

Neutral Citation Number: [2015] EWHC 16 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 15/01/2015

Before:

MR JUSTICE CRANSTON

Between:

	The Queen (on the application of Galaxy Land Ltd)	<u>Claimant</u>
	- and -	
	Durham County Council	<u>Defendant</u>

-and-

(1) Martin Corney

(2) Ian Waller

(3) Michael Allan

(4) John Tipling

(5) Bernard Tipling

(6) David Tipling

(7) Peter Tipling

(8) Colin Crozier

(9) John Crozier

(10) Alan Crozier

(11) North of England Estates Ltd

(12) Henry Tomlinson

(13) Theakston Estates Ltd

(14) Theakston Estates (Properties Ltd)

Interested
Parties

Robin Purchas QC and Mark Westmoreland Smith (instructed by **TWM Solicitors LLP**)
for the **Claimant**

Richard Drabble QC (instructed by **Durham County Council**) for the **Defendant**

Hearing dates: 9-10 December 2014

Judgment Mr Justice Cranston :

Introduction

1. The claimant, Galaxy Land Ltd (“Galaxy”), is a property developer and is the registered freehold proprietor of land at Sniperley Farm. It acts through its shareholder and

director Mr Alan Moralee. It was a member of a limited liability partnership established for the purpose of promoting land in the area known as Sniperley Park for residential development. Durham County Council (“the Council”) was not a member. In this judgment that limited liability partnership is called Sniperley Park LLP1. However, Galaxy was not a member of the second limited liability partnership for promoting land to housing development in Sniperley Park formed in September 2013 (“Sniperley Park LLP2”). That was the consortium which the Council joined as a result of the decision of its cabinet of 16 April 2014. That is the Council decision challenged in this judicial review.

2. Of the interested parties Messrs Corney and Waller are property developers and promoted both Sniperley Park LLP1 and Sniperley Park LLP2. Theakston Estates Ltd and Theakston Estates (Sniperley) Ltd (renamed Theakston Estates (Properties) Ltd) are owned and controlled by Mr Corney and Mr Waller. The Tiplings are the owners of 115 acres within Sniperley Park, Mr Allan the owner of 114 acres, the Croziers are the owners of 14 acres, North of England Estates Ltd is owner of 7 acres, and Mr Tomlinson, the owner of 18 acres. All are members of Sniperley Park LLP2.
3. The land within the Council’s ownership at Sniperley Park comprises some 37.87 acres, in four different parcels: (1) the Pity Me household recycling centre at the very north-east of the site, with access off a roundabout on the A167; (2) land adjacent to the A167; (3) St Leonards Comprehensive School playing field (about a mile from the school itself); and (4) the Pity Me Caterhouse colliery reclamation site. The latter cannot be developed for housing but forms a nature area.

Sniperley Park LLP1

4. In 2009 the Council identified eight sites around Durham which could be released for housing, including the Sniperley Park site which is green belt and situated to the north west of Durham City. Messrs Corney and Waller promoted the release for housing of the Sniperley Park land and persuaded the private owners of land to form a limited liability partnership under an agreement dated 24 July 2010, what I have called the Sniperley Park LLP1 Agreement.
5. Under the Sniperley Park LLP1 agreement Messrs Corney and Waller were not landowners but were to promote the site on behalf of the landowners (clause 16.2). They were defined as “professional members” and were to be paid a development fee of 20 percent of the net sale proceeds. Each of the landowning members of the partnership also entered into option agreements granting options to the partnership over their individual land holdings. Galaxy purchased the land at Sniperley Farm subject to the option agreement and entered into a deed of adherence following which it was admitted as a member of Sniperley Park LLP1.

6. Under the option agreements, in the event of a sale following the exercise of the option, profits were to be equalised between the parties such that individual owners would receive the same proportion of the net sales proceeds less the development fee that their land comprised of the total land allocation by the Council for housing.

The Council's planning and corporate property policies

7. At the time of the events dealt with in this judgment the Council was in the process of drafting the Durham County Plan. Policy 8 of the draft allocates Sniperley Park for development comprising 2,500 new homes along with associated retail and facilities. Policy 8 states that housing at Sniperley Park is dependent on completion of the Western relief road. It also states that there is emerging evidence of an oversupply of adult football pitches in Durham City and that the existing pitches at Sniperley Park will not need to be replaced. Policy 9 deals with the Western relief road. The County Plan was submitted to the Secretary of State for examination by a planning inspector on 25 April 2014. The examination in public commenced on 1 October 2014 and phase 1 was completed on 13 November 2014.
8. The Council has produced a supplementary planning document for development at Sniperley Park dated October 2013. Its development is said to represent a central element of the emerging Plan's vision for Durham City, creating a new sustainable urban extension over the coming years, fundamental to meeting the city's housing requirement. The intention is for the Council to adopt the Supplementary Planning Document at the same time as the County Durham Plan. It expands on Policy 8. The importance of the Western relief road is underlined, with the development of strategic housing sites like Sniperley Park providing the means of funding it. The document refers to the Council's "recreation ground" on the Sniperley Park site, "incorporating a number of playing pitches (with no public access) ..." It reiterates the oversupply of adult football pitches in Durham City, but adds the need for a number of additional mini soccer pitches for public use, to be incorporated at the new primary school at Sniperley Park. There is also mention of the phasing of the development: 2014-2019, 610 dwellings, 2019-2034, 700 dwellings; 2024-2030, 89 dwellings; and 2030 onwards, 300 dwellings.
9. The Council's Property Strategy has a section entitled "Disposal Strategy". This states that to assist the Council in making the best use of its assets, and to support the delivery of the Property Strategy, it needs to establish and set out the processes and procedures for how it will identify and declare an asset as surplus; manage the asset prior to disposal; and formally dispose of the assets. However, each land disposal is treated on its own merits and nothing in the strategy brings the Council to a particular course of action in respect of an asset disposal. Alternative methods of disposal, not specifically mentioned, may be used where appropriate, subject to obtaining proper authority.
10. Under the strategy, property is regarded as being surplus if, inter alia, "its disposal is

important for the delivery of the Council's aims and objectives (clause 5.2.1). The process for identifying surplus or underperforming property arises in a number of ways, including as a result of planning policies and their designation. The decision-making process for disposal is set out in clause 5.2.7:

“Once a property falls within the category of surplus, the Assets Service will then instigate a process of consultation before seeking a formal approval, as set out in the Council's constitution, to declare a property as being surplus to requirements. Properties should only be sold after rigorous option appraisal for retained future authority needs and those of related bodies.”

11. Under the strategy the Council will obtain the best consideration by the most appropriate method of disposal, although consideration does not necessarily need to be financial. As to valuations, where it is decided to negotiate a disposal to a single party, rather than to offer the property on the open market, all negotiations for disposals should be conducted or advised by a suitably qualified property professional, preferably a member of the Royal Institution of Chartered Surveyors (“RICS”).

12. Appendix B of the Property Strategy provides further details of disposal privately, without being publicly marketed.

“[T]he reasons justifying a private sale must be recorded in writing. In some circumstances the Council may seek an independent valuation to verify that “best consideration” is being obtained. A private sale without the land being marketed may be justified where:

...

- the nature of the Council's land ownership and that of the surrounding land ownership is such that the land must be sold to adjoining or surrounding landowners if best consideration is to be obtained;

...”

The Council considers joining Sniperley Park LLP1

13. In 2011-2012 there were meetings within the Council to discuss housing development and infrastructure around Durham City. There was a meeting in December 2012 between Gerard Darby and Mr Corney. Mr Darby is the asset service manager for the Council and a fully qualified member of the RICS. Although he did not draft it Mr Darby was responsible for the conclusion in the Cabinet report dated 16 April 2014, discussed below, that the terms proposed in Sniperley Park LLP2 were considered

acceptable. At the December 2012 meeting Mr Corney informed Mr Darby of Sniperley Park LLP1 and that he was interested to know if the Council was willing to join the partnership.

14. Following consultations with the head of Planning and Assets, Mr Darby concluded that to enter into Sniperley Park LLP1 was the clearest way of supporting an allocation of land for housing in the County Development Plan. It would evidence the deliverability of the scheme. That would help create an opportunity for the Council to receive a share of the potentially substantial capital receipts at some stage in the future and facilitate the funding of the proposed Western relief road. Mr Darby also concluded that the deal being proposed did not warrant the involvement of an independent surveyor under the Council's Corporate Property Strategy.
15. Mr Darby's view was that if the Council opted not to join the LLP and the site still received allocation for housing it would be left in a difficult position where it would be required to negotiate with adjoining landowners if it were to release its land for development. The Council's land adjacent to the A167 and the Pity Me Caterhouse colliery reclamation site were land-locked in terms of redevelopment and would no doubt be subject to ransom negotiations with adjoining landowners; where values would be reduced by anywhere between 33 to 50 percent. (Highways had advised that the land adjacent to the A167 could not be accessed from it since it was a busy road).
16. The household recycling centre might require specialist remediation or decontamination works, and that would be difficult to develop in isolation. In order to develop the site, significant road realignment and junction construction would be required. In theory it might be possible to develop the school playing field site in isolation but this would only be possible with the consent of St Leonards Comprehensive School, the Department for Education and Sport England. (Consent to dispose of the playing fields is necessary under Schedule 1 of the Academies Act 2010 and section 77 of the School Standards and Framework Act 1998.) Consent would only be forthcoming if the facilities could be replicated elsewhere within the immediate area. That would be extremely difficult based on the limited land availability within the area. The LLP offered a solution since there was land potentially available within the overall area covered by the LLP to relocate the playing field site.
17. In January 2013, Mr Darby prepared a draft report on Sniperley Park to go to the Council's management team ("Mr Darby's draft report"). In fact the report never went further than to the head of Spatial Policy planning and to his colleagues in the Regeneration team. The purpose of the draft report was stated as being to obtain approval for the Council to enter a limited liability partnership (not specified) for the development of Sniperley Park. The Council owned 37.87 acres in the area. It had been approached by Theakston Estates, which had established a limited liability partnership with all landowners within the red line boundary on an attached plan. It was essentially a partnership with the aim that all landowners could procure that the whole or part of the

land was sold if it was allocated for development as part of the County Durham Plan.

18. The draft report contained an explanation that sale of the St Leonards' playing field would need to obtain Department of Education consent and that the facility would need to be re-provided elsewhere. It noted, however, that the partnership agreement provided for substitute playing fields within the development site, if required. The school had not been formally approached. The draft report also identified the need to replace the Household Waste Recycling Centre. Neighbourhood Services would only be prepared to relocate if a suitable alternative site was found. That would be on Council land if possible but the developer had offered to secure this on areas of land it owned or over which it had an option in the Durham City area. Mr Darby added: "Again our participation in the Agreement would have to be caveated to reflect this."
19. Under the heading "Options" the draft report set out in tabular form the advantages and disadvantages of entering the limited liability partnership agreement. Among the advantages were that the Council would share in any disposal proceeds potentially earlier than if it had to await development of its own sites. Moreover, the Council would share in any uplift in land values throughout the development period. The disadvantages were that first, the Council would pass over control of the sites to a consortium for a period of 32 years; secondly, that different consortium members were bound to have different requirements at different points, so that the Council might be bound to accept a share of a price which it felt was below value; and thirdly, the Council had no control over the party to whom the land was sold. The advantages of not entering the consortium were that the Council was free to dispose of land in accordance with a planned disposal programme and that it controlled to whom it sold its land as well as future use. The disadvantages of not entering were that fragmented ownership of the site might lead to the Planning Inspector not allocating the site for development, and that the different areas the Council owned in the site were difficult to develop in isolation.
20. The recommendations in the draft report were that Cabinet agree in principle to the proposal, subject to further negotiations. The concluding paragraph noted that this provided the opportunity of retaining an influence in such a prominent, potentially high quality development with its potential for much needed revenue for the Council, but also facilitate its ambition to have the site developed in a planned way.
21. In October 2013 Mr Darby and colleagues from Economic Development met with Jonathan Bull-Diamond of Turnberry Real Estate, an international firm of property consultants, to discuss the proposed agreement. Mr Bull-Diamond had advised the Council in the past. In a letter to the Council dated 4 November 2013 Mr Bull-Diamond recorded his initial views about the Council entering Sniperley Park LLP1. Those included:

"My initial reaction, in that the legal documents seek for the Council to pass over control of the site to a consortium (whose

primary interest is making maximum financial gain) for a period of 32 years (2045) for £1, is that it will at best place the Council in a challenging position. It does not appear that there are any grounds for the option being capable of early termination by the Council.

...

Should the Council need to re-provide the existing [school sport ground] facilities elsewhere, the Council must understand the cost implications of those obligations – especially when considering having to spend capital now (to acquire new sites) with a phased release of land and receipts at Sniperley.

...

[T]he Council has no control over the party to whom (ultimately) control might be passed over. The deal is currently being controlled by Theakston Estates, but it could easily be a different party tomorrow, and there is no control/reasonableness test to protect the Council here.

In summary, I share the concerns raised by Counsel. The Council holds a strategic interest in a wider site that potentially has significant value in the long term. I think that there are other ways of allowing the Council to participate alongside the existing LLP but not as part of it, that can better protect the public sector's value and minimise the potential for conflict – and therefore minimise potential challenge from both objectors and competitors.”

22. Regarding Mr Bull-Diamond's views, Mr Darby's conclusion was that while he had raised some concerns, his (Mr Darby's) overriding impression was that they were not material.

Sniperley Park LLP2

23. Meanwhile, on 3 September 2013 the Sniperley Park LLP Agreement (“Sniperley LLP2”) was entered into by all of the members of Sniperley LLP1 (except Galaxy) and two further companies, Theakston Estates Ltd and (now) Theakston Estates (Properties) Ltd. The latter is the “professional member” under the agreement. Under an agreement (“the Theakston Option Agreement”) the land owned by Theakston Estates Ltd was optioned to Sniperley LLP2.
24. Under the terms of the Sniperley Park LLP2 Agreement and the Theakston Option

Agreement, in the event of a sale following the exercise of the option, profits are again to be equalised between the parties such that an individual owner of allocated land would receive the same proportion of the net sale proceeds less the 20 percent development fee that his land comprised of the total land allocated by the Council for housing.

25. Under clause 16.2 of the Sniperley Park LLP2 agreement, the professional member must at its own cost and its sole discretion, submit applications and/or undertake any appeal as they see fit, in order to procure that the total project land and or as much thereof is designated as allocated land. Moreover, the professional member must

“promote the Allocated Land with a view to achieving a sale of the whole or any part of the Allocated Land at the best price achievable and to procure such sale as soon as is commercially viable following the determination of the Allocated Land for the mutual benefit of the Allocated Members. For the avoidance of doubt the Professional Member shall comply with the obligation set out within this clause 16.2(b) when contemplating whether to accept an Offer pursuant to clause 11.1.”

The cabinet report and decision

26. The report to cabinet dated 16 April 2014 was entitled “Durham City Strategic Site and Infrastructure Delivery Strategy” (“the cabinet report”). It was a joint report of the corporate director, Regeneration and Economic Development, and the corporate director, Resources. Also named at the outset were Councillor Neil Foster, cabinet member for Economic Regeneration, and Councillor Alan Napier, cabinet member for Finance. Mr Darby was not involved in its drafting.
27. The purpose of the report was for members “to endorse and agree the approach towards the delivery and financing of the strategic regeneration sites and associated infrastructure priorities of Durham City, as consulted upon within the pre-submission draft document of the County Durham plan”. The report was also designed to outline the next steps going forward and agree the associated recommendations. It noted that the Council was preparing to submit the preferred option for examination by a planning inspector. The report continued that the delivery of the strategic housing (and employment) sites relied on better transport infrastructure. The housing sites and the investment into transport infrastructure (including the Western and Northern relief roads) were intrinsically linked to delivering economic growth. The plan highlighted Durham City as a key location for new development in the county, with Sniperley Park as one of three strategic housing sites. The construction of the Western relief road early in the period was said to be vital in enabling the housing sites, including Sniperley Park, to be delivered.
28. The implementation of the plan involved significant road construction before the

building of most of the new houses. The Council would need to make a substantial financial commitment. Contributions to the infrastructure investment for the Western relief road would be secured by way of planning conditions. Legal counsel had advised that the Western relief road would be most sensibly funded via a section 106 agreement and the Northern relief road by community infrastructure levies.

29. Thus, the report noted, the level of development contribution, planning gain and value from land sales was capable of delivering the required infrastructure for the strategic sites outlined in the plan, including the Western relief road, which was the key infrastructure. The financial tables included in the report presented how this was to be achieved. Under the heading “Financial implications, strategic housing sites, capital”, the report stated that a conservative scenario analysis had been utilised, to ensure all risks were accounted for. In the process, discussions had been held with potential developers to explore the viability of the proposals. As a result, various assumptions had been made about the costs and timing of development, including the Western relief road being constructed from 2017 to 2019, at a total cost of approximately £37m; development at Sniperley Park being expected to start in 2017/2018 and end in 2037/2038 at a generally steady rate of 100 to 150 properties a year; developers would be charged under the sites affected by a Section 106 agreement; and

“(xiv) The Council’s land at Sniperley Park is estimated to generate a significant capital receipt, which will be received in tranches as development progresses, in line with the profile of housing development. For financial planning purposes the income is based on the current estimated developable area at present market value. It is expected that capital income is estimated to be in the region of £7.3m.”

30. Over the plan period the report stated, there was expected to be a capital surplus, which included income relating to the current market value of council owned land on the Sniperley Park site. The arrangements through which this was to be achieved needed to be determined and needed to take account the fact that the land owned by the Council included a playing field. The treatment of this particular area of land produced specific legal issues relating to replacing the playing fields. There would also be a requirement to reprovide the household waste disposal site presently at the north of the site. The report added:

“A developer has drawn up an agreement with the main Sniperley landowners whereby the site proceeds are legally controlled by way of a Limited Liability Partnership (LLP). This agreement entitles the Council to a percentage of any sale across the Sniperley proposal on its release and income will thereafter be received in tranches. The Council has been invited to participate in this agreement.

The terms proposed by Sniperley LLP landowners are considered acceptable. Part of the Council's land includes school playing fields and it has been agreed that the Council cannot commit to selling this land until the playing fields have been relocated and necessary consents obtained. A separate agreement will cover this area of land. The Sniperley LLP agreement will prevent the land on which the current waste recycling land stands being released until alternative provision is available elsewhere in the locality. Inclusion of the reminder of the Council land immediately in the LLP with the playing fields and waste recycling sites to follow when available will provide the necessary certainty of delivery of the Council's part of the Sniperley strategic site."

31. The report recommended that cabinet agree:

"to continue the preparation for the release of the strategic housing sites including Sniperley Park and develop further the design and delivery options of the Western and Northern relief roads, subject to approval of the County Durham Plan; to continue preparation for the construction of the Western relief road subject to approval of the County Durham Plan, on the principle that the Council commits to financially supporting the delivery of the Western relief road as outlined in the report; and that the Council join the Sniperley LLP on the terms negotiated and enter an agreement to add the school playing fields subject to obtaining the necessary statutory consent."

32. At its meeting on 16 April 2014 the Council's cabinet approved the recommendations in the report.
33. The following day, 17 April 2014, the Council entered three agreements: first, a Deed of Adherence under which the Council became a member of Sniperley Park LLP2; secondly, an option agreement under which it granted an option in respect of the transfer of its land in Sniperley Park; and thirdly, a deed of variation of the option agreement under which it granted a further option in respect of the St Leonard's playing fields so that they were included within its scope upon the grant of statutory consent for their disposal. Under the option agreement the fee is £1. The option period is until 24 July 2045. Under it the Council contracts to apply to the Secretary of State for Education as soon as practicable for consent to dispose of the playing fields and to use its best endeavours to obtain such consents as soon as reasonably practicable (clause 2.2). It will also use its best endeavours to acquire or procure the use of a suitable alternative waste site as soon as reasonably practicable (clause 6.6).

34. On 28 June 2014, the head of spatial policy, planning, assets and environment took a delegated decision to declare the Council's land at Sniperley Park surplus to requirements and to dispose of the land. The report backing the delegated decision, dated May 2014, noted that the land had been allocated for housing in accordance with Policy 8 of the emerging County Durham Plan. Service departments in the Council had been consulted but no objections had been raised, although Ecology had advised that the Caterhouse colliery site had a high value for wildlife and any proposals for housing development would need to take it into account. Councillors had been consulted and two had objected to the disposal of the land.

Expert evidence

35. The claimants obtained an expert report from Charles Trustram Eve, a director in the firm of property consultants, GVA Grimley Ltd. In relation to the Sniperley Park LLP2 agreement, he commented that although the obligation on its professional member under clause 16.2 (b) was to procure the sale of the land as soon as commercially viable, there was otherwise no timetable, milestone events or references provided. There was also no obligation on the professional member to submit planning applications or to appeal. It was also unclear as to what the obligation to proceed as soon as commercially viable entailed. The timing was at the discretion of the professional member, and the professional member may well be the proposed purchaser. There was no obligation on the professional member to carry out works to the land, for example servicing or remediation. Further, the professional member, Theakston Estates (Properties) Ltd, had no track record in this context. Its ownership could change without reference to the landowners. A professional member may have extensive discretion as to how and when to promote the land and how and when to sell it but in this case there did not appear to be any meaningful ways in which a landowner could control or dictate its actions. Mr Trustram Eve summed up on this point:

“While the landowners may, for their own reasons, be comfortable with the arrangements, I am surprised that the Council ... can conclude that LLP2 can deliver its objectives. In my opinion the Agreement provides no certainty in respect of either objective and the Council has effectively ceded control to a company with no track record and no money.”

36. Mr Trustram Eve also commented on omissions in the Cabinet report. It contained nothing on the alternative courses of action open to the Council and there was no detail provided as to how the £7.25 million figure had been calculated. There seemed to be no valuation, and given the uncertainty as to when the land would be sold, and the agreements into which the Council was to enter, any judgment as to what the ultimate receipt to the Council would be would be highly speculative. It was also unclear as to whether the sale receipt was simply for the land which the Council had put into the limited liability partnership at the outset, or also included the playing fields and waste

site. There was no detailed review of the Sniperley Park LLP2 Agreement and the options provided. There was no commentary on the option period or the implications for the Council's objectives in signing up to a 31 year period.

37. Moreover, there was no commentary on the obligation the Council was undertaking to use its best endeavours to procure a suitable alternative waste recycling site, or about the cost of acquiring it and who would bear that cost. There was also no comment on the implications of the Council agreeing to apply for consent to dispose of the playing fields, given that guidance from the Department of Education is that proceeds from the sale of playing fields must be used to improve sports or education facilities. There was no commentary on the ability of Theakston Estates (Properties) Ltd to deliver the Council's objectives or its financial standing.

“In my opinion the material presented to the Cabinet members, and the information that was admitted, would suggest that the members could not make an informed decision as to whether the agreements to be signed represented the best consideration reasonably obtainable for the land or that they were in the best interest of the Council in securing its objectives”.

38. Adam Mirley, the director and head of planning and development at the consultancy Lambert Smith Hampton, prepared a witness statement at the request of the Council dated 22 October 2014. It is agreed between the parties that this statement of Mr Mirley focuses on matters which are no longer in dispute. However, in the course of his statement Mr Mirley acknowledges the need to obtain consent for the disposal of the playing fields but notes his understanding that the playing fields could potentially be relocated within the site.
39. In a second statement dated 1 December 2014 Mr Mirley concludes that if the Council were not to enter the LLP its only viable alternative was to do nothing. It would not have been possible for the Council to have joined the LLP on different terms from that agreed by the other members. By doing nothing the Council would have risked making their land exceptionally difficult to dispose of, losing the ability to equalise value across what are undoubtedly difficult sites to develop in isolation. Only a developer who had secured a position on the wider site would be interested in the Council's land because other developers would find the sites too difficult to develop due to their current use and landlocked nature. For the Council to hold back with a view to outright sale at some later point, the difficulty would be that the value of its land would be diminished as there would be only a limited market for it. Even if the Council's land were not landlocked, and could be accessed, that would not alter the position that the Council was better being part of the LLP than not, due to the ability to equalise value across the wider development and to maximise value on their assets. In his opinion the Council had entered into an agreement that was in accordance with the market evidence.

40. In a supplementary report dated 5 December 2014 Mr Trustram Eve stated that while the use of a special purpose vehicle such as Theakston Estates (Properties) Ltd is common place, his experience is that any obligations placed on such a special purpose vehicle are backed up by parent company covenants, guarantees and undertakings. That was particularly important in this case where the Council has no share in the special purpose vehicle itself, the special purpose vehicle has no money, the project is of long duration, and any failure on the part of the special purpose vehicle directly impacts on the landowners who have no effective control of it.
41. As to a “do nothing” option for the Council, and Mr Mirley’s criticisms of that, it was not his experience that agreements can only be reached prior to planning approval or that contractual arrangements remain without alteration following the grant of planning permission or during the marketing process. In his opinion the Council would be in strong position to sell the land at a later point to the LLP given that it would be the last landowner to join, and that it controlled land which was critical to the delivery of the scheme and was within the first phase.
42. In an email on the eve of the hearing, Mr Mirley reiterated that if the Council had sought his advice prior to entering into the LLP agreement he would have suggested some changes to ensure that it had more control and an ability to exit if delivery targets were not met. However, the issue was whether the Council had acted reasonably in considering its options and it was his strong opinion that it had, considering the options open to it. It had also complied with the requirements of section 123 of the Local Government Act of 1972; it was fair to assume that the Council were getting best consideration. He simply could not accept that the Council could have acted independently of the LLP, given the landlocked nature of the Council’s land and the restriction on the disposal of the playing field land.

Ground 1

43. Ground 1 of the claimant’s challenge is that the exercise of the Council’s power to dispose of its property at Sniperley Park under section 123 of the Local Government Act 1972 was unlawful. Section 123 of the Local Government Act 1972 provides, in its relevant part:

“(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.

(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.”

44. Under these provisions the grant of an option to purchase is a disposal of land: Trustees of the Chippenham Golf Club v North Wiltshire District Council [1991] 64 P&CR 527. Ordinarily a decision of a Council to sell land is a private law matter, not amenable to judicial review. However, judicial review is possible where there is a public law element to the decision making process: R v Bolsover District Council ex parte Pepper [2000] 3 LGLR 20. An attempt to give effect to planning policy or objectives is sufficient to inject a public law element into a decision. In R (on the application of Molinaro) v Royal Borough of Kensington and Chelsea [2001] EWHC (Admin) 896, Elias J held that the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power is being abused: [65]-[64]. In my view the position here is that there is a public law element to the disposal, given the circumstances I have outlined.
45. Mr Purchas QC boiled down most of the asserted unlawful aspects under ground 1 to the Council’s decision to join the LLP on 16 April 2014 being made when failing to have regard to material considerations. The stated objective of the Cabinet report backing the decision was for members to agree an approach regarding the delivery and financing of strategic regeneration sites and associated infrastructure, as consulted upon in preparation for the County Durham plan. Thus what should have been put before the Cabinet were factors material to that. In his draft report in January 2013, which never went anywhere, Mr Darby had recommended that the agreement to enter the limited liability partnership be agreed in principle, with further negotiations to follow. That was the approach which should have been adopted in the 16 April 2014 report. Yet the report contained no details of the limited liability partnership, no analysis of any other options open to the Council, no summary of the views of officers or their appraisal as regards the limited liability partnership, and nothing about future negotiations. The report did not grapple with the re-provision of the St Leonard’s playing fields or the legal provisions associated with its disposal. The Cabinet was not told that there had been no consultation of the school itself, let alone with the public. There seemed to be no investigation whether the playing fields could be located elsewhere and it was simply assumed that there could be provision within the overall development. There was a similar omission as regards the future of the waste disposal site. Yet under the limited liability partnership arrangements the Council was undertaking to use its best endeavours to relocate it.
46. Moreover, Mr Purchas QC added, the Council was not told that the land was being

disposed of without compliance with the procedures set out in the Council's property strategy, especially the need to have a valuation. This was the discharge of an executive power to dispose of public assets and the Cabinet did not have regard to material considerations in doing so. Mr Darby's earlier, draft report, had dealt with the advantages and disadvantages – not present in the current report – but at that stage it was Sniperley Park LLP1 which was on the table, not Sniperley Park LLP2. That was a different agreement. There had, it seems, been no negotiations or even consideration in relation to LLP2. Mr Mirley's contention that the terms were not available for negotiation simply ignored the strategic nature of the Council's landholding and the power it had as a consequence. The commanding position which the Council had was underlined in Mr Bull-Diamond's earlier advice.

47. In response, Mr Drabble QC contended that there was no breach of section 123 of the Local Government Act as a result of the Cabinet decision. This was a decision to join an existing limited liability partnership and it was a reasonable inference that other members had been in receipt of appropriate advice and were happy with the terms. The decision of the Council to join could not sensibly be described as outwith the range of rational decision making. Indeed, joining it was the best course open to the Council and resulted in it obtaining the best consideration for the land. Given the situation as it existed in April 2014, when the other landholders had signed up to its terms, other alternatives were impractical. That was the view correctly advanced by Mr Mirley in his expert report. To the criticism that there was no guarantee that the developer, the "professional member" in the LLP agreement, was obliged to dispose of the land timeously or on a time-scale meeting the Council's objectives, Mr Drabble QC submitted that the professional members' return depended on it developing the land. Moreover, it was not commercially realistic to conceive of the Council developing its parcels of land without cooperating with the other landowners. If the playing fields were to be developed provision had to be made elsewhere and that would need to be within the Sniperley Park development. There was nothing unusual in this type of consortium nor in the developers using a special purpose vehicle. The Council officers had properly considered the matter and advised satisfactorily, and no public law error had occurred. The agreement had a commercial logic and the housing market would drive the development. The £7.2 million figure was a forecast and a valuation was not necessary.
48. Moreover, Mr Drabble QC invoked the now established learning in relation to section 123(2) of the Local Government Act of 1972, that it is directed at outcome. A disposal of Council land should obtain the best price reasonably obtainable and the section does not impose a duty to conduct any particular process: R (Salford Estates) v Salford City Council [2011] EWHC 2135 (Admin), [95], per HHJ Waksman, and R (Midlands Cooperative Society Ltd) v Birmingham City Council [2012] EWHC 620 (Admin), [122]-[123], per Hickinbottom J. That meant that any review by the Court as to whether the requisite outcome has been achieved can draw on subsequent expert evidence: see Hickinbottom J at [144 (vii)]. Section 123 does not require valuation evidence. The £7.2 million figure was not consideration for entering the limited liability partnership but was the estimated Council receipts for the land. The report informed the Cabinet as to

the mechanisms to raise the money for infrastructure and also the timing of its release for housing. Cabinet members were being advised clearly that they were disposing of Council land in return for which they would obtain a capital receipt.

49. In my judgment the Cabinet was not provided with the necessary information so that it could take into account obviously relevant considerations. The Salford Estates and Midland Cooperative Society cases make clear that while section 123 does not require any particular process, a purported discharge of a duty under the section can be impugned on ordinary public law principles. I preface my remarks by observing that the Cabinet did not need to be appraised of everything which was within the knowledge of the officers. The officers are there to digest material and to bring to bear their expertise, which the Cabinet members will not have. The Cabinet can rely on the officers' fair summary of relevant matters and their balanced evaluation of the implications. If the officers have given proper consideration to different arguments and then come to a conclusion there is no necessary error should the report not refer to the different contentions but only to the conclusions reached.
50. With that as background my difficulty with the Cabinet report in this case is threefold. First, there is no evidence before me that the officers had considered and resolved a number of obviously relevant issues behind the recommendations being advanced. Mr Bull-Diamond was called in by the Council to give advice and his letter of 4 November 2013 contains some pungent comments on the control the Council was ceding to the LLP. (This is a matter expanded upon in Mr Trustram Eve's expert reports). The only evidence available as to whether these were considered is Mr Darby's statement that his overriding impression was that they were not material. Secondly, Mr Darby's own draft report of January 2013 sensibly set out the advantages and disadvantages of the Council joining the consortium or holding back. He recommended that the consortium be entered but only in principle and coupled with further negotiations. The evidence is that this draft report did not get beyond his head of department to the senior officers under whose names the report of 16 April went to the Cabinet. Mr Darby's own evidence was that he was not involved in the preparation of the Cabinet report although he accepts that he was responsible for the positive recommendation which it advanced.
51. Thirdly, Mr Bull-Diamond had advised that the Council held a strategic interest in the wider Sniperley Park site. Mr Darby seemed to ignore that. He persists in his witness statements in the belief that the Council's land was somehow landlocked and would be subject to ransom negotiations, so that its value would be reduced by anywhere between a third and a half. That belief infects Mr Mirley's advice. Very fairly in argument Mr Drabble QC conceded that in the light of the evidence before me it was too simple to say the Council's land was landlocked. To my mind the strategic nature of the Council's landholding is an obviously relevant consideration which on the evidence was not considered by the officers and thus not fed through to the Cabinet. The upshot is that the Cabinet decision is consequently flawed.

Ground 2

52. The claimant's second ground of challenge is that the Council failed to recognise that the playing fields are open space within the meaning of section 336 of the Town and Country Planning Act 1990 and failed, consequently, to follow the procedure required by section 123 (2A) of the Local Government Act 1972. That sub-section is set out earlier in the judgment.
53. The Council's answer to this is that playing fields were not open space. They were school playing fields and, as the Council's Supplementary Planning Document put it, there was no public access to them. Mr Moralee had produced evidence that for 40 years he had used the fields for recreation, as had other members of the public, but even if the court accepted that evidence the user was not comparable to that in R v Doncaster Metropolitan Borough Council ex parte Braim (1989) 57 P&CR 1. The evidence of public use did not suggest the existence of a licence requiring a reasonable period of notice before termination.
54. In R v Doncaster Metropolitan Borough Council, ex parte Braim (1989) 57 P. & C.R. 1 McCullough J. considered whether the lease of part of Doncaster Common (not registered as such) fell within section 123(2A). He held that for over a century the public had, as of right, used Doncaster Common for what could be conveniently termed recreation. Even if the public's use depended upon a bare licence, the Council would be obliged to comply with the section, unless reasonable notice of termination was given and had expired. McCullough J said (at 15):
- “What quality of user “for purposes of public recreation” is required before the land is “open space” for the purposes of section 123(2A) of the Local Government Act 1972 as amended? Mr. Whybrow contends that it must be as of right, *i.e.* that user under a bare licence will not suffice. He suggests that any other construction would be absurd and inconvenient. I do not agree. Section 123(2A) appears to have been enacted to protect the interests of those lawfully using open spaces. A bare licensee has no interest in land, but so long as his licence exists he has something which he can enjoy. It can only be brought to an end on giving him reasonable notice. In many cases such notice need only be very short, but it is possible to envisage circumstances in which a significant period would be required. Where a licence has been given, there is no hardship or absurdity in a council having to choose between postponing its disposal of the land until such notice has been given and expired and, alternatively, advertising the intended disposal in the way required.”
55. In my view the evidence of public use of the St Leonard's playing fields is such as to

constitute the bare licence contemplated by McCullough J in ex parte Braim. Moreover, the Council has entered into a binding agreement to grant an option of the playing fields – an interest in land – subject to the requisite consents. In any event the relevant intention to dispose of the open space was already in existence at the time of the decision to enter the agreements. The failure to publicise that intention before the agreements were entered meant that it would not be possible for the Council to consider any objections to the proposed agreement under the section. Ground 2 is made out.

Conclusion

56. In their written submissions the Council raised objections to the claimant's standing. Since Galaxy is a neighbouring landowner that gets nowhere. I do not find the Council's points about the claimant's delay persuasive. Consequently, for the reasons I have given, I grant judicial review.