> Valuation	District Valuer
<b>Veterans Hall</b> Valuations	Martyn Gerrard ( Local )

# London Borough of Barnet

## Conclusions and Statement of Reasons

An Investigation by PricewaterhouseCoopers LLP into the Sale by the London Borough of Barnet of the Land known as Underhill to Barnet Football Club (Holdings) Limited, as part of the Audit of the Accounts for the Year ended 31 March 2002

*8 October 2008*



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# Section 1 – The Auditor's Responsibility and the Law

## Introduction

1. The Audit Commission Act 1998 ('the 1998 Act') establishes the statutory framework for the audit of the accounts of local authorities. It also provides for there to be a Code of Audit Practice ('the Code'), renewable every five years, which sets out the way in which auditors are to perform their functions. For the purposes of this investigation, the relevant Code is the one that came into effect in March 2000, and was amended in March 2002. It provides that auditors are to review and report on the financial aspects of the audited body's corporate governance arrangements, its financial statements, and aspects of its performance management. Schedule 1 also notes the special powers and duties of auditors, including the right granted by the 1998 Act to members of the public to question auditors and make objections to the accounts.
2. Section 16 of the 1998 Act provides that:  
*'a local government elector for an area to which the accounts relate, or any representative of his, may attend before the auditor and make objections-*
  - a) *as to any matter in respect of which the auditor could take action under section 17 or 18 of the Act; and*
  - b) *as to any other matter in respect of which the auditor could make a report under section 8.'*
3. At the time of the events subject to this audit, the Audit Commission for Local Authorities and the NHS in England and Wales had appointed PricewaterhouseCoopers LLP as the external auditor of the London Borough of Barnet ('the Council'). In the course of our audit of the accounts for the year ended 31 March 2002, several such objections were made to us. They concern the sale of the freehold interest in a football stadium known as the Underhill stadium by the Council to the Barnet Football Club Holdings Limited ('the Company'), the majority shareholder of Barnet Football Club Limited ('the Club'). We have set out the nature of those objections in section 2 of this document.
4. As required by the 1998 Act and the Code, we have conducted a detailed audit into the matters raised with us. Our approach is summarised in section 3 of this document. In so doing we have, as required by the Code, reached our own conclusions; we have considered the matters contained in the objections, but have not restricted ourselves only to those matters. We have taken due account of the conclusions of other investigations and actions, but without regarding ourselves as being bound by them.

5. In this statement direct quotations are set out in italics. References to the masculine such as 'he' or 'his' should be regarded as including the feminine where appropriate. A supporting bundle of documents has previously been circulated to all interested parties – the objectors, those members or officers of the Council who played a significant role in the transaction, the council itself and where relevant their legal representatives. The bundle contains copies only of those documents to which the statement refers directly. Other documentation that has been gathered during our enquiry, but which has not been referred to, has been made available for inspection by interested parties.

**Powers under the Act**

6. Section 17(1) to (3) of the 1998 Act provides that:-

(1) *Where*

- (a) *it appears to the auditor carrying out an audit under this Act, other than an audit of accounts of a health service body, that an item of account is contrary to law, and*  
(b) *the item is not sanctioned by the Secretary of State*

*the auditor may apply to the court for a declaration that the item is contrary to law.*

- (2) *On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes the declaration then, subject to subsection (3), it may also-*

- (a) *order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the body in question and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid;*  
(b) *if the expenditure declared unlawful exceeds £2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of a local authority, order him to be disqualified for being a member of a local authority for a specific period; and*  
(c) *order rectification of the accounts.*

- (3) *The court shall not make an order under subsection 2(a) or (b) above if satisfied that the person responsible for incurring or authorising the expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay the expenditure or any part of it".*

7. Section 17 of the 1998 Act, as set out above, remains in full force and effect for the purposes of consideration of these objections, notwithstanding amendments made by section 90 of the Local Government Act 2000. The reasons for this view are set out in paragraphs 14 to 16 below.
8. The courts have taken a relatively narrow view of the circumstances in which they have regarded an item of account as "contrary to law" within the meaning of that phrase in section 17(1) (a) of the 1998 Act. For example it has been held to cover:
- a) expenditure or income which a local authority had no power to incur or receive or which was otherwise 'ultra vires' (Beecham v Metropolitan District Auditor (1976) 75 LGR 79)
- b) expenditure which was incurred or income which was received without authority (Beecham v Metropolitan District Auditor); or
- c) expenditure or income which was debited or credited to the wrong statutory fund or account (Stockdale v Haringey LBC (1990) 88 LGR 7; Wilkinson v Doncaster MBC (1985) 84 LGR 257).

9. In exercising section 17, neither an auditor nor the Courts are entitled to substitute their own view of what may be a desirable policy for that of a local authority. The Courts can only intervene, on the application of an auditor or otherwise, if in exercising discretion conferred on it by Parliament a local authority has acted unlawfully. This it may do, for example, by acting for an improper purpose, by misdirecting itself in law, by failing to take into account a matter it was bound to take into account, by taking into account a matter which it ought not to take into account, or if it reaches a conclusion that no local authority acting reasonably could have reached (see for example, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) KB 223; *Giddens v Harlow District Auditor* (1972) 70 LGR 385).
10. Section 18 of the 1998 Act provides:
- “(1) Where it appears to the auditor carrying out an audit under this Act, other than an audit of accounts of a health service body...*
- (a) that any person has failed to bring into account a sum which should have been brought into account and that the failure has not been sanctioned by the Secretary of State, or*
- (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, the auditor shall certify that ... the amount of the loss or deficiency is due from that person.*
- (2) Subject to subsections (4) and (8), both the auditor and the body concerned..... may recover for the benefit of the body a sum or amount certified under this section as due; and if the sum or amount is certified to be due from two or more persons, they shall be jointly and severally liable for it”.*
11. It has been put to us that the two sub-sections are mutually exclusive, and that the auditor is not restricted to issuing a certificate only where wilful misconduct is proven. The argument is that all that is required is for a person to fail to bring into account a sum which should have been brought into account.
12. We are aware of two precedents with a bearing on the point. In *R v Roberts* 1901 1KB 117 it was held that an inspector of weights and measures who was personally under a statutory obligation to collect certain fees failed to do so despite having wrongly been instructed by the authority not to. In *Rex (O'Carroll) v King* it was however held that it would be a defence if an individual under such an obligation could demonstrate that it had been '*lost without negligence or default on his part.*' The relevance of these cases to the Council is the extent to which individuals were personally involved in collecting amounts arising from the disposal.
13. In our view sub-section 18 (1) (a) covers two specific situations. It would apply in a case where an individual had received a sum, but had failed to bring it into account. Secondly, we believe that it would also apply where as a result of his or her office an individual was under a specific obligation to collect and bring into account a particular amount but did not do so. However in this instance we do not consider that either of the cases cited above applies. It is not argued that any amount has been collected personally by the parties involved, and so the first situation is not relevant. Moreover, none of the individuals whose actions we have considered were under a personal obligation as a result of their office to collect and account for a sum arising from the disposal of the freehold. We do not consider that the sub-section should be more widely interpreted. We therefore believe as a matter of law it is not necessary for us to consider further ss 18 (1) (a), and our analysis below considers only ss 18 (1) (b).
14. The Local Government Act 2000 provides a mechanism for section 17 (1) (b) and section 18 to be disapplied and in due course revoked. Disapplication arose when an authority adopted the Code of Conduct required by Regulation 4 of the Local Authorities (Model Code of Conduct) (England) Order 2001, and these sections were formally omitted on 27 July 2002 under the provisions of section 90 of the Local Government Act 2000 and the Commencement No. 9 Order 2002. However we consider that section 18 was in force for the purposes of our audit of the Council's accounts for the year ended 31 March 2002.

15. The Local Government Act 2000 obliged all councils to adopt a code of conduct for members, before the expiry of a period of six months commencing on 5 November 2001. The Council adopted such a code in April 2002, which set out in general terms the standards expected of members; it followed the general guidance made available for all Councils, and covered in particular members' interests and how they should be declared.
16. We take the view, as a matter of law, that if there is a loss caused by wilful misconduct on the part of any person before the date on which such a code of conduct was adopted by the Council, the responsible external auditor should issue a certificate in respect of any such loss or deficiency caused. In accordance with this view, we are of the opinion that we should consider any objection put to us under section 18 of the 1998 Act, and we have accordingly done so.
17. Wilful misconduct means deliberately doing something which is wrong or wrongly omitting to do something, knowing it to be wrong or with reckless indifference as to whether it is wrong or not (Graham v Teesdale (1983) 81 LGR 117). This definition, which must be read so as to include wrongful omissions to act, was accepted by the House of Lords in Porter v Magill [2001] UKHL 67. Misconduct occasioned by imprudence, negligence, excess of zeal, misplaced enthusiasm, error or lack of judgement falls short of wilful misconduct.
18. We are mindful of the seriousness of a finding of wilful misconduct. Although a section 18 enquiry is not a criminal proceeding, proof to a high standard is required. Lord Nicholls in In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 said *'the standard of proof required...is the preponderance of probability, usually referred to as the balance of probability.'* He continued *'the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'*
19. We consider how these principles should be applied to this objection in section 7 of our report, as part of our assessment of the case under s18 of the Act.
20. Section 8 of the 1998 Act provides that:

*"In auditing accounts required to be audited.....the auditor shall consider- (a) whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit, in order for it to be considered by the body concerned or brought to the attention of the public..."*
21. In considering whether to make such a report, we have asked ourselves whether it is in the public interest to do so, and in particular whether any matters have arisen that should be drawn to the attention of the public. We consider in section 8 of this report the merit of making clear to the public our views on the legality of the transaction, the conduct of those involved, the weaknesses in the Council's procedures and the extent of the remedial action we consider necessary.

# Section 2 - The Nature of the Objections

## Introduction

22. Notices of objection to the accounts of the Council for the year ended 31 March 2002 were lodged by three objectors. We did not accept the initial letters from Mr David Miller (the letters dated 5 November 2002 supplemented by letters dated 7 November 2002, 25 November 2002 and 27 December 2002 and Mr Andrew Markey (the letter dated 17 May 2004) as notices of objection as they were not in our view compliant with the requirements of audit legislation. The correspondence listed below sets out the notices of objections that we have accepted and which are considered in this document.
23. The notices of objection are:
- Mr David Miller's letters dated 24 September 2004, 20 June 2005 and 4 August 2005 (Documents 286, 301, 307)
  - Mr Andrew Markey's letters dated 15 September 2003, 22 September 2005, 7 October 2005, 26 October 2005 (Documents 269,308,310,314)
  - Mr Mike Dawson's letter dated 19 June 2005 (Document 299)
24. Earlier correspondence in respect of the objections was addressed to Simon Sharp, who was then the Engagement Partner for the audit of the Council on behalf of PricewaterhouseCoopers LLP. Peter Flamank took over responsibility as Engagement Partner for the audit in March 2005.

## Objection by Mr David Miller

25. Mr David Miller has written to us on a number of occasions since late 2002 about the disposal of the freehold of Underhill Stadium, sold by the Council to the Club for the sum of £10,000 together with the benefit of an overage deed (a mechanism whereby the Council would, in certain cases, share in profits arising from a subsequent disposal by the Club). In a letter of 5 November 2002, he explained that the sale was to a private company, Barnet Football Club Holdings Limited, which is wholly owned by Mr Tony Kleanthous, the Chairman of the Club. Mr Miller has contended that the Council had breached section 123 of the Local Government Act 1972 (LGA 1972) as it was undertaken '*without the necessary consent of the Secretary of State,...they did not seek or obtain the best price that could have been realised*'. Furthermore, the sale contract was so poorly drafted so as to cause the loss of potential future development rights.'
26. Mr David Miller's correspondence has provided us with some factual background, which we have incorporated into Section 3 of this document. His letter of 5 November 2002 (Document 249), although we have not formally accepted it as an objection, provides a summary of five areas of concern:
- The land had been leased to the Club in 1985 for a term of 99 years, and the lease

contained restrictive covenants limiting the use of the land. By disposing of the lease, the Council forfeited its rights to uphold those covenants, and the payment received does not adequately compensate it for the loss

- The Council should have taken into account (and by implication, he asserts it did not) the revised deposit draft of the Unitary Development Plan, which omitted the land from the green belt. He argues that the value of the land with the development rights would be in excess of £5 million
  - The Overage payment Deed of 27 March 2002 includes a cut off period of ten years from the date of the contract, after which all provisions of the Agreement cease to operate. Mr David Miller believes that this effectively means that the Council has '*absolutely no entitlement to future revenue after this period*'
  - The sale was conducted by officers under delegated powers, although they are restricted to dealing with transactions with a consideration under £100,000. As the future development value of the land was expressly written into the contract, they arguably exceeded their authority
  - The lease contained repairing obligations, which if no longer enforceable by the Council would have been of substantial value to the Club
27. Mr David Miller concludes his letter by contending that senior Cabinet members including Mr Alan Williams, the then Leader and Councillor Danish Chopra, the then Cabinet member for Resources were fully aware of the conditions of the sale and must be held liable for the loss. He also left open the possibility of certain officers also being held responsible.
28. The earliest letter from Mr David Miller that we accept constitutes a valid objection is that of 24 September 2004, in which he alleges that three Councillors were '*responsible for the losses*' while three officers are '*culpable for their failure to prevent a sale taking place on terms which they knew, or should have known, were illegal and not in the Council's best interests*'
29. We have subsequently received a number of further communications from Mr David Miller. Much of this has provided additional information, and we have incorporated the items we consider relevant into later sections of this document. His letter of 20 June 2005 can conveniently be summarised below, as it sets out his objection in more detail. We reproduce below the key factors.

### **Section 17**

30. Mr David Miller requests that we apply to the Court for:
- *A declaration that the sale of the land at Underhill was contrary to law and that the income was an unlawful receipt (section 17 (1) (a))*
  - *A declaration that the sale was not sanctioned by the Secretary of State as required under section 123 (2) of the Local Government Act 1972 (section 17 (1) (b))*
  - *An order under section 17 (2) (a) requiring all those persons responsible for the unlawful receipt to be held jointly and severally liable for the difference in the sale price and the true value of the land at the time of the sale*
  - *An order under section 17 (2) (b) that any Members involved in the sale who are judged to have acted unreasonably be disqualified from office*
  - *Rectification of the accounts, either by having the sale set aside or by requiring the purchaser to pay the true value of the land at the time of sale under section 17 (1) (b).*

31. In a supporting schedule Mr David Miller claims that:

a) The sale was illegal as:

- *It was in breach of section 123 of the LGA 1972*
- *There was no attempt by the Borough to advertise the sale of the freehold in order to obtain best consideration*
- *No attempt was made to obtain an independent valuation*
- *The in-house valuation was based on a false premise regarding the green belt status of the land*
- *Safeguards were not included in the sale contract as had previously been proposed*
- *The sale was negotiated on the basis that the land would be de-designated (as green belt land)*

b) There was a breach of the Constitution as:

- *The sale of assets over £100,000 was not permitted under delegated powers*
- *The sale of property with a lease in excess of 30 years was not permitted under delegated powers*
- *The sale was not reported to Members as required*
- *The sale should have been approved by Members as it breached the Council's stated policy on green belt land*
- *The sale should have been treated as a key decision and approved by Members*

c) The sale was politically motivated as:

- *The football club had threatened to move out of the Borough if their requirements were not satisfied*
- *The previous Administration were fearful of the political consequences if the club moved away and the London Borough of Barnet was blamed*
- *The previous Administration had wished Barnet Football Club Holdings Limited to keep 100% of the value of Underhill if a new stadium was built in the Borough*

32. Mr David Miller also notes the conclusions of an inquiry commissioned by the Borough referred to as the 'Land at Underhill' inquiry.



## Section 18

33. Mr David Miller requests us to certify that the amount of loss proven to have been caused by the wilful misconduct of any individual named below, as an amount due from that person:
- Mr Alan Williams – Leader
  - Councillor Danish Chopra – Cabinet Member for Resources
  - Councillor Anita Campbell – Mayor
  - Mr Leo Boland – Chief Executive
  - Mr Jeff Lustig – Borough Solicitor
  - Mr David Stephens – Chief Valuer
34. Mr David Miller provides us with a series of supporting schedules setting out more detailed allegations and commentaries against each individual. We consider these matters in Section 7 of this document.
35. Mr David Miller's letter of 4 August 2005 (Document 307) states that he contends that the loss for the purposes of the section 18 objection is an amount of up to £5,402,660.

## Objection by Mr Andrew Markey

36. Mr Andrew Markey first wrote to Simon Sharp setting out formal notice of his objection on 15 September 2003. He explained that he had concerns over matters relating to the Club, and referred to difficulty in obtaining information to which he believed he was entitled. He drew our attention to apparent inaccuracies in the accounts and he objected to the way the sale of the freehold of the club was handled. At that point he asked us to consider issuing a public interest report.
37. Whilst we do not consider that his letter dated 17 May 2004 (Document 308) is a formal notice of objection, it contends that the evidence suggested:
- Criminal intent to deceive and defraud
  - An illegal disposal of a substantial freehold
  - Deliberate price-fixing, at a fraction of what it should have been
  - A resulting loss of over £5 million suffered unnecessarily by the Council's tax-payers
  - A sale to a private, non-trading company with only one shareholder
  - Constitutional abuse
  - Democratic abuse
  - Collusion to cover-up, which seems to be continuing
  - A material failing in the internal control of the Council
  - Inaccurate and misleading disclosure in the accounts
38. Following further consideration Mr Andrew Markey formulated his objections to the accounts in the manner required by the Act. He confirmed on 13 October 2005 that he wished to object under sections 8, 17 and 18 of the 1998 Act.

### Section 17

39. Mr Andrew Markey stated on 26 October 2005 (Document 314) '*The item of account I object to, as I think it contrary to law, is the disposal by the London Borough of Barnet of their freehold interest in the land comprising the present site of Barnet Football Club, resulting in a potential loss of some £5.5 million.*'

### Section 18

40. Mr Andrew Markey wrote to us on 7 October 2005 in the following terms:

*'I think the amount of the loss suffered to be in the region of £5 million, based on the estimated potential value given by the Borough Valuer, Dave Stephens.*

*Under section 18 (1) (b) Audit Commission Act 1998, I request you certify that the amount of loss proven to have been caused by the wilful misconduct of any individual named below, be due from that person.*

- *Mr Alan Williams*
- *Cllr Danish Chopra*
- *Cllr Anita Campbell*
- *Mr Leo Boland*
- *Mr Jeff Lustig*
- *Mr David Stephens'*

### Section 8

41. Mr Andrew Markey states in an e-mail to us of 13 October 2005 that he wants to make an objection under section 8, section 17 and section 18. He notes that he feels his letter of 17 May 2004 can be used to support his case '*in all three objections.*'

### Subsequent representations

42. We have received representations from solicitors representing parties named in the section 18 objections that Mr Andrew Markey has not made a valid objection, as section 16 of the Act requires him to identify the relevant expenditure involved. Mr Andrew Markey, it is contended, has only identified a '*potential loss*'. (Document 378). We are not persuaded by that argument. In our view the uncertainty that does exist flows from the uncertain timing of any future receipts accruing to the Council. There is no doubt over the transaction that Mr Andrew Markey challenges. As a result, we believe it appropriate to consider the merit of the matters he raises.
43. It has also been put to us (Document 398) that s17 (2) of the Act refers to '*expenditure*' that is declared unlawful. It is contended that a loss of income cannot properly be regarded as expenditure of the Council. We accept this point, and hence accept that an application to the Court under the provisions of s17 (2) will not be successful. We have taken due account of this matter in determining what action we should consider.
44. Solicitors acting for three of those named in the objection have made representations on the matters that should properly, in their view, be included in a report under s8 of the 1998 Act. They note (Document 378 page 11) that such a report '*should only refer to facts that (have) not previously been brought to the attention of the audited body or which are not already in the public domain and which ought to be brought to the attention of the public.*' They add '*where a report is justified, the emphasis should be on the steps that are necessary to bring about an improvement.*' Their conclusion is that '*any criticism by the Auditor of past performance in this case would therefore be gratuitous.*'

45. We have considered these views carefully. We consider that it is for the auditor to determine the circumstances in which a report is required, and the nature and contents of that report. We also take the view that careful analysis of the circumstances of each case is needed. We consider that the auditor's powers under section 8 of the 1998 Act are wider than indicated in the representations referred to in paragraph 43 and certainly wide enough to encompass all the matters we have considered in the course of determining the objections in question, in framing this decision and in issuing any accompanying report under section 8. We consider Mr Andrew Markey's objection meets the statutory requirements.

### **Objection by Mr Mike Dawson**

46. Mr Mike Dawson wrote to us on 19 June 2005 (Document 299) to make a formal objection to the accounts for the year ended 31 March 2002, *'in respect of the sum received by London Borough of Barnet for the sale of Barnet FC's ground at Underhill, under sections 16 and 17, Audit Commission Act 1998.'* He adds:

*'I am objecting because I contend that the sale of Underhill was made, and the sum for the sale received, without the correct authority, so was unlawful.'*

*'I am objecting because I contend that the sale of Underhill breached section 123 (2), Local Government Act 1972, because the Secretary of State's approval was not sought and best value was not obtained, so was unlawful'*

*'I am objecting because I contend that the sale was unconstitutional and therefore illegal, as various Government Acts define the basis of the Council's constitution. To break the constitution is therefore breaking the Act, so was unlawful'*

47. We regard this as an objection under section 16 of the 1998 Act that asks us to take action under s17 of that Act. In relation to other possible grounds of objection, Mr Mike Dawson wrote:

*'For the sake of formality I confirm that I am not accusing Officers or Members of financial corruption, but I contend that there is sufficient evidence to warrant further investigation by you.'*

*'I do not wish for a public interest report to be made about the subject of my objection.'*

48. We do not believe that Mr Mike Dawson wishes to object on any other grounds than section 17.

## Section 3 – Our Approach

### Background

49. In performing our work, we were conscious of the significant level of review to which the matters raised by the objectors have already been subject. In particular, we were aware of:
- The Land at Underhill inquiry, sometimes referred to as the Harbord enquiry, an independent review established by the Council under the chairmanship of Mr Richard Harbord. Its remit was to examine all matters it considered relevant to the sale of the Council's freehold interest in the Underhill Stadium, and it reported back during 2003
  - The action of the Council in the High Court, seeking to have the sale of the freehold set aside. This was rejected in February 2004
  - The subsequent appeal to the Court of Appeal, that was dismissed in July 2004
  - The further internal enquiry on behalf of the then Leader, Mr Victor Lyons. This investigation was led by Mr Brian Reynolds, the Council's Deputy Chief Executive. It reported in June 2004
50. During our own investigations we have considered the findings of each of these reviews and actions, and the significant evidence that they received. However, while we have taken account of these matters, we have been conscious of our responsibility to formulate our own conclusions on those matters that as external auditors of the Council we are required to address. We have not therefore regarded ourselves as bound by any earlier material conclusions.

### Timing

51. A significant period has elapsed since the events in question. In part that is due to the extent of the earlier reviews and actions; we considered it appropriate to await the outcome of the earlier reviews and actions before determining the extent of the audit action that was required. Further, although concern had been expressed informally by the objectors earlier in the process, it was not until September 2003 that the first properly formulated objection was received, while the last was not submitted until October 2005. The consequence was that although we were conscious of the desirability of a speedy resolution, it was not until early in 2005 that it was appropriate to perform any detailed investigation. The hearing of objections has been undertaken in the period from October 2005, to date. Even during that period, our review has inevitably been made more complex and therefore time-consuming by the involvement of three objectors and several firms of solicitors, necessitating a considerable volume of correspondence.

## Approach

52. As auditors we are mindful of the public money that has been expended on this matter and the need to fulfil the duties imposed by audit law on the appointed auditor. We decided to hear the objections by way of correspondence, since we considered that was likely to be the most efficient and effective approach. Representations from interested parties, such as those submitted by solicitors acting for those against whom section 18 objections have been made, have been invited and on receipt circulated to all of the interested parties. In a number of places in this conclusion and statement of reasons we make reference to the matters raised in such submissions and responses.
53. Formal interviews have been held with those most closely involved, in certain cases on more than one occasion. The purpose of those discussions was to ensure that the auditor had a full understanding of the events. We also wished to establish both what each individual did, and what he or she knew about what was happening at the time in question. The interviews also provided an opportunity to ask questions about the process. Transcripts of the principal interviews were taken, agreed with the individuals concerned and subsequently made available. In the case of interviews of those who played only a minor role, we have taken notes.
54. We have undertaken a comprehensive review of the key documents involved; a summary of the main items is given as Appendix 1. We also found it helpful to conduct a forensic review of some of the key computer records. This took the form of a review of electronically held data, to the extent that information was available, including for example the hard disks of the computer of the former Leader. The purpose of that examination was to establish whether we had a complete understanding of the events that took place, and to ensure that our views were properly balanced.
55. Our views have taken due account of the range of advice we have received. We have been supported by a firm of solicitors throughout our work, and we have taken Leading Counsel's opinion on a number of matters. Valuation advice has been obtained from a firm of Chartered Surveyors. We also found it helpful to consult the Audit Commission on matters of process.
56. As part of our process, on 9 November 2007 we issued to those directly involved a statement of our provisional views. This was intended only to convey the conclusions that we were provisionally minded to reach, and the reasons for those views. We indicated to all parties at the outset that we intended to deal with this matter by way of correspondence, but in order to ensure justice and fairness were best served we also gave an opportunity to all parties to make oral representations. We have now fully considered all representations on our provisional views, and have taken full account of them in drawing up our conclusions and statement of reasons. Appendix 1 sets out the main documents that we have relied upon.

# Section 4 - Chronology of Events

57. This section contains an overall chronology of the events that are relevant to the disposal. The Table below contains a brief description of what occurred and provides a cross reference to the key documentation. Section 5 provides further detail, focussing on the main issues.

<i>Date</i>	<i>Event and Related Documents</i>	<i>Document Reference</i>
20.8.86	99 year lease of the Underhill stadium granted to Barnet FC (the Club) by the London Borough of Barnet (the Council)	1
5.3.98	Press release by the Labour group, explaining that it is the policy of the Labour group to support the Club	3
18.9.98	Submission of a planning application to further develop a stadium at Cophall - Internal memorandum from the Director of Environment Services to the Chief Executive	4
25.9.98	Letter from Mr A. Kleanthous to the Chief Executive about the Cophall application	6
18.5.00	Proposal to develop a site at Claremont Road in alliance with Hendon FC - Letter to the Club from the Chief Executive, enclosing revised heads of Terms	31
8.6.00	Approach to the Council by the Club to assign the Underhill lease to a holding company, Italian Sports Design Limited - Internal memorandum from Mr David Stephens to Mr Jeff Lustig	32
9.6.00	Discussions within the Council about the suggested assignation	34
9.6.00	Letter from Mr David Stephens to Mr Jeff Lustig about the assignation	35
6.7.00	Discussions over the development of a larger ground on the existing Underhill site - Briefing note from Mr David Stephens to Ms Rita Dexter	39
21.9.00	Note of a Meeting between the Club, the Leader and officers on de-designation of the Underhill site from the green belt and alternative locations for the Club	53
25.9.00	Letter from BFC (Mr Tony Kleanthous) to Mr Alan Williams about de-regulation	54
8.10.00	Internal e-mail on the proposals, including s123 issues	57

<i>Date</i>	<i>Event and Related Documents</i>	<i>Document Reference</i>
17.10.00	Memo from Mr Andrew Barry-Purssell to Mr Alan Williams/Ms Rita Dexter setting out details of a further meeting	58
27.11.00	Discussions over the sale of the freehold interest in Underhill	63/64
1.01	Discussions over the enlargement of Underhill	
16.1.01	Note to Leader from the Head of Development, about a meeting with the Scouts and St. John's Ambulance to discuss their re-location	72
17.1.01	E-mail from Mr Alan Williams to Ms Rosemary Coates	73
7.2.01	Letter sent by Mr Alan Williams to Mr Graham Slyper at the Club on de-designating the Underhill site	75
16.2.01	Letter from Mr Graham Slyper to Mr Alan Williams expressing concern over lack of progress	76
21.2.01	Legal advice received	77/79
22.2.01	Briefing note from Mr Andrew Barry-Purssell before a meeting of the Strategic Directors Group to be held on 27.2.01	80, 82
28.2.01	Meeting between the Leader and the Club – no notes available	
6.3.01	Letter from Mr Graham Slyper to Mr Alan Williams explaining that the Club has decided to look elsewhere for a new ground	84
14.3.01	Letter from Mr Alan Williams to Mr Graham Slyper in which the Council expresses willingness to sell the freehold of Underhill	85
21.3.01	e-mail from Mr Graham Slyper to Mr David Stephens, requesting proposals	87
12.4.01	Meeting on the shape of the disposal. Club notes that it is still looking for an alternative location - Internal file note written by Mr David Stephens dated 16.04.01	92
30.5.01	Note prepared by Mr David Stephens on progress with the disposal, but with no financial detail	99
	E-mail from the Leader to Mr David Stephens	98
14.6.01	Further briefing note prepared by Mr David Stephens	108
14.6.01	Leader indicates his support for these latest proposals and includes an observation that the Club would want a 50:50 split	108
7.01	Report to Cabinet drafted and distributed	119, 120
2.7.01	E-mail from Kasum Shah to Mr David Stephens	122
4.7.01	Clearance by Cllr Chopra	118
16.7.01	Cabinet agenda does not have the report on it	341 App 27
23.7.01	Draft delegated powers report (DPR) prepared and	127

<i>Date</i>	<i>Event and Related Documents</i>	<i>Document Reference</i>
	circulated by David Stephens to Mr Jeff Lustig, Mr Jeremy Jaroszek and Mr Leo Boland	
	Consultation responses	126
30.7.01	Comments by Mr Jeff Lustig	135
Oct/Nov 01	Articles appear in the press concerning plans for a stadium at South Underhill	149
18.10.01	The Council is informed in a note from Mr Andrew Smith to Mr David Stephens that an application for planning permission has been submitted for land to the south of Underhill	145
25.10.01	Briefing note on details of application	146
26.10.01	DPR sent to Cllr Chopra for comment	147
4.11.01	Cllr Chopra gives agreement, subject to the Leader's views	237 App 31
Early 11.01	The Club enquires about the sale of the freehold in an E-mail from Ms Valerie Welch on behalf of Mr Graham Beattie to Mr Paul Chadwick	151
9.11.01	Club advised that the DPR passed to the Borough Solicitor to enable a start to be made on preparing documents	237 App 32
12.11.01	Letter by Club to Cllr Campbell thanking her for her assistance	152
13.11.01	DPR signed by Paul Chadwick	153
	DPR sent to the Principal Legal Assistant to prepare a contract	150
11.01.02	Draft contract sent to the Club for comment	174
27.2.02	Contracts for the sale of land	237 App 39
27.2.02	Planning and Environment committee meet and accept the South Underhill application, subject to various conditions	205
27.3.02	Overage Payment Deed signed	237 App 40, 21
5.02	Conservative party gains control of the Council	
9.02	Review of the background to the disposal undertaken for Mr Boland	237
	Harbord enquiry reports	
13.2.04	High Court judgement given (see paragraphs 136 to 138)	280
1.6.04	Brian Reynolds' enquiry reports its conclusions to Cabinet	
30.7.04	Court of Appeal gives its judgement (see paragraph 139)	284



# Section 5 – Background

## Introduction

58. This section of our conclusions provides factual material on the events under examination. It is intended to provide an indication of the intentions of those involved, thereby also casting light on what those individuals knew. It also focuses on other key issues that have subsequently caused concern. The following matters are addressed:
- Options for the site of the Club's new stadium
  - Negotiations for the sale of the freehold of Underhill
  - Valuation of the Council's freehold interest in the Underhill stadium
  - The Council's approval process, and the Delegated Powers Report (DPR)
  - Contractual issues
  - Developments after the sale
59. The text refers to a number of key documents, which are summarised in Appendix 1 and have been made available as explained in paragraph 5.

## Background to the Events

60. In August 1986 the Council granted the Club a 99 year lease on their Underhill Stadium, to take effect from 25 December 1985 (Document 1). The lease contained a number of significant restrictions including:
- The land and buildings shall be maintained in good repair
  - The land may only be used for playing association football or directly related purposes
  - In the event that the Club is wound up, or the lease is determined for any other reason, the land will revert to the ownership of the Council.
61. In 2002, the Club operated as a football business through a number of companies. Mr Tony Kleanthous and his wife held the majority of the shares in the Club until 26 February 2002 when their shares were transferred to Barnet Football Club Holdings Limited, the Company, which Mr Tony Kleanthous formed in April 2001 and of which he was the sole shareholder and director. In addition to the Association football business, the Club sought to demonstrate community support by providing facilities for local youth and ladies' football, however it was not a charity nor was it operated on a not for profit basis. Based on its published accounts, it was loss making and its going concern status depended upon the personal guarantees of Mr Tony Kleanthous (*Document 323, page 10*).

62. The Underhill stadium occupies an area of approximately 3.5 acres. The 99 year lease was on the basis of a fixed annual ground rent of £50, the Club having paid a lease premium of £35,000 on its commencement. The lease restricted the use of the stadium to the playing of Association Football and associated activities (*Document 1*)
63. Between 1998 and 2001 there had been a number of proposals put forward by both the Club and the Council concerning Underhill Stadium and a possible new ground for the Club. The proposals were stimulated initially by the need to improve football stadia generally and football stadium safety in particular as a consequence of the Taylor review. It was believed that if improvements were not made to the Underhill Stadium, the Club would be barred from the league as a result of the unsuitability of its ground. The Underhill stadium is not well suited for its purpose as it has insufficient capacity, insufficient stands, the pitch has a severe slope and it is generally run down. The stadium is surrounded on all but one side by housing and whilst it is in a metropolitan green belt area, this status has been subject to review by the Council from time to time.
64. The Labour administration's policy throughout the period 1994 to 2002 when they had effective control over the Borough was to support recreation generally and to support the Club. For example, on 25 January 2000, the Council resolved to support the Club as shown in the following extract (*Document 21*):

*"This Council affirms its full support for Barnet Football Club and states its commitment to work with the club to identify suitable and appropriate facilities within the Borough"*

65. This translated into taking steps to support the Club's wish to obtain a new stadium and to remain in Barnet. An example of the support given is contained in a press release from the Labour Group of the Council on 5 March 1998 (*Document 15*). The press release stated that the '*Barnet Labour Leader has pledged continued support of his Group to the Club over the redevelopment plans for Copthall Stadium*'. It goes on to state that only the Labour Party supported the Club's plans.
66. By 2001/02 the Council had no overall control, but there was a Labour administration supported by the Liberal Democrats.

#### **Options for the site of Barnet FC's new stadium**

67. It is relevant to have some understanding of the various developments that had been proposed in respect of new stadium for the Club in the period 1998 to 2002.

#### ***Copthall***

68. The first proposal that we have considered was for the development of an existing stadium at Copthall. The suggestion was for a mixed use stadium (i.e. to be used by the community and the Club) that would be partly funded by the Council and partially by the Club. A planning application for residential development at Underhill was made in September 1998 (*Document 4*). Council officers saw this application as premature and suggested to the Chief Executive that the way forward "*would be to try and negotiate an acceptable scheme that could be determined once a favourable decision on Copthall is reached*". The proposition for Copthall did not proceed due to opposition and the outcome of a public enquiry. It appears that the planning application for residential development was not pursued.

#### ***Claremont Road***

69. The next proposition concerned the development of a site at Claremont Road where the Hendon Football Club had a football field. The Council sought to forge an alliance between the Club and Hendon Football Club in May 2000 with a view to a new stadium being built at Claremont Road. It was hoped that the disposal of Underhill would provide £3m towards the development of an improved ground, although this figure was dependent on planning approval being given for residential development. These proposals did not progress as the parties, Hendon FC and the Club, could not reach an agreement.

70. While discussions about the Claremont Road proposals continued, on 6 June 2000 Mr David Stephens the Council's Chief Valuer was approached by the Club regarding the assignment of the lease of the Underhill stadium to a holding company, Italian Sports Design Limited. (*Document 298*). The Club said that by separating the ownership of the property assets from the Club, future stadium issues would not be subject to ratification by the Board of the Football League. Discussions took place with the Club about the proposal and the conditions that might be associated with it. The assignment was not progressed as the Club did not wish to accept the safeguards that the Council required in the assignment, which were intended to persuade the Club to continue to play at Underhill, or for the lease to be surrendered if it chose to move '*in or out of the Borough*' (*Document 39*).

***Expansion on the Underhill site***

71. Mr Tony Kleanthous appears to have become frustrated by repeated disappointments. In discussions with Mr Andrew Barry-Purssell, Head of Development and Regeneration on about 9 June 2000 he is reported as saying (*Document 237 Appendix 4*) that there was little point in further discussions with the Council unless it came up with a site as other local authorities had done for their local football clubs. He stated that dealing with the Council meant lengthy (and expensive) negotiations and that the Council appeared to put commercial considerations first.
72. A meeting involving Mr Andrew Barry-Purssell and Mr Alan Williams on 7 July 2000 was held to discuss the Club (*Document 39*), and the options for its expansion that were then under consideration. It was decided that the Council should explore the feasibility of a larger ground being developed at Underhill. During the meeting the Council endeavoured to demonstrate that a possible solution to the Club's stadium problems would be to rebuild on the existing site; in Mr Stephens' words '*We keep offering this option to TK but he keeps refusing.*' The scheme would necessitate the use of a small parcel of Green Belt land immediately to the south of the existing stadium. This proposal was supported by Mr Alan Williams, who made public statements concerning this option. The Council prepared a plan showing a possible stadium layout (*Document 237 Appendix 5*) and this received widespread local press coverage at the time (*Document 237 Appendix 6*).
73. The Council is required to prepare and periodically update a Unitary Development Plan (UDP), showing the anticipated use of the land in its boundaries. The Underhill Stadium is on land designated as Green Belt within the adopted Plan. In line with the possible redevelopment of the existing site for a new stadium the Draft Deposit UDP included provision to de-designate from Green Belt status the area shown on Drawing. No. 22824 (*Document 237 Appendix 34*). This area includes Underhill Stadium, the St John's Ambulance and Scouts sites as well as part of the playing fields to the south of these sites.
74. The proposals did not win favour with the Club, who adopted the line that all possibilities of staying at Underhill had already been explored and there was no point investigating this latest idea when it might not happen.

***The new site at South Underhill***

75. Some months later, in October 2001, articles appeared in the local press concerning plans for a 10,000 seat stadium at South Underhill. A planning application was subsequently received by the Council on 16 October 2001 (*Document 144*). The site concerned did not involve any of the land that was the subject of the freehold disposal that by then was well under way. The planning application was apparently a surprise to the constituency members; Councillor Anita Campbell informed us that they had been expecting a proposal to enlarge Underhill, and not a completely new stadium. (*Document 321, page 20*)

76. Councillor Coakley Webb emailed Mr Alan Williams on 4 October 2001, requesting a meeting to discuss developments. (*Document 143*). We know from statements made by Councillor Anita Campbell that she was disappointed Mr Alan Williams had not alerted her in advance about the development of a new stadium at South Underhill. (*Document 321, page 21*). A meeting was arranged and a paper written by Mr Alan Williams referring to the Club was taken to the Labour Group meeting on 22 November 2001. This paper states that '*The Barnet Football Club saga continues apace. Despite every best endeavour on the part of the Council, despite all the commitment we have displayed over the years and despite the support of the Group has given it seems that there are people who continue to seek to make mischief.*' 'I did receive..... a 57,000 signature petition in support of the Club's redevelopment plan'. Following the meeting Councillor Anita Campbell continued to have concerns and emailed Mr Alan Williams seeking a further meeting. (*Document 156*).
77. On 19 October 2001 Mr Andrew Smith, Principal Planner, wrote to Mr Alan Williams, Councillor Munroe Palmer, Councillor Beverley Pearce and Councillor Anita Campbell advising about the planning application and its details. This memorandum was also sent to various officers including Mr Stephens, the Chief Valuer. Mr Andrew Smith's note set out details of the planning application. He attached a briefing note which explained that the whole of the area for the planned development was located in the Metropolitan Green Belt. It added that if the planning application were allowed and the development of South Underhill proceeded, the Greater London Authority had indicated that the Green Belt status of Underhill and the St John's Ambulance and Scouts sites would need to be retained (*Document 144/313*).
78. The Planning committee considered the application at its meeting on 27 February 2002. Planning permission was granted subject to a number of conditions. Development was only achievable if the Council were willing to allow the Club sufficient title over the land for the stadium. Following the elections of May 2002 there was a change of political administration, and the Conservative party resolved not to make that land available.

#### **Negotiations for the Sale of the Freehold of Underhill**

79. The terms of a possible freehold transfer of the Underhill site were the subject of a discussion recorded in an e-mail dated 27 November 2000 between Mr David Stephens and Mr Jeff Lustig (Chief Solicitor). The e-mail details the requirement for the transfer to be at market value unless the approval of the Secretary of State was obtained, for which it says there was no supporting justification. Mr David Stephens notes '*it's hardly for the economic benefit of the Borough or similar.*' (*Document 237 Appendix 11*).
80. Mr Andrew Barry-Purssell wrote to Mr Alan Williams on 16 January 2001 to update him on the Club's discussions in the context of the enlarged Underhill proposition (*Document 237 Appendix 14*). He set out the key components of an agreement:
- a) Preparation by the Council of drawings incorporating the agreed requirements of the Scouts / St John's Ambulance (the tenants of land adjacent to the Club) sufficient to accompany a planning application for the Quinta / Grange site (these are alternative sites owned by the Council that may have been available), to which it was proposed they would relocate
  - b) On grant of planning permission, the Council would grant the Club a 99 year lease of the Quinta / Grange sites at a peppercorn rent, without a review
  - c) The Club would erect a new building on the Quinta site to the reasonable requirements of St John's Ambulance / Scouts
  - d) On completion of the new building, the Club would grant St John's Ambulance / Scouts each a new 99 year (less three days) lease at a peppercorn rental for their respective areas. They could also grant a further underlease to the intended users of the remaining facilities

- e) The Scouts / St John's Ambulance would then vacate their existing premises and surrender their respective leases to the Council
- f) The Council would then convey the freehold of the St John's / Scouts premises, and the Underhill ground, to the Club
- g) The Club would pay the reasonable legal fees incurred in the negotiation of the transfer and legal fees in respect of the new leases
81. Mr Andrew Barry-Purssell also advised Mr Alan Williams that the Council was under pressure from the Club for a formal response to plans for the construction of a new stadium on the Underhill site, to avoid falling foul of the League at the end of the 2000/2001 season (*Document 237 Appendix 14*). Mr Andrew Barry-Purssell further advised Mr Alan Williams that the Council should agree to the proposals in principle subject to discussion and agreement of the detail. He also referred to his view that a planning application for development (of what he described as Underhill East Stand) should be moved forward.
82. In an e-mailed response dated 17 January 2001 (Document 73), Mr Alan Williams said 'I have no objection in principle to the proposals though we will need to take a paper to Cabinet. I agree we should promote an early planning application.' He continued '*I am concerned about 2 things:*
- *The transfer of the freehold of the ground to the Club – can we protect the Council in some way so that they cannot simply sell the land, keep the cash and move away from the Borough. I know we have talked about this before.*
  - *The cash contribution to the Quinta Drive buildings – how much is this likely to be. Where will the money come from. It appears we get a double whammy – no capital receipt for Underhill and a cash obligation for Quinta. We need to identify a funding source and cap our exposure.'*
83. The Leader wrote to Mr Graham Slyper, a Director of the Club, on 7 February 2001 (*Document 75*), stating that the Council believed that the proposal for de-designating the Underhill site could be secured and the objections from the GLA set aside. The Club replied (*Document 237 Appendix 16*) on 16 February indicating that they found Mr Alan Williams', the Leader's, letter disappointing and inaccurate and complaining about the lack of progress on the matters discussed at the meeting on 21 September 2000. On 16 February 2001, the Club wrote to the Council to say they concluded that there had been no progress and they had no option but to look at other sites outside the Borough.
84. In response to the letter, Mr Alan Williams requested a full briefing from Mr Andrew Barry-Purssell and an urgent meeting with the Club (*Document 76*). It is evident that Mr Andrew Barry-Purssell requested advice from other officers. Document 77, dated 21 February 2001, indicates that he asked Mr Jeff Lustig for legal advice on the Council's powers to incur expenditure under the wellbeing powers contained in section 2 Local Government Act 2000 (the 2000 Act) relating to the relocation.
85. Mr Lustig replied to Andrew Barry-Purssell on 22 February 2001 (Document 79). He wrote: '*We did of course have a fairly extensive discussion yesterday on the section 2 of the Local Government Act aspects in relation to funding the relocations. Obviously the social and environmental benefits to which you have referred will need to be fully set out and analysed. However, in principle, this is probably the type of arrangement which previously caused difficulties in terms of LA powers, but now can be dealt with under section 2. The new power... does not permit a local authority to do something which is otherwise prohibited or limited by other legislation and cannot be used to raise money. Those constraints do not seem to apply here though. Exercise of the powers is subject to the principles of Best Value... There are still the old fiduciary duty and Wednesbury tests, but presumably the Council would not fund the relocation of the two organisations unless and until it is satisfied that there is a viable business plan in place to achieve the redevelopment of Underhill.'*

86. Mr Jeff Lustig concludes '*If we put the sort of restrictions on re use and development profits that you have mentioned wouldn't that best value have to be assessed on that basis and therefore not requiring of Secretary of State's consent under Section 123? The restrictions are not artificial, but imposed in order to achieve legitimate Council policy objectives.*'
87. Mr Andrew Barry-Purcell presented a paper to the Strategic Directors' Meeting on 27 February 2001 (*Document 80*). In his introductory paper he refers to Mr Alan Williams' request for a report to be put to the March 2001 Cabinet. He also asks the Strategic Directors for guidance on how to proceed. The Strategic Directors attending the meeting on the 27 February 2001 were Mr Leo Boland, (Chief Executive), Ms Rita Dexter, (Deputy Chief Executive), Mr Jeremy Jaroszek, (Director of Resources), Mr Brian Reynolds, (Director of Social Affairs), Mr Martyn Kempson (Director of Education and Children) and Ms Anne Lippitt, (Director of Environment). The document provided by way of background was a briefing note that Mr Barry-Purcell had prepared for Mr Alan Williams dated 22 February 2001. The notes of the meeting (*Document 82*) show that the Directors wanted further discussions and negotiations to take place as well as a further meeting with Mr Alan Williams to discuss the matters arising. There is also reference to Mr Alan Williams' meeting with the Club being rescheduled for 28 February 2001. No report was presented to Cabinet in March 2001 concerning the Club, although at the conclusion of the meeting of 27 February 2001 this had been the expectation.
88. We have no notes of the meeting between Mr Alan Williams and the Club on 28 February 2001. However, we have a copy of a letter from Mr Graham Slyper of the Club to Mr Alan Williams dated 6 March 2001 referring to the meeting (*Document 84*). The letter states amongst other things
- '...Thank you for calling the meeting with us on Wednesday...prior to our scheduled Board meeting on Thursday.....The main item on our agenda was the position of the club within the Borough...I must regretfully advise that after lengthy discussion extending throughout the afternoon and well into the evening it was the unanimous view of the Board that the current proposals from the Council are no more definite than those of the past, and in order to safeguard our position the Club has no alternative other than seek a suitable location for both our stadium and our academy outside of Barnet'.*
89. The Club also said that they would raise the issue of relocation outside Barnet with supporters.
90. We have been told by Mr Alan Williams that following the receipt of the letter of 6 March 2001 he did not seek to contact the Club by telephone and no conversations with the Club took place (*Document 322, page 59*). His next action was to write to the Club on 14 March 2001 (*Document 85*). The main issue raised in the letter was an indication that the Council was willing to sell the freehold of Underhill. Mr Alan Williams has advised us that when he wrote his letter he did not know whether the disposal of the freehold would be sufficient to persuade the Club to remain in Barnet. There is no record of any discussion between officers on that date or in the days previous to the issue of the letter concerning the agreement to sell the freehold. Mr Alan Williams' letter of 14 March 2001 did ask the Club to draw to supporters' attention that the Council was still seeking to find locations for a new stadium within Barnet.
91. In response, Mr Graham Slyper sent an e-mail to Mr David Stephens on 21 March 2001 (*Document 237 Appendix 17*) quoting from the Leader's letter:
- "The only issue I have to raise from your letter is the statement that there is reluctance on the part of the Council to sell the freehold of your existing site at Underhill to the Club. This is not the case and we have indicated quite clearly our willingness to take that forward."*
92. Mr Graham Slyper requested proposals for the freehold sale from Mr David Stephens.
93. Mr David Stephens subsequently wrote to Mr Tony Kleanthous on 3 April 2001 confirming he had instructions to enter into negotiations for the sale of the freehold of the Underhill Stadium and requesting a meeting with the Club. His letter indicated that any terms provisionally agreed would need to be reported to the appropriate committee for approval (*Document 237 Appendix 18*).

### Valuation of the Council's freehold interest

94. Mr David Stephens met Mr Graham Slyper on 12 April 2001. Mr David Stephen's file note, dated 16 April 2001 (*Document 237 Appendix 19*) makes reference to the Football League's restrictions on Clubs, preventing them from dealing with property assets without the League's approval. The note also sets out the Club's wish again to explore assignment of their lease to a holding company (*Document 237 Appendix 19*). On valuation, it says that '*we generally agreed a freehold value for the stadium subject to the existing lease of circa £10,000. This is subject to i) a covenant being imposed prohibiting the use of the land for anything other than the playing of Association football and associated activities; and ii) a claw-back provision which provides that if the stadium/ land is subsequently sold .. for any other purpose...then the Council will be entitled to the whole of the enhanced value...*'
95. Mr David Stephens prepared a briefing note on the progress of negotiations with Mr Graham Slyper on 30 May 2001 (*Document 237 Appendix 20*). This document outlined three possible freehold disposal options that officers had considered:
- a) Unrestricted disposal: £5.4m
  - b) Covenant restricting use to football: £1.3m (reflects the weakness of covenant over time)
  - c) As b, but with a supplementary receipt of up to £5.6m (index linked) if sold, whether freehold or leasehold, for purposes other than football.
96. This briefing note also makes reference to Draft Heads of Terms being received from Mr Graham Slyper. The note indicates that Mr Graham Slyper's proposals were designed to give the Club the lion's share of any development value. It also makes reference to a lease assignment (to what became Barnet Football Club Holdings Limited) which the Club was still requesting and refers to the terms that the Club was sent in June 2000 (*Document 34*). The Club had not accepted these terms.
97. A copy of the briefing note was sent to Mr Alan Williams. The covering e-mail indicated that the Club was reluctant to discuss actual figures, hoping that these would be agreed between the Club Chairman and Mr Alan Williams. (*Document 237 Appendix 21*). We have seen no evidence that such discussions took place. (*Document 322, 27 March 2006, page 62*)
98. In his e-mail response Mr Alan Williams advised:
- '...we are not going to allow the Club to sell the site and move away from Barnet with any receipts. We will only support a move to elsewhere in the Borough....the Mayor of London has now accepted the basis for de-designation from Green Belt but only on the grounds that the site will be used for a football stadium development....We do need to push the Club to accept they can get what they want on the site especially with the Mayor's general agreement we now have.'*
99. The Leader also said that he had written to the Club Chairman along these lines, inviting him to talk to the Council. (*Document 237 Appendix 21*).
100. Discussions continued with Mr Graham Slyper and Mr David Stephens prepared a further briefing note on 14 June 2001 (*Document 237 Appendix 22*). This note set out the following as the negotiated basic proposals:
- a) Freehold sale of stadium (excluding any adjoining land) for £10,000.
  - b) Club relocates to new permanent ground in Barnet: 100% development value to Club.
  - c) Club relocates outside Barnet or just leaves Underhill: development value split 60% Council: 40% Club.

- d) Sale is to holding company (Barnet Football Club Holdings Ltd).

Mr David Stephens indicated that Mr Tony Kleanthous wanted the matter reported to Cabinet in July.

101. A copy of this briefing note was sent to Mr Alan Williams. The Leader indicated his agreement to the proposals in the briefing note and in a hand written observation suggested that Mr Tony Kleanthous would want a 50%:50% split (*Document 237 Appendix 23*). Referring to this document, during his interview Mr Alan Williams advised us that he was indicating that Mr Tony Kleanthous was looking for a different percentage and that he (Mr Alan Williams) was not asking Mr David Stephens to alter his approach. (*Document 322, page 46*)

### **The Council's Approval process and the Delegated Powers Report**

102. Mr David Stephens drafted a report to Cabinet in the name of the Cabinet Member for Resources, Councillor Danish Chopra (*Document 237 Appendix 24*). This report was sent to Councillor Chopra for clearance on 2 July 2001. He confirmed his agreement on 4 July 2001 subject to the endorsement of Mr Alan Williams, the Leader (*Document 237 Appendix 25*).
103. The agreed report was sent by Mr David Stephens to Mr Alan Williams on 5 July 2001 and was copied to a number of senior officers. In his covering e-mail, Mr David Stephens asked Mr Alan Williams whether the report should go to Cabinet on 16 July 2001 or be held over to the October meeting (*Document 237 Appendix 26*). There is no record of a reply to Mr David Stephens' e-mail and the report did not find its way onto the agenda for the July Cabinet. Mr Jerry Herring (Committee Section) spoke to the Club Chairman on 16 July advising Mr Tony Kleanthous that the matter was not on the Cabinet agenda. He then e-mailed Mr David Stephens to ask him to phone the Club Chairman to explain why (*Document 237 Appendix 27*).
104. It should be noted that the July 2001 Cabinet meeting was the first to be undertaken under the new constitutional arrangements determined by the Local Government Act 2000. In practice, Barnet had been operating a shadow cabinet system for some time, but from July 2001 the new arrangements had statutory effect. We were advised by Mr Jeff Lustig that there was a heavy agenda for that meeting. (*Document 320, page 12*)

### **Delegated Powers Report**

105. The Council had in place a scheme under which less significant decisions might be taken by officers without referral to a committee. The use of such powers was subject to the requirement that a 'Delegated Powers report' or DPR should first be completed. Approval was structured in different ways depending on the purposes of the DPR. For the purposes of the disposal of land, approval was by the Acting Head of Development and Regeneration in conjunction with the executive member of resources. The scheme also required that the DPR should subsequently be publicised.
106. It has not been determined who took the decision for the report not to go to Cabinet and the consequential adoption of the DPR approach. None of the members or officers interviewed accepted responsibility for this. Mr David Stephens prepared a Draft DPR in July 2001 which involved consultation with Councillor Danish Chopra, the Cabinet Member for Resources (*Document 237 Appendix 28*). Mr David Stephens circulated the draft document by e-mail on 23 July 2001 for comment to three senior officers, Mr Leo Boland (Chief Executive), Mr Jeff Lustig (Monitoring Officer and Borough Solicitor) and Mr Jeremy Jaroszek (Strategic Director) (*Document 237 Appendix 29*).



107. Mr Leo Boland received the same e-mail from Mr David Stephens at 17.54 on 23 July 2001 and he responded at 18.01 on the same day with the words 'I am happy with it'. Mr Clive Medlam the Borough Treasurer saw the e-mail in the first week of August 2001. Mr Clive Medlam informs us that he passed the draft Delegated Powers Report to his assistant, Mr Peter Willetts to review, and that he discussed the response with Mr Peter Willetts prior to its release to Mr David Stephens. The comments raised by Mr Peter Willetts were of a minor nature (*Document 319, pages 32/33*) When Mr Jeff Jeff Lustig responded on 30 August 2001 (*Document 135*) he made a number of comments:

*'I understand the thrust of the proposed on-sale provisions, but I think we need to be careful not to over complicate them because we might miss a trick that way. Are these not the key provisions:*

*Barnet FC is allowed to play at Underhill for at least 10 years unless it finds and moves to another facility during this period*

*Unless Barnet FC has relocated to another suitable ground within the Borough and the holding company or its successor in title has provided and developed or will provide and develop that other ground, then on any sale of Underhill the sale proceeds division provisions will apply.*

*We particularly have to be careful to ensure that, under the agreement, the holding company can't avoid the sharing arrangement by effectively transferring the development value before Barnet FC relocated out of the Borough.'*

108. We have found no acknowledgement from Mr David Stephens of any of these responses.

#### **Approval of the DPR**

109. Mr David Stephens wrote to Councillor Danish Chopra on 26 October 2001 enclosing a copy of the DPR for his comments (*Document 237 Appendix 30*). Councillor Danish Chopra replied confirming his agreement on 4 November 2001, subject to the agreement of Mr Alan Williams (*Document 237 Appendix 31*). In his interview we asked Mr Alan Williams whether he recalled being asked by Mr David Stephens if he was content with the Delegated Powers Report at that time. We were told that he did not. Mr Alan Williams confirmed that his method of dealing with Mr David Stephens was in writing and not orally. (*Document 322*). We have found no record of any correspondence between Mr David Stephens and Mr Alan Williams confirming his continued agreement to the disposal at this point.
110. At the beginning of November 2001 Mr Graham Slyper of the Club rang Councillor Anita Campbell and enquired about the sale of the freehold, asking if she could make enquiries on behalf of the Club. Councillor Anita Campbell has explained that she then rang Mr David Stephens to ascertain what the position was. (*Document 321, page 20*) This may have prompted Mr David Stephens to action the DPR.
111. Mr David Stephens subsequently informed Mr Graham Slyper by email, on 9 November 2001, that the DPR had been passed to Mr Jeff Lustig (Borough Solicitor) so he might start preparing the required documents, and he asked for details of the Club's solicitors (*Document 237 Appendix 32*). This document was copied to Councillor Anita Campbell.
112. On 9 November 2001 Mr Graham Beattie, Acting Director of Community Development, spoke to Mr Alan Williams, who was under the impression that there was delay with the freehold sale of Underhill and wanted reassurance that the delay was not on the Council's side. He also wanted reassurance that following the sale, the Club would have no scope for any change of use without the stadium returning to the Council. As a result of this discussion, Mr David Stephens was asked to e-mail Mr Alan Williams with the latest position (*Document 237 Appendix 33*).

113. The Leader also advised Mr Graham Beattie that he wished to see the Club's planning application progressed at a steady pace, and that the Council should not leave itself open to claims of delay. Barnet Cricket Club, the occupant of the Underhill South site, was seen as a 'significant issue' and the Council needed to identify possible future options. The Cricket Club had written to Mr Alan Williams requesting a meeting which was in the process of being arranged (*Document 237 Appendix 33*).
114. On 12 November 2001 Mr Graham Slyper emailed Councillor Anita Campbell (*Document 152*) thanking her for her assistance in chasing the freehold sale as previously the matter had been 'overlooked' by officers.
115. The DPR (*Document 153*) was signed by Mr Paul Chadwick, the Acting Head of Development and Regeneration, on 13 November 2001. We have been informed by Mr Paul Chadwick that he had little involvement with Mr David Stephens prior to November 2001, that there had been few, if any, one to one briefings and that he had not seen the DPR before it was presented for signature. Mr Paul Chadwick in his evidence to the Harbord enquiry states that '*I suspect that I would have speed read the report, probably more than anything, looked at the conclusions, looked at the best price issues and signed it off on that broad basis*'. (*Document 237 Appendix 1*). The stated purpose of the report was to approve the freehold sale to a holding company subject to safeguards ensuring future use of the stadium by the Club, with the Council sharing any future development value. In his further interview with the auditor on 22 January 2007, Mr Paul Chadwick reiterated that there was '*potential for some development profit for the Council that wouldn't have been there in the terms of the original lease*.' (*Document 365 page 12*)

#### **Publication of the DPR**

116. According to the Constitution (*Document 141*), the disposal of interests in land with a consideration of less than £100,000 are delegated to the Head of Development and Regeneration in consultation with the Cabinet Member for Resources. Mr Jeff Lustig took the view that the sale of Underhill was not a 'key decision' within the meaning of Article 13 (*Document 228*) and therefore was not reserved to full Council. Mr Jeff Lustig also thought that it was not a decision which fell within any of the express constitutional reservations to Cabinet or Cabinet Resources. This was based upon a disposal value of £10,000 and not potential development value or any share that might accrue to the Council, depending upon whether, where and when the Club might relocate at some time in the future, and the future use of the Underhill site. We address these points further in section 6 of our report.
117. The Constitution delegates to the Head of Development and Regeneration, in conjunction with the Executive Member for Resources, the power to make decisions about leases of up to 30 years. The Borough Solicitor took the view that this was not relevant in this instance as the contract concerned the disposal of a freehold interest and not the disposal of a lease.
118. When the new delegated powers arrangements were set up in 1998 it was intended that all DPR decisions would be published via the Intranet. However, service areas experienced technical difficulties in using the Intranet, and despite attempts by the Regeneration Service to enter their DPRs they were not successfully published. The Regeneration Service then attempted to send reports to Hendon Town Hall so that they could be entered on the system at the centre but this proved impractical and they were asked to stop doing this. The Regeneration Service therefore reverted to maintaining paper file records of all DPR decisions at Barnet House. All the Valuer's DPR decisions since 1998 had been recorded in this fashion. The Constitution itself gives no guidance as to how decisions are to be made available to members as an alternative to the Intranet.

119. IT support for the Intranet was eventually withdrawn, pending the launch of a new internet system which formed part of new library arrangements, known as TROVE, but this was not operating in 2001. Mr Martin Hughes, Democratic Services Manager, wrote to all chief officers on 27 July 2001 (*Document 130*) setting out the need to publish DPRs as prescribed by the Constitution, the steps to be taken as TROVE was not working, and requesting colleagues to continue to produce DPRs in the normal way and forward draft reports to Ms Janet Rawlings in the Committee Services for corporate approval.
120. We have been informed by Mr Roy Goddard, Head of Democratic Services, (*Document 349, page 1*) that the DPR (Delegated Powers Report) in respect of the disposal of the freehold of Underhill was not passed to Democratic Services at any stage, either during its development or subsequently. Once the DPR decision had been made, a copy of the report should have been placed on the Valuer's DPR file at Barnet House along with other DPR decisions. The Constitution (Para. 6.10 of Part 3 (page 20)) (*Document 141*) requires non-key decisions taken by officers under delegated powers to be recorded and made available to members of the Council, either as individual or summary decisions published on the members Intranet or as a performance indicator reported to an Overview and Scrutiny Committee. This did not take place and therefore the DPR was not published in line with the requirements of the Constitution.
121. Mr Clive Medlam told us of his view that this failure in no way frustrated any call-in process for scrutiny as officer decisions made under delegated powers are not subject to that process. (*Document 319, page 45*). Had it been published as prescribed in the Constitution, members would have been alerted to the disposal and would have had the opportunity to ask questions about it. Mr Alan Williams told us that it would have been his view that the DPR should have been capable of being called in, and therefore the interpretation of the constitution taken by officers may not have been the view of members. (*Document 322, page 60*).

**DPR and valuation issues**

122. The basis for the valuation used in the DPR was set out in a file paper prepared by Mr David Stephens (*Document 237 Appendix 35*), which notes amongst other matters that
- a) The lease restricts the use of Underhill to the playing of Association Football and associated activities. There is an absolute prohibition against parting with possession or under-letting part or the whole.
  - b) If the land is now, or in the future, de-designated as Green Belt, it could alternatively be developed for residential purposes.
  - c) The current rental value of the stadium and supporters Club is circa £30,500 per annum.
  - d) The value of the land for residential development is £5,577,600.
123. The DPR specifically addresses the issue of future development value for the stadium site and how this would be shared. It will be noted that the DPR is based on the sale being made to the Company and not the Club. Various scenarios were considered and these can be distilled as follows:-

Scenario	Conditions	Sale Distribution	
		Holding Company	Council
Holding company builds new stadium in Borough, Barnet FC moves to permanent new home and Underhill sold.	Barnet FC must remain and play at new stadium for at least 10 years.	100%	Nil
Club permanently relocates to stadium outside	None (but 10 years might	40%	60%

the Borough and Underhill sold.	apply).		
Club leaves Underhill Stadium or a new stadium built within the Borough and Underhill sold.	Within 10 years.	40%	60%
Club ceases to exist and Underhill sold.	None.	40%	60%

124. The wording of the DPR is not completely clear regarding the above sale distribution. Para. 11.4 (4) of the DPR is intended to set out the circumstances in which the Holding company will receive 40%, rather than 100%, of any future development value. However, it appears to contain a typographical error, with a bracket shown in the wrong place. It states:

*“... or leaves Underhill Stadium (or a new stadium built at the Underhill location or elsewhere in the Borough) within 10 years or...*

but should have stated:

*“... or leaves Underhill Stadium (or a new stadium built at the Underhill location or elsewhere in the Borough within 10 years) or...*

125. As a result, the DPR does not state clearly to which scenario the “within 10 years” limitation applies. It certainly applies to leaving Underhill or a new stadium built at Underhill or elsewhere in the Borough, but it appears also to apply to permanent relocation outside the Borough. Mr David Stephens has confirmed that the latter interpretation was not the intention of the Council. He states that the clause was intended solely to relate to the scenario of the Club relocating to a new stadium within Barnet within 10 years and says the closing bracket was erroneously located. This position is supported by Para 11.4 (3) which deals only with the Club being permitted to remain and play at a new stadium within the Borough and does not set down what would happen if this condition were not met.
126. The effect of this erroneously located closing bracket is apparently to allow the Club to retain 100% of disposal value if it leaves Underhill after 10 years, irrespective of where it subsequently goes. No such provision was intended. Any reference to 10 years was relevant only to the scenario whereby the Club relocated to an alternative stadium within the Borough. If it did this and remained there for at least 10 years then the Club's disposal share would be 100%. If the Club left the new Borough site within 10 years then the split would be 40% (BFC): 60% (LBB). This issue is only relevant if the Club manages to secure some form of non-football redevelopment of Underhill after March 2012. The future Green Belt status of the stadium site is clearly relevant in this regard.

### **Contractual matters**

127. A copy of the DPR was sent by Mr David Stephens to the Principal Legal Assistant with a request that he prepare the necessary contract. The Borough Solicitor's office determined that Mr Steven Strange would take responsibility for preparing the contractual documentation. Mr Jeff Lustig was not involved with that decision. (*Documents 150/161*). The freehold sale of the stadium was effected through the completion of a contract between the Council and the Company. The required contract documentation was prepared by Mr Steven Strange working to instructions from Mr David Stephens.
128. A draft contract was prepared which reflected the DPR, and despatched to the Club in December 2001. Liaison between the Council and the Club's solicitors then followed as the detailed wording was agreed and associated enquiries, requisitions and searches were completed. Contracts for the freehold sale were exchanged on 27 February 2002 and completion was achieved on 27 March 2002.

129. The documents were sealed in accordance with the Council's standing arrangements under the cover of the signatures of the Mayor, Councillor Anita Campbell, and the Borough Solicitor, Mr Jeff Lustig. Representations (Document 368) have been made that Councillor Anita Campbell as Mayor did not '*take part*' in the decision to sell the freehold interest; rather, her role was to '*attest to the fixing of the Council's seal.*'

#### **Planning issues**

130. On 27 February 2002 the Planning and Environment Committee met to decide various matters including the planning application in respect of South Underhill. The Committee decided that, subject to the application not being called in by the Secretary of State for Environment, Transport, and the Regions following referral to the Government Office for London and the GLA, a number of section 106 agreements under the Town and Country Planning Act 1990 and other conditions, development could go ahead. Councillor Anita Campbell, having previously been advised that she had a conflict of interest in this development, took no part in this meeting and her position was taken by Councillor Kanti Patel (*Document 205*). Opposition to the planning application was led by BRASS (Barnet Residents Against a Second Stadium).

#### **Financial issues**

131. The financial sums in respect of the sale amount and costs incurred were paid to the Council on the due dates (*Document 15*).
132. There was no involvement of internal audit in respect of any of the Club's transactions with the Council and no business case addressing the options for the development or disposal of Underhill was prepared.
133. The Council's financial accounts duly record the transaction. Those accounts were properly placed on deposit for public inspection, and they disclose the nature of the assets held for the year ended 31 March 2002, together with comparative figures for the previous year. They do contain a typographical error, so the column headings mistakenly refer to the position at 31 March 2000 and 2001, rather than as at 2001 and 2002. This error was corrected as part of the finalisation of the accounts.

#### **Developments after the sale**

134. There have been a number of developments, enquiries and court actions since March 2002 that are pertinent to the objections:
- a) The apparent typographical error in the DPR, as noted above, was identified in May or June 2002 by the Director of Environment
  - b) The opposition to the planned South Underhill Stadium became more vocal and that opposition was represented by a group called BRASS. This group occasioned public meetings and sought to stop the planning application for South Underhill and the Club relocating. During these meetings it became known that the freehold of the Underhill ground had been sold. (*Document 219*)
  - c) Council elections took place in May 2002 and the Labour administration lost control to a Conservative administration that was not minded to support the relocation of the Club. The new administration instigated enquiries into the sale of the Underhill freehold. Mr Alan Williams stood down as Leader and was obliged to vacate his office. Mr Alan Williams has advised us that he arranged for all the official papers in his office to be shredded following advice he received from the Chief Executive's office that this was normal for those in his position (*Document 322, page 22*).
  - d) Mr Leo Boland arranged for the background to the freehold disposal to be documented and a confidential paper was compiled by officers in September 2002. (*Document 237*).

### ***Harbord inquiry***

135. Owing to the level of concern amongst members and in the press, the Council decided to arrange, via an Ad Hoc Scrutiny Committee, for an independent review. The Panel was chaired by Mr Richard Harbord, formerly Managing Director of the London Borough of Hammersmith and Fulham, and before that Chief Executive of the London Borough of Richmond, and had two other members, Mr Peter Waddington, a chartered surveyor, and Mr Samuel Jones, former Town Clerk of the City of London. The inquiry received cooperation from officers, former officers and councillors. However, the Club did not help with the inquiry and did not provide any evidence. The Panel's remit was to inquire into all relevant matters relating to the sale of the freehold interest of the Underhill Stadium. The Panel's unanimous conclusions are set out in section 5 of the report, (*Document 341*) and are summarised below:

- a) During the relevant period many senior officer changes took place and disruption occurred in communication and knowledge.
- b) Issues concerning to the Club or Underhill were not handled as a project with a supporting project team
- c) There was a lack of clarity about the Council's aims and what they hoped to achieve
- d) There was no evidence of malpractice, however, the Council's dealing with the Club since June 2000 was characterised by confusion as to motives
- e) There was no attempt to let the public know what the Council's position was regarding the sale of land
- f) There was no reason why the report relating to the sale of Underhill could not have been submitted to the July 2001 Cabinet meeting
- g) The decision to sell the freehold should have been taken by Members and not an officer DPR
- h) It was amazing that no one questioned the delay between the DPR being raised in July 2001 and not approved until November 2001 and that the files are strangely silent on the delay
- i) The three statutory officers involved with signing off the DPR did not engage effectively with the issues involved.
- j) The DPR did not adequately deal with the potential release of speculative development value
- k) Mr Alan Williams and Councillor Chopra relied on the comments and advice of the Head of Paid Service and Monitoring Officer in respect of the DPR. The Panel accepted that this was a reasonable position for them to take.
- l) Throughout the process, Mr Alan Williams made it plain that the Council should protect itself should the Club leave the Borough with the land reverting back to the Council. The Leader was not told that this could be achieved if the land was sold to the club on the terms being negotiated.
- m) The Panel did not understand why the Council felt it necessary to sell the freehold to the Club.
- n) It is clear that in September 2001 members should have been informed about the sale of Underhill to a holding company and be asked if they wished to continue to go down this route.

- o) In the Panel's view the error in the DPR was typographical. In the light of the political sensitivities the officers should have been more diligent in ensuring key clauses were properly drafted and Mr David Stephens should have sought advice from the legal department.

### **High Court action**

136. The Council unsuccessfully sought rectification of the transfer and supplemental deed, but not of the agreement for sale in the High Court. It therefore addressed only a limited range of issues. The Council's argument was that the sale was not at the agreed terms and that the contract should be rectified. Effectively, it sought a declaration that the transfer was void as a consequence of section 123(2) LGA 1972. AG Bompas QC, sitting as Deputy Judge in the High Court, in turning down the Council's request made a number of comments in his judgement of 13 February 2004 (*Document 280*) that may be considered pertinent to this matter, although we are advised by Leading Counsel that these points should be regarded as observations rather than evidence:

#### *Paragraph 18*

*Barnet LB got a poor bargain, a fact known to Holdings (the Club). Barnet LB was 'in the position of a trustee in relation to the land which it holds on behalf of the community' ..... Barnet LB did not act in relation to the sale of the Underhill Ground with care and Holdings has taken advantage of that.*

#### *Paragraph 127*

*I also accept that none of the Contract, the Transfer and the Deed accurately set out the terms of the accord reached in July 2001. In particular I have no doubt that back in July 2001 the ten-year limit to the claw-back, and the ten year limit to the operation of the restrictive covenant, were not contemplated by any of Mr Stephens, Mr Slyper, Mr Kleanthous or Holdings as part of what was to be the terms of sale of the Underhill Stadium.*

137. In referring to the DPR, at paragraph 133 AG Bompas QC stated 'If, through error on Mr David Stephens' part, the document did not in fact communicate what Mr David Stephens intended that it should, that error does not alter what was understood and intended by Barnet, in contrast to Mr David Stephens.'
138. The Council's action failed in the light of section 123(2) of the Local Government Act 1972. This, amongst other things, had the effect of providing that transactions such as that in question would not be invalid because of a lack of ministerial consent.

### **Court of Appeal**

139. The Council took the case to the Court of Appeal, whose judgment was made on 30 July 2004. The Court of Appeal dismissed the appeal, on the basis that the transfer had been properly authorised by the Council and at the time of the execution of the transfer both parties had been fully aware of the terms to which they were agreeing. (*Document 284*).

### **Mr Brian Reynolds's review on behalf of Mr Victor Lyons, the then Leader**

140. The Council decided a further review was required to examine matters raised in the previous reviews and whilst it was in the name of Mr Victor Lyons, the then Leader, it was led by Brian Reynolds, Deputy Chief Executive. Its findings were reported to Cabinet on 1 June 2004. The conclusions of that review were, in summary:
- No firm conclusions could be drawn why the draft Cabinet report had not been tabled in July 2001.
  - The decision to use a DPR was acceptable in principle
  - The delay in dealing with the DPR could be attributed to low priority, pressure of work and lack of chasing by the Club

- The Council drifted into the disposal rather than making an objective decision
- Officers signing the report defended their position in the context of their responsibilities
- The DPR was generally low on detail and difficult to understand
- Mr David Stephens expressed concerns relating to the proposals to sell the freehold but these were ignored.
- If the sale had been effected on the terms originally envisaged the sale would have been for the best possible consideration
- Whilst there was a view that best value had been achieved, it is acknowledged that it would have been better to have sought the Secretary of State's dispensation for the disposal
- It judged that disposal on the open market was not viable in the situation before them owing to the adverse reaction it would have provoked from the Club
- Mr David Stephens was reported to have queried the sale to a Holding company but was overruled by 'somebody' but there were lapses in checking out the status of the Holding company
- A set of proposals have been compiled to avoid any further similar problems arising

***Disciplinary action***

141. The Council took disciplinary action against Mr David Stephens in respect of his non-compliance with Council's procedures relating to the DPR. Mr Stephens received an official warning.



# Section 6 – Our Conclusions on action under s17 Audit Commission Act 1998

## Introduction

142. In this section we set out our conclusions and the reasons for the actions that we propose to take, formulated on the evidence that is before us, under section 17 of the Audit Commission Act 1998. We noted earlier that we accept that s17 (2) a) and b) provides only that a court may grant an application by the auditor for certain remedies where expenditure is involved and that a loss of potential income does not constitute expenditure for these purposes. However we believe that it is important to establish whether the Council has acted lawfully, and to consider what other actions we should take.
143. Our approach has been to address four fundamental issues:
- Was the consideration obtained by the Council for the freehold of the Underhill site the best reasonably obtainable?
  - Was the decision one that a Council acting in a reasonable manner could have reached?
  - Was appropriate authority delegated to those who took the decision?
  - Was the transaction entered into the same as that which was authorised?
144. We then turn to the main issues raised by the objectors, to the extent we have not already addressed them, and consider each in turn. Our view is based upon this analysis.

### **Was the Consideration the best reasonably obtainable?**

#### *Relevant law*

145. The fundamental statutory provision on this issue is contained in section 123 of the Local Government Act 1972, which states in respect of the disposal of land by principal councils that:
- 1) *Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.*
  - 2) *Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.*
146. Whilst section 123(1) therefore confers wide powers on the Council for the disposing of its land section 123(2) limits these by effectively giving statutory force for these purposes to the Council's fiduciary duty. This is of course the Council's duty to act effectively as a trustee of public monies.

147. The courts have interpreted this provision in this light. For instance in *R v. Middlesborough Borough Council ex parte Frostree Limited* ( Unreported. High Court, 16 December 1988) Roch J noted the observations of Bingham LJ (as he then was) in *Tomkins and Leach v. Commission for the New Towns* ( Court of Appeal, 25 October 1988) concerning a provision similar to s123(2) in section 37(3) of the New Towns Act 1981 that the policy of that provision is to ensure that so far as reasonably possible, '*public assets are not sold at an undervalue save on the authority of the Secretary of State. The public interest underlying the policy is obvious*'.
148. Roch J consequently considered that the elements of consideration required to comply with section 123(2) must '*have a commercial or monetary value which is capable of being assessed by those expert in the valuation of land and does not include elements which do not have a commercial or monetary value for the vending council*'.
149. This 'trustee' approach was followed by Lightman J on 1 July 1999 in *R v. Pembrokeshire County Council, ex parte Coker* and another [1999] 4 All ER 1007 where the Court found that (on the facts of that case) the Council could not without obtaining the consent of the Secretary of State allow the perceived social value of job creation to be counted towards the monetary value it had to obtain for the disposal.
150. Again in *R (Lemon Land Ltd) v. Hackney London Borough Council* [2001] LGR 555 Lightman J said that: '*the requirement that the elements in the consideration should be capable of having a commercial or monetary value to the local authority reposes on the local authority the responsibilities of a trustee of its land and enables its stewardship to be effectively audited*'.
151. We therefore consider that to comply with s123(2) of the 1972 Act (in the absence of the consent of the Secretary of State) the consideration for the disposal of land must have a commercial or monetary value (or a value capable of being assessed by those expert in the valuation of land) and that social elements not having such value are to be disregarded.
152. We have also considered the precedents available from instances in which advice has not been accepted or proceeded on. We note *R. v. Darlington Borough Council, ex p. Indescon* (1990) 1 EGLR 278, where Kennedy J. held that in principle a court was only likely to find a breach of section 123 (2) if a council had (a) failed to take proper advice; or (b) failed to follow proper advice for reasons which cannot be justified; or (c) had followed advice which was so plainly erroneous that in accepting it the Council must have known that it was acting unreasonably.

### ***Analysis of the transaction***

153. We have found it helpful first to analyse the nature of the transaction. We perceive three distinct parts:
- The immediate payment of £10,000 by the Company to the Council
  - The imposition of a covenant restricting the use that could be made of the land
  - A mechanism for discharging the covenant that would secure for the Council a share of the open market value of the land with vacant possession, in certain circumstances
154. The consideration therefore has an element that is both immediate and of a fixed sum, and a further part that may or may not be received, and cannot at present be quantified. In assessing the value of the latter, it is relevant to consider both the likelihood of it arising, and the sum that might be involved.
155. The freehold interest was of value to the Company, and hence the Club, largely as it removed the restrictions imposed by the lease. Three such restrictions seem of particular relevance; that the site might only be used for playing association football, the repairing obligations and the rent due.

156. The question of value also turns on the issues facing the parties involved. The Club faced a pressing need to develop its ground further, either at its present location or on an alternative site, as the current ground arrangement would from 2004 not satisfy the requirements of the football authorities. Secondly, the potential for the site of the stadium to be de-regulated for planning purposes was relevant to its future value, particularly in an alternative use. Such alternative use was not permitted under the lease. Other factors for the Club included the repairing provisions of the existing lease, and the small annual rental. It thus had a considerable incentive to negotiate with the Council for the freehold.
157. We are of the view that a loss will have arisen if the value of the Council's interest at the date of disposal is considered to be greater than the value of what is received. It follows that we need to establish the worth of the grant of a freehold interest in the site to the Club, in the circumstances which then applied. Against that we will set the £10,000 plus the potential further sums due under the provisions for sharing development gains.

**Valuation advice**

158. We have considered the advice on valuation matters obtained after the event by the Council, and we have also taken further advice of our own from Savills, Quantity Surveyors.
159. Mr Eric Shapiro was appointed as an independent valuer by the Council in the autumn of 2002 to review the disposal. In his report to the Council, Mr Eric Shapiro expressed the view that £10,000 did not represent the open market value of the Council's freehold interest in the Underhill Ground. His view was that if offered in the open market, subject to and with the benefit of the lease, "*it would have achieved a price very significantly in excess of £10,000*". Mr Eric Shapiro reasoned as follows:

*"Purchasers in the market would have considered that redevelopment for residential purposes would be a realistic possibility if Barnet Football Club vacated the land. If this were to happen Barnet Football Club, or its Receiver or Liquidator (as appropriate), would then have joined with the freeholder with a view to selling for development at the best price achievable. The open market would currently appreciate that planning permission did not exist for residential purposes, that the site was zoned as Green Belt, and that Barnet Football Club would only seek to vacate if they could not redevelop on the site (with or without acquiring additional land) or if they could no longer function as a Football Club. Thus whilst buyers in the market would not have paid a price which reflected the residential development value they would have paid a price to reflect hope value".*

160. He went on to say that he thought the "minimum price" which would have been achieved if the Club were not in the market themselves would have been in the region of £100,000. This figure, he said, could not be established as the product of a valuation calculation, but was his estimate based on his knowledge of the market and perception of speculators operating in this market.
161. Mr Eric Shapiro's argument is convincing, regardless of whether his "minimum" figure of £100,000 is too high or not. At the end of 2001, we are of the opinion that it was likely that
- there was some prospect of development being allowed at some time in the future,
  - the Club was in the market for the freehold; and
  - the freehold interest could be an important lever.
162. In these circumstances, our view is that the sum of £10,000 could have been bettered if the freehold had been placed on the open market without any restriction, leaving aside the typographical error in the DPR.

163. However, when the freehold was disposed of, the Council sought to reserve for itself a right to share in any future development value. The Council did not establish whether the price achievable on the open market would have been greater than £10,000 had the freehold been disposed of by the terms provided for in the Contract - that is, a disposal subject to a possible claw-back of 60% of development gain (a) limited to ten years and (b) excluding certain cases where a gain was made within the ten years.
164. We have taken our own advice on valuation from Messrs Savills, quantity surveyors. We are informed that in their view a local authority valuer should have valued the property using the same principles as adopted by an independent / private valuer in the valuation of a private asset. Savills explain that the valuation should have been undertaken in accordance with the relevant RICS standards, which in 2001 were the Practice Statements, Guidance Notes and Appendices of the RICS Appraisal and Valuation Standards published in 1995, known as the Red Book
165. Savills also comment that in their view there are three potential valuation scenarios:
- The value of the property on the assumption that there were adequate and proper mechanisms to capture the added value
  - The transaction as it was contracted, with imperfect overage provisions
  - The value of the Council's interest on the assumptions that there would be no attempt at any further share of value
166. Against these bases, Savills speculate that the price that might have been achieved through an unrestricted sale – scenario 3 – would be £250,000, while on the basis of the restrictions actually imposed a bidder might have reduced his final offer to £100,000.
167. Messrs Savills also explain that the Club would be regarded as a 'special purchaser', defined by the RICS as someone with a particular reason for acquiring an interest in a property, because of special circumstances. They say that the RICS rules require that for determining market value a special purchaser should be ignored, as a sale to that party would involve a marriage value. Their report adds *'there are no rules (in valuation or in real life) regarding how marriage value should be apportioned, and it is impossible to predict how an individual will behave in response to any particular opportunity to purchase a property.'* (Document 373 page 3)
168. We note also that the High Court reached a view on the evidence then before it that the disposal proceeds did not amount to best consideration. It based its decision on the facts that the amount received was £10,000 plus any further sums that may be forthcoming if the Underhill site is redeveloped in the period to 27 February 2012 and the proceeds are not invested in a new football stadium. After 27 February 2012 any additional development profits will vest in the Holding company of the Football Club as will any sums arising before that date if they are invested in a new stadium built within Barnet.
169. Our conclusion based on this analysis is that the Council did not obtain best consideration from the disposal of its freehold interest in the Underhill stadium, and it did not obtain the sanction of the Secretary of State. The transaction is therefore contrary to s123 of the Local Government Act 1972.

**Was the decision one that a Council acting in a reasonable manner could have reached?**

170. In addressing this point we have asked ourselves what the Council was trying to achieve through this deal, the powers it believed it had available and whether its approach towards achieving those aims was reasonable.

171. The evidence indicates that the Council's principal intention was to encourage the Club to keep its main stadium in the Borough. We have seen a press release from 1998 (*Document 3*) that affirms that was the long-held policy of the Labour administration of the day, and this view was confirmed during our interviews with the Leader (*Document 322, page 24*). The Club had made repeated statements, some of them in public, that it would have to consider relocation options outside the Borough unless the Council cooperated with it, and we accept that this was seen by the Labour administration as undesirable.
172. We consider that in exercising its powers of disposal under s123 of the 1972 Act the Council must act reasonably and in good faith and upon lawful and relevant grounds of public interest. We accept that the Council's apparent overall intention that the Club should remain within the Borough may constitute a proper purpose, since it would lead to identifiable benefits to the Borough. The thinking behind the Council's approach is however much less clear. We have sought to understand in particular why the Council saw it necessary to sell the freehold interest at all. We have also asked how the 60:40 split in any future surplus was derived, regardless of how the legal contract was ultimately drawn up.
173. We also note that under the terms of the 1986 lease, title would revert to the Council if the Club were wound up, or ceased to exist, or if it ceased to occupy the land. The Council would of course also obtain a freehold interest at the end of the lease period. During the period in question the Club was in debt, and we understand that it was able to continue to trade only because of the financial support of Mr Tony Kleanthous. These circumstances mean that there was some advantage for the Club to explore how it might realise value from its leasehold interest, which in turn would have had an impact on the value of the Council's interest.
174. We have found little evidence to support a conclusion on the rationale for the Council's approach. The Club had pressed hard since at least November 2000 for a freehold transfer. Mr Jeff Lustig is recorded as representing that any such transfer would have to be at market value, but there is no evidence that he or any other Council representative considered why the transfer was in the best interests of the Council. During our interview with Mr Alan Williams (*Document 322, page 36*), he made it clear that he was concerned the Club should not obtain '*huge windfall benefits*', and that '*the most we would support was a relocation elsewhere in the Borough, away from Underhill.*' Later, (*ibid page 41*), in response to a suggestion we put to him, Mr Alan Williams denies having been aware of or having discussed with the Club that it wished to acquire the freehold interest to enable it to raise further finance.
175. It is possible to speculate that the motivation might have been either directly to permit the Club to expand on that site, or as a means of transferring funding to the Club, but neither has been clearly articulated in any documentation we have seen, and those we have interviewed have not clarified the point.
176. The split of any potential surplus appears to have been derived in the course of negotiations between the Council and the Club. A briefing note of 30 May 2001 (*Document 99*) by Mr David Stephens provides an outline of discussions that were held between himself and Mr Graham Slyper of the Club on and after 12 April 2001. Mr Graham Slyper is recorded as feeling there should be an agreement as to how much of the proceeds of a sale should be retained by the Club if it sold Underhill for development. He also provided draft heads of terms which contain a number of the provisions ultimately found in the final agreement. However, no figures are shown for the respective proportions. Mr David Stephens comments '*this is intended to be the subject of discussions between Tony K and the Leader.*' The same note records his view that '*Graham Slyper has been pressing for the sale to the Club of the freehold interest in Underhill so that it can be used as collateral for a bank loan.*' He also comments that Mr Graham Slyper '*is also pushing for consent to assign the current lease to a holding company to avoid land trading restrictions to be imposed by the Football League.*'

177. We noted earlier that Mr Jeff Lustig had discussed with Mr Andrew Barry-Purssell, in the context of the further development of the Underhill site, the powers available to the Council under s2 Local Government Act 2000 – the 'well-being' powers. *Document 79* shows that Mr Jeff Lustig had some reservations, particularly:

- The powers are subject to the principles of Best Value
- The Council would have to '*put in place the sort of restrictions on re-use and development profits that you have mentioned*'

178. A note from Mr Jeff Lustig to a member of his staff, (*Document 77*), provides some further detail of the understanding of the available powers. He comments in relation to the potential grounds of the expenditure bringing social or environmental benefits, that '*on the social side there will be definite improvements for the two organisations who will get better facilities.*' He continues '*On the environmental side, the site, which is presently unattractive and untidy, will be physically improved and should bring an immediate improvement to the area in terms of appearance.*' Mr Jeff Lustig says that he has pointed these matters out to Mr Andrew Barry-Purssell, who in turn said there would have to be a detailed cost-benefit analysis. Further, Mr Jeff Lustig adds that '*this is probably something which we would want to discuss with the external auditors before the event.*'

179. We have considered whether the Council's approach was reasonable. There are two matters in particular that do not appear to us consistent with the intention to secure the Club's future in Barnet:

- The arrangements provide for the Company to receive 40% of the development value of the land if the Club moved outside the Borough within 10 years or if it ceased to exist. This provides an incentive which the original lease did not for the Club to cease playing at the Underhill stadium
- By transferring the Council's interest to the Company, rather than the Club, the Council made the Club's position more difficult than it was under the lease, since it gave the Company an incentive to realise for itself some part of the development value

180. In neither case have we received a clear justification for the Council's actions.

181. In considering the reasonableness of the decision we have sought to weigh the perceived advantages against the costs to the Council. We have not received any clear indication, either during our interviews with those involved, or from the relevant documentation of what the Council saw as the benefits of the sale. In particular, we have not been made aware of any cost-benefit analysis that was undertaken in line with Mr Jeff Lustig's note, nor any discussions with the external auditor.

182. Our conclusion is that the Council did not act reasonably in taking the decision to sell the freehold, given the rationale that has been put forward for this disposal. There is no evidence that there was any consideration of how the sale would contribute to the Council's articulated policy, and its apparent aims of assisting the Club. We accept that the transaction was one that the Council had the power to enter into, but in this case it failed to ask what purpose it served. Further, we have seen no analysis to demonstrate that it was consistent with the achievement of its statutory duty to achieve best consideration. We are concerned at the apparent absence of any debate or consideration of the benefit of foregoing further immediate receipts in return for possible future sums.

### **Was appropriate authority delegated to those who took the decision?**

183. The decision to dispose of the freehold of Underhill was taken through the Council's delegated powers report procedure. To establish whether this was appropriate we have considered the broader requirements of the Council's constitution, and then the specific circumstances in which a DPR is permissible.

184. The Council's Constitution, approved in October 2001 (*Document 356*) contains a section called 'Rules for the Disposal of Land and Real Property.' It notes that holdings of land are a corporate resource, and sets out the following provisions if it is decided that a property is no longer required:
- The Head of Development and Regeneration will consult all Chief Officers on possible alternative uses of the property (Rule 3)
  - The Head of Development and Regeneration will report to the relevant body on the disposal, including the uses to which the property might be put and the method of disposal (Rule 5)
185. We have seen no evidence that this happened and consequently our view is that these steps were not followed in this case.
186. The Constitution also establishes in section 3 the Responsibility for Executive functions (*Document 141*). It gives (at 6.5) to the Head of Development and Regeneration, in consultation with the Cabinet members (sic) for Resources the power to make decisions about:
- leases of not more than 30 years
  - licenses (sic) and easements
  - acquisition of land for under £5,000 and
  - disposal of interests in property for consideration not exceeding £100,000 plus proper fees
187. There does not appear to have been any consideration of whether this decision fell within the description of '*disposal of interests in property*.' The Delegated Powers Report was drafted by David Stephens in July 2001, in consultation with the relevant Cabinet member, Cllr Danish Chopra. Three senior officers then received it, Mr Leo Boland the Chief Executive, Mr Jeff Lustig as Monitoring Officer and Mr Jeremy Jaroszek, a Strategic Director. In October and November 2001 it was finalised, apparently agreed by the Leader and it was signed by Mr Paul Chadwick as Acting Head of Development and Regeneration on 13 November.
188. Article 13 of the Constitution provides that '*key decisions*' are reserved for the full Council.
- (i) A "*key decision*" means an executive decision which is likely:-
- (a) to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function to which the decision relates; or
- (b) to be significant in terms of its effects on communities living or working in an area comprising two or more wards in the borough.
189. The definition of a "key decision" for the purposes of a local authority's constitution is provided in statute by Regulation 8 of the Local Authorities (Executive Arrangements: Access to information) Regulations 2000. What seem to be the relevant elements are given below:
- An executive decision which is likely... to be significant in terms of its effects on communities living or working in an area comprising two or more wards in the Borough*
190. Mr Jeff Lustig was consulted on whether this decision constituted a key decision (*Document 228*). His conclusion was that it did not, although he describes this view as '*really just initial thoughts*', and it is apparent from the tone of his note that this was not a straightforward issue.
191. The failure of the Council to ensure that the DPR was publicised as required by the Constitution was noted earlier.

192. In our view the main areas of concern over the decision making process are first, whether it was appropriate to regard it as a disposal of an interest in property for a consideration not exceeding £100,000, and second whether this should have been regarded as a key decision, and thus been determined by the full Council.
193. We do not consider the immediate monetary value of the disposal was significant in relation to the Council's budget. However, in our view the issues involved in this case were of significance, within the meaning of Article 13 1 b) of the Constitution, particularly in terms of their impact on local communities. The use of delegated powers therefore seems inappropriate. However, in the context of a section 17 objection, we need to assess whether the use of the delegated powers report was capable of being a legally sound procedure. We consider that the decision was capable of being regarded either as a key decision or not, as the definition allows discretion on interpretation.
194. This means that the decision was capable of being dealt with under delegated powers and as such, the transaction (if properly constructed under the constitution) was not inevitably inappropriate. However, given the political sensitivity, the commitment to forego contingent assets and that the value of the consideration as a whole was higher than the stated £10,000 we take the view that matter should have been considered by members in Cabinet.
195. Our enquiries indicate that the Council considered the proper value to be included on the DPR, which itself sets out a number of relevant factors. However, there is no indication that the Council asked whether this might invalidate the use of the DPR process. For example, Mr Jeff Lustig's note to Mr Graham Beattie (*Document 228*) talks only of the initial payment of £10,000.
196. We have considered whether it was reasonable to regard this transaction as being the disposal of an interest in property, and have concluded that it was.
197. We would agree that there is no obvious method of taking account of a future value, although it would presumably require a view of the likelihood of events arising and of their impact. We have seen no evidence that any account was taken of future consideration.
198. In all the circumstances, although our own view is that it would have been more appropriate for the matter to have been determined by members, not least because of the greater transparency that would have resulted, sufficient discretion was available to the Council to allow us to conclude that those taking the decision to dispose of the freehold of Underhill had the authority to do so.

**Was the transaction entered into the same as that which was authorised?**

199. The disposal of the freehold was effected by means of an agreement dated 27 February 2002, together with a supplemental deed of the same date (*Document 237, Appendices 39 and 40*), which we have regarded as forming the transaction. The DPR imposes a number of conditions on this disposal, including:
- (3.1) The sale to a holding company of the Club is to be subject to safeguards for the Club having future use of the stadium and to the Council sharing in any future development value
  - (4.1) The matter is to be completed to the satisfaction of the Borough Solicitor
  - (11.4.1) The purchase price will be £10,000
  - (11.4.3) If the holding company at its own cost builds a new stadium facility within the Borough and the Club moves to that facility as its permanent ground, then the full value from any sale of the Underhill stadium shall be entirely for the benefit of the holding company, and the Club should be permitted to remain and play at the new facility for a period of 10 years
  - (11.4.4) Alternatively, if the Club permanently relocates to a stadium outside the borough or leaves Underhill stadium (or a new stadium built at the Underhill location or elsewhere in the borough) within 10 years, or ceases to exist, and the Underhill stadium is sold, the holding



company will be entitled to 40% of the net proceeds of sale in excess of the base value of the facility as a football stadium and at the time of disposal, with the Council being entitled to 60%

200. The ambiguity within the DPR at clause 11.4.4, over the sum due on the permanent relocation outside the Borough, has already been noted.
201. The Borough Solicitor's department used this report, we understand, to develop the legal documentation required. An Agreement for the sale of the land was entered into by the parties on 27 February 2002, together with a supplemental deed of 27 March 2002 dealing with the overage payment.
202. In comparing the provisions of the two deeds against the delegated powers report, a small number of differences are evident. The phrase 'permanently relocate' in 11.4.4 of the DPR is interpreted in the deeds as *'the Football Club playing its first team Association Football fixtures at a site or sites other than the property for a continuous period in excess of ten years or having the settled intention of doing so for the foreseeable future.'* The cut-off period after which the supplemental deed ceases to have effect is fixed at 10 years from the date of the deed. The introduction of the 10 year period appears to have been the principal issue to have emerged from the negotiations in the summer of 2001.
203. The main difference is in the event that triggers the payment of the further consideration. Both 11.4.3 and 11.4.4 of the DPR make it clear that the sums involved become payable on the sale of the stadium. However, the transaction as eventually completed involves a payment falling due only on a request from the Company that it be released from the covenant.
204. The other matter of substance is the consequence of the Club moving to a new stadium elsewhere in the borough. The supplemental deed is clear; at clause 2.2 it states  
  
'the purchaser will not be required to pay the further consideration in the event that the Football Club permanently relocate to a stadium built by the purchaser or a direct subsidiary company within the Borough boundaries of the London Borough of Barnet...'
205. Further provisions then deal with the facilities the new stadium must have, and that the clause will only be of effect if:  
  
'planning permission is granted in respect of the Property as an exception to Green Belt policy or the Green Belt designation in respect of the property is removed.'
206. By contrast, the DPR is ambiguous, although we have no reason to think it deliberately so. It is also silent on the implications of any change in Green Belt status.
207. Our view is that the ultimate agreement provides for payment at a point different from that set out in the DPR. Elsewhere, ambiguity in the wording of the delegated powers report resulted in a transaction that did not fully reflect what was intended. In all other respects we consider that the contract entered into was the one authorised.

## The objections

208. We have considered three objections that allege that the item of account in respect of the disposal of the freehold interest in the Underhill stadium was contrary to law and did not conform with the requirements of section 123 of the LGA 1972. Each of the objectors has asked that we take action under section 17 of the 1998 Act and apply to the Court for a ruling that the item of account is contrary to law.
209. The objections by Mr Mike Dawson, Mr David Miller and Mr Andrew Markey are not in identical terms but relate to the same transaction. Their principal arguments in support of the objections are summarised below.

### Summary of objectors' principal arguments

- a) *In order to comply with section 123 of the LGA 1972, the proceeds from the disposal of the freehold interest must represent best consideration. It is contended that they did not, although officers were well aware of the statutory requirements in respect of land disposals.*
- b) *Clause 7 of the Overage Payment Deed (Cut-Off Period) limiting the Council's right to a claw back payment to ten years was incompatible with the justification for the £10,000 'down payment'. To comply with section 123, there should have been no limitation in time.*
- c) *The sale contract failed to take into account the restrictive covenants of the original lease to BFC thereby depriving the Council of the value of its asset.*
- d) *There was no attempt by the Council to advertise the sale of the freehold in order to obtain best consideration*
- e) *Case law shows that speculative value should have been considered (Montlake and others v Lambert Smith Hampton Group Ltd - May 2004) (Francis v Barclays Bank plc - December 2004)*
- f) *The possible de-designation of the land from green belt which was actively being sought at the time was not properly taken into account*
- g) *There was no attempt by the Council to seek an independent valuation*
- h) *Adequate safeguards in respect of future development gain were not incorporated in the disposal agreement*
- i) *The sale was not capable of being dealt with by a delegated powers report as sale of assets over £100,000 not permitted under delegated powers*
- j) *Sale of property with a lease in excess of 30 years may not be approved under delegated powers:*
- k) *The sale was not reported to Members as required: action taken under delegated powers as "urgent" must be reported to Members within 48 hours; this did not happen; the failure was blamed on technical problems with the Council's intranet, but other methods existed for Members to be advised which were not used.*
- l) *The sale should have been approved by Members as it breached the Council's stated policy on green belt land.*
- m) *The sale should have been treated as a 'key' decision and approved by Members:*
- n) *The sale was politically motivated as BFC had threatened to move out of the Borough if their requirements were not satisfied*
- o) *The previous Administration was fearful of the political consequences if BFC moved away and they (the Council) were blamed:*
- p) *Deputy Chief Executive claims that the contractual agreement to allow BFCH to keep 100% of the Underhill value if a new stadium was built in the Borough was the expressed desire of the previous Administration. (e-mail dated 26th April 2004):*

- *Who requested this clause in the contract and why?*
- *Where was the political authority to allow it?*

*q) The conclusions of the Harbord Land at Underhill Inquiry (LAUI) conclusions support the view that the sale had been mismanaged, as it had concluded:*

*There had been “a major breach of the democratic process.”*

*If the decision had been taken by Members, it would have been subjected to scrutiny and the errors might have been noticed.*

*The three Statutory Officers, Leo Boland, Jeff Lustig and Clive Medlam did not effectively engage with the issues involved.*

*Leo Boland told the enquiry it had not seemed “a great issue to sell a lease to a long leaseholder”. (The sale was not to the leaseholder and even a cursory reading of the documentation would have revealed this.)*

*Leo Boland should have asked more questions than he did.*

*The Council should have sought dispensation from section 123 Local Government Act 1972.*

210. Many of these issues have of course already been addressed in the course of our own investigation. However, for completeness we express below our conclusions on each of the issues.

### **Consideration of the objection**

211. We have considered each of the principal arguments advanced by the objectors. In the following paragraphs we comment on each matter, using the summary that appears after paragraph 207.

*a) The sale did not comply with section 123*

212. We consider this point at paragraphs 145 to 169. In our opinion the Council did not obtain best consideration from the disposal of its freehold interest in the Underhill stadium, and it did not obtain the sanction of the Secretary of State. We agree that the transaction is therefore contrary to s123 of the Local Government Act 1972.

*b) The Overage Payment Deed is incompatible with the down payment of £10,000*

213. We do not accept that section 123 requires that there should be no limitation to the Council's right to a claw back payment. It is generally agreed that an error was made in the wording of the final contract that means it did not properly reflect what was intended

*c) The sale contracts failed to take into account the value of the restrictive covenants*

214. It is argued that the consideration for the sale failed to take into account the restrictive covenants in the 1986 lease. The original lease, amongst other matters, restricted the use of the Underhill site to the playing of association football and ancillary activities. This restriction effectively prevented the leaseholder from disposing of the site for development purposes even if the site were removed from green belt (other than with the consent of the freeholder). The objectors take the view that whilst this restriction applied, the value of the site was limited and the removal of the clause thus had significant value to the Club. The position is that once the freehold was sold, the lease vested in the Company and the covenants in the lease, whilst still in place, were unlikely to be used to prevent development taking place. Our view is that this should have been a factor in determining the best consideration that the Club would be prepared to pay. Whilst this is mentioned in the documentation concerning the negotiation it is not evident that it was given the attention it merited in the valuation process.

*d) The Council should have advertised the sale of the freehold*

215. The objectors suggest that the sale should have been advertised and independent advice on the valuation obtained. Based on our experience of local authority practice, we consider that generally land disposals should be advertised but that need not always be the case. In some instances where the marketability of a site is more difficult or where there is only likely to be one entity interested in the site, a negotiated sale to a single purchaser is not incompatible with the legal requirements. In the situation involving the Underhill sale, there is no evidence that any consideration was given to selling the freehold to any party other than the Club. The purpose of the sale was to assist the Club and, whilst the Council may argue otherwise, not to raise capital receipts.

216. It is uncertain whether the sale of the freehold would have attracted interest from any parties other than the Club although we believe that it might have. The presence of an active market in such assets is supported by the valuers' advice available to us. The special factors such as the lease covenants would suggest that the value of the freehold to the Club would be greater than to any other party who would have a freehold of a property with a sitting tenant with rights of occupation subject only to a modest rent extending for 86 years.

*e) Case law shows that speculative value should have been considered*

217. A further point put to us by Mr David Miller is that case law shows that the speculative value should have been considered in setting the amount of the consideration. It is also put to us that the possible de-designation (which was actively being sought at the time) was not properly taken into account. We accept that in considering the development potential, a number of future events including both de-designation and planning approval were relevant factors in determining best consideration. We believe that the Council was seeking to achieve this with the claw back provisions which, if achieved properly, had the potential to satisfy the legal requirements.

*f) The potential de-designation from green belt was not properly taken into account*

218. The DPR does explain that the Underhill site had green belt status and the claw back clauses had been designed to protect that the Council. If the DPR had not contained a typographical error then arguably the provisions in the sale would have protected the Council against an element of the financial loss. We have noted earlier our view that the Council did not clearly articulate the rationale for agreeing that the Company should retain a proportion of any development gain. We do not agree with the objectors that the valuation did take a false premise in respect of green belt status.

*g) There was no attempt to seek an independent valuation*

219. In the exceptional case that land sales are being negotiated with a single purchaser, it is our view that good practice would be for an independent valuer to be involved. We agree with the objectors that the Council departed from good practice in the way the sale was processed and negotiated.

*h) Adequate safeguards in respect of future development gain were not incorporated*

220. The Council's intention was that the overage provisions would provide some safeguards in this event, but it is generally accepted that a typographical error occurred and this led to financial loss.

*i) The sale was not capable of being dealt with by a delegated powers report as the assets involved had a value of in excess of £100,000*

221. We consider it is arguable whether the assets involved had a value of in excess of £100,000. However, in view of the political sensitivity of the matter, we consider that it should have been considered by the Council

*j) Sale of property with a lease in excess of 30 years may not be approved under delegated powers*

222. The objectors have drawn to our attention that under the Constitution the sale of property that is subject to a lease in excess of 30 years is not permitted under delegated powers. The Council's position is that the transaction concerned the sale of a freehold interest and therefore the restriction in the constitution relating to long leases did not apply. We do find that it is anomalous that this transaction involved the foregoing of a lease of over 30 years. It is not a matter that we need to address given the other conclusions we draw, but we are of the view that the ambiguity in the constitution should be addressed.

*k) The sale was not reported to Members as required within 48 hours*

223. We accept the views of officers that the primary reason for the failure to report the use of the DPR was the failure of the Council's intranet. While we agree that the DPR was not placed on the valuers' DPR file at Barnet House, we have received no representations that this limited members' opportunity to ask questions, and we note that decisions taken by officers using the DPR route were not subject to call-in.

*l) The sale should have been approved by Members as it breached the stated green belt policy*

224. We have not identified any formal requirement for the sale to be reported to Members on this ground alone. However, we believe it would have been good practice for it to have been so approved.

*m) The sale should have been treated as a key decision*

225. It is put to us that the sale should have been considered by members and not dealt with by a delegated powers report. We take the view that there is sufficient latitude in the Council's and the statutory definition of a 'key decision' to enable this question to be answered either way.

*n) The sale was politically motivated*

*o) The previous Administration was fearful of the political consequences if BFC moved away*

226. We have considered these two issues together. We take 'politically motivated' to mean that it was designed to secure political advantage as opposed to meeting the aims and objectives of the Council. We believe that the sale in part was intended to deflect the Club from pursuing its stated intent of looking to the possibility of moving out of the Borough. That might have attracted adverse publicity, suggesting that the Council was not helping the Club. We are aware from statements made to us by Mr Alan Williams and Councillor Anita Campbell that it was the adverse publicity that occasioned the consideration of Barnet Football Club matters by the Labour Group (*Documents 321 and 322*). The Council officers were aware that they needed to act in a manner that avoided criticism being aimed at the Council, in relation for example to unnecessary delay. (*Document 173*) In a period running up to elections in May 2002, it is our view that adverse publicity would have been perceived as politically damaging.

227. However, the evidence we have seen shows that it had been a long-standing element of Council policy to assist the Club in its aspirations to find a new ground. These attempts had extended over the previous 4/5 years and many officers had been involved. There was no secrecy over those efforts and the Labour administration's wish to support the Club was well known and evidenced. Mr Alan Williams informed us (*Document 322, page 24*) that this was part of the administration's wider policy of supporting recreation and the community. It is possible that the disruption caused by a number of officers leaving and starting during 2000/1 created confusion as to policy aims. For example, during 2000 disposal of the freehold of Underhill had been considered, but as part of a linked series of transactions and not as a stand alone transaction. However, the sale of the freehold was perceived by Mr Alan Williams and the officers involved as part of that continuum of discussions, even though it was not linked with any wider proposals. We do believe that it should have been considered in a wider context and we are concerned about the absence of any clear rationale in policy terms for the disposal. It is also unclear how the sale of the freehold would in any way have assisted the Council with any of its land management plans or other statutory functions. The emergence of the South Underhill planning application might have caused the sale of the freehold to be reconsidered. However those officers who might have questioned the wisdom of proceeding did not do so.

228. We consider, on the material before us, that a robust case can not be made that the sale was driven to secure inappropriate political advantage.

*p) Permitting BFCH to retain 100% of the Underhill value was the expressed desire of the previous Administration*

229. We have seen no evidence to support this assertion.

*q) The Harbord Inquiry's conclusions support the view that the sale had been mismanaged*

230. We concur with the views cited by the objectors

### **Conclusion**

231. We are of the view that the sale of the freehold of Underhill did breach the requirements of section 123 Local Government Act 1972 and it was occasioned by a number of procedural breaches, misjudgement and errors by a number of officers.

232. Based on the valuation information available to us, the entry in the financial accounts for the year ended 31 March 2002 in respect of the consideration for the sale of Underhill is contrary to law, on the basis that the £10,000 received together with the contingent further consideration does not meet the requirements of section 123 of the LGA 1972.

233. We have reservations as to whether it was appropriate to use a delegated powers report to authorise the disposal of the freehold interest. Even if this were a legitimate route, there were manifest flaws in the authorisation process, notably:

- The Borough Solicitor's concerns were not properly addressed;
- The Constitutional requirement for publication of the DPR were not put in place; and
- The errors in drafting create doubt as to whether the delegated powers report was properly approved.

234. We are also concerned at the apparent absence of debate about the benefits to the Council of disposing of the freehold interest in the Underhill stadium, and the granting of a proportion of any future development gain to the Company.

235. The consequent question for us is, having formed a view that the transaction was contrary to law, whether to apply to the Courts to seek a declaration that the item of account was unlawful, or whether to exercise discretion and not apply to the Courts. There are a number of factors we need to take into account:

- We are aware that significant amounts of public money have already been spent on investigating the sale and that a decision that causes even more public money to be spent should only be taken if there is good reason to do so
- We also recognise that the transaction has already been considered by the Courts albeit in the context of rectification rather than a section 17 action
- The Council has accepted that it acted in error, and has taken steps to rectify the situation and to identify procedural weaknesses
- Disciplinary action has been taken against one key officer
- Section 17(2) of the 1998 Act allows the Courts to order the persons responsible for any expenditure found to be contrary to law to repay it to the Council involved. However, in this case the item of account involved is income not received rather than expenditure, and we accept that there is a case that such income is not subject to that section. We also note that under s17 (3) the Court will not make an order *'if satisfied that the person responsible for incurring or authorising the expenditure acted reasonably or in the belief that the expenditure was authorised by law, and that it shall also have regard to all the circumstances, including that person's means and ability to repay the expenditure or any part of it'*

236. For these reasons, we find that the transaction, being the sale of the Underhill freehold, was contrary to law and did not comply with section 123 of the LGA 1972. However, we do not propose to apply to the Court for an order under section 17 of the 1998 Act for the reasons set out above.

# Section 7 – Our Conclusions on action under s18 Audit Commission Act 1998

237. The objectors have asked us to take action against six individuals under s18, alleging that their behaviour resulted in a loss to the Authority. We have also assessed whether we should consider the actions of anyone else, and have concluded that we should address the conduct of Mr Paul Chadwick, the Acting Head of Development and Regeneration.
238. Our analysis follows a similar pattern in each instance. First we set out the role of the individual, and their involvement in the sale. We then note the matters raised by the objectors, and any other points that have arisen in the course of our investigation. After that we consider each issue, and conclude with our formal determination and statement of reasons.
239. We have also considered some important ingredients of the proper role of members and officers of a local authority.
240. A member of a local authority is not free to act in his own interests. He occupies a position of trust. He is one of those individuals entrusted by Parliament and the electorate with making decisions, and with deploying resources contributed by others to their best effect, as the law and his view of the public interest require in the discharge of functions vested in the authority by enactment. As a person holding such a position of public trust, when taking or contributing to Authority decisions he has an obligation to act lawfully, carefully, reasonably and with a due regard to the interests of those required to fund the authority's activities. A person entrusted with the taking of decisions for a local authority is entitled to take into account the advice given by others but such a person cannot abdicate his or her responsibility or the duty of exercising his own personal judgment.
241. In a number of respects the duties of officers may differ from those of members. Except in those cases in which lawful arrangements have been made for an officer to discharge an authority's functions or he or she has specific statutory tasks to perform, their tasks and thus their responsibilities can often be quite different. Other considerations apart, officers are paid employees of the Council with a duty to give impartial and professional advice to the elected and other members who constitute their employing authority. Conversely authority members, whilst they have a duty to make or contribute to the decisions of their authority in the light of proper and relevant considerations, are often members of political groups, a situation which the law expressly recognises and respects. What the duties of an officer may be will depend on the position held and the terms and conditions of employment. In the case of an officer misconduct may amongst other things *"consist in the negligent or non-performance of routine duties, where no question of formal decision making arises."* (Robert Walker LJ in *Porter v Magill* [1999] LGR 375.
242. We have been particularly mindful of the test of 'wilful misconduct'. In paragraph 17 above, we noted the definition of wilful misconduct that has been agreed in leading cases, as



*'Deliberately doing something which is wrong, or wrongly omitting to do something, knowing it to be wrong or with reckless indifference as to whether it is wrong or not', but that*

*'Misconduct occasioned by imprudence, negligence, excess of zeal, misplaced enthusiasm, error or lack of judgement fall short of wilful misconduct'*

243. In considering whether there was wilful misconduct on the part of any party involved in the matter we have considered first whether there was any misconduct, and second whether, if there was, that misconduct was wilful. For these purposes we consider that misconduct may reasonably be regarded as conduct which falls significantly below the standard that could reasonably be expected of an officer in that position and under the particular circumstances.
244. We have noted that a certificate under s18 (1) (b) of the 1998 Act is to be given only where *'a loss has been incurred or deficiency caused by the wilful misconduct of any person.'* We therefore considered not only whether there had been wilful misconduct, but also whether it was a cause of a loss or deficiency. In so doing, we took the view in the light of advice that it would be sufficient to show that the misconduct in question was a cause, as distinct from being the only cause.
245. In assessing whether or not any individual has been responsible for a deficiency caused by wilful misconduct, we have used a three part test built on this approach:
- Has the Council suffered a loss in the relevant financial year as a result of the conduct of that individual? We describe this below as *'Did a loss result from that individual's activities?'*
  - If so, was that loss caused by an individual doing something wrong or failing to do something to an extent that their performance fell significantly below the standard that could reasonably be expected of an officer in that position and under the particular circumstances – *'Is there evidence of misconduct that caused the loss?'*
  - If so, did that individual know that his conduct was wrong, or was he recklessly indifferent as to whether or not it was wrong – *'Was the misconduct deliberate or the result of reckless indifference?'*
246. In reaching a view we have considered whether the individual deliberately did something wrong or wrongly omitted to do something, knowing it to be wrong or with reckless indifference as to whether it was wrong or not.

## Councillor Anita Campbell

247. Councillor Anita Campbell was the Council's Mayor during the year commencing May 2001, a member of the Planning Committee and she was a member for Arkley Ward in which the Underhill Stadium is located.

### Councillor Campbell's role

248. We see that Mrs Anita Campbell acted in three distinct capacities:

- As the Councillor for the Arkley ward it was her role to represent the views of the local community towards the planning applications at Underhill, and to the Club in general
- As a member of the Planning Committee, she would play a part in the determination of applications, taking due account of the advice proffered
- As Mayor, it fell to her to seal documents, thereby formally approving documents on behalf of the Borough

249. While no part of her own role, we also find it relevant that her husband acted as a steward at the Club.

### Her actions

250. Councillor Anita Campbell has made public her long term support for the Club. It is alleged that she and the Leader had discussions with the Mayor of London about the future use of the Underhill site during the summer of 2001, but she denies this. There is evidence that she was asked by the Club at the end of October 2001 to find out whether there was any reason why the sale of the freehold was not progressing. She informed us that she telephoned Mr David Stephens to establish the position, which may well have induced him to progress the delegated powers report. The Club was under the impression that her input had been influential as a director, Mr Graham Slyper, sent her a note of thanks on 12 November 2001. (*Document 152*)

251. Councillor Anita Campbell was also involved as a constituency councillor in discussions about the Club in Labour Group, and with Mr Alan Williams directly, about the planning application at South Underhill.

252. When the planning application for South Underhill arose, Councillor Anita Campbell declared her interest, and took no part in the debate.

253. As Mayor she signed the sale contracts as part of the Council's sealing process. Representations put to us stress that the role of the Mayor is to attest to the fixing of the Council's seal, and was not to take part in the decision to sell the freehold interest in Underhill. (*Document 368 page 6*)

### Points raised by the Objectors

254. We have considered two objections that allege Councillor Anita Campbell caused the Council losses as a consequence of wilful misconduct. The objections by Mr David Miller and Mr Andrew Markey are in the same terms and raise the same issues. Their arguments in support of the objections are repeated below for completeness;

*a) Anita Campbell was Mayor at the time of the sale and also Ward Councillor for Underhill (then known as Arkley)*

*b) Anita Campbell had a declared interest in BFC and should not have taken part in any matters relating to the club*

*a) (sic) Anita Campbell claimed not to have known about the sale until she was required to sign the contract in her capacity as Mayor (e-mail to David Miller, 4 December 2002)*

*b) Evidence proves that Anita Campbell was involved in the transaction at least five months prior*

to sale (e-mails 29 & 30 October & 9 November 2001)

c) Borough Solicitor claimed that Anita Campbell's signing of the contract should be treated in the same way as the Queen's assent of a Parliamentary Bill (i.e. she had no choice) The Mayor does have the right to refuse to sign a document and, given Anita Campbell's declared interest, she should not have signed.

d) Anita Campbell and Alan Williams met with the Mayor of London in the autumn of 2001 to discuss the proposal for a second stadium at South Underhill. This proposal can be linked to the sale of Underhill because of the likelihood that BFCH would have needed to develop the land to pay for a new stadium.

e) In addition to her reported meeting with the Mayor of London, it is clear from e-mail evidence that Anita Campbell was involved in discussions with BFC and the Chief Valuer. She clearly knew that she should not have been involved.

f) Although the Borough Solicitor advised the objector that Anita Campbell's signing of the Overage Payment Deed was effectively ceremonial, it brought legal effect to the contract, which means that her declared interest was a relevant matter. Her Deputy Mayor could have signed in her place.

255. The objectors contend that Councillor Anita Campbell's actions meet the test of wilful misconduct because her involvement was not a simple lack of judgement. They believe she was aware of the rules of personal interest, and that she deliberately did something she knew she should not have done and then denied all knowledge of the sale.

### **Consideration**

256. We consider that there are three broad themes that we should address:

- Awareness of the sale - Councillor Anita Campbell had an awareness of the sale of the freehold and she was party to the intention to allow the Club to dispose of the Underhill site for residential purposes;
- Discussions with the Mayor of London - Councillor Anita Campbell had discussions with the Mayor of London concerning the planning application concerning the South Underhill Stadium planning application; and
- The Agreement for Sale and the Supplemental Deed - Councillor Anita Campbell signed these agreements when she had a conflict of interest in the transaction. The conflict of interest is her declared interest which we interpret as being her formal statements in support of the South Underhill development.

257. We have also received representations by the objectors, and further submissions from Councillor Anita Campbell relating to those views. The former expand on the view that it was not appropriate for Councillor Anita Campbell to sign the documentation on behalf of the Council, as Mayor, given her declared interest. The latter note that in signing or sealing documents in these circumstances she performed a purely ceremonial role. (*Document 368 page 6*)

258. In addition the objections concern issues relating to conflicts of interest. It is accepted practice throughout the public sector that members should adopt the highest standard of behaviour and should take decisions only in the light of relevant and proper considerations. In this instance Councillor Anita Campbell made public statements in support of the South Underhill stadium planning consent prior to any consideration by the Planning Committee. It has been put to us that she had an indirect pecuniary interest under the terms of section 94 of Local Government Act 1972 in the Club owing to her husband's employment.

### **Awareness of the sale**

259. The information before us demonstrates that Councillor Anita Campbell was aware of the proposed disposal of the freehold interest at the end of October 2001, as she was asked to intervene on behalf of the Club to chase officers who did not seem to be progressing the matter.

260. There is no evidence of any involvement prior to that time. In particular, we have seen nothing to indicate that she was aware of the detail of the disposal or had any involvement in its negotiation.

### ***Discussions with the Mayor of London***

261. Councillor Anita Campbell has indicated that she has met the Mayor of London once in a social setting. She represented that, at that meeting, she did not discuss the South Underhill planning application. (*Document 321, page 3*). There is no evidence to suggest that she sought to influence the Mayor's position in respect of the Underhill development.

### ***Signing the Agreements***

262. Councillor Anita Campbell signed the deeds relating to the disposal of the Underhill freehold interest in her capacity as Mayor. We accept the objectors' argument that it is inappropriate that a member should sign a deed in respect of a transaction where a conflict of interest exists, even as part of what is perceived to be a ceremonial procedure, which is what the sealing of deeds in the Council is judged to be by its officers.
263. However, we are also of the view that this is not a substantial matter in the context of the objections before us. Firstly, Councillor Anita Campbell's interest in the planning issue for South Underhill came about as a consequence of public statements in respect of the new stadium and therefore impaired her ability to sit on the Planning Committee and take an impartial view on the consent. She therefore removed herself from the Planning Committee when the matter was considered in February 2002. This is not the same as having a conflict of interest in respect of any transaction involving the Club. Second, Councillor Anita Campbell performed the signing alongside Mr Jeff Lustig, Borough Solicitor and the Council's monitoring officer, who was aware of the Council's support for the Club generally.

### ***Conflict of interest***

264. It has been brought to our attention that Councillor Anita Campbell's husband works for the Club as a match steward. Councillor Anita Campbell has confirmed this during interview. (*Document 321, page 30*). In our opinion this is a low level role that involves no contact with the Club's directors and / or decision making. It seems to us that it is doubtful whether this creates an indirect pecuniary interest as defined by local government legislation. In practice, we have not regarded this situation as significant. Councillor Anita Campbell acknowledged in her interview that she is a supporter of the Club and expressed support for the South Underhill stadium proposal and said she dis-barred herself from involvement in the planning discussions concerning this development as a consequence.

### ***Determination***

265. Applying our tests, we have concluded that no loss resulted from Councillor Anita Campbell's activities. We do not therefore propose to take any action against Councillor Anita Campbell under s18 Audit Commission Act 1998.

### ***Statement of Reasons***

*Did a loss arise from Councillor Anita Campbell's activities?*

266. The loss that arose to the Council did not result, at least directly, from the actions of Councillor Anita Campbell. We accept that in sealing the overage payment deed, she acted only in a formal capacity; had she not signed, we are in no doubt that her Deputy or another substitute would have done so.

*Is there evidence of misconduct that caused the loss?*

267. We have found no evidence of misconduct. We do not agree that Councillor Anita Campbell had a significant indirect pecuniary interest as a result of her husband's employment by the Club. We also believe that in dis-barring herself from involvement in the planning discussions relating to Underhill she acted properly.

*Was the misconduct deliberate or the result of reckless indifference?*

268. As we have found no evidence of misconduct, we do not need to consider whether her actions were deliberate or reckless.

*Recommendation*

269. We suggest that the procedures for sealing deeds should include a requirement for the Mayor or Deputy Mayor to distance themselves from signing any legal agreements where there is a possibility of this leading to a perception of conflict of interest.

## Councillor Danish Chopra

270. Councillor Danish Chopra was the Executive member for Resources at the time of the disposal, a role which included responsibility for land transactions

### Councillor Chopra's role

271. As Executive member for Resources, Councillor Danish Chopra's role was to direct the Council's overall strategy towards its use of the wide range of inputs required by a major Council. The Constitution (*Document 95*) describes his responsibility as being to 'lead on budget, policy formulation and implementation in relation to resources. In particular, finance, personnel and property budget.'(sic)

272. The Cabinet committee that he chaired discharged a set of functions that included:

- Capital and revenue finance, forecasting, monitoring, borrowing and taxation
- Grants and loans from all sources to voluntary organisations
- All matters relating to land and buildings owned, rented or proposed to be acquired or disposed of by the Council

273. The Council's scheme for the delegation of certain decisions to officers required consultation with the Executive member. Councillor Danish Chopra, as the Executive Member for Resources, was the relevant person for the disposal of land that might be dealt with under this route

### His actions

274. Councillor Danish Chopra's involvement with the sale of Underhill freehold was wholly linked to his role as Executive Member for Resources. He was asked by Mr David Stephens to approve a draft cabinet report in July 2001 and he asked Mr David Stephens to brief him prior to the Cabinet meeting. In November 2001, his approval was required to the DPR and was given, although the DPR was formally signed by an officer. We are not aware of any other involvement.

### Points raised by the Objectors

275. We have considered two objections that allege Councillor Danish Chopra caused the Council losses as a consequence of wilful misconduct. The objections by Mr David Miller and Mr Andrew Markey are in the same terms and raise the same issues. The arguments in favour of the objections are repeated below for completeness.

a) *Danish Chopra was the Cabinet Member for Resources who approved the Delegated Powers Report (DPR). That report allows for the buyer to keep 100% of the future value, – contrary to section 123 of the Local Government Act 1972*

b) *He approved the DPR on condition that "Alan" (Alan Williams) was happy with it.*

c) *Danish Chopra stated in an interview "Of course we looked at the detail of the sale. But I'm not a professional valuer or Solicitor." He is a tax inspector with, presumably, some experience of reading documents containing figures*

d) *Danish Chopra could not have failed to notice the "100%" option even if he did not notice the typographical error in the DPR.*

276. The objectors have also noted:

*Whilst evidence shows that Danish Chopra saw Alan Williams as the lead figure in the sale, the draft Report to Council (16 July 2001) was in his (Danish Chopra's) name. This report quite clearly sets out the circumstances in which BFC keeps 100% of the development value. This report had no erroneous brackets. Danish Chopra is a professional man who would have had no difficulty in understanding the document, and it is not credible to suggest that he did not realise this option would fail to comply with section 123 of the LGA 1972.*

*Danish Chopra was also aware that the Report should have gone to Cabinet, and when it re-appeared in the form of a Delegated Powers Report, he did not query the delay or reason for a change of approach. This cannot be described as negligence as he was too closely involved not to have known that there was a material change in circumstances.*

*On the basis that Danish Chopra must have known that neither the transaction as set out in his report nor the Delegated Powers Report could possibly comply with the requirements of section 123, I contend that his actions meet the test of wilful misconduct because **he deliberately did something (signed off the DPR) which he knew to be wrong.***

*It has been reported to the objectors by Cllr Kanti Patel, that Mr David Stephens has alleged that Danish Chopra put pressure on him with regard to the Delegated Powers Report. Cllr Patel has indicated that he is willing to make a statement to this effect and be interviewed by you.*

### **Consideration**

277. The issues can be broadly analysed into three components:

- Awareness of the sale – Was Councillor Danish Chopra aware that the sale of the freehold should be dealt with at Cabinet and not by use of a DPR?
- Pressure to progress – Did Councillor Danish Chopra pressure Mr David Stephens to progress the disposal by way of a DPR and not process the sale through Cabinet?
- The DPR – Should Councillor Danish Chopra, as a professional man, have identified that the DPR might have allowed the Borough to sell the freehold interest for less than best consideration, and to have identified the mistake in the DPR?

### **Awareness of the sale**

278. The Harbord Inquiry took the view that Councillor Danish Chopra was entitled to rely on officers when carrying out his responsibilities as an Executive Member. We agree that even an experienced Councillor will not have a full appreciation of the legislative, operational and financial arrangements appropriate to a complex organisation such as a local authority and might reasonably rely on the officers appointed by the Council. However, an Executive Member does have a responsibility to undertake his or her role with responsibility and with appropriate skill. The initial question for us is whether Councillor Danish Chopra fell short of the required standards in any respect.

279. It appears from our review of the documentation that Councillor Danish Chopra was acting in a reactive capacity throughout the period in which he had involvement. Following a request from Mr David Stephens to approve a draft Cabinet report, he was content for the sale of the Underhill freehold to be subject to a report to Cabinet in July 2001. There is no evidence to suggest that any action on the part of Councillor Danish Chopra caused the Cabinet report not to be tabled. When presented with the DPR, Councillor Danish Chopra could have insisted that the matter went to Cabinet. Whilst Councillor Danish Chopra could have taken this view, we are not persuaded that he was not entitled to rely on officer's representations that the decision could be progressed by way of a DPR. It is suggested that the Councillor should have known that the sale should have been progressed through Cabinet. We do not believe that the argument has substance as senior officers of the Council were content for a DPR to be used and we consider that he could rely on their interpretation of the Council's constitution.

### ***Pressure to progress***

280. The objectors state that Councillor Danish Chopra pressured Mr David Stephens to prepare the DPR instead of a Cabinet report. We have spoken to Mr David Stephens and he has not supported this view of events. In his supporting evidence for his objection Mr David Miller states, *"It has been reported to me by Cllr Kanti Patel, that Mr David Stephens has alleged that DC put pressure on him with regard to the Delegated Powers Report. Cllr Patel has indicated that he is willing to make a statement to this effect and be interviewed by you"*. However, Mr Kanti Patel informed us that he has no first hand knowledge of such events and was interpreting information provided to him by Mr David Stephens.
281. The Council's then constitution provided the Director of Regeneration with delegated powers to dispose of a property for a consideration of under £100,000. The power had to be undertaken in conjunction with the Executive Member for Resources. The Acting Director of Development and Regeneration at that time was Mr Paul Chadwick, who had the primary responsibility, and to whom David Stephens reported at this time. It is our view that there is insufficient evidence to be certain who decided to progress the disposal by way of DPR.

### ***The DPR***

282. When the draft DPR was presented to Councillor Danish Chopra he would have seen that the Head of Paid Service, the Monitoring Officer and the Borough Treasurer had all looked at the DPR and had apparently made no criticism of the planned sale. None of the officers had on the face of the DPR highlighted any errors in drafting or issues of legal or financial non-compliance.
283. We have considered what would be a reasonable expectation of the Executive Member of Resources. We understand that Councillor Danish Chopra has a relatively senior position in HM Revenue and Customs. In our opinion, it would be reasonable for him to read the document, focus on matters of key importance to the Council and raise any queries with the appropriate officer. Indeed, this is what he appears to have done. Councillor Danish Chopra might have raised more issues, but in all the circumstances it appears to us that he fulfilled his responsibilities.

### **Determination**

284. Applying our tests we have concluded that the loss that arose to the Council did not result from the actions of Councillor Danish Chopra. We do not therefore propose to take any action against Councillor Chopra under s18 Audit Commission Act 1998.

### **Statement of Reasons**

*Did a loss arise from Councillor Danish Chopra's activities?*

285. The loss that arose to the Council did not result, at least directly, from the actions of Councillor Danish Chopra. He did not play a fundamental role in the disposal.

*Is there evidence of misconduct that caused the loss?*

286. There is no evidence that Councillor Danish Chopra improperly intervened and caused a DPR to be used instead of a Cabinet report. There is no evidence to suggest that Councillor Danish Chopra put pressure on Mr David Stephens in connection with the sale. We consider that Councillor Danish Chopra fulfilled his responsibilities.

*Was the misconduct deliberate or the result of reckless indifference?*

287. As we have found no evidence of misconduct, we do not need to consider whether his actions were deliberate or reckless



## Mr Alan Williams

288. Mr Alan Williams became Leader of the Council following the local elections in May 1994, and remained in that position at the time of the disposal. He was elected to the Council in 1986 and remained a Councillor representing Burnt Oak Ward until he stood down in 2003.

### Mr Alan Williams' role

289. The Council's constitution ascribes no explicit responsibility to the post of Leader. It does however note that *'the Leader may carry out any of the functions delegated to the executive, cabinet committees, lead members or officers.'* In our view it is reasonable, given his role as the head of the Council's controlling group, to regard him as playing a primary part in the formulation of the Council's strategy and in monitoring its service delivery.
290. Other relevant responsibilities of the Leader include the chairmanship of the Cabinet, and the duty to publish a scheme of delegation each year.

### His actions

291. Mr Alan Williams was involved with the various attempts to find the Club a new ground. In each case, the documentation suggests that Mr Alan Williams was seeking to facilitate a solution. The owner of the Club, Mr Tony Kleanthous, was considered a difficult character to deal with; it has been reported to us that he had been known to berate officers when they did not act on matters as he thought they should and officers have explained to us that he was difficult to deal with and would not listen to them. For these reasons, Mr Alan Williams invited Mr Tony Kleanthous to deal directly with him and there is evidence of meetings between them throughout the period covered by this investigation. The relationship was business related and not one of friendship.
292. Mr Alan Williams has told us that the Club was important politically as it had the potential to create adverse publicity. He commented to us on the critical press reports:

*'the club would become a big issue. Quite rightly, members are then saying to its leadership, 'What the hell are we doing?' We've got a manifesto commitment to support clubs and organisations and so on. Barnet Football Club is, in Barnet's terms, an important sporting resource and sporting provision, and here's the Council, according to the newspapers and according to the Club, trying to drive it out of existence.'* Mr Alan Williams informed us that unlike his political opponents, the Labour Group has been continuously supportive of the Club. (Document 322, page 24)

293. He explained by way of background that the Council and its Labour-led administration had expressed its general support to a range of clubs and organisations within the Borough. The Labour party manifesto stressed that providing recreation and leisure, sporting and other facilities, and the support of those clubs that delivered those facilities, was as important to the Council as the provision of housing and social services, mending the roads and the footpaths.

### Points made by the Objectors

294. We have received two objections that allege Mr Alan Williams caused the Council losses as a consequence of his wilful misconduct. The objections by Mr David Miller and Mr Andrew Markey are in the same terms and raise the same issues. The arguments in favour of objection put forward by the objectors are repeated below for completeness.

- a) *Alan Williams was undoubtedly the key Member driving this sale of Underhill forward.*
- b) *Barnet Football Club actually expected Alan Williams to negotiate terms directly with them (Minutes of meeting, January 2001) (The objectors explain that they do not know if this happened due to Alan Williams's files being shredded)*
- c) *Alan Williams publicly stated that he wanted to de-designate the land to allow Barnet Football Club to sell the plot for development (Barnet Press, September 2000)*
- d) *Alan Williams stated "In planning terms there is no reason why we need to take the site out of*

*the green belt in order to develop Underhill. But it is a nonsense that it is in the green belt-the ground is surrounded by development".*

*Alan Williams was told in a briefing note from the Head of Development & Regeneration (11 September 2000) that Underhill was "indefensible" in the green belt.*

*e) Alan Williams ignored a clear warning from David Stephens over the value of the land (briefing note 30 May 2001)*

*f) Alan Williams ignored a clear warning that Barnet Football Club's proposals gave the club "the lion's share of the development value whether or not they remain within the Borough" (briefing note 30 May 2001).*

*g) Alan Williams appears to have withheld the report on sale from going to Cabinet.*

*h) Alan Williams was warned by Barnet Football Club that it would have to relocate outside the Borough if a deal could not be done.*

*i) Alan Williams's clear intent was to sell Barnet Football Club the freehold so that the land could be redeveloped to pay for South Underhill and keep the club in the Borough.*

*The Chief Valuer clearly warned Alan Williams that the value of the land had to be more than £10,000 as the club wanted to use the freehold as security for a bank loan. Although Alan Williams stated in an e-mail (30 May 2001) that LBB was not going to allow the club to "sell the site and move away from the Borough with any receipts" he nonetheless approved the Delegated Powers Report which stated only that "the Council **may** share in any enhanced value" (emphasis added). When Cllr Chopra approved the Delegated Powers Report (4 November 2001) it was conditional upon Alan Williams similarly approving the action.*

*The word "may" in the Delegated Powers Report is significant as it demonstrates that LBB knew in advance there were circumstances where the Council would **not** receive any further payment. To justify the £10,000 down payment, the Council was supposed to receive a proportion of the future development value absolutely, and not conditionally.*

*The Chief Valuer stated in his private file note "Despite some of the comments by Alan Williams about not allowing Barnet Football Club to take any value out of Underhill, comments from Barnet Football Club about needing financial assistance from the Council and by Alan Williams tend to suggest that there was a double agenda which not all officers, including myself, were being fully advised about."*

*The Chief Valuer prepared a report which was due to go to the Cabinet on 16 July 2001. He sent the draft to Cllr Chopra on 2 July 2001 who approved it subject to Alan Williams's agreement.*

*On 5 July 2001, the Chief Valuer sent the draft report to Alan Williams asking whether it should go to the July Cabinet or be held over until October. There does not appear to be a reply on file, but on 26 October 2001, the report re-appeared in the form of a Delegated Powers Report.*

*Test for wilful misconduct:*

- *Alan Williams was told that the land was worth more than £10,000*
- *Alan Williams was told that the proposed deal did not give LBB the appropriate share of future development value.*
- *Alan Williams knew that the land was indefensible in the green belt and this would have affected its value upwards.*
- *Alan Williams knew that the transaction should not have been dealt with using a Delegated Powers Report because of the underlying value of the asset (which would have allowed Barnet Football Club to pay for South Underhill).*
- *Alan Williams knew that the matter should have been reported to Cabinet.*
- *By ignoring professional advice, **Alan Williams clearly had no regard for the question of whether what he was doing was right or wrong.** He simply wanted the deal done.*
- ***His actions appear not to be negligent or careless but, rather, deliberate.***

*The objectors contend there is sufficient evidence to prove wilful misconduct.*

### **Consideration**

295. We believe that the issues put forward by the objectors cover all the matters that it is necessary for us to deal with, and we address each in turn below.

a) Alan Williams was undoubtedly the key Member driving this sale of Underhill forward.

296. We consider that the disposal was effectively initiated by Mr Alan Williams when he wrote to the Club on 14 March 2001 indicating that the Council was willing to sell the freehold. No other member was consulted and the Cabinet did not debate the issue. At that date, Mr Alan Williams had no authority in law to commit the Council to sell the freehold, as the rules under section 101 of the Local Government Act 1972 did not allow a member the ability to take action of this kind. However, the Council was operating a shadow cabinet arrangement anticipating the new constitutional arrangements based on the Local Government Act 2000 that came into force in July 2001.

b) Barnet Football Club actually expected Alan Williams to negotiate terms directly with them (Minutes of meeting, January 2001) (we do not know if this happened due to Alan Williams's files being shredded))

297. It does appear from correspondence that at various stages in the negotiation, the Club would have liked to have had discussions directly with Mr Alan Williams. However, we have found no evidence that any such discussions took place. Negotiations were between Mr David Stephens and Mr Graham Slyper. Mr Alan Williams was never directly involved in any detailed negotiations although he was informed about developments.

c) Alan Williams publicly stated that he wanted to de-designate the land to allow Barnet Football Club to sell the plot for development (Barnet Press, September 2000)

298. Mr Alan Williams had been involved with the various proposals for a new stadium and the proposals for new stadium that were developed. His involvement consisted of receiving copies of correspondence, briefing notes and at various times attending meetings. We are of the view that he was aware of the possibility of Underhill being sold for residential purposes, with the proceeds being invested in a new stadium, as he received copies of documents that indicated such a possibility. Mr Max Caller's letter to the Club in May 2000 (*Document 31*) stated:

*'... if you decide to move and seek to build a new stadium outside the Borough there can be no prospect that any of the capital receipts from Underhill will go towards that project.'*

299. It is evident that in 2000, reports mentioning the possibility of Underhill being sold for residential purposes had been discussed and it was also the view of officers that Underhill was capable of being de-designated. In that year the Council issued a draft UDP for consultation containing the proposition that Underhill should be de-designated from green belt status. We find that statements made by Mr Alan Williams to the press in respect of de-designation were consistent with the draft UDP.

*d) Mr Alan Williams stated "In planning terms there is no reason why we need to take the site out of the green belt in order to develop Underhill. But it is a nonsense that it is in the green belt - the ground is surrounded by development". Alan Williams was told in a briefing note from the Head of Development & Regeneration (11 September 2000) that Underhill's status as part of the green belt was "indefensible"...*

300. It appears that Mr Andrew Barry-Purssell expressed the view that Underhill should be taken out of the green belt. That position was consistent with the Council's actions in putting forward revisions to the UDP seeking to de-designate the site as green belt. In discussions with Mr Andrew Barry-Purssell, Mr Alan Williams would no doubt have heard such opinions and have been influenced by them. It is our understanding that buildings such as a stadium for recreational purposes can be built in the green belt, which could therefore have included an expanded Underhill.

*e) Alan Williams ignored a clear warning from David Stephens over the value of the land (briefing note 30 May 2001)*

*f) Alan Williams ignored a clear warning that Barnet Football Club's proposals gave the club "the lion's share of the development value whether or not they remain within the Borough" (briefing note 30 May 2001).*

301. We have been told that the briefing note of 30 May 2001 was designed to inform officers and Mr Alan Williams, the Leader, of the state of negotiations. It makes reference to draft heads of terms having been received from Mr Graham Slyper, which Mr David Stephens describes as being designed to give the Club the lion's share of any development value. (*Document 99*) The briefing note says that this was the Club's position and not the Council's. The note also sets out a range of calculations that might be used to determine the value of the freehold. We have no evidence to show that Mr Alan Williams ignored any clear warning from Mr David Stephens concerning the value of the land and its development value.

*g) Alan Williams appears to have withheld the report on the sale from going to Cabinet.*

302. We have no evidence to show that Mr Alan Williams intervened to stop the draft cabinet report going to the July 2001 Cabinet. On the basis of the information before us we consider that Mr David Stephens had not then finalised the report and obtained all the necessary comments. We know that Mr Jeff Lustig, the Borough Solicitor, had not commented by the day of the Cabinet. As the report did not reach Cabinet, it may have either occurred to Mr David Stephens, or alternatively it may have been put to him by a colleague that the disposal could be dealt with by way of a DPR. We cannot be sure what exactly occurred but it is evident that once a draft DPR had been prepared no further consideration was given to the matter going to a later meeting of the Cabinet.

*h) Alan Williams was warned by Barnet Football Club that they would have to relocate outside the Borough if a deal could not be done.*

303. The Club threatened to move out of the Borough, which is evidenced in a letter dated 6 March 2001, (*Document 84*) expressing concern at the lack of progress.

*i) Alan Williams's clear intent was to sell Barnet Football Club the freehold so that the land could be redeveloped to pay for South Underhill and keep the club in the Borough.*

304. It had been anticipated in previous proposals that the proceeds of Underhill would be part of the potential funding of a new stadium. It is also one of the terms of the freehold sale agreement: if the Underhill site is sold at any time, the proceeds can be invested in any new stadium designed for association football if it is located within the Borough. Furthermore, unless a sale takes place in the period to 27 March 2012, the Holding company of the Club will be able to retain all the proceeds. If the sale takes place within the next ten years (between 2002 and 2012) and the Club does not invest in a stadium in the Borough, the Council receives 60% of the proceeds. It was the original intent for 60% of the proceeds to be retained for the Council's benefit except in the case that the Club relocated to a new ground within the Borough and remained there for at least 10 years.
305. Mr Alan Williams explored with officers a number of options in respect of possible stadium developments and evidence shows that the proceeds of any disposal of Underhill might have been reinvested in a new stadium. However, there is no evidence that the sale of the freehold was directly linked to redevelopment plans for Underhill.

#### **Other points put to us by the objectors**

##### *The freehold as security*

306. There is no evidence before us that the Club raised or intended to raise loans on the basis of the increased value of the Underhill ground following the acquisition of the freehold. At present, the land still remains in green belt and has no planning permission for residential development. Hence, whilst there is reference in the documentation (*Document 99 Para 5*) to the Club raising finance, it appears to be speculation that is not borne out by any factual evidence.

##### *A double agenda*

307. The expression 'double agenda' is cited by the objectors as a quotation from Mr David Stephens. "Despite some of the comments by Mr Alan Williams about not allowing Barnet Football Club to take any value out of Underhill, comments from Barnet Football Club about needing financial assistance from the Council and by Mr Alan Williams tend to suggest that there was a double agenda which not all officers, including myself, were being fully advised about."
308. The political agenda of assisting the football club was not a private agenda. It may be that there were political priorities such as being seen to be supporting the Club and avoiding adverse publicity, but we have not identified evidence that suggests that Mr Alan Williams departed from proper Local Government behaviour.

##### *Use of DPR*

309. The events noted by the objectors are not quite in accord with our information as the draft DPR was first prepared in July 2001. However, there is no evidence that Mr Alan Williams asked for the sale to be dealt with by DPR. It is our view that the most probable scenario is that this decision to use the DPR approach was taken by officers.

##### *Mr Alan Williams was told that the land was worth more than £10,000*

310. Based on the information before us Mr Alan Williams relied on officers to negotiate the sales value.

##### *Mr Alan Williams was told that the proposed transaction did not give LBB the appropriate share of future development value.*

311. Based on the information before us the deal was designed to provide the Council with a share of development gain but the DPR and sale agreement did not provide the arrangements that were intended.

##### *Mr Alan Williams knew that the land was indefensible in the green belt and this would have affected its value upwards.*

312. During 2000 this was Mr Alan Williams' position. By June 2001 it was known that the GLA was not minded to support de-designation but was prepared to allow a development of a stadium on green belt land. The ability for disposal with development potential was apparently less likely than it had appeared in 2000.

*Mr Alan Williams knew that the transaction should not have been dealt with using a Delegated Powers Report because of the underlying value of the asset (which would have allowed Barnet Football Club to pay for South Underhill).*

313. There is no evidence before us to support this assertion.

*Mr Alan Williams knew that the matter should have been reported to Cabinet.*

314. There is no evidence before us to support this assertion.

*By ignoring professional advice, Mr Alan Williams clearly had no regard for the question of whether what he was doing was right or wrong. He simply wanted the deal done. His actions appear not to be negligent or careless but, rather, deliberate.*

315. There is no evidence before us to suggest that he ignored professional advice.

#### **Consideration of other matters**

316. We have considered whether the threat to move out of the Borough set out in the Club's letter dated 6 March 2001 prompted Mr Alan Williams to say that the Council would sell the freehold. AG Bompas QC in his High Court judgement saw a direct link between the Club's letter of the 6 March 2001 and Mr Alan Williams' reply on 14 March 2001 when he indicated the Council's willingness to sell the freehold. We see the same direct linkage.

#### **Determination**

317. Applying our tests we have concluded that the loss that arose to the Council did not result from the actions of Mr Alan Williams. We do not therefore propose to take any action against Mr Alan Williams under s18 Audit Commission Act 1998.

#### **Statement of Reasons**

*Did a loss arise from Mr Alan Williams's activities?*

318. The loss that arose to the Council did not result from the actions of Mr Alan Williams, as the sale was approved by DPR, rather than by submission to members. We have no evidence to suggest it was Mr Williams who determined that the DPR route should be employed.

*Is there evidence of misconduct that caused the loss?*

319. The question arises as to whether Mr Alan Williams caused the loss by influencing either the transaction or the manner in which it was handled. We have found no evidence to support either case. We conclude that Mr Alan Williams did not set any parameters for the transaction and did not imply that the sale would be at anything other than best consideration – such matters being left to officers. The objectors would say that he was unwise to act in such a manner and that is a matter of opinion. However, his letter of 14 March 2001 was merely a statement of intent and the officers of the Council had ample time to intervene and comment if the transaction were in any way questionable. It is evident that officers did not intervene.

320. We have not identified any misconduct in any of Mr Alan Williams' other actions, including his dealings with Mr Tony Kleanthous, and the disposal process.

*Was the misconduct deliberate or the result of reckless indifference?*

321. As we have found no evidence of misconduct, we do not need to consider whether his actions were deliberate or reckless

## Mr Leo Boland

322. Mr Leo Boland was appointed Chief Executive with effect from 1 January 2001. He had previous appointments with other local authorities but this was the first time that he had worked for Barnet. Mr Leo Boland describes himself as a professional manager and has a Master of Business Administration postgraduate degree, but has no further qualification in finance, valuation or law. He had no formal handover from the previous Chief Executive, Mr Max Caller, and whilst they had some contact it fell short of a comprehensive briefing. Mr Caller had left in June 2000, and in the intervening period the post had been held on an acting basis by Ms Rita Dexter.

### Mr Leo Boland's role

323. As Chief Executive, Mr Leo Boland was both Head of the Council's paid service, and also its principal officer.
324. During our interview with Mr Leo Boland, we asked for his view of the responsibilities of the Head of Paid Service. He commented *'it's a very restricted role, the Head of Paid Service; it's basically about making sure that the Council has the right money and people.'* (Document 318, page 41)
325. We have also received representations from solicitors acting for Mr Leo Boland, (Document 378) which touch on his role as Chief Executive. They stress his responsibility to set strategy at a high level through the corporate plan, ensure systematic monitoring and management of performance against such a plan and to keep under review the performance of Directors and Heads of Service at their jobs.
326. According to the submission, Mr Leo Boland:
- inherited a situation where there was no systematic matching of operational decisions against the objectives of Council policy, there being an absence of proper planning, project and performance management...
  - had every reason to believe in and was entitled to rely on the professional competence of the officers advising on the sale of the freehold interest in Underhill

### His actions

327. Although during his induction period prior to taking up his post, Mr Leo Boland indicated that he had visited the Underhill Stadium with Mr David Stephens, he has told us that he had no involvement with any matters relating to the Club before that date. In the period following his appointment, he had limited involvement with any developments concerning the Club that were taking place. He effectively left the issues in respect of the Club to be dealt with Mr Andrew Barry-Purssell and other officers. Throughout 2001 he had no involvement with the Chairman of the Club nor any of its directors, nor any involvement in determining the sale value of freehold, nor any meetings solely concerning the Club.
328. Mr Leo Boland has told us that during the early part of 2001 his routine meetings with the then Leader, Mr Alan Williams included discussion of matters concerning the Club. He advised us that during that meeting, the Leader confirmed that there was no commitment by the Council to provide any funding to support the Club's ambitions for a new stadium.
329. Mr Leo Boland has confirmed that he received a request for comments on the draft DPR under cover of an email dated 23 July 2001 from Mr David Stephens. He also confirms that he responded 7 minutes later with the short response *'I am happy with it.'* In his interview with us (Document 318, page 43) he expressed the views that:
- *The constitution did not require his comment to the DPR and with hindsight he should have refused to comment and sent it back to Mr David Stephens; and*
  - *He did not expect the DPR to be issued with his 'I am happy with it' comment included and he*



*said that he saw the 23 July 2001 distribution as the first stage in a process of developing the DPR.*

330. Mr Leo Boland added 'I've never seen this in any other Council, this Head of Paid Service observation. ... I never was asked formally for my Head of Paid Service's observation, so, 'I am happy with the report' is not a Head of Paid Service's observation. That was what I said in response to the email when I said, 'I was happy with this issue going forward' is what I meant. The only way I would only comment on it as Head of Paid Service per se would be to say, 'This has no staffing or resources implications.... And we don't have it now, so we just have one paragraph that deals with staffing, legal, financial, constitutional, equalities issues. That's, you know – that's best practice. This was not best practice, but you can't change everything in the first six months'. (Document 318, page 41)
331. Subsequent representations to the auditor (*Document 387*) argue that Mr Leo Boland was required as Head of Paid Service to comment on staffing implications. By implication, it is argued he was not required to comment in his role as Chief Executive. Mr Leo Boland has confirmed to the auditor that the disposal of a freehold interest to a long leaseholder is a routine matter in a local authority and he saw the disposal of the freehold interest in that light. Given the protections within the framework in the event of development gain he saw no reason for concern or a need for him to take more than a passing interest.

#### **Points raised by the Objectors**

332. We have received two objections that allege Mr Leo Boland caused the Council losses as a consequence of wilful misconduct. The objections by Mr David Miller and Mr Andrew Markey are in the same terms and raise the same issues. Their arguments in support of the objections are repeated below for completeness.

- a) *Leo Boland claimed that "the decision (to sell Underhill) had become irreversible by the time he commenced work". (Report of Deputy Chief Executive, June 2004)*
- b) *Evidence proves Leo Boland was involved in the transaction at least 8 months prior to sale – more than sufficient time to check/amend the details.*
- c) *Leo Boland was required to approve the Delegated Powers Report in his position as Head of Paid Services. This required him to pay more than a cursory glance at relevant information.*
- d) *Evidence proves that Leo Boland spent a maximum of 7 minutes studying the Delegated Powers Report before giving his approval (e-mail 23 July 2001).*
- e) *Leo Boland claims he didn't think the matter was strategic despite knowing that green belt land has statutory protection.*
- f) *Leo Boland "did not feel he should intervene" (Report of Deputy Chief Executive, June 2004). What is the purpose of a Chief Executive if not to intervene in a major transaction which he would have known would arouse controversy and was procedurally incorrect?*
- g) *Leo Boland was shown the site prior to taking up his appointment. Why would this have occurred if the transaction was not deemed important?*
- h) *Leo Boland told the Land at Underhill Inquiry that it had not seemed "a great issue to sell a lease to a long leaseholder". The lease was not sold to the leaseholder, which Leo Boland should have known from reading the correspondence. The Land at Underhill Inquiry concluded that Leo Boland should have asked more questions than he did.*
- i) *Leo Boland wrote to a resident in July 2002 regarding the sale in terms which he should have known were not true.*
- *Leo Boland claimed "as the club was in possession of a 99 year lease on site, with 85 years remaining, it would not have been appropriate to seek bids from any other party"*
  - *This is clearly in breach of section 123 of the LGA 1972*
  - *Underhill was not sold to the Club*

- *Leo Boland claimed that the sale “makes provision for any surplus from subsequent disposal of the site to be shared between the Council and Barnet Football Club”. This is misleading and not correct.*

- *Leo Boland claims the sale was in line with Council’s constitution. It wasn’t.*

*It is important to consider the words of Leo Boland’s predecessor, Mr Max Caller, who wrote to BFC on 18 May 2000:*

*“Your board needs to be aware that if you do decide to move and seek to build a new stadium outside the borough there can be no prospect that any of the capital receipts from Underhill will go towards the project. The only way in which I have been able to contemplate resources from Underhill being used is that the Council as freeholder of Underhill and as freeholder of any other proposed site for the stadium was going to secure the necessary benefit in terms of sport provision and community facilities. A decision to develop outside the borough means that the Council will have to act as a commercial freeholder and ensure that in any development of the Underhill site it receives a capital payment commensurate with normal property arrangements. The Council could not take a decision which would vary this and your board needs to be under no illusions in this respect.”*

*Mr Caller clearly understood that the Council could not simply give away the capital value of Underhill and that Leo Boland would require conditions if the value of Underhill was to be used towards a new stadium. His final sentence is clear and unequivocal.*

*In August 2000, the former Head of Development & Regeneration informed the then Acting Chief Executive that he was lodging, on BFC’s behalf, a suggestion that a hectare of land be de-designated from the green belt to allow construction of a second stadium.*

*Did Leo Boland have sight of either of these two letters? If so, he cannot have failed to have understood their meaning in the context of the Underhill sale and valuation, and to have consequently taken no action cannot be deemed merely careless or negligent; rather it suggests that Leo Boland deliberately ignored pertinent information.*

*If Leo Boland did not read the correspondence, this also suggests wilful misconduct. Given that Leo Boland was a Statutory Officer whose authorisation for the sale was required, he had a duty to familiarise himself with the transaction (even though he was not the instigator). He therefore appears to have failed to do something when he knew he should have done it.*

*It is not credible to suggest that a professional person would take over a job from his predecessor without familiarising himself with the file.*

*(Note: It is not clear why the former Head of Development & Regeneration thought it necessary for the land to be de-designated given that sports stadium development is permitted on green belt land. Perhaps a clue lies in the statement from Mr Kleanthous at a meeting with Officers (14 August 2000) in which he expressed concerns at Leo Boland’s proposals for a new stadium on the existing footprint (plus a small additional parcel of land) because “it did not make the necessary provision for commercial activity” (Land at Underhill Inquiry 4.46(c)). This is further evidence that Officers knowingly valued the land on the wrong basis.)*

*From the time of his appointment, to the current day, Leo Boland appears to show scant regard for the facts in this matter by continuously suggesting that the land was sold to the lessee. To continue making the same mistake, and to compound that mistake by giving out other information (Paragraph 4.i above) which he should have known to be erroneous, indicates either a lack of understanding of simple facts, which is not credible, or is symptomatic of the intent to obfuscate.*

*Given that Leo Boland was aware of the desire of the previous Administration to sell Underhill, it was incumbent on him to take extra care to ensure that the sale was carried out lawfully and that the Council’s position was properly protected. That he did not do so suggests wilful misconduct because, by his own admission, he deliberately did not intervene when he could and should have, and therefore **did not care whether the sale was lawful or not**. He had no intention of preventing the former Administration from carrying out its wish to sell the land.*

## **Consideration**

333. We believe that the issues put forward by the objectors cover all the matters that it is necessary for us to deal with, and we address each in turn below

- a) *Leo Boland claimed that the decision to sell had become irreversible by the time he commenced work*
- b) *Evidence proves Leo Boland was involved in the transaction at least 8 months prior to sale*
334. It is evident that from July 2001 he had some awareness but he regarded the disposal of the freehold interest as a routine matter and not one that warranted his personal attention.
- c) *Cursory review of the DPR*
- d) *Evidence proves that Leo Boland spent a maximum of 7 minutes studying the DPR*
335. The constitution places responsibility on the Head of Regeneration and does not refer to the decision being taken in conjunction with the Head of Paid Service and other statutory officers. It is arguable whether there was any obligation on Mr Leo Boland to consider the report. Nonetheless, the DPR form that was used does refer to the Head of Paid Service and it would seem that custom and practice was for the author of DPRs to seek comments from senior officers. Since Mr Leo Boland responded it suggests that at the time he considered that he had a role in the process. It does appear that he regarded the matter as routine and skim read the report very quickly.
336. We have considered the argument advanced that since the DPR was to be signed by the Head of Paid Service, Mr Leo Boland did not need to consider any matters other than the staffing implications. We do not believe that a reasonable officer would have so compartmentalised his views that he would not have regard to the broader aspects of the decision. We do not find such a stance credible
- e) *Leo Boland claims he did not think the matters was strategic*
- f) *Leo Boland 'did not feel he should intervene'. What is the purpose of a Chief Executive if not to intervene in a major transaction?*
- g) *Leo Boland was shown the site prior to taking up his appointment. Why would this have occurred if the transaction was not deemed important?*
337. It is evident by Mr Leo Boland's actions that he did not regard the issue as warranting a significant amount of his attention. Mr Leo Boland has explained that he visited all the wards of the Borough to gain an understanding of the issues facing the Council, its nature and characteristics. The Club was only one of the many sites he visited.
338. The objectors refer us to a letter sent by Mr Max Caller dated 18 May 2000 (*Document 31*) and the draft Unitary Development Plan issued in July 2000 (*Document 38*) suggesting that a hectare of land be de-designated to allow for the development of a second stadium. The objectors assert that Mr Leo Boland had seen these letters and could not have failed to understand their significance in the context of the value of the Underhill freehold. They believe it is not credible that a professional person taking over a new appointment would not have familiarised himself with the background and read the file. We have seen no evidence that he did familiarise himself with the historical background to the Club and the Council in any detail. We accept that he relied, as he was entitled to do, on the officers who remained in office to provide the continuity and link to previous dealings and relationships.
- h) *Leo Boland told the Land at Underhill inquiry that it had not seemed 'a great issue to sell a lease to a long leaseholder.' The lease was not sold to the leaseholder, which Leo Boland should have known...*
339. The freehold interest was sold to Barnet Football Club Holdings Limited, a company owned by Mr Tony Kleanthous, as opposed to the Club, which was a wholly owned subsidiary of the holding company. Although a major part of the rationale for the sale was to encourage the Club to remain within the Borough, we have not been able to find that any of the officers involved, including Mr Leo Boland, made enquiries into why the sale was to the holding company.
- i) *Leo Boland wrote to a resident in July 2002 regarding the sale in terms which he should*

*have known were not true*

340. We are told that Mr Leo Boland wrote in July 2002 to an elector (Mrs Anderson) giving information relating to the sale that was not true. That allegation relates to the 2002/3 financial year and has no bearing on the 2001/2 financial accounts.

#### **Consideration of other matters**

341. We have considered the actions of Mr Leo Boland against what we would have expected from an experienced and politically astute chief executive. We would have expected him to have liaised with the Borough Solicitor and Treasurer on the legality and prudence of committing the Borough to effectively funding a professional football stadium when there was no Council authority to do so. It is apparent that he did not do so.
342. We have also considered whether Mr Leo Boland should have taken extra care to ensure that the sale was carried out lawfully and that the Council's position was properly protected, given the political sensitivity of the issue. In practice Mr Leo Boland did not seek to be briefed and for practical purposes had put himself at a distance to all matters concerning the club. He said he saw the sale of a freehold interest to the long leaseholder as a routine matter, and so it can be. In the context of a football club, especially when the sale potentially involved contingent assets amounting to millions of pounds it was not routine and he should have given more time to its consideration

#### **Determination**

343. Applying our tests we have concluded that the loss that arose to the Council did not result from the actions of Mr Leo Boland. We do not therefore propose to take any action against Mr Leo Boland under s18 Audit Commission Act 1998.

#### **Statement of Reasons**

*Did a loss arise from Mr Boland's activities?*

344. The loss that arose to the Council did not result from the actions of Mr Leo Boland. He did not play a fundamental role in the disposal, and could not reasonably be expected to have done so.

*Is there evidence of misconduct that caused the loss?*

345. Notwithstanding the matters raised above, we do not consider that Mr Leo Boland's actions fell significantly below the standard we would have expected as:
- a) We believe it reasonable for a Chief Executive to consider only the strategic issues that face the Council, leaving matters of detail to his subordinates
  - b) We also consider it reasonable for him to expect that having delegated responsibility for certain matters he would receive a further report in the event of difficulty arising to the point that there was a need for reconsideration. It is evident that during the period under review there were several issues concerning the Club that should have been considered together as collective issues but they were not. Individual developments were considered in isolation. No officer reported back to Mr Leo Boland, or indeed to the Leader questioning for example whether in the light of the planning application for South Underhill, it was still appropriate to sell the freehold.
  - c) We accept that it is not appropriate to blame a new officer for flaws in procedural arrangements that existed prior to his appointment and where he has had little opportunity to make changes. Mr Leo Boland did not have and could not be expected to have a full understanding of the development of the scheme, or of the underlying processes including the use of DPRs.

*Was the misconduct deliberate or the result of reckless indifference?*

346. As we have found no evidence of misconduct, we do not need to consider whether his actions were deliberate or reckless.

## Mr David Stephens

347. Mr David Stephens has been employed by Barnet for over 20 years. He is a professional member of the Royal Institution of Chartered Surveyors (RICS), and is thus bound by the professional requirements of his Institute and the guidance that it publishes insofar as they relate to local government.
348. He informed the auditor that during his time at Barnet, his role grew from being Assistant Borough Valuer supported by a small team to becoming Property Services Manager, when he was responsible for the whole team. For the period between 1998 and 2002, he was the Borough's Chief Valuer. He was not a member of the management team and reported to the Head of Development and Regeneration.

### Mr David Stephens' role

349. We have read a job description (*Document 400*) of the post of Chief Valuer, which the Council believes dates to 2000/1. Under the heading 'Principal Accountabilities' it notes that the postholder has the responsibility to '*Identify and provide best professional practices and acquire and implement up-to-date skills to ensure maximum benefit for the Council in all tasks undertaken.*' We understand from this and our interviews with Mr David Stephens that it was his responsibility to ensure that the Council received proper advice on its property transactions, whether he dealt with them himself, or they were handled by another member of his department. Such advice was required to ensure that the Council acted in accordance with its statutory responsibilities, especially s123 of the Local Government Act 1972.
350. As a member of the RICS, Mr David Stephens was qualified to deal with the valuation of the Council's property interests himself. It was part of his role to request external advice on particular issues.
351. The Council's constitution delegates to the Head of Development and Regeneration a number of detailed responsibilities in relation to the Disposal of Land and Property (*Document 356*). In practice, many of these obligations were in Barnet discharged by Mr David Stephens, although he had no power to sign off disposals of land.

### His actions

352. Mr David Stephens had some involvement with each of the stadium options that were considered in the period 1998 – 2002. He developed valuations, a framework for capitalising revenue costs and had awareness of the potential use of a joint venture company for the Copthall proposals. He had similar involvement with Claremont Road proposals. In each of these instances, Mr David Stephens received instructions to take action direct from the then Chief Executive, Mr Max Caller (who took a close interest in the Club's matters) rather than through his line managers.
353. During this period he had contact with the Club's directors, and he had dealings with Mr Slyper by meeting and also by correspondence. We note that there has been a tendency throughout the documentation we have examined, for correspondence concerning the Club to be sent to Mr David Stephens directly especially following the departure of Mr Andrew Barry-Purssell in June 2000.
354. Mr David Stephens advised us that during 2000, he was also involved with other proposals relating to the Club concerning an extension of the existing lease arrangements and we have also seen correspondence concerning a proposed assignment of the Underhill lease to a holding company. Mr David Stephens also told us that it was Mr Max Caller who first told him that the Council was prepared to sell the freehold. Mr Max Caller had left the Council in June 2000, being replaced temporarily replaced by Ms Rita Dexter and then permanently by Mr Leo Boland from 1 January 2001.

355. Following the interchange of correspondence between the Club and Mr Alan Williams, the Leader indicated a willingness to sell the freehold of Underhill in February 2001. This information was relayed to Mr David Stephens. On 3 April 2001 Mr David Stephens wrote to Mr Tony Kleanthous stating that he had instructions to enter into negotiations for the freehold sale of the Underhill Stadium. His letter indicated that any terms provisionally agreed would need to be reported to the appropriate committee for approval.
356. Between April and June 2001, Mr David Stephens negotiated the consideration for the freehold directly with Mr Graham Slyper. At various times he reported the position reached, by way of departmental briefing notes that were shared with other officers and at times with Mr Alan Williams. There was no involvement of other valuers in the process and no use of external advice. We are informed that Council policy at the time was that external consultants were not employed for any purpose. There is no evidence of any effective departmental overview system in place. Mr David Stephens' valuations in respect of this transaction, rightly or wrongly, represented the Council's position.
357. The framework for the claw back provision (if Underhill were sold following a relocation of the ground to another location) was developed by Mr David Stephens. This was Mr David Stephens' attempt to protect the Council and meet the wishes of Mr Alan Williams, who had in correspondence with Mr Andrew Barry-Purcell in January 2001 expressed concern about protecting the Council's position as a condition of the sale of the freehold. Again there is no indication that this arrangement was subject to any internal review or debate.
358. The attitude of the Chief Executive, Borough Solicitor and Borough Treasurer was not to question another professional. Following the departure of Mr Andrew Barry-Purcell at the end of June 2001, we were informed by his successor Mr Paul Chadwick that he took little direct interest in the work of Mr David Stephens and effectively managed with a light touch, focusing on other issues. Mr David Stephens told us that he could not recall when anyone within the Council had questioned his valuations.
359. In July 2001, Mr David Stephens drafted a Cabinet report in respect of the disposal of the freehold and sought clearance from Mr Alan Williams, the Executive Member for Resources and the statutory officers. In the event the report was not submitted to the meeting of the Cabinet held in July, although there is evidence that Mr David Stephens sought clarification about when it would be dealt with in an e-mail to the Leader, copied to four senior officers. We are not aware of any reply, and we accept that it was not Mr David Stephens' role to draw up the Cabinet agenda.
360. It was then decided that the matter should be dealt with by DPR. We have sought to understand by whom this decision was taken, but without success. Representations for Mr David Stephens note that he *'thinks it was Mr Chadwick'* (Document 386, page 6), although Mr Paul Chadwick has no recollection of this. Mr David Stephens has also told us that the DPR route was followed as the constitution provided for it to be employed in cases such as this, not for any other reason such as urgency. A draft DPR was prepared in similar terms to the draft Cabinet report and circulated for comments at the end of July 2001 to Mr Leo Boland, Mr Jeremy Jaroszek and Mr Jeff Lustig.
361. During October 2001, the Club made an application for a new stadium in South Underhill and copies of the briefing note explaining the application were shared with Mr David Stephens and other officers. Mr David Stephens can be expected to have been aware of the articles in the local press about the development.

362. Despite the wish to move the disposal forward the DPR appears to have lain dormant until the end of October/beginning of November 2001. What then happened is a matter of dispute, although a letter from Mr Graham Slyper to Councillor Anita Campbell thanks her for her intervention and adds that '*clearly the matter had been overlooked*' (Document 152). Councillor Anita Campbell also notes that she spoke to Mr David Stephens and was told that there was '*a bit of a hold-up*' (Document 321, page 17). However representations for Mr David Stephens note that his actions were the '*result of instructions given by Mr Chadwick*' (Document 386 page 7) Whatever the cause, Mr David Stephens advised Mr Graham Slyper that he was instructing the Council's legal department to prepare the documentation for the sale. He prepared a DPR, which was considered and approved by Councillor Danish Chopra and Mr Paul Chadwick.
363. Based on the evidence before us Mr David Stephens when preparing the final version of the DPR did not:
- reflect the concerns raised by Mr Jeff Lustig on the form of the claw back provisions in the DPR or make any changes to alter the framework of the deal
  - liaise with Mr Alan Williams to confirm that he was content with the disposal given the changed circumstances i.e. the planning permission
  - refer the matter back to Mr Leo Boland, Mr Jeff Lustig or Mr Clive Medlam for further consideration
  - check with the Leader that he was content with the disposal, despite it having been specifically requested by Councillor Danish Chopra that this be done
364. Having passed the signed DPR to the legal department, he liaised with Mr Steven Strange and finalised the documentation with him. At certain stages in the development of the finalised disposal arrangements, Mr Steven Strange sought Mr David Stephens's agreement to the form of words being developed for the overage agreement. Mr David Stephens made changes but did not spot the fundamental error in the wording.

#### **Points raised by the Objectors**

365. We have to consider two objections that allege Mr David Stephens caused the Council losses as a consequence of wilful misconduct. The objections by Mr David Miller and Mr Andrew Markey are in the same terms and raise the same issues. The objection is repeated below for completeness.

- David Stephens produced a valuation showing BFC's lease as being worth £165,000.*
- David Stephens estimated the open market rental value of Underhill at circa £30,500 p.a.*
- During negotiations, David Stephens advised AW that the Council should retain 100% of any future development value.*
- The signed contract means that the Council will receive either 60% or 0% depending on the circumstances.*
- Who overruled David Stephens's recommendations and on what legal authority?*
- David Stephens says he was instructed to sell the land under delegated powers but can't remember precisely by whom.*
- When asked about the status of the buyer, David Stephens says he was instructed to sell to Mr Kleanthous' private company but again can't remember by whom.*
- David Stephens Ignored comments from the Principal Legal Assistant with regard to the 10 year cap*
- Advised the Court that his valuation was on the basis that the land remained in the green belt*
- David Stephens knew that the Council were negotiating to de-designate, which is at variance with his evidence to the Court.*

*k) David Stephens has voluntarily provided the Auditor with his comprehensive private files*

*One of the key issues relating to the sale of Underhill is the value of the land. If it is worth more than £100,000 then it should not have been sold under delegated powers.*

*Valuation is not an exact science, but David Stephens valued the leasehold interest alone at £165,000 which was clearly substantially above the constitutional threshold.*

*It is not uncommon for the freehold of a property let on a long unexpired lease with a peppercorn or ground rent, to be worth less than the leasehold interest. For example, a lease with 900 years unexpired at a ground rent of, say, £2 p.a. means the freehold is likely only to be worth a few hundred pounds whereas the lease itself would be extremely valuable.*

*For the purposes of the Constitution, the minimum value that should have been applied was the marriage value, i.e. the value of the leasehold and freehold interest combined. On a simple capitalisation of the ground rent, LBB valued the freehold at £10,000. Whilst this methodology is inappropriate in this instance, based on the Council's own figures, the value of Underhill was at least £175,000.*

*In reality it was worth more because there is a premium attached to owning both the freehold and leasehold interest. This is before taking into account the speculative value of the land which would have increased its value considerably further.*

*On a straight forward commercial basis, if the open market rent was £30,500 then the freehold would have been worth, say, £358,800 based on a generous yield of 8.5%.*

*David Stephens was therefore well aware that the land was worth far more than the maximum amount permitted to be dealt with by officers under delegated powers. David Stephens is therefore guilty of wilful misconduct **because he knowingly did something he knew to be wrong.***

*In dealing with valuations, the Constitution does not refer only to the value of the Council's interest in a property. It simply refers to the value of the asset, and it is therefore self evident that in the case of land that has been leased the marriage value or underlying value of the asset must be considered. If you do not consider the marriage or underlying value, then in theory there would be nothing to prevent Officers from selling any Council asset by declaring a low value under the threshold with a future claw back.*

*The claw back in this instance was up to 60% of the residential development value and that should have been added to the freehold value.*

*It is not clear who had sight of this valuation, but no Officer or Member who read it could have been in any doubt that the value of the land exceeded the constitutional threshold. Therefore, all those who had sight of David Stephens's valuation are guilty of wilful misconduct **for knowingly allowing the sale to be completed without the proper legal authority.***

*David Stephens claims in his private file that he was "made" to produce the Delegated Powers Report. This suggests that he did so against his will. Any person responsible for forcing an Officer to do something unconstitutional would clearly also be guilty of wilful misconduct.*

*Given the consequences of a section 18 complaint being upheld against him, it would surely be in David Stephens's interest if he could be persuaded to:*

- Provide the Auditor with a list of recipients of his valuation*
- Provide the Auditor with details of the person(s) responsible for instructing him to produce the Delegated Powers Report*
- Provide the Auditor with details of the person(s) responsible for instructing him to sell to BFCH, not BFC or a true holding company of BFC*

*The Deputy Chief Executive has stated (meeting with BRASS, January 2004) that the option to give BFCH 100% of the proceeds of sale if BFC remained in the Borough was the express wish of the previous Administration. This represents the complete opposite of the advice David Stephens gave to AW.*

*Whoever instructed David Stephens to introduce the 100% option (in favour of BFCH) in his*



*Delegated Powers Report must be guilty of wilful misconduct because there are no circumstances under which this arrangement could comply with section 123 (without the approval of the Secretary of State, which had not been sought). Giving away a valuable asset meets the test of deliberately doing something you know is wrong.*

*David Stephens was sent the draft contract by the Principal Legal Assistant who pointed out the inclusion of the ten year cap. David Stephens did not respond to this, despite it being drawn to his attention on two separate occasions. At the very least, David Stephens was negligent to ignore this which would meet the test of unreasonableness as required by the Court under section 17.*

*David Stephens gave written evidence to the court setting out the basis of his various valuations. I am not certain if the Court had sight of the version which included his estimate for the value of the lease, but even if not, David Stephens argued that the valuations which assumed residential development were inappropriate as there was no likelihood of that scenario occurring.*

*However, there is substantial evidence to show that the Council were publicly and privately attempting to de-designate the land. The Deputy Chief Executive stated (meeting with Brass, January 2004) that David Stephens would have been aware of the attempts to de-designate the land in the draft UDP.*

*The witness for BFCH, Mr Graham Slyper (a Director of BFC and a professional surveyor) also provided written evidence to the Court suggesting there was no basis for adopting green belt valuations. This witness was described as unreliable by the Judge.*

*BFC admitted at the subsequent Unitary Development Plan enquiry (March 2004) that both parties were actively seeking de-designation of the land and were negotiating the sale on that basis:*

*• Mr Andrew Troup (BFC's Representative) told the enquiry "The case for the removal of the enlarged site from Green Belt has been readily accepted by the professional officers at the Council and was the agreed position between the Club and the Council from July 2000 until the change in administration (May 2002)".*

*It would appear that the evidence of David Stephens and Graham Slyper may be at variance with the known facts, and it therefore might be appropriate for this aspect to be investigated separately by the appropriate authorities.*

*If a Court took the view that both parties to the sale negotiated the transaction on terms they knew to be unlawfully disadvantageous to LBB (i.e. they did not have 'clean hands') then perhaps it would consider an order to set aside the sale or require BFCH to make restitution.*

### **Consideration**

*a) David Stephens produced a valuation showing BFC's lease as being worth £165,000.*

*b) David Stephens estimated the open market rental value of Underhill at circa £30,500 p.a.*

366. The issue for the auditor in respect of the section 18 objection is whether Mr David Stephens followed acceptable professional practice in determining the valuation of the freehold and the negotiation of the sale price. We have taken advice from Savills, Chartered Surveyors, (*Document 373*) who inform us that in 2001 local authorities had differing ways of commissioning and using internal and external valuers. Some local authorities would have adopted procedures that involved appointing an external adviser to assist with the valuation in cases such as the sale of Underhill freehold. In such circumstances the external valuer should have been provided with a formal set of instructions. Transactions involving football clubs have the potential to be politically sensitive and the value of potential development land is extremely sensitive to a range of considerations and it might be expected that the use of external valuers would be more common in these circumstances. Savills note that Barnet did not adopt such a formal process in this instance and that Mr David Stephens both negotiated the terms of the sale and valued the property. They comment that this removes a layer of check, and places all the work with a single individual. However, Mr David Stephens was reporting to a more senior officer who was himself a chartered surveyor, a process which provides for further review.

367. Savills inform us that in their view, regardless of whether a local authority or a private sector valuer had undertaken the work, the same principles would have been adopted. (*Document 373*) The valuation should have been undertaken in accordance with the relevant RICS standards, which in 2001 were the Practice Statements, Guidance Notes and Appendices of the RICS Appraisal and Valuation Standards published in 1995, known as the Red Book. In the event the valuations set out in the documents headed 'draft proposals for the sale of the freehold' do not fully comply with all the requirements for a full report. However the report does contain the essential minimum requirements to allow a decision to be taken. We have also received representations that the Appraisal and Valuation Standards referred to were not at that time mandatory for local authorities. However, in our view they did represent best practice.
368. Turning to the sale, where an officer is exercising delegated powers he would have to obtain the best consideration that could reasonably be achieved. The effect of the covenants, providing for a future clawback, would have a negative effect on the sale price, reducing or removing the special purchaser premium.
369. The value of the freehold subject to the lease to the club as an investment is considered below but Savills have also commented (*Document 371*) that in their view there appear to be three valuation scenarios:
- The value of the property on the assumption that there were adequate and proper mechanisms to capture the added value
  - The transaction as it was contracted, with imperfect overage provisions
  - The value of the Council's interest on the assumption that there would be no attempt to benefit from any further share of value
370. Against these bases, Savills consider that the price that might have been achieved through an unrestricted sale – the third situation above – would be £250,000, while on the basis of the restrictions actually imposed a bidder might have reduced the final offer to £100,000.
371. Savills also explain that the Club would be regarded as a 'special purchaser', defined by the RICS as someone with a particular reason for acquiring an interest in a property, because of special circumstances. The RICS rules require that in determining market value a special purchaser should be ignored, as a sale to that party could involve a marriage value. The Savills report states '*there are no rules (in valuation or in real life) regarding how marriage value should be apportioned, and it is impossible to predict how an individual will behave in response to any particular opportunity to purchase a property.*
372. Provided proper negotiations had taken place and the price which had been achieved was better than the market value (ie the value that might be expected if the bid of a special purchaser were ignored) then Savills state they would assume that best consideration had been obtained, even if the premium were small. The cash price achieved by the Council was considerably less than Mr David Stephens' opinion of the market value of its freehold interest subject to the lease, but the Council sought to protect its interest by securing a share of the potential uplift from any future development.
373. The existence of a safeguard to secure deferred consideration would be a factor in the decision making, when presented with the price in relation to the estimated value of the Council's own freehold subject to the lease. In these circumstances the sale was justifiable, if not commercially motivated.
374. Savills have reported that such arrangements are relatively common in public sector disposals especially where there is a large uplift in value which may be triggered by events at some stage in the future. In normal circumstances the surveyor negotiating the sale and the solicitor acting for the vendor would expect to have a discussion with their client about the best way of securing this, in parallel with the final stages of the negotiations.

375. It is represented on behalf of Mr David Stephens that s84 of the Law of Property Act 1925 has a material bearing, as that section enables a lessee to apply to the Lands Tribunal to modify user restrictions. We note that any such application could not be made until December 2010 at the earliest, and in any case there is a range of issues on which the Tribunal would have first to be satisfied before granting such a modification.
376. There is no evidence that this possibility was considered at any point in the process by either the Club or the Council. In any case it was not in the interests of the Council to encourage the Club to do so. We do not agree that this option might have had a material bearing on the valuation.
377. Having considered this advice and Mr David Stephens' submissions, we do not believe there is clear evidence that Mr David Stephens did not follow acceptable professional practice.

*c) During negotiations, David Stephens advised Mr Alan Williams that the Council should retain 100% of any future development value.*

378. There is no evidence that any such advice was given. Both Mr David Stephens and Mr Alan Williams reject this suggestion.

*d) The signed contract means that the Council will receive either 60% or 0% depending on the circumstances.*

379. The terms of the sale agreement were intended to protect the Council in the event of the Underhill ground being vacated and development taking place, the basis of that protection was on the following lines.

Scenario	Conditions	Sale Distribution	
		Holding Company	Council
Holding company builds new stadium in Borough, Barnet FC moves to permanent new home and Underhill sold.	Barnet FC must remain and play at new stadium for at least 10 years.	100%	Nil
Club permanently relocates to stadium outside the Borough and Underhill sold.	None (but 10 years might apply).	40%	60%
Club leaves Underhill Stadium or a new stadium built within the Borough and Underhill sold.	Within 10 years.	40%	60%
Club ceases to exist and Underhill sold.	None.	40%	60%

380. However, owing to a drafting error in the DPR which was then incorporated into the sale documentation, the outcome is that after 10 years, the holding company of the football club is entitled to a 100% of any disposal proceeds.

*e) Who overruled David Stephens's recommendations and on what legal authority?*

381. The disposal terms were the ones that Mr David Stephens originated and Mr Chadwick approved and we do not understand the basis of the question.

*f) David Stephens says he was instructed to sell the land under delegated powers but can't remember precisely by whom.*

382. Mr David Stephens has represented to us that it was Mr Paul Chadwick who instructed him to use delegated powers. Mr Paul Chadwick has no recollection of this; in his second interview Mr Paul Chadwick said on being asked about the appropriateness of the DPR route '*I think that it's the kind of thing that others should have been thinking about for me, not relying on a brand new chief officer acting up to think through those issues.*' (Document 365, page 35) There is no evidence before us to suggest any improper pressure was placed on officers to use a DPR.

*g) When asked about the status of the buyer, David Stephens says he was instructed to sell to Mr Kleanthous' private company but again can't remember by whom.*

383. The use of a holding company for facilitating new stadium developments and protecting the Club from various rules established by the Football League had been a feature of proposals emerging in the period 1998 – 2002. The Council and Mr David Stephens had become used to this possibility. It seems that the issue surfaced again in the negotiations with Mr Graham Slyper in April 2001. Mr David Stephens did refer to the holding company in his departmental briefing notes. No officer questioned the status of the holding company and no checks at Companies House or anywhere else took place. We accept that it was not Mr David Stephens' role to undertake such checks.

*h) David Stephens ignored comments from the Principal Legal Assistant with regard to the 10 year cap*

384. Mr Steven Strange did seek confirmation that the draft contracts correctly represented the agreed terms for the disposal. Mr David Stephens did respond to such enquiries but made an error in not identifying the issue over the brackets.

*i) Advised the Court that his valuation was on the basis that the land remained in the green belt*

385. This is the basis of the valuation, however, the possibility of eventual disposal was recognised and that is the reason for the claw-back clause.

*j) David Stephens knew that the Council were negotiating to de-designate, which is at variance with his evidence to the Court.*

386. Based on the evidence before us the position in July 2001 was that the Council's proposals for de-designation were not ones that the GLA was minded to support. The GLA was prepared, however, to contemplate the possibility of a further stadium being developed within the green belt. The possibility of de-designation was recognised and that was why the claw back clause was developed.

*k) David Stephens has voluntarily provided the Auditor with his comprehensive private files*

387. Mr David Stephens' position as he explained it us is that he provided his files to Mr Victor Lyons, the former Conservative Leader. Mr David Stephens has represented to us that without his knowledge or consent Mr Victor Lyons passed the files to the objectors, who passed the file to the auditor.

### **Valuation of the freehold**

388. The assertion by the objectors as reproduced in the following paragraph is that Mr David Stephens undervalued the freehold and that because of alleged undervaluation he was able to progress the sale of the freehold under delegated powers.

*On a straight forward commercial basis, if the open market rent was £30,500 then the freehold would have been worth, say, £358,800 based on a generous yield of 8.5%. Mr David Stephens was therefore well aware that the land was worth far more than the maximum amount permitted to be dealt with by officers under delegated powers. Mr David Stephens is therefore guilty of wilful misconduct because he knowingly did something he knew to be wrong.*

389. As we note above we have taken advice from Savills, who have reminded us that the circumstances at the date of the transaction were very different from those suggested by the objectors. The Open Market Rental Value of the property was assessed for the purposes of reporting a further figure concerning the hypothetical distribution of marriage value but the property was actually let for a term of 84 years at £50 pa. Their view is that in the circumstances of the sale, the actual rent is a relevant consideration, in addition to the deferred value of the reversion at the end of the lease in 84 years and other matters such as the restrictions on use imposed by the lease, and its repairing obligations.
390. Savills conclude '*With the restrictions intended to be imposed, a figure of £100,000 might have been expected.*' This is, of course, the maximum sum permitted if the delegated powers route is to be followed.

### **Consideration of other matters**

391. We have considered the cause of the delay in processing the sale that arose in the summer of 2001, and the possible consequences of that delay for Mr David Stephens. Mr David Stephens had direct dealings with Mr Alan Williams, the Leader and with the Football Club directors over the freehold disposal. He knew the political pressure to retain the Club in the Borough and he was aware of the history of failing to deliver previous options. He had a grasp of the principles of s123 Local Government Act 1972 and the need to secure best consideration. He also knew that he was subject to very limited supervision and check. A failure to action the sale of the freehold when it was supported by Mr Alan Williams, the Leader, would expose him to criticism from a politician who we have been told had a reputation of being forceful. The Club's chairman was likely to be equally vocal.
392. Mr David Stephens also knew that he was subject to few internal checks and little effective management. Despite this, he did not act on the outputs of those systems that should have protected the Council from losses due to error. Awareness of any statement that the Borough Solicitor was concerned that the claw back arrangements were complicated, would have raised the issue in the eyes of Mr Paul Chadwick and Councillor Danish Chopra in the final stages of the DPR approval, and might have averted the loss.
393. Mr David Stephens made mistakes in drawing up the DPR. The mistake in misplacing the brackets was not easy to spot and, in itself, appears to be a simple error. However, the Council's safeguards in respect of DPRs involve the review of documentation by senior officers. No one in the Council spotted the error in the brackets until the sale had been effected. Mr Jeff Lustig's queries were left unanswered and apparently unconsidered

### **Determination**

394. Applying our tests we have concluded that the loss that arose to the Council resulted, at least in part, from the actions of Mr David Stephens. We consider that his actions amount to misconduct. However, we do not believe that misconduct was either wilful or the result of reckless indifference. We do not propose to take any action against Mr David Stephens under s18 Audit Commission Act 1998.

### **Statement of Reasons**

*Did a loss result from Mr David Stephens' activities?*

395. We believe that the loss resulted, at least in part, from Mr David Stephens' actions. Our reasoning for this is:
- a) We consider that Mr David Stephens had primary responsibility among all of the Council's officers for the transaction. He conducted the majority of the negotiations, and was also responsible for developing the structure of the transaction

- b) While we have been unable to conclude on who decided to employ the DPR route, once that decision had been taken Mr David Stephens' evidence suggests that he was responsible for drafting the DPR and obtaining the necessary comments and approvals.

*Is there evidence of misconduct that caused the loss?*

396. We conclude that Mr David Stephens' actions and omissions fell significantly below the standard we would have expected of an officer in his position and therefore that they amount to misconduct. We do not consider that the drafting error within the contract of itself constitutes misconduct. However, we believe the procedural failures such as representing Mr Jeff Lustig as having made no comments when in fact he had expressed concerns, and failing to pursue Councillor Danish Chopra's request to ensure the Leader was content do amount to conduct significantly below standard.

397. Our conclusion is also based on:

- a) For reasons that he assigned to pressure of work, progress on the sale of the freehold lay dormant from July 2001 to early November 2001. Mr David Stephens was prompted to move it forward in November, although who was involved is not wholly clear. He had drawn up the DPR in July and, in our view, he should have been aware that there were comments on the DPR to resolve. Mr David Stephens claims that he overlooked these important comments from Mr Jeff Lustig. We note that in order to resolve the queries, he would have needed to have spent more time speaking to the Club and revisiting the wording of the DPR. He would then have had to re-circulate the DPR to the statutory officers; this would have created further delay and exacerbated the potential criticisms of his apparently dilatory performance.
- b) Later in the process, Mr David Stephens had another opportunity to review the terms of the claw back when Mr Steven Strange sought clarification of the clauses giving effect to the requirements as set out in the DPR. The legal contracts for the disposal are not so complicated that upon reading through, the drafting error would not have become apparent to an informed reader. Based on the information before us, a review of these documents as a whole by such a person would have highlighted the error in drafting. It therefore follows that Mr David Stephens either did not elect to read through the draft sale contracts or alternatively he scan read it without due care and attention. Although he has informed us that he was working under considerable pressure at the time, we do not consider that this was a sufficient reason to omit an appropriate review.
- c) As well as overlooking Mr Jeff Lustig's comments we find every reason to believe he also took no action to follow Councillor Chopra's wishes by confirming that the then Leader, Mr Alan Williams, was content for the disposal to proceed.

*Was the misconduct deliberate or the result of reckless indifference?*

398. If we are to reach a finding of wilful misconduct against Mr David Stephens under s18, we need also to be able to show that his actions were either deliberate or were reckless. We do not believe there is sufficient proof that he acted in a manner that can conclusively be shown to be either. We have no clear evidence that having overlooked the matter for some period, he sought to expedite it in order to escape criticism. There is no doubt that in so doing important steps were not undertaken. On the other hand, there is no suspicion of personal monetary gain. Further, we accept that he was working under pressure with only limited resources. While Mr David Stephens' claim of a lapse of memory may be convenient, we can not prove it amounts to more than that. On balance, we have insufficient evidence to demonstrate that his actions were either deliberate or reckless.

## Mr Jeff Lustig

399. Mr Jeff Lustig had been employed as a solicitor by Barnet for many years, having first been appointed in 1983. He became Acting Borough Solicitor and Acting Monitoring Officer at the end of May 2001 and Borough Solicitor and Monitoring Officer on 10 September 2001.

### Mr Jeff Lustig's role

400. In May 2001, Mr Jeff Lustig became responsible for giving legal advice to members and fellow officers. Within the Borough Solicitor's department, which was styled the Law and Probity Service, he had a team of just over 30 lawyers, being a mixture of solicitors, barristers, legal executives and some un-admitted staff who carry out legal advice and case work. There was also a support team of administrative and secretarial staff. Mr Jeff Lustig had responsibility for electoral registration, local land charges, registrars of births, marriages and deaths, democratic services which was committee related, the scrutiny team, the mayor and member support team, facilities, management of the town hall, corporate anti-fraud team and the CCTV and emergency services team.

401. The position of Monitoring Officer was established by s5 (2) Local Government and Housing Act 1989. That section requires every Council to establish a post of Monitoring Officer, whose duties are, inter alia, to report on any proposal that appears to be likely to give rise to a contravention of any enactment.

402. We have received representations for Mr Jeff Lustig that explain his duties at the time were restricted to being consulted on a draft DPR, and that he did not see the final DPR. He was not, and was not required to be, further involved. The representation notes that '*It is the case that Jeff Lustig had every reason to believe and did believe that the decision making process was in accordance with the Council's constitution and that the sale was lawful.*' (Document 378 page 25)

### His actions

403. Mr Jeff Lustig had some sporadic involvement with matters relating to the Club over the years. He gave advice in connection with the Cophall proposal. The legal team was involved with the planning inquiry for Cophall. Legal issues would arise from time to time, officers with property responsibilities or the planners would ask for some specific advice and advice would be given with no further ongoing involvement from the legal team.

404. As far as the disposal of the Underhill freehold was concerned, the first development was the receipt of the draft Cabinet report from Mr David Stephens on 2 July 2001. Mr Jeff Lustig responded in an email dated 17 July 2001 stating that '*My only comment is that perhaps some reference should be made about the Council getting a share of the proceeds from a sale of part of the site.*' (Document 122). The next development noted was when Mr David Stephens circulated the draft DPR document on 23 July 2001 for comment to the statutory officers, being Mr Leo Boland (Chief Executive), Mr Jeff Lustig (Borough Solicitor) and Mr Jeremy Jaroszek (Strategic Director) (Document 237 Appendix 29).

405. Mr Jeff Lustig responded to that email on 30 August 2001 and he made a number of comments:

*'I understand that the thrust of the proposed on-sale provisions, but I think we need to be careful not to over complicate them because we might miss a trick that way. Are these not the key provisions:*

*Barnet FC is allowed to play at Underhill for at least 10 years unless it finds and moves to another facility during this period*

*Unless Barnet FC has relocated to another suitable ground within the Borough and the holding company or its successor in title has provided and developed or will provide and develop that other ground, then on any sale of Underhill the sale proceeds division provisions will apply.*

*We particularly have to be careful to ensure that, under the agreement, the holding company can't avoid the sharing arrangement by effectively transferring the development value before Barnet FC relocated out of the Borough.'*

406. He did not receive a reply to this email. In his discussion with the auditor, Mr Jeff Lustig made the following comments:

*'What generally happens now, for instance if I'm consulted on a report, if I'm satisfied with the report, all the consultation now is invariably done by email, I will send an email back saying, 'Cleared' or 'Okay' or 'I'm satisfied with the report'. I don't physically sign the report. In this particular case I didn't do that because I wasn't satisfied with the wording of the report, not specifically in my monitoring officer role, but in my role as borough solicitor or the lawyer giving advice, because I didn't feel that the terms were being expressed with the appropriate clarity. In those circumstances I would have expected (a response) because in every other case I can think of where I've made comments on draft reports – we're talking about 20 years or more – there's always been a response. This is the single occasion where it didn't happen.'* (Document 320, page 18)

407. Following a lengthy delay Mr David Stephens subsequently advised the Football Club by email on 9 November 2001 that *'the report has been passed to Legal for them to start the necessary work.'* (Document 150). He asked for details of the Club's solicitors. The request for legal documentation to be prepared was passed to Ms Alberta Owusa-Tevie, Chief Solicitor, who in turn passed it to Ms Philomena Jemide, Team Manager – Projects Team, who allocated the work to Mr Steven Strange, Principal Solicitor. Mr Steven Strange received details of the DPR on 28 November 2001 and completed the legal documentation in conjunction with Mr David Stephens. Mr Jeff Lustig had no direct involvement in this process.

408. In his interview with the auditor in relation to the error Mr Jeff Lustig said at page 27:

*'I wish that I had noticed it, obviously. It was brought to my attention by Graham Beattie, Director of Environment, who had come to see me; I think that it was in May or June 2002. I can't be sure of the exact date, but I think it was around about that time. He asked if he could have a copy of the transfer documentation. I supplied it to him and he came back to me and said, 'I think there's been a mistake'. That's when I looked at it and we discussed it, and I realised he was right'.*

409. Mr Jeff Lustig informed us that he signed the contract and witnessed the seal of the overage deed.

*"I'm authorised by the constitution to sign contracts on behalf of the Council, and I'm authorised under the constitution to witness the fixing of the Council seal with the Mayor, the Deputy Mayor, or Mr Alan Williams, the Leader. Well, obviously it is a significant responsibility, and we do go through the documentation before we sign it, but, given the volume of it, and sometimes the size and complexity of the documentation, we are reliant on my staff to assure me that the documentation is in order. As an example, sometimes we are required to sign contracts that will constitute three or four folders like these. The people have been working on them for months and months and months and have huge familiarity with the technical detail. Whilst we did obviously take the responsibility very seriously, it would be completely impossible for me to go through the contracts and transfers with the sort of depth that my own lawyers have gone through. We would have to set aside probably the whole week to do that.'* (Ibid, page 27)

#### **Points raised by the Objectors**

410. We have to consider two objections that allege Mr Jeff Lustig caused the Council losses as a consequence of wilful misconduct. The objections by Mr David Miller and Mr Andrew Markey are in the same terms and raise the same issues. The arguments in support of the objections are repeated below for completeness.

- a) Jeff Lustig told the Land at Underhill Inquiry that he considered the deal was getting too complicated.
- b) If so, why did he allow a legal assistant to draw up the draft contract and not check it?
- c) The Delegated Powers Report states that sale had to be in a form to Jeff Lustig's approval.
- d) Did Jeff Lustig approve the contract? If not, why not?
- e) Why did Jeff Lustig not notice the typographical error? Others may have had an excuse, but not



*the Borough Solicitor.*

*f) Even if Jeff Lustig did not notice typographical error, why did he allow the resultant ten year cap as clearly stated in the Contract? (Clause 7, Overage Payment Deed)*

*g) Why did Jeff Lustig allow a contract to be drawn up that ignored the covenants contained in the original lease?*

*h) Why did Jeff Lustig allow someone else to sign off the Delegated Powers Report in his name?*

*Much has been made of the typographical error in the Delegated Powers Report. Whilst it may have been negligent for Jeff Lustig not to have noticed the error, the consequence of this mistake was to introduce a ten year 'cap' into the draft contract which would have been clearly understood by him.*

*Jeff Lustig was aware that the Chief Valuer's valuation was calculated on the basis that there would be a claw back if the land was sold for development. However, Jeff Lustig knew that the Delegated Powers Report allowed for BFCH to keep 100% of the proceeds of the sale of Underhill if a new stadium was built within the Borough.*

*It is not credible to suggest that Jeff Lustig did not realise this could not possibly comply with section 123 of the Local Government Act 1972, especially as e-mail evidence shows that he and the Chief Valuer had discussed this aspect at length.*

*Given that the Contract had to be drawn up in a form to Jeff Lustig's approval, the only possible conclusion is that Jeff Lustig knowingly allowed it to be signed off in its final form when he had ample opportunity to amend the details. Whether he was under pressure from certain individuals or merely a heavy workload is irrelevant. Jeff Lustig allowed the sale to proceed on terms knowing that they could not possibly comply with the law. As Borough Solicitor, it was within his power to prevent the sale from taking place.*

*Jeff Lustig was aware of the length of the unexpired lease to BFC.*

*As Borough Solicitor, Jeff Lustig must have been aware that the Council's Constitution prohibits Officers from dealing with land sales under delegated powers where the length of the lease is more than 30 years.*

*Jeff Lustig was therefore aware that the Delegated Powers Report must have been ultra vires.*

*By allowing the sale to proceed via the Delegated Powers Report route instead of insisting that a report be sent to Cabinet, **Jeff Lustig knowingly permitted a course of action to be pursued which he knew to be wrong.***

*Whilst the current objection relates to the sale of Underhill in March 2002, it is relevant to consider subsequent action taken by Jeff Lustig after the new Administration decided to pursue a legal action against BFCH. The Council's case was prepared by the Borough's legal department, despite the obvious conflict of interest.*

*Why did Jeff Lustig pursue the wrong legal case – i.e. rectification of contract when he knew that this made no difference to the 100% option?*

*Why did Jeff Lustig pursue a section 123 argument in Court when he should have known that the Club could (and did) use section 128 as a defence?*

*Why didn't Jeff Lustig give evidence at Court? Defence counsel refers to this. Was it because he did read the Overage Deed, understood the cut-off period, and did not want to state this in court?*

*Did Jeff Lustig properly brief the Barrister vis-à-vis the Constitutional irregularities and that there was no legal authority for the sale?*

*If the Court case had been successful, this would have proved that the Officers were complicit in an unlawful act. It was therefore not in the interest of Officers for the case to succeed.*

*It is clear from comments made by the Judge, that a different action might have been more successful.*

*The Borough Solicitor admitted to me in an e-mail that even if the High Court case had been successful, BFCH would still have been able to sell the land and keep 100% of the revenue. Pursuing a case for rectification therefore had no purpose.*

*The erroneous bracket, and the failure to notice it, could be considered merely negligent. But there were far too many other 'errors' by Jeff Lustig and others for them all to be considered negligent. A reasonable person, when availed of all the facts, would be bound to conclude that the terms of the sale were deliberate.*

411. Mr David Miller made additional representations to us in a letter of 14 August 2006. (*Document 397*). His argument is that Mr Jeff Lustig should have been further involved. He says that if it is accepted Mr Jeff Lustig was not further involved in the disposal after expressing his comments on the DPR, other than executing the documents, it would amount to 'a *dereliction of duty* (that) *goes beyond negligence*.' Mr Mike Dawson, in a letter of the same date, (*Document 399*) notes that the DPR format included sections for recording the observations of the Monitoring Officer, and contends that Mr Jeff Lustig was required to comment on the final DPR by the Council's constitution.

### **Consideration**

412. We have considered all of the matters raised by the objectors, and we have considered whether there are any further issues we should address. We believe the principal matter before us is the manner in which Mr Jeff Lustig undertook his responsibilities. We have to consider whether he the Council has suffered a loss; if so whether that loss was caused by him doing something wrong, and if so whether he knew his conduct was wrong, or was recklessly indifferent as to whether it was right or wrong.
413. The objectors expect a high standard of performance and expectation from the Borough Solicitor. In the introduction to the objection against Mr Jeff Lustig, the objectors state:

*'The erroneous bracket, and the failure to notice it, could be considered to be merely negligent. But there were far too many other 'errors' by JL and others for them all to be considered negligent. A reasonable person, when availed of all the facts, would be bound to conclude that the terms of the sale were deliberate.'*

414. Mr Jeff Lustig did criticise the DPR and expressed his reservations in an email to Mr David Stephens. However, the error in the brackets was not spotted until June 2002 and then by Mr Graham Beattie. It was unfortunate that internal procedures were weak and that no system was in place to ensure that Mr Jeff Lustig's previous comments, and those of the other commentators on a DPR were dealt with and drawn where necessary to the attention of the ultimate signatories. Furthermore, the actions of Mr David Stephens did not assist when he misrepresented Mr Jeff Lustig's position on the final version of the DPR that was signed off by Mr Paul Chadwick.
415. We have considered representations on behalf of Mr Jeff Lustig (*Document 378*) to the effect that he is not to be criticised for the incorrect drafting of the contract documentation, as that was dealt with by a separate team. It is also contended that it is unrealistic to regard him as under a duty to follow up his comments on the draft DPR, since that was not the role of the Borough Solicitor. We accept that no senior officer can review all of the work of all his or her staff, and we also accept that Mr Jeff Lustig had a considerable volume of matters to deal with. Nevertheless, our view is that this was a complex and high profile matter, and that it would be reasonable to expect Mr Jeff Lustig to have made himself aware of the structure of the eventual contract.
416. The question arises whether he might have been more diligent in other areas. The standard we have used is the one we would expect of an individual with Mr Jeff Lustig's experience and in his position, with the information available to him. While we accept that Mr Jeff Lustig did not have any valuation expertise, we take the view that he might have raised other questions. For instance he did not question whether:
- a) The total consideration was less than the £100,000 limit for the use of the DPR route referred to in the constitution. The cash sum involved was under £100,000 but the value of the total consideration is not clear. It cannot be judged from the DPR as no assessment is made of the commercial value of the potential development value clause. Mr Jeff Lustig might have been expected to query the basis on which the consideration had been established, if only to ensure that the process was constitutionally sound.
  - b) The sale gave rise to a number of monetary benefits to the football club. Firstly, it relieved the Club from covenants contained with the original lease. Mr Jeff Lustig might have questioned if these arrangements had been considered. Second, and more importantly, the Council's share of any development gain for the first ten years of the agreement in respect of sale was being foregone if it were invested in a new stadium in the Borough. There is no evidence to show whether the appropriateness of the Council foregoing capital receipts was considered. It does not appear to us that Mr Jeff Lustig considered whether so doing was compatible with the requirements of s123 (2) to obtain best consideration, a matter which a Borough Solicitor and Monitoring Officer should have considered.
417. The other points made by the objectors are:
- a) *He knew that the deal was getting too complicated.* He did alert Mr David Stephens who chose not to take action on the points raised.
  - b) *Why did he allow a legal assistant to draw up the contract and not check it?* The arrangements in the Borough Solicitor's department allow work to be delegated and checked by line management. The procedures within the department did not allow the Principal Solicitors working on the draft contracts to be aware that the Borough Solicitor's comments had not been dealt with in the finalised DPR.
  - c) *The DPR said that contractual documents had to be in a form that was approved of by the Borough Solicitor.* Paragraph 4.1 of the DPR states that the contract is to be in a form that is acceptable to the Borough Solicitor. The interpretation adopted was that this meant the contract should be in a form acceptable to the Borough Solicitor's department rather than to Mr Jeff Lustig personally. We accept that in practice Mr Jeff Lustig can not be expected to undertake or to review all of the work of his department.

- d) *Did Jeff Lustig approve the contract?* The contract was prepared by the Borough Solicitor's department and not the Borough Solicitor himself. The Borough Solicitor did not check the document but relied on the line managers within the department.
- e) *The sale was in breach of the constitutional requirements for a DPR as it was in respect of a lease with over 30 years to run.* This transaction was for the disposal of the Council's freehold in the stadium. Consequently the prohibition by the constitution of the use of a DPR for the purchase or disposal of a lease for a period of more than 30 years is not relevant.
- f) *The basis of the legal case put for the rectification of the sale agreements was fundamentally flawed.* These are matters for the 2002/3 audit and not matters that can be considered as part of the audit of 2001/2 accounts.

### **Consideration of other matters**

- 418. We consider that Mr Jeff Lustig made some astute points in reviewing the DPR. He identified flaws in the draft DPR which he drew to the attention of Mr David Stephens. We believe that Mr Jeff Lustig expected Mr David Stephens to consider his points and develop a revised draft but no response was received. Mr Jeff Lustig's office had no procedure to ensure that responses were received.
- 419. Mr Lustig advised the auditor that he could not recall any other instance where no response has been received to a query in respect of a DPR. He did not expect that Mr David Stephens would ignore his reservations and prepare a draft DPR for approval by Mr Paul Chadwick and Councillor Danish Chopra showing that the Monitoring Officers comments as none. We note that he and the other senior officers had a high level of trust in the Chief Valuer.
- 420. The Borough Solicitor's department received the instruction from Mr David Stephens in the form of the approved DPR. They acted on it in the usual manner as a normal routine disposal, which did not call for Mr Jeff Lustig's personal attention.
- 421. Mr Jeff Lustig or members of his department might also have questioned other aspects of the transaction such as the foregoing of potential future income if it were invested in a football ground. there is no evidence that they did so, and we believe they should have done.

### **Determination**

- 422. Applying our tests we have concluded that the loss the Council incurred did not result from the actions of Mr Jeff Lustig. We do not therefore propose to take any action against Mr Jeff Lustig under s18 Audit Commission Act 1998.

### **Statement of Reasons**

*Did a loss result from Mr Jeff Lustig's activities?*

- 423. The loss that arose to the Council did not result from the actions of Mr Jeff Lustig. We consider that the loss did arise from a poorly drafted contract which had been drawn up in the Borough Solicitor's department. However it was not drawn up by Mr Jeff Lustig personally, and neither could it reasonably have been expected to be. The Borough Solicitor did sign the sale agreements at the sealing ceremony at the end of February 2002, but we accept that this did not carry with it any responsibility to conduct a further review.

*Is there evidence of misconduct that caused the loss?*

- 424. We do not find that Mr Jeff Lustig acted in a manner that represents misconduct. We consider that:
  - a) It was not necessary or even practical for Mr Jeff Lustig to conduct all of the work required on the contract personally, particularly given his role in overseeing the legal arrangements of a large London Borough.

- b) Mr Jeff Lustig did not supervise directly the work of Mr Steven Strange who was responsible for drafting the contract
- c) He raised some significant issues in relation to the DPR, but did not pursue them when he received no response from Mr David Stephens. While we believe that he might have done so, we do not think that the omission amounts to conduct significantly below the standard we would have expected

*Was the misconduct deliberate or the result of reckless indifference?*

425. As we have found no evidence of misconduct, we do not need to consider whether his actions were deliberate or reckless.

## Mr Paul Chadwick

426. Mr Paul Chadwick was appointed as the Acting Head of Development and Regeneration following the resignation of Mr Andrew Barry-Purssell in July 2001. He was first appointed by the Council in 1997 as Chief Valuer, and he became Deputy Head of Development and Regeneration, under Mr Andrew Barry-Purssell, in late 1999.

### Mr Paul Chadwick's role

427. In his acting role Mr Paul Chadwick took over the constitutional responsibilities of the Head of Development and Regeneration. The constitution states that amongst other matters the holder of this post, in consultation with the Executive Member for Resources, has delegated authority to dispose of land, provided that the consideration is less than £100,000 plus fees. In addition he has responsibility to ensure that the Council complies with its rules on the disposal of land and property.

428. Where the Head of Regeneration exercised his delegated powers, the Council's processes required that he do so in consultation with the relevant Executive member, in this case Councillor Danish Chopra

429. Mr Paul Chadwick's post also involved the management of a significant department, which faced many pressures apart from the one under review.

### His actions

430. We know from Mr Paul Chadwick's interviews with the auditor and his statements to other enquiries that while Mr Paul Chadwick had been a colleague of Mr David Stephens for a number of years prior to November 2001, he had little direct involvement with him in relation to Underhill. In particular there were few, if any, one to one briefings.

431. Mr Paul Chadwick's main part in the disposal revolves around the delegated powers report. He has said that he had not seen the DPR before it was presented to him for signature. In his evidence to the Harbord enquiry, Mr Paul Chadwick stated that *'I suspect that I would have speed read the report, probably more than anything, looked at the conclusions, looked at the best price issues and signed it off on that broad basis'*. (Document 348). In his further interview with the auditor in January 2007, Mr Paul Chadwick added *'I would have been looking at the, kind of, headings; I would have been looking at the marriage issues, the marriage value issues, the percentage split, and whether that was ... appropriate and fair'* (Document 365, page 11)

432. To comply with the processes supporting the DPR, Mr Paul Chadwick effectively relied upon Mr David Stephens. When the DPR was presented to him he would have seen that the Head of Paid Service, the Monitoring Officer and the Borough Treasurer had all looked at the DPR and had apparently made no criticism of the planned sale. None of the officers had on the face of the DPR highlighted any errors in drafting or issues of legal or financial non-compliance. He then signed the report without comment.

### Consideration

433. Mr Paul Chadwick's actions have not been the subject of any of the objections. Nevertheless as the officer to whom delegated responsibility was assigned by the Council's constitution, it was he who effectively approved the transaction by signing the DPR. In undertaking his responsibilities, we consider that it was incumbent on him to satisfy himself of the purpose and legality of the transaction.

434. We have considered three specific matters:

- Whether Mr Paul Chadwick played a sufficient role in the disposal, given the responsibilities of his post
- The adequacy of the evidence available to him on which he relied in signing the DPR

- Whether he was justified in giving his approval

*Did Mr Paul Chadwick play a sufficient role?*

435. We noted above that Mr Paul Chadwick took little direct interest in the work of Mr David Stephens and effectively managed with a light touch, focusing on other issues. Mr David Stephens in fact told us that he could not recall when anyone within the Council had questioned his valuations. (*Document 350, page 46*)
436. Mr Paul Chadwick took up his post in July 2001 when the negotiations with the Club were already well advanced and the form of the final agreement was already almost complete. It was in July for example, that it was settled that the period in which the Council would continue to share a proportion of some future receipts would be 10 years.
437. In these circumstances Mr Paul Chadwick has informed us that he did not seek to play a greater role in the disposal of Underhill during the autumn of 2001. In his interview with the auditor, in answer to the question about the DPR 'What process entered your mind when you got the document?', Mr Paul Chadwick replied '*I just signed it as I had been advised to as it had been seen by the Borough Solicitor.*' (*Document 324, page 5*) In subsequent interviews, Mr Paul Chadwick has explained that he believes he would have reviewed the key points, although the passage of time makes it difficult for him to be precise.
438. He might have been more rigorous in his enquiries when he was required to sign the delegated powers report in his own name. The political sensitivity of the issue would by that time have been clearer to him, given the involvement of the Leader and the profile that football matters enjoy. Further, at that point the press was reporting the planning application for the South Underhill site. In addition, it might well have struck him as odd that the DPR route was being adopted.
439. When Mr Paul Chadwick was asked to approve the DPR on 13 November 2001, he would have seen that all three of the statutory officers had already commented that they were content. However, while there was no direct evidence to him that any had any misgivings, he took no steps to obtain positive assurances.

*The adequacy of the available evidence*

440. Mr Paul Chadwick had to consider a report (*Document 153*) which had the purpose, in the words of its summary, of being 'to approve the sale of the freehold interest in the Underhill Stadium to a holding company on behalf of the Club subject to safeguards for the Club having future use of the stadium and to the Council sharing in any future development value'.
441. The report concludes that the terms negotiated will achieve the following:
- *Realises (sic) a price for the freehold which reflects the current lease and the annual income*
  - *Ensures that Barnet FC can continue playing at the ground*
  - *Provides the Council with a proper share of any future development value if the Underhill stadium is sold and Barnet FC no longer plays in the Borough*

As the arrangements will assist the Club with sorting out its future, I recommend that the freehold sale be approved.

442. We have already noted that it is not clear how the sale of the freehold to the Company would assist the Club, or why the transaction was in the Council's interests.

443. It is not apparent that Mr Paul Chadwick had any first hand knowledge of the scheme. On the other hand the report contains provision for observations from the Monitoring Officer, the Head of Paid Service and the Borough Treasurer, and none raised any points. There are also several paragraphs of explanation of the safeguards referred to in the summary, and a short note confirming that the requirements of s123 have been met. Finally, the Cabinet member had no comments.

*Was Mr Paul Chadwick justified in giving approval?*

444. During his interviews on 19 May 2006 and 22 January 2007 (*Documents 324 and 365*) Mr Paul Chadwick laid stress on a number of factors that relate to the manner in which he gave his approval. In particular, he noted that:
445. When he received the DPR it had already gained the approval of the Chief Executive, the Finance Director and the Borough Solicitor. He was aware that all had significant prior involvement with the case, and they were experienced in ensuring that proposed actions were consistent with policy. He was also aware of the importance of the case and the priority that senior officers and members were giving it.
446. Mr Paul Chadwick emphasises that whilst he was the officer with delegated powers, giving a delegated decision is just one part of the process and that others should also bear responsibility for ensuring their actions are reasonable and professional. As a consequence Mr Paul Chadwick is strongly of the view that his actions were reasonable.
447. Owing to the passage of time, Mr Paul Chadwick tells us he can not recollect the precise nature of the steps he took to consider the valuation advice, including the work of Mr David Stephens, but believes he would have looked to see whether the main headings were appropriate and fair. Since Mr Paul Chadwick occupied a Chief Officer's post and was remunerated accordingly, we consider it appropriate to judge him against the standard of behaviour reasonably to be expected for a Chief Officer. We do not accept that in this instance the steps taken by Mr Paul Chadwick were clearly sufficient; he did not for example note that the comments made by the Borough Solicitor had not been acted on.

**Determination**

448. Applying our tests we have concluded that the loss that arose to the Council resulted from the DPR that was approved by Mr Paul Chadwick. However, we do not consider that his actions amount to misconduct. We do not therefore propose to take any action against Mr Paul Chadwick under s18 Audit Commission Act 1998.

**Statement of Reasons**

*Did a loss result from Mr Paul Chadwick's activities?*

449. The loss that arose to the Council did result from the actions of Mr Paul Chadwick as it was he who formally authorised the disposal of the freehold.

*Is there evidence of misconduct that caused the loss?*

450. We are of the view that Mr Paul Chadwick's failure to consider the matter more fully does not constitute conduct significantly below the standard that might reasonably have been expected of him, and thus that it does not amount to misconduct. We consider that:
- a) Mr Paul Chadwick was entitled to take comfort from the apparent lack of concern on the part of the three senior officers of the authority who had commented on the DPR before it was presented to him for signature
  - b) It was not unreasonable for him to place reliance on the work of Mr David Stephens, given Mr David Stephens' long-standing involvement.



*Was the misconduct deliberate or the result of reckless indifference?*

451. As we have found no evidence of misconduct, we do not need to consider whether Mr Paul Chadwick's actions were deliberate or reckless.

# Section 8 – Our Conclusions under s8 Audit Commission Act 1998

## **Request for a public interest report to be issued**

452. We have to consider issues raised by Mr Andrew Markey and whether we are to issue a public interest report. In his letter dated 17 May 2004 (*Document 308*) Mr Andrew Markey raised a number of issues which can be summarised as:

- Criminal intent to deceive and defraud
- An illegal disposal of a substantial freehold
- Deliberate price-fixing, at a fraction of what it should have been
- A resulting loss of over £5 million suffered unnecessarily by Barnet tax-payers
- A sale to a private, non-trading company with only one shareholder
- Constitutional abuse
- Democratic abuse
- Collusion to cover-up, which seems to be continuing
- A material failing in the internal control of the Council
- Inaccurate and misleading disclosure in the accounts

453. We have also received representations from Mr David Miller urging us to issue a public interest report on the grounds that it *'may be the only way to force the Council to recognise its failings and its requirement to be democratically accountable at all times.'* (Document 401)

454. In our view it is important to be clear as to the interests of the public in issuing a report. Such interests may include, inter alia:

- Our conclusions on the legality of the transaction
- Any failures on the part of the Council that led or may have led it to suffer loss
- The responsibility of individuals for such loss
- The changes that the Council might make to minimise the likelihood of repetition

455. We have concluded that:

- There is a public interest in the conclusions that we have reached
- We have addressed many of the objector's representations within the body of the report above
- We have made several recommendations concerning systems, processes and controls that we believe the Council should consider, if it has not already done so

456. We have received assurances that the Council will regard this statement as a public document, and will consider and respond to our recommendations at a public meeting.

457. As a consequence, and after taking into account the factors above, we have determined that there would be no further public interest to be gained from making a further report to the Council formally under s8, six years after the date of the relevant transaction. This position is dependent upon the Council's consideration of and response to this report.

### **Recommendations**

458. By way of summary our recommendations to the Council are:

a) Delegated Powers Reports

The Council should reconsider the process through which it determines whether it is appropriate to employ a delegated powers route in any particular case.

b) Publicity for Delegated Powers Reports

The Council should review its procedures for publicising the use made of delegated powers reports to ensure that they now provide an appropriate level of accountability and transparency.

c) Use of the Council's seal

The Council should consider including provisions in its constitution so that in those instances where either the Mayor or Deputy Mayor has declared any form of interest in any transaction he or she is not involved in the use of the Council seal at any subsequent stage of that transaction

d) Retention of records

The records of members and officers generated whilst in office and pertaining to Council business, should be retained for an appropriate period commonly applied by statute (six years).

e) Monitoring of performance

Consideration should be given to improved monitoring of performance by members and officers, to ensure that individuals have the appropriate capacity to discharge their responsibilities effectively.

Issues raised in the Harbord report

459. The Council should also consider and confirm that it has addressed the following recommendations made in the Harbord report:

- i) The Council needs to ensure that all officers involved in the decision making process are aware of the procedures to be followed under the Constitution
  
- ii) It should be made clear to all staff that ignoring decision making procedures or statutory officers' comments will be regarded seriously
  
- iii) The statutory officers need to consider the kind of comments they make on reports
  
- iv) Draft reports should set out all relevant information and be clear about implications
  
- v) The Council may wish to review its procedures for ensuring that the Leader or appropriate Cabinet members are fully advised of the implications of decisions
  
- vi) The Council may wish to review its procedures ..including the greater use of independent valuations..to ensure it maximises the income arising from the sale of assets

# Appendix 1: Document references

Document Reference	Date	Brief Description
1	20.08.86	Lease between LBB and BFC
3	05.03.98	Press Release
4	18.09.98	Letter from LBB in response to BFC's concerns
6	24.09.98	Letter from Mr Max Caller to Mr Tony Kleanthous
15	26.07.99	Letter from Mr Alan Williams in response to residents questions
21	25.01.00	Letter from Mr Alan Williams
31	18.05.00	Letter from Mr Max Caller re: key issues surrounding the future location of BFC
32	08.06.00	E-mail from Mr David Stephens to Mr Jeff Lustig
34	09.06.00	Covering e-mail from Mr David Stephens enclosing attachments to BFC with the terms for granting consent for the assignment of the lease to a holding company
35	09.06.00	E-mail from Mr David Stephens to Mr Jeff Lustig
38	01.07.00	Barnet UDP Deposit draft 2000
53	21.09.00	Meeting notes
54	25.09.00	Letter from BFC (Mr Tony Kleanthous) to Mr Alan Williams
57	08.10.00	E-mail from Mr David Stephens to Mr Andrew Barry-Purssell
58	17.10.00	Memo from Mr Andrew Barry-Purssell
63	27.11.00	E-mail from Mr David Stephens to Ms Rosemary Coates
64	27.11.00	E-mail from Mr Jeff Lustig to Mr Tony Vincent
68	08.01.01	Minutes of meeting discussing BFC in relation to the Scouts
72	16.01.01	Briefing note update on discussions with BFC, St Johns Ambulance and the Scouts
73	17.01.01	E-mail from Mr Alan Williams to Ms Rosemary Coates
75	07.02.01	Letter from Mr Alan Williams regarding the future of the club
76	16.02.01	Letter from Mr Graham Slyper outlining the problems with the negotiations

<b>Document Reference</b>	<b>Date</b>	<b>Brief Description</b>
77	21.02.01	E-mail from Ms Penny Filtness to Mr Jeff Lustig re: status update
79	22.02.01	E-mail from Mr Jeff Lustig re: section 2 of the Local Government Act
80	22.02.01	Briefing note from Mr Andrew Barry-Purssell re: update on BFC
82	27.02.01	Minutes of the meeting of the Strategic Directors
84	06.03.01	Letter from Mr Graham Slyper re: potential relocation of BFC
85	14.03.01	Letter from Mr Alan Williams re: continual search for alternatives for BFC
86	20.03.01	Letter from Ms Anne Lippitt re: revised draft UDP – reference of discussion
87	21.03.01	E-mail from Mr Graham Slyper to Mr David Stephens
92	16.04.01	Barnet FC Issues
95	21.05.01	Cabinet Members - delegation
99	30.05.01	Briefing note from Mr David Stephens re: BFC – Stadium at Underhill
112	02.07.01	E-mail from Mr Graham Slyper to Mr David Stephens
113	02.07.01	E-mail from Mr David Stephens to Mr Graham Slyper
118	04.07.01	E-mail from Mr Danish Chopra to Mr David Stephens
119	16.07.01	Draft Cabinet Report (various versions)
120	16.07.01	Draft Cabinet Report (various versions)
122	17.07.01	E-mail from Kasum Shah to Mr David Stephens with a comment in relation to the draft cabinet report
123	18.07.01	E-mail from Mr Graham Slyper to Mr David Stephens
126	23.07.01	E-mail from Mr David Stephens requesting comments on draft DPR
127	23.07.01	E-mail from Mr David Stephens regarding BFC and the DPR
130	08.08.01	E-mail from Mr Jeff Lustig re: intranet for DPR's
135	30.08.01	E-mail from Mr Jeff Lustig to legal team
141	01.10.01	Constitution 2001 – Article 13
143	04.10.01	E-mail from Councillors re: request for meeting to discuss BFC
144	16.10.01	Notification of application for planning permission
145	18.10.01	Memo from Mr Andrew Smith to Mr David Stephens
146	25.10.01	Briefing note with planning application by BFC for new stadium at Underhill
147	26.10.01	Memo from Mr David Stephens to Mr Danish Chopra requesting comments on the DPR
149	08.11.01	Press Article
150	9.11.01	E-mail from Mr David Stephens confirming the report has been passed to legal
151	10.11.01	E-mail from Ms Valerie Welch on behalf of Mr Graham Beattie re: clarification of the freehold sale and planning application

<b>Document Reference</b>	<b>Date</b>	<b>Brief Description</b>
152	12.11.01	E-mail from Mr Graham Slyper seeking clarification
153	13.11.01	Delegated Powers Report – signed copy
156	27.11.01	E-mail from Ms Rosemary Manning re: meeting with BFC and Barnet Cricket Club
174	11.01.02	Comments from Steven Strange to Mr Good relating to Clause 13 of the draft contract
205	27.02.02	Decision of the Planning and Environment Committee
211	27.03.02	Overage Payment Deed between LBB and BFCH
228	07.06.02	E-mail from Mr Jeff Lustig re: DPR decision and BFC
237	01.09.02	Background to freehold disposal (full report including all appendices)
280	13.02.04	High Court approved Judgement
284	30.07.04	Appeal Court Judgement
287	04.01.05	Report from Mr Alan Williams to approve action plan agreed by Cabinet
298	07.06.05	Memo from Mr David Stephens re: BFC Ltd/Italian Sports Design Limited
318	14.02.06	Transcript of interview with Mr Leo Boland
319	16.03.06	Transcript of interview with Mr Clive Medlam
320	21.03.06	Transcript of interview with Mr Jeff Lustig
321	22.03.06	Transcript of interview with Mrs Anita Campbell
322	27.03.06	Transcript of interview with Mr Alan Williams
323	30.06.06	Transcript of interview with Mr Tony Kleanthous
324	19.05.06	Transcript of interview with Mr Paul Chadwick
325	08.02.06	Transcript of interview with Mr David Stephens
341	Undated	Land at Underhill Enquiry
356	Undated	Extract from Part 3 of Constitution – Responsibility for Executive Functions
144	16.10.06 & 19.10.05	Notification of application for planning permission and Planning application by BFC for new stadium at Underhill - Draft
150/161	09.11.01 & 30.11.01	Confirmation that the report has been passed to legal and e-mail advising that the draft will be available by 12.12.01
365	22.1.07	Transcript of interview with Mr Paul Chadwick
368	2.2.06	Representations on behalf of Cllrs Anita Campbell, Danish Chopra and Mr Alan Williams
369	20.3.06	Representations on behalf of Cllr Danish Chopra

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371	26.4.06	Draft report from Savills
373	7.6.06	Comment from Savills on valuation matters
378	30.6.06	Representations on behalf of Mr Leo Boland, Mr Jeff Lustig and Mr Clive Medlam
379	26.7.06	Comments on representations made by Mr Leo Bolam, Mr Jeff Lustig and Mr Clive Medlam
380	26.9.06	Comments on representations made by Mr David Miller
383	19.1.07	Representations made by Mr Paul Chadwick
386	3.5.07	Representations made for Mr David Stephens
387	29.5.07	Representations made for Mr Leo Boland
398	16.1.06	Letter from Mayer Brown Rowe & Maw
397	14.8.06	Representations made by Mr Mike Dawson
400	2000/1	Job Description Questionnaire of the Chief Valuer



# Appendix 2: Key individuals

	<b>Role</b>
Mr Andrew Barry-Purssell	Head of Development and Regeneration until July 2001
Mr Graham Beattie	Acting Director of Community Development
Mr Leo Boland	Chief Executive since January 2001
Councillor Anita Campbell	Mayor at the time of the sale
Mr Paul Chadwick	Acting Head of Development and Regeneration from July 2001
Councillor Danish Chopra	Cabinet Member for Resources at the time of the sale
Ms Rita Dexter	Acting Chief Executive July – December 2000
Mr Roy Goddard	Head of Democratic Services
Mr Jerry Herring	Committee Group Leader
Mr Jeremy Jaroszek	Strategic Director of the Borough
Mr Tony Kleanthous	Chairman of Barnet Football Club
Ms Anne Lippitt	Strategic Director of the Borough
Mr Jeff Lustig	Borough Solicitor
Mr Clive Medlam	Borough Treasurer
Mr Graham Slyper	Director of Barnet FC
Mr David Stephens	Chief Valuer
Mr Steven Strange	Principal Legal Assistant
Mr Alan Williams	Leader at the time of the sale