

Findings on allocation of additional funding for Carriage way and Footway repairs

Introduction

On 30 May 2014 Councillor Alison Moore, the Leader of the Labour Group within Barnet Council wrote an email to the Council's auditor Grant Thornton LLP asking them to investigate the decision-making process in relation to the allocation of Council resources in the last financial year for highways schemes. The matter was referred to Maryellen Salter, Assurance Director and the Council's Monitoring Officer.

Background

Sharpe Pritchard was commissioned, through HB Public Law, to undertake a review of the following:

- Consider the process of decision-making in relation to highways expenditure within Barnet Council in the light of the issues raised in the email from Cllr Alison Moore to Grant Thornton LLP of 30th May.
- Advise on whether that decision-making has been undertaken lawfully and in accordance with the Council's constitution.
- If the advice is that the decision-making process has in any way been unlawful or a breach of the Council's constitution has occurred, advise on the steps which should now be taken by the Council as a result of this.

For reference the questions raised by Councillor Moore, and officer responses obtained, are as follows (these are then analysed and followed up on in the Detailed Findings section):

Question raised by Councillor Moore	Officer Response (Strategic Director of Growth and Regeneration and Lead Commissioner for Housing and Environment)
1. Cabinet agreed on 4 November 2013 to allocate an additional £4m to roads and footway schemes, and delegated the allocation to the Cabinet Member for Environment: http://barnet.moderngov.co.uk/documents/s11410/Business%20Planning%202014-15%20-%202015-16.pdf	No comment factual point
2. The Cabinet Member for Environment was directly involved in the drawing up of the list of schemes.	This was within the remit of the Cabinet Member to oversee what officers proposed. He wanted to apply a common sense view and

Question raised by Councillor Moore	Officer Response (Strategic Director of Growth and Regeneration and Lead Commissioner for Housing and Environment)
	make sure that the proposed works were based on identifiable need. The annual programme of works is agreed by Area Sub-Committees and that agreement includes a delegation to the Cabinet Member in consultation with the Chairs (of the Area Sub-Committees) to modify or amend the programme during the year should additional funding become available or the condition of the roads changes. This delegation requires that changes are reported back as part of the following year's programme report to the Area Sub Committee.
3. According to an officer briefing note (attached) that was compiled at the beginning of May 2014, the list of schemes was prepared for consideration by Cabinet, but the decision on the final list of schemes did not go to Cabinet for formal decision, and no Cabinet Member DPR was published to formalise the decision about which schemes were chosen.	Covered in answer to 2 above in the sense that the process described in answer to question 2 is the correct process.
4. The proposed list of schemes should have been subject to scrutiny and call-in - £4m is over the threshold for call-in.	Every year a list is agreed as part of the programme which consists of millions of pounds worth of additional schemes (March/April 2013). This could have been called in. The schemes that were proceeded with could have been called in when they were reported in March 2014.
5. The list of schemes was only formally submitted to Area Environment Sub-Committees for approval on 26 March 2014, but this appears to be for rubber-stamping/information as schemes on the list had already been completed or progressed before: http://barnet.moderngov.co.uk/ieListDocuments.aspx?Cid=168&MId=7510&Ver=4	This is as described in the answer to 2& 4.

Question raised by Councillor Moore	Officer Response (Strategic Director of Growth and Regeneration and Lead Commissioner for Housing and Environment)
6. It is not clear what the process was for consulting members to ascertain which schemes should be included in drawing up the proposals, and how some schemes put forward by members were included compared with others that weren't included.	Answered in 2.
7. It appears that administration councillors were consulted on the schemes – the attached officer briefing note refers to changes being made following comments by the Hale councillors.	This is in line with the process described above.
8. The allocations disproportionately benefited the Cabinet Member's own ward with the highest allocation of resources over the year, and the second highest number of schemes for the additional funding (6).	The programme is based on priority need following technical inspection of the highway. Detailed evidence can be provided of the inspection process. It is worth pointing out that roads can deteriorate between annual inspections and therefore may have to be prioritised.
9. Hale ward had the second highest allocation of resources over the year, and the highest number of schemes for the additional funding (10).	This was part of the process described in answer 2.
10. Over the last 4 years the profile of spend appears to be significantly more in administration held wards compared with opposition held wards (see attached officer briefing note).	This is a way of analysing the spend, however, it has not been allocated on a ward basis as clearly roads are not always contained within ward boundaries.
11. Only about 15 of the 44 schemes funded by the additional money were on the reserve list of schemes, so no formal decision on 29 schemes has been made other than the very late approval at Area Environment Sub-Committees on 26 March 2014.	Please see the process described in answer to question 2.
12. The criteria against which these 29 schemes have been selected has not been published or made clear – particularly the reasons why	See answer to 11.

Question raised by Councillor Moore	Officer Response (Strategic Director of Growth and Regeneration and Lead Commissioner for Housing and Environment)
these were chosen compared with any others – including those on the reserve list.	
13. Only 7 out of the 44 schemes funded by the additional £4m were in Labour held wards. Although policy adopted in recent years is not to have a straight geographical distribution of resources but to base it on need, we believe there are roads and footways in each Labour held ward that would meet any robust criteria as much as roads in Conservative held wards.	This money has been not been allocated on a ward/political basis but on need as described above in questions 8 & 10.
14. As far as we are aware no Labour councillors were consulted on the proposed schemes prior to them being submitted to the Area Environment Sub-Committee, and no Labour councillors were asked to submit roads/footways for consideration as part of the process.	Clearly the original schemes were consulted on once the additional money became available in 4 November 2013. The additional schemes were not consulted on with any ward members but in line with the process the Area Chairmen and the Cabinet Member were.
15. 2013/14 was an election year, and many of the schemes were progressed very close to the local elections.	The funding for the additional works came from the improved financial offer from the two outsourcing projects (DRS and NSCSO). The outsourcing projects had themselves been delayed by the judicial review (to September (NSCSO) and October (DRS) 2013) so the money was also delayed which impacted on timing of the highways work.

High Level Conclusions and Recommendations

The requirement of the Council's Constitution and the 2012 regulations, specifically Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 Regulation 9), were not met.

The reasons for this appear to be a combination of following previous practice and a belief from officers overseeing these works that the Cabinet Member's delegated authority did not require a separate formal decision-making process.

The consequence was that the decision-making in relation to the list was not as transparent as it should have been.

Whilst this lack of transparency is regrettable, it is probable that the outcome would have been the same if the final list of schemes had been subject to a formal decision-making process. This is due to the fact that the schedule is developed by officers on a needs basis and could be supported by the works required met certain criteria.

The investigator concluded that he would not describe the expenditure on highways which resulted from this decision-making process as unlawful. The additional money was spent on lawful items of expenditure and there is no evidence that the decision-making process was invalidated by being undertaken for an improper purpose.

The investigator did not think there was a need for wider consultation about the proposed list of schemes since the object was to prepare a list based on need rather than ensure that each area was allocated a certain proportion of the expenditure.

The investigator did not think there was any basis for concluding that the list was compiled or altered for party political motives.

Since the decisions about highways expenditure were made in 2013/2014, the Council has changed its constitution and decisions relating to highways expenditure are now a matter for its Environment Committee. In these circumstances, the investigator did not consider that there was any meaningful recommendation he could make about the Council's decision-making procedures.

Detailed Findings

The following relates to the background to the conclusions made by the investigator.

In her email of 30 May Cllr Moore makes a number of criticisms of the decision-making in relation to the additional expenditure. These fall into three categories: the decision-making process, the lack of consultation and a suggestion that the compilation of and changes to the list were subject to political bias.

The decision-making process

The approval of individual schemes was at the relevant time undertaken at an Area level by the three area Environment Sub-Committees. At their meetings in March of each year these committees approved the schemes within their area. Members were informed at these meetings of the budget allocation each year.

For the March 2013 meetings, the minutes of the Area Environment Sub-Committees, following the recommendations, are the same for all three Sub-Committees. The Director for Place was, subject to the overall costs being contained within available budgets, instructed to implement the schemes proposed in Appendix A by placing orders with contractors.

She was also instructed to agree any variations to the scheduling of the programme in consultation with the Cabinet Member for Environment and the Chairman of the relevant Sub-Committee.

During the course of the year there were Environment theme meetings at which, among other things, the progress on the implementation of the highways maintenance schemes was discussed. These meetings included the Cabinet Member for the Environment, the Chairmen of the Area Environment Sub-Committees and relevant officers including the Director of Place (now Strategic Director for Growth and Environment).

At points 2 and 3 of her email Councillor Moore expresses concern that the Cabinet Member for Environment was directly involved in the drawing up of the list of schemes. She then criticises the decision-making process in the following terms:

“According to an officer briefing note (attached) that was compiled at the beginning of May 2014, the list of schemes was prepared for consideration by Cabinet, but the decision on the final list of schemes did not go to Cabinet for formal decision, and no Cabinet Member DPR was published to formalise the decision about which schemes were chosen”.

The response of the officers to this is as follows:

“This was within the remit of the Cabinet Member to oversee what officers proposed. He wanted to apply a common sense view and make sure that the proposed works were based on identifiable need. The annual programme of works is agreed by Area Environment Sub-Committees. That agreement includes a delegation to the Cabinet Member in consultation with the Chairs to modify or amend the programme during the year should additional funding become available or the condition of the roads changes. This delegation requires

that changes are reported back as part of the following year's programme report to the Area Committees".

The fact that the Cabinet Member for Environment was directly involved in the drawing up of the list of schemes is not a matter for criticism. The Cabinet Member was expected to assume a role in the process as part of his portfolio. It was appropriate for the Cabinet Member to accompany officers on site visits and for him to express views about individual schemes. As an elected representative holding a portfolio in relation to the environment including highways he had a duty to use his own judgement about the type of scheme which ought to be prioritised and as to how expenditure should be allocated as between carriageway and footway schemes.

However, there appears to be an assumption by officers within that service that the Cabinet Member had the exclusive right to decide which schemes went forward.

This is indicated by the exchanges of emails referred to above which appear to indicate that approval was being sought from the Cabinet Member. The assumption was shared by the Council's contractor Capita as is witnessed by a further email.

There was also an officer assumption that following the Environment Theme meeting on 14th October, it was for the Cabinet Member to approve any changes to the list. The updated spreadsheet was forwarded to Councillor Cohen on 18th October. These recommendations were that certain footway schemes should be added, that some of the carriageway repairs could be carried out using a cheaper process of Micro Asphalt surfacing and that as a result of this, other schemes could be accommodated. Following this there must have been a further discussion between CC (council officer) and Councillor Cohen. There was then a revised list forwarded on 28th October with two changes to the carriageway list and a further footway project added. It was this list which Councillor Cohen then approved by emailing "Fine" to CC.

In the officers' response it was stated that there was a delegated authority to the Cabinet Member to modify or amend the programme during the year should additional funding become available. The delegation from each Area Environment Sub-Committee was in the following terms:

"That subject to the overall costs being contained within available budgets, the Director for Place be instructed to:

(iv) Agree any variations to the scheduling of the programme in consultation with the Cabinet Member for Environment and the Chairman of this Sub-Committee."

Any formal decision under this delegation should have been made by the Director for Place. It is also arguable that the terms of the delegation do not in fact allow for agreement to changes to the programme itself. The wording refers to changes to the scheduling of the programme.

In the context of the highways budget and the amount available for highway schemes in 2013/2014, £4M is a very significant sum. The total budget for this year was in the region of £8M excluding s106 monies. This was made up of a grant of £4.979M from TfL and a Council

budget for planned maintenance assumed to be in the region of £3M in March 2013. The allocation of this additional sum was therefore a decision of some significance.

The delegated powers of the portfolio holder and the Area Environment Sub-committees at the relevant time overlapped and both had responsibilities in relation to highways. The Area Environment Sub-Committees had delegated authority to deal with highways matters. Under paragraph 4.10 of the Council's constitution it had power "To discharge the Executive's functions in respect of highways."

The Cabinet Member had a general delegated authority under the Council's constitution. The Cabinet Member's responsibilities encompassed:

"All matters relating to the development and management of the environment, including the street scene including pavements and all classes of roads." (paragraph 4.2). He also had the general delegated authority which applied to portfolio holders:

"To discharge the executive functions that fall within their portfolio whether or not they are also delegated to officers except for matters specifically reserved to Council, Cabinet or Cabinet committees." (paragraph 4.3)

However this could not be relied on for making a decision of this nature since a decision about allocation of highways expenditure was a decision delegated to a Cabinet committee, namely the Area Environment Sub-Committees.

The Cabinet Member was given a specific delegated authority by the Cabinet at its meeting on 4 November 2013. The Cabinet decided:

"To allocate £4m to the Cabinet Member for Environment to be spent on roads and pavements as set out in paragraph 9.4.6, with spending plans to be finalised in consultation with the Cabinet Member for Performance and Resources."

There was nothing improper or unlawful in the Cabinet delegating to the portfolio holder the decision about how the expenditure was to be allocated. However, paragraph 9.4.6 simply refers again to the amount of the expenditure. There is not a formal decision approving the list of the schemes until the Area Environment Sub-Committee meetings in March 2014. The list of roads had in fact already been finalised in October before the relevant Cabinet meeting and could have been approved by the Cabinet.

If the Cabinet Member was purporting to decide these schemes by virtue of the delegation from the Area Environment Sub-Committees the formal decision should have been made by the Director for Place and there should have been a formal record of this decision. If the Cabinet Member was purporting to approve the schemes under the delegated authority given by the Cabinet, there should have been a formal record of this decision. It is possible to argue that the decision of the Cabinet to allocate the £4M was the only formal approval needed on the basis that the Cabinet Member was simply implementing the agreed decision by finalising the spending plans. In reality, when making a decision about expenditure, the important issue is what the money is actually spent on. The requirement that the money is spent on roads and pavements could encompass a huge variety of different types of expenditure.

It is also difficult to categorise the approval of the Area Environment Sub-Committees in March 2014 as a decision to approve the schemes. The plan was that the schemes would be completed by March 2014 and the investigator was informed that the bulk of them had

been completed by then. In these circumstances there was no decision for the Area Environment Sub-Committees to make about this expenditure.

Points 4 and 5 in Cllr Moore's email are as follows:

4. *The proposed list of schemes should have been subject to scrutiny and call-in - £4m is over the threshold for call-in.*

5. *The list of schemes was only formally submitted to Area Environment Sub-Committees for approval on 26 March 2014, but this appears to be for rubber-stamping/information as schemes on the list had already been completed or progressed before*

The response of the officers to these points is:

"Every year a list is agreed as part of the programme which consists of millions of pounds worth of additional schemes (March/April 2013). This could have been called in. The schemes that were proceeded with could have been called in when they were reported in March 2014" (Copies of both reports have been provided).

The difficulty with the response to point 4 is that call-in for the March 2013 Area Environment Sub-Committees would not have been relevant to the way in which the additional £4M was spent, since it was not known about at this point. Nor was it relevant in March 2014 since by this time the schemes had been approved and the work had largely been finished.

The requirements in relation to Call-in as set out in the Council's Standing Orders which applied at the relevant time are in the following terms:

15.1 When a decision is made by the Cabinet, a committee of the Cabinet or an individual member of the Cabinet, or a key decision is made by an officer with delegated authority from the Cabinet, the decision shall normally be published on the Council's website.

15.2 The Head of Governance shall send a copy of each decision to all Members of the Business Management overview & Scrutiny Committee and to all Members of the Cabinet.

15.3 Each decision will bear the date of publication and will specify the date on which it will come into force and can be implemented.

The paragraph goes on to set out the procedure and define the meaning of "key decision". Such a decision:

(a) Must involve expenditure or savings in excess of £500,000 as well as otherwise being 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."

If the decision was made by the Cabinet Member, then it does not need to be a "key decision" to be subject to the call-in procedure. If it was made by the Director of Place then it needed to be subject to the call-in procedure only if it was a "key decision". The investigator concluded that the decision in relation to the approval of the schemes for additional expenditure was a "key decision" within this definition. It should therefore have been subject to the call-in procedure whether the decision was made by an officer or a member.

Consultation

Points 6 and 7 of Cllr Moore's email relate to lack of consultation:

6. It is not clear what the process was for consulting members to ascertain which schemes should be included in drawing up the proposals, and how some schemes put forward by members were included compared with others that weren't included.

7. It appears that administration councillors were consulted on the schemes - the attached officer briefing note refers to changes being made following comments by the Hale councillors.

There was no process for consultation about these schemes. The list of schemes was put forward on the basis of need. The needs had been identified partly by a process of scanning the roads in the borough and partly by visual inspection. There may have been other suggestions put forward but they would have been evaluated on the basis of the level of urgency of the works. The investigator concluded the Council was under a duty to carry out a consultation exercise in relation to these schemes.

In this context, there are concerns about a paragraph in a briefing note forwarded to Councillor Alison Moore by The Strategic Director for Growth and Environment (previous title Director for Place) on 2nd May. After an initial sentence stating that the funding for highways was allocated on the basis of need, the briefing note goes on to say: "Consequently the CMfE (i.e. Councillor Dean Cohen) requested a further adjustment of the draft schedule of schemes, following comments he received from the Hale ward members, in order to ensure spending was more equally distributed between the constituencies and wards. The schedule was finalised, and consisted of £3 million footway projects and £1 million of carriageway resurfacing projects, for consideration by Cabinet."

The officer who wrote this has left the Council and the investigator has been unable to ascertain what the comments received from the Hale ward members were and what effect, if any, they had on the list of schemes. It is confusing because it indicates that the impact of the intervention was to ensure a more equal distribution between wards and constituencies. However, this contradicts the statement made immediately before which indicates that the intention had been to move away from a policy of equal distribution to an allocation based on need. Nor was the schedule finalised "for consideration by Cabinet". The Cabinet made a decision to allocate the £4M but delegated the decision about the actual schemes to the Cabinet Member.

Political bias

Points 7 to 15 are all complaints that the outcome of the process was not even-handed from a political perspective in that a disproportionate number of schemes in Conservative held wards were approved.

Whilst it is clear that the data supports the view that there has been more expenditure in administration held wards, this does not justify drawing a conclusion that there has been political bias. The schemes are not allocated in such a way as to ensure that an equal amount of expenditure is allocated to each ward. This would be an illogical approach which would no doubt result in schemes being prioritised because of the area in which the roads were situated rather than the need for repair.

The proposed schemes were drawn up by officers using professional judgement as to which carriageways and footways should be prioritised. These were based on technical appraisals of the highways and footways. The process which took place then involved the Cabinet member seeking to ensure that footways were prioritised over carriageways and that there were certain changes to the scheme. Nothing I have read leads to the conclusion that this was done in order to benefit the Conservative party rather than to reflect different priorities about the relative importance of footway rather than carriageway schemes and which schemes needed to be progressed in the current financial year.

Advice on decision-making process

In my view the decision-making process was not correctly followed. The power to make decisions in relation to these matters was delegated to the Area Environment Sub-Committees. If it was not possible to convene meetings of these sub-committees then either the decision should have been taken by Cabinet or, in reliance on the delegated authority given by the Cabinet meeting of 4th November, the decision should formally have been taken by Councillor Cohen and the requirements of the Council's Standing Orders should have been met.

In addition to the Council's standing orders the Council was under a duty to comply with the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012. These regulations require "key decisions" to be undertaken in accordance with the process set out at regulation 9.

Publicity in connection with key decisions

9.—(1) Where a decision maker intends to make a key decision, that decision must not be made

until a document has been published in accordance with paragraph (2), which states—

(a) that a key decision is to be made on behalf of the relevant local authority;

(b) the matter in respect of which the decision is to be made;

(c) where the decision maker is an individual, that individual's name, and title if any and, where the decision maker is a decision-making body, its name and a list of its members;

(d) the date on which, or the period within which, the decision is to be made;

(e) a list of the documents submitted to the decision maker for consideration in relation to the matter in respect of which the key decision is to be made;

(f) the address from which, subject to any prohibition or restriction on their disclosure, copies of, or extracts from, any document listed is available;

(g) that other documents relevant to those matters may be submitted to the decision maker;
and

(h) the procedure for requesting details of those documents (if any) as they become available.

(2) At least 28 clear days before a key decision is made, the document referred to in paragraph

(1) must be made available for inspection by the public—

(a) at the offices of the relevant local authority; and

(b) on the relevant local authority's website, if it has one.

(3) Where, in relation to any matter—

(a) the public may be excluded under regulation 4(2) from the meeting at which the matter is to be discussed; or

(b) documents relating to the decision need not, because of regulation 20(3), be disclosed to the public, the document referred to in paragraph (1) must contain particulars of the matter but may not contain any confidential, exempt information or particulars of the advice of a political adviser or assistant.

The essential requirement is that key decisions must be taken in a formal manner so that the reasons for them can be clearly understood and subject to public scrutiny.

It is understandable that the decision-making process was conducted in the way that it was. This had been the process followed for a number of years under the previous Cabinet Member and it was taken for granted by officers that the Cabinet Member had the appropriate authority. Once the decision was made in the Cabinet meeting of 4th November to allocate the additional funds to highways the question of whether finalising the list of schemes was itself a decision does not appear to have been considered.

As regards the lack of consultation, it was the view of the investigator that this was not a process which required consultation. The choice of schemes was not an issue on which the views of relevant stakeholders needed to be taken into account. An assessment was made of the need for repair of the carriageways and footways in the borough and the final list was derived from this with modifications made in the light of information about the position on the ground.

It was the view of the investigator that there was no evidence that the decision-making was tainted by political bias. There were different amounts allocated to each ward. However, this is not in itself surprising. Once a decision has been made to allocate expenditure according to need then it is inevitable that the different areas will benefit from varying levels of expenditure.