

Public Document Pack



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Dear Councillor

I am now able to enclose, for consideration at the meeting of the **CABINET** on Monday 3 February 2020 at 11.00 am, the following additional representation from members of the public that was received after the agenda had been published.

5 **REPRESENTATIONS FROM MEMBERS OF THE PUBLIC** (Pages 2-9)

To consider the attached additional representation from members of the public.

Yours sincerely

A handwritten signature in black ink, appearing to be "Nicky", written over the text "Chief Executive".

Chief Executive

Dear Cabinet member,

I write in response to your letter dated 16th December 2019.

For ease of reference I have responded to your comments on your interpretation of our objections to leasing the Pavilion to a private enterprise, contrary to the Charities Act 2011.

Objection One: You state *“The use of the pavilion has diminished in the last 18 months to 2 years, despite being available to any person(s) booking any of the football pitches. Even when booked, the use requested of the pavilion was solely for its changing facilities when the pitches are in use.*

The bookings for the pitches and the pavilion appear to have diminished when the local (Deal) football league collapsed. The only online booking received for the football pitches in September for instance, were by the club who wish to take up a lease of part of the pavilion.”

The Pavilion has required refurbishment for some years preventing full utilisation of its facilities, yet the Trustees have done nothing to improve it. This amounts to mismanagement of the Charity. The question must be asked, if the Pavilion hasn't been maintained by the Charity over the years, what other facilities within it were available and capable of being used, other than the changing facilities? Surely this is due to the lack of maintenance and encouraging use of public recreational facilities, as they would have been in the past. Better facilities lead to better use of them.

DDC records show that no discussion of Marke Wood has taken place by Trustees for years. No agendas, no minutes of meetings, nothing. This is a failing in the responsibilities of the Trustees of the Charity of Frederick Franklin for a Public Park and we would refer you to the following Government publication:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/351608/council_as_charity_trustee_overview.pdf

Furthermore, the sale of the former caretaker's premises at 56 Liverpool Road raised around £180,000 yet not a penny of the proceeds has been spent in refurbishing the Pavilion. The amount of goods and services £180,000 could have provided when the caretakers house was sold would now cost £240,000. (Figures drawn from the Bank of England's inflation calculator). The Trustees have been asleep at the wheel.

The “collapse” of the local football league followed altered requirements issued by the Kent FA for changing facilities. Changes the Trustees could have provided if they had been on the ball, so to speak. These requirements are referred to in the letter to residents sent by Cinque Ports Football Club. No investment has been made into the Tennis courts or upgrading the Pavilion and its facilities for other recreational use.

“The only online booking received for September...”

Perhaps this is a consequence of the fact that DDC staff's response when bookings of the Pavilion have been attempted has been to say, ‘No, the Pavilion belongs to a football club now.’ and did not appear to know that Marke Wood and its Pavilion have charitable status.

“The Trustee is permitted under clause 8(2) of the scheme to consider letting the land and buildings during such periods as they are not in occupation, as outlined above.”

Despite requests to see a copy of the Scheme referred to as applicable to the Charity of Frederick Franklin for a Public Park, nothing has been forthcoming. However, this section does not apply for DDC or the Trustees to rely upon. The Pavilion and Pitches are not unoccupied. They are being used

by Cinque Ports Football Club at weekends and on training days, when members get together in the pavilion to drink alcohol.

Had the council complied with the below section of the Open Spaces Act 1906[a]; had not driven away those wishing to hire the facilities by claiming they now belonged to CPFC; had prevented CPFC claiming that Marke Wood was now their home in the local press even before a lease was considered by the Cabinet, it might be different.

However, CPFC have filled the DDC-made void in occupancy and so, on this point alone, the lease may not proceed.

[a] Section 10 of the Open Spaces Act 1906 (“the 1906 Act”) reads:

“A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired:

(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and

(b) maintain and keep the open space or burial ground in a good and decent state.

This was confirmed in the recent case of *Muir v Wandsworth Borough Council*, in the Court of Appeal, which impacts on Local Authorities considering placing Public Land into private occupation via Lease, to the exclusion of the public at large. “It was also held that the obligation under section 10 of the 1906 Act applies equally to buildings in the open space. Local authorities will therefore need to ensure that care is taken not to prevent public use of such buildings for a significant period of time.

The decision to let the premises to a private company to operate a fee-paying nursery would deny members of the public a right of access to the premises and would not provide them with any facilities. Facilities would only be provided for the cohort of children enrolled in the nursery and not for children generally. If local authorities are considering letting any such premises to private companies, then they will need to consider whether the services provided by any such company can be said to be for the benefit of the public as a whole, rather than just a specific group of people.

This decision does not prevent local authorities from allowing private companies to step into its shoes and provide facilities for the use of clubs, services or organisations and make a charge for those services. However, this must be distinguished from the circumstances of the present case in which the council was allowing the Company to make an entirely different use of the premises and create a new charge for its use.”

By granting CPFC exclusive use of part of the Pavilion through a five year lease in return for an annual rent, this prevents the public from accessing the whole Pavilion for their enjoyment. It has been stated that the public are able to access the changing facilities within the Pavilion but no other part. As there are two pitches available for hire at the weekends, what would happen if four sides wished to use the changing facilities in the Pavilion, would CPFC have primacy of use due to their lease? But it is interesting to note that the online Pitch Booking facility for DDC operated Recreational Grounds has, since September last year, stated “Pavilion not available”.

Maintaining the Pavilion is crucial to the intended use of the open space as a recreation ground and, because the Trustees failed in their management duties to the Charity of Frederick Franklin for a Public Park, the use of the changing facilities and wider availability of the Pavilion declined.

It is specious to claim the right to dispose of the Pavilion on the basis of it not being occupied when that lack of full occupation and or use, has arisen entirely from the Trustee's failings.

"With that in mind, the Trustee wrote to the Charity Commission to enquire whether the substantive disuse of the pavilion amounts to a period of no occupation."

In response to this claim we make two points:

1. Firstly, we would like to see the letter sent to the Charity Commission to evaluate how the question was framed. As this is a question concerning a public charity there can surely be no concern in sharing this information with a concerned community. The Local Government Transparency Code 2015 makes clear;
2. Secondly, the timing of the sending of the latter is important. If it was sent after the pavilion and pitches were turned over to CPFC, then characterising this period as one of 'no occupation' is false.

Let us make it transparent that we have no problem with CPFC using the facilities at Marke Wood, providing it is done on an equitable basis with the public at large. The issue is whether this is being facilitated on a sound legal basis.

We find it absolutely mesmerising that the Council is not following guidance for Local Authorities from the Government's own website. What has transpired over the course of this concern - non disclosure of information on request, restriction of the Public from part of a Cabinet meeting to discuss a public asset, failure to provide a detailed Report on the legal Title of Marke Wood in the event of a legal transfer of land and property into the sole hands of a private football club.

Frankly, the easiest way forward is to issue a licence to CPFC rather than a lease and the matter can be resolved. A licence with conditions as to use (no alcohol consumption or disorderly behaviour) would allow CPFC to play regularly whilst sharing the facilities with local inhabitants. It would go some way towards meeting the aims of the Council's own Safer Stronger Communities Partnership Plan 2019 relating to Safeguarding children by limiting the impact on the use of the children's play park eight feet away from the pavilion.

You go on to say, "To put the above into context, the Trustee is permitted, subject to following correct procedures, to let the pavilion if it considers the letting to be in the best interests of the charity."

You do not mention how such a decision would not breach the findings in the *Muir v Wandsworth Borough Council* 2017 finding and which was upheld by the Court of Appeal in 2018, which begs the question as to whether the outcome of that case has been evaluated by DDC, as you have never mentioned it. There is much guidance on Local Government websites and blogs that cover the impact of this case. Furthermore, and importantly, if the Trustees are considering leasing land and property they must seek to obtain the best price possible and follow guidance in Section 123 of the Local Government Act 1972 which allows principal councils to dispose of land held by them in any manner they wish, subject to a requirement in section 123(2) to secure the best consideration that they can. *"Without marketing the property and/or obtaining an appropriate independent valuation, it is impossible for an authority to demonstrate that it has achieved the best consideration possible."*

“It is essential that not only is proper legal advice taken but that the advice which is received is actually considered.” “When disposing of land, an independent valuation should be obtained to comply with the relevant section of the Local Government Act 1972.

Committees and sub-committees should have clear terms of reference and should ensure that they operate within these.

Proper legal advice should be obtained, and account of that legal advice should be taken in the decision-making process.

If key information is not available to council members beforehand, the meeting should be adjourned to allow proper consideration of any new information or the decision deferred to a later meeting.”

This is taken from <http://publicsectorblog.practicallaw.com/local-authorities-disposing-of-land-take-note/>

Next, you say; “The current proposal for the letting of the pavilion is not for exclusive use of the entire building.”

No disclosure of any changes to the original Proposal has been forthcoming. That proposal outlined in the Public Document Pack of the 22nd August, and the only Pack released, states:

‘Identification of Options

3.1 Option 1: To offer the club a 5-year lease. It is proposed to include a break clause actionable by either party on serving six months’ written notice.

3.2 Option 2: To offer to hire the building on a non-exclusive basis for match days and practice days. On other DDC-owned grounds with pavilions, the pitch hire fee does not cover the pavilion costs.

3.3 Option 3: Not to offer the club a lease.

Later in the Pack it says:

‘4.7 Option 1: Would restore use of the pavilion and result in improvements to the building. It would also provide a small income for the Trust while reducing the liabilities. This is the recommended option.

4.8 Option 2: Is not acceptable to the Cinque Ports Football Club as they intend to invest in the building by installing furniture and equipment.

4.9 Option 3: Would result in the pavilion continuing to lay dormant while incurring expenses for the Trust.’

There has been no publication or consultation on a revised proposal whatsoever.

Objection two: You state in your letter, “*We believe this objection has been responded to in answering the above objection.*” You have not answered the above objection. Once again, you have missed the point. You cannot now claim lack of occupation when you have allowed CPFC sole occupation rights.

You then mention “*market rent*”. You have not defined that term. You have not made public, as you are required to do in relation to a public charity, what the offered rent by CPFC is or what the proposed terms of the lease are.

You also mention; *“The club will also be providing sporting facilities to the local community.”* This was certainly not mentioned in the Public Document Pack and nor have you defined what sporting facilities are to be provided and under what governance policy. Are these to be sporting facilities for young people and children?

Again, you have offered no public consultation on such alternatives.

Can you reassure us that both DDC and CPFC have written policies in place complying with HM Governments ‘Working Together to Safeguard Children’ guide of July 2018? Is DDC, in regard to Marke Wood, cognisant of their responsibilities under section 11 of the Children Act 2004?

For instance, the guidance mentioned above states;

“Every VCSE, (Voluntary, Charity and Social Enterprise) faith-based organisation and private sector organisation or agency should have in place the arrangements described in this chapter. They should be aware of how they need to work with the safeguarding partners in a local area. Charities (within the meaning of section 1 Charities Act 2011), religious organisations (regulation 34 and schedule 3 to School Admissions) and any person involved in the provision, supervision or oversight of sport or leisure are included within the relevant agency regulations.”

Safeguarding legislation applies to schools, youth groups and charities, and sports clubs. Simply put, safeguarding applies to anyone who works with, or around, children.

The main pieces of legislation and guidance documents that you should be aware of include:

The Children Act 1989 (as amended).

The Children and Social Work Act 2017.

The Safeguarding Vulnerable Groups Act 2006.

Working Together to Safeguard Children 2018.

Keeping Children Safe in Education 2019.

Can you confirm that both DDC and CPFC have policies and practices in place to cover Safeguarding?

Objection three. You reference the Pavilion and its use as a drinking establishment. You say, *“Any lease to the club will not permit the sale of alcohol.”*

That is good to hear but does not address the fact that the Pavilion is already being used for the consumption of alcohol. In this regard we would refer you to the above mention of the Communities Partnership Plan 2019.

Objection four. You assert that *“the prohibition of disposal of open space land does not apply.”* We draw your attention to the previously mentioned Muir v Wandsworth Borough Council 2017 decision at the Court of Appeal and ask for clarification. There is currently insufficient detail for the public to be certain these legal requirements have been met. It must be remembered that the conveyance of Marke Wood to the Walmer Urban District Council in 1929 came under the auspices of the Open Spaces Act 1910, and Section 10 of that Act set out the obligations for the maintenance of those open spaces so bequeathed.

You further state that; *“The park is designated as open space under the Council’s Planning Policy, but this is not relevant to this matter at hand as it is only to limit proposals for developments that would result in a loss of open space. No such proposal has been made by the club.”*

We disagree and would say that this is relevant on two points. DDC have designated it as an open space, and this supports the view that the land be treated in accordance with the Muir ruling. Secondly, you refer to CPFC *“not having made a proposal regarding development.”* That may be so – at present. They didn’t propose turning the pavilion into a drinking establishment initially but that changed as soon as DDC turned a favourable eye to the leasing of the Pavilion and Pitches to CPFC.

What would be different is that CPFC would have legal possession of the Pavilion for a term of years and on a formal statutory lease basis. Do the proposed terms of the lease permit, or exclude, a situation where, in the future, they decide that the Pavilion needs extending or changing in some way, for the sole development and benefit of the club? We should be concerned with future proofing Marke Wood and not simply dwelling in the here and now.

Objection five: You referenced in your letter a proposal to *“give the club the use of part of the pavilion, however it is not intended that the proposal will include all of the changing rooms, which will continue to be available for use by the public via the online booking system.”*

Two points here:

1. What Proposal are you referring to? It certainly isn’t the one referenced in the Public Document Pack of 22nd August.
2. Which changing facilities will be available to the public and which retained for the exclusive use of CPFC?

It must be reiterated that the online facility for booking the pitches at Marke Wood, two in number, both of which have the statement *“Pavilion not available”*, a situation that has been in place since 14th September 2019 and continues to be.

Objection six. You state that. *“The Proposal does not include exclusive use of all the football pitches.”*

I refer you again to the Public Document Pack of 22nd August:

“2.7 The club has also indicated its intention to train during the summer season and therefore the lease for the pavilion would allow for use for the full calendar year.”

However, we reiterate, as there are two football pitches for use and potentially at the same time, as it is possible to book them independently, how would the changing and shower facilities operate for four football teams?

If they need the pavilion for the full year then they need the pitches to train on. At Victoria Park where CPFC used to play and train, they attempted to have a Dog Exclusion Order placed on the pitch, thus excluding dog walkers. There would be a real threat of such an Application being sought for Marke Wood. A great more dog walking occurs on the Recreation Ground than there is use by any football club.

Objection seven: You state that you don’t understand the query.

In August 2019 you were sent the following, to clarify what the Charity Commission had advised us:

Charity Commission Legal requirements on Private Benefit

<https://www.gov.uk/government/publications/public-benefit-running-a-charity-pb2/public-benefit-running-a-charity>

Charity trustee duties generally

Legal requirement: charity law says that once a charity has been set up, its trustees must operate it as a charity in accordance with charity law and the charity's purpose.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588234/PB1_The_public_benefit_requirement.pdf

Legal requirement: charities must not define their beneficiaries in the following ways as these will not benefit a sufficient section of the public:

A private (or 'self-regarding') members' club generally exists for the benefit of its members only, and so cannot be for the public benefit. Even if it has an open membership, an organisation that is 'inward-looking', supported by its members for the purpose of providing benefits for the members, does not benefit a public class of people and so cannot be a charity.

If it is not clear whether your organisation's purpose benefits the public, or a sufficient section of it, you will need to explain who may benefit and why that is a section of the public. The Commission will make a decision in each such case on the basis of its own facts.

This should make crystal clear what a private benefit amounts to. What advice did you receive from the Charity Commission regarding this point? Again, such disclosure cannot be objected to in relation to a public charity.

Were CPFC to use the pavilion to sell refreshments, alcohol or otherwise, they will be using charitable premises for a private benefit. This is not permitted under the Charities Act 2011. Nothing could be clearer.

It is a shame that DDC have encouraged CPFC to pursue this matter without first clarifying the legal position in relation to the Charities Act. We don't begrudge CPFC making an income, but it cannot be done off the back of a public charity and contrary to the law and for their own private benefit.

Finally, we come to **Objection eight**: "*Is the proposal in the best interests of the charity?*"

Firstly, without knowing what any new Proposal in relation to leasing the Pavilion states, makes comment impossible. However, if anything proposed reflects what has been set out in this letter, then it cannot possibly be in the long-term interests of the charity. No consultation with the Public has been carried out prior to entering negotiations with CPFC. No evaluation by a private Valuer has been carried out to determine a Market Rent for the Pavilion so as to comply with 'best value' for the Charity.

Secondly, in the short-term, if DDC/Trustees flout charity law; continue to preside over the loss of charity funds (already, the £180,000 held in trust has devalued by one third because of inflation and mismanagement); the Trustees make themselves an example of how to bring a charity into disrepute, it is ridiculous to think that what is proposed is in the best interests of the charity.

As referred to earlier, we would strongly recommend you reading the Government's own guidelines as detailed below:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/351608/council_as_charity_trustee_overview.pdf

We ask that the above concerns are seriously considered.

Councillor Chris Vinson mentioned the following in an email on the 18th October 2019;

“DDC are meeting with the Charity Commission next week to discuss the legal concerns that you’d raised.

Once that meeting has happened, Trevor [Bartlett] has confirmed that we can arrange a meeting with the relevant Cabinet members and Council Officers to discuss next steps. He agrees with me that you [REDACTED] and [REDACTED] would be very welcome to join that meeting to discuss future plans.”

Is it the case that this was merely a delaying tactic to allow DDC to push through the plans for a lease based on secret negotiations with a private enterprise and avoid discussing the issue with concerned residents?

We are still more than willing to meet to discuss the future of the pavilion.

Yours etc