

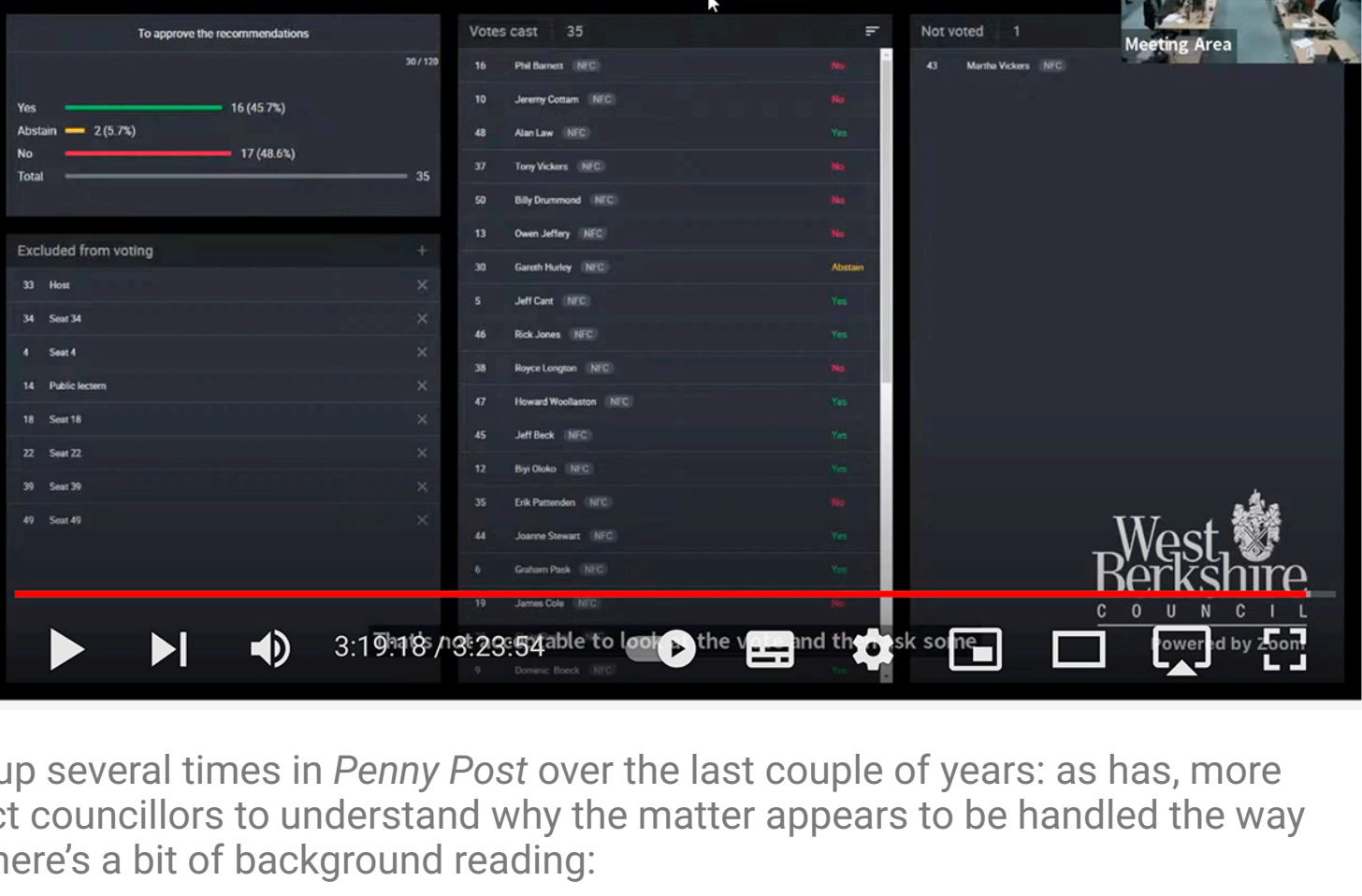
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Your District Councillor can ask the question: but can they get the answer? (Part two)



The question of CIL charges has come up several times in Penny Post over the last couple of years: as has, more recently, attempts made by some district councillors to understand why the matter appears to be handled the way that it has been.

The background

- This post (3 December 2020) looks at the issues surrounding the two cases which are particularly problematic;
This post (20 January 2022) provides a report on part of a WBC Full Council debate at which the matter was raised in a motion; and
This post (27 January 2022) provides a report on WBC's Governance and Ethics Commission (G&EC) on 17 January as to whether or not officers could release a particular report concerning CIL enforcement to Councillor Claire Rowles.

The issue then had a further airing at WBC's Full Council meeting on 17 March 2022. You can see a video of this here, from 2 hours 54 minutes (yes, council meetings do often go on for that long). There was, however, a surprise in store.

The QC

The surprise was that WBC had decided to hire (at a cost of £3,850) a QC to state its legal position, the opinion of the legal officer presumably being felt to be insufficient. This was also a surprise to Claire Rowles. I asked WBC why she had not been told in advance and received the following reply:

"The Council has always been clear about its interpretation of the legal position regarding Members rights to access information, which was set out in the report to the G&EC. As the Council's interpretation of the law was effectively challenged during the meeting of the Governance and Ethics Committee in January, independent legal advice was obtained to assist Council in considering this matter."

This is, of course, a description of why a QC was instructed but not of why Councillor Rowles was not told of this (a question I've asked again). Two points strike me from this. First, although the G&EC did look at the wider legal framework, the challenge was at least as much a challenge to WBC's interpretation of its own constitution. Second, it's unclear to me that only one side having such advice would "assist Council in considering this matter": although it might encourage the Council to come to a particular decision.

I also asked why Councillor Rowles was not given an opportunity to have a legal opinion for her side of case. "The Council obtained independent legal advice," the statement continued, "and there was nothing to prevent Cllr Rowles from doing the same had she wished to do so."

Well, that's certainly true. I could have obtained a QC's opinion before having had a haggle with a garage last week: however, I didn't because I had no expectation that the mechanic would do so. I don't know if it's normal for WBC to take a QC's opinion before a council meeting which considers an issue raised by a member but it certainly wasn't what Councillor Rowles was expecting. Nor am I sure, were she to be have been apprised of WBC's decision and wanted her own advice, if WBC would have paid for it. I've asked about these matters too.

"We can all find barristers to back up our argument," Councillor Rowles told the meeting. "I was deliberately not given this opportunity which would have presented members with a balanced view." As neither the advice, nor the terms of reference nor the list of documents the QC was asked to examine are publicly available, it's impossible judge how useful this advice was to a wider understanding of the issues.

The decision to extend and pay for legal advice for one party in and not the other seems, at best, odd and unsatisfactory if the intention of the discussion was for all the members to have a rounded understanding of the issues. It will be interesting to see if WBC clarifies its position on this.

The discussion

The discussion itself didn't cover anything much that hadn't been raised at the Governance and Ethics Commission although it focused - perhaps on the advice of the QC - on the "need to know" justification for whether information should be released rather than on the principle of public interest or on WBC's own clause 13.3.6. This states that "where Officers consider that information is of a confidential nature which should not be openly available to the public or press, this information will be supplied by Officers to Members on a private and confidential basis".

Aside from a piece of political knockabout between Councillor Steve Masters (Green) and Alan Law (Con) and an impassioned speech from Jeff Brooks (LD) about the CIL problem (which he promised to re-visit) the most notable contribution came from Deputy Leader Graham Bridgman (Con).

He outlined the evils that might result from confidential advice given to members of the Executive being circulated to others, a point echoed by Ross Mackinnon (Con). He also referred to the difference between "confidential" and "exempt" information, suggesting the information discussed here was "exempt". However "exempt" seems mainly to apply - according to the Local Government Act 1972 (with amendments) - to instances where the identity of an individual might be disclosed.

In both these CIL cases we're way past that stage: both the cases have been referred to in the press and on TV while, in the Kintbury case, it seems the applicant's neighbours were given information about her case during the enforcement process. Councillor Rowles, however, at no point suggested that if she received the information requested (about the enforcement process) it would go any further.

Councillor Bridgman then added that "if the Council's senior legal officer says that something is exempt from production then it is exempt from production." I find this remark very troubling. By exempting an officer of a certain rank from scrutiny he's admitting that any statements from people senior or equal to her should likewise be accepted and, as he put it, "not looked behind." How far down the organisation chart would this exemption run? To the second-most senior officer in a team? To all of them? Does it also apply, by implication, to the Leader of the Council, and perhaps her Deputy? Scrutiny cannot be defined by rank.

Not all the Conservative members supported the officers, however. As matters proved, three abstained.

Councillor James Cole (Con), who opposed the motion, said that "could see holes" in the legal case and re-iterated the basic point that Councillor Rowles was merely "trying to establish why different enforcement considerations were applied" in the two CIL cases, something that officers were without good reason "stopping her from doing." He added that "it does appear" that these residents have been wronged and that "it does appear that Council has covered this up." I think this is a good summary of what an increasing number of people feel about the issue.

In her own statement, Councillor Rowles repeated several of the points that she had made at the above-mentioned Governance and Ethics Commission. "I am just trying to do my job as a councillor - to challenge and hold the Council to account on behalf of residents. To close down this request is closing down the very cornerstone of our democracy and the role that we are elected to do as members. This sets a very dangerous precedent." She concluded that this issue raised the question of "what the Council has got to hide and why it is so nervous about this report. If I am not supported tonight," she concluded, "I shall be making a FOI request."

The car crash

At its denouement, the meeting descended into something approaching farce.

There was first a dispute about whether Councillor Martha Vickers (LD) could vote, having been absent for part of the debate. The Monitoring Officer - in the invidious position of having to intervene in the process of a vote the result of which would directly concern her - advised that she probably couldn't but left it for Councillor Vickers herself to decide.

There were then further discussions, some of which were audible, about (i) the failings of the digital voting system, (ii) whether or not one member had been persuaded to change their mind, (iii) an occasion when this was alleged to have happened in the past; and (iv) how many votes had, amid all this confusion, actually been cast. It was like watching the procedural equivalent of a car crash.

When the dust settled, the result was a tie (16 each with four abstentions). As a result, the Chairman was required to use his casting vote. This he eventually did; though with no great enthusiasm, it seemed to me.

"I've no option," he said, although whether this referred to his having to do this at all or to the way he felt he was compelled to vote he didn't specify. Eventually, he supported the claim that the information should not be disclosed. With almost the same, exhausted, breath he announced that the meeting was closed.

The conclusion

For those who are concerned about members' access to information, and the CIL issue, this was probably the best possible result. A decision to support the officers' views supported by the blind-sided intervention of a QC and based on a vote in which three Conservative members abstained, two voted against and which was only determined by a procedural ambiguity and the Chairman's casting vote is hardly a ringing endorsement that all is well.

There was clearly a good deal of unease during the debate: after all, any of the members could have found themselves in Councillor Rowles' position and may yet do so in the future.

Everything I heard added to the feeling I had after the officers' underwhelming performance at the Governance and Ethics Commission discussion that about eight half reasons didn't add up to a whole one. After all, if the Legal Officer's arguments then had been clear and well made, why spend thousands of pounds on a QC to re-state them?

It also suggests that the report, which looks at the enforcement issues in the CIL cases, contains something WBC's Executive is nervous about. This might relate to proposed legal action. However, there's no suggestion that Councillor Rowles or anyone else would disclose this information if provided to her.

I've spoken to most of WBC's councillors and have never been offered anything contained in the part 2 (confidential) aspect of a meeting nor anything else which was not publicly available. This reluctance adds to the perception - denied by Councillor Bridgman - that some feel Councillor Rowles could not be trusted.

There is, of course, the possibility that were Councillor Rowles supplied with the information then she would change her mind and fall into line with WBC's official view on the matter. The fact that this hasn't happened suggests that disclosure would not have had this effect.

Despite this decision, the CIL issue remains exactly as it was before. Councillor Brooks has promised to keep this alive, as have others. Some of the questions they might ask (indeed have asked) are

- (i) why matters of enforcement and interest payments were handled differently in the two cases;
(ii) why the applicant in Lambourn has had a "sword of Damocles" hanging over him for over two years, with legal action threatened but none taken; and
(iii) whether WBC's handling of the issue accords with members displaying "the utmost integrity at all times", a point Jeff Brooks proposed in his motion in the 18 January WBC meeting which was passed unanimously.

WBC does a some things very well and I've been quick to say so. Covid, refugees, asylum seekers, expediting the implementation of government grants and dealing with problems at care homes are amongst these. CIL (and the very different cases of the Newbury football grounds and Readibus) are otherwise. In each case, these started badly, back in 2017-18, and have got more divisive ever since. Huge amounts of money, time and reputation have been spent on each to defend decisions or policies that make increasingly little sense. All have been and continue to be PR disasters.

I elect my representative/s to look into any issues which seem relevant. The more grit, perseverance and courage it takes for them to, as Claire Rowles put it, "do their job", the more I'm inclined to support them, regardless of their political party. So too are others. As long as we care about democracy, transparency and scrutiny then none of these issues are going to go away.

Brian Quinn

Brian Quinn March 23, 2022 10:57 am No Comments

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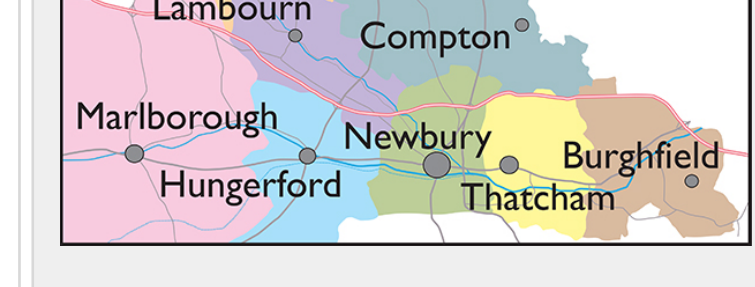
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