

Agenda Item: 8.1
Report to: Full Council
Date: Wednesday 15th July 2020
Subject: Co-Option Meeting March 17th March 2020
Summary: To consider obtaining professional legal advice

Decisions Required:

To consider obtaining professional legal advice to conclude the councillor disagreement as to the lawfulness of the co-option meeting held on March 17th 2020.

1. Background

Cllrs Petty and Zahidi had called an extra-ordinary meeting due to be held on March 17th 2020 to co-opt new councillors on to the council, this had been approved by the Chairman. There were four vacancies to be filled and fifteen candidates had applied.

On March 16th 2020 the Prime Minister made the first announcements concerning self-isolation for vulnerable groups due to Coronavirus.

On the evening of 16th March applicants began to contact the clerk advising of the need to self-isolate due to being classed as 'vulnerable'. The clerk emailed all eight councillors to consider postponing the meeting. There were worries that if the meeting went ahead without those that were self-isolating the council could be deemed as excluding these candidates from the opportunity to become a councillor due to their pre-existing conditions or their age¹. The majority of the eight councillors responded in agreement to postpone the co-option meeting until further government advice was given.

The clerk emailed the candidates and advised them that the meeting would not be going ahead and that more information would follow.

On the morning of March 17th 2020, Cllr Petty took action to re-convene the co-option meeting by contacting candidates directly and inviting them to the golf club to be interviewed. Cllrs Zahidi and Bridger attended the meeting with Cllr Petty. No officers attended and a member of the public took the minutes. Five of the fifteen candidates joined the meeting and four candidates were voted onto the council; Dave Hurring; Clive Henley; Kim Tanner; and Siobhan Kirk.

Once news broke of these co-options the lawfulness of this action was questioned and the clerk sought to obtain advice. Since then, the council has disagreed over the lawfulness of this meeting and a substantial amount of

¹ Equality Act 2010

negative public interest has been created over the matter, with Cllrs Petty and Zahidi publishing posts on social media stating that the meeting was lawful.

2. KALC Advice

The parish council obtains its advice from the Kent Association of Local Councils. The advice received from the KALC legal adviser confirmed the view that the meeting was unlawful. Along with a list of inappropriate measures of how the meeting was convened, organised and minuted, primarily its lawfulness was not valid due to the lack of quorum.

Local Government Act 1972 Schedule 12 s12 states subject to paragraph 45 below, no business shall be transacted at a meeting of a parish council unless at least one-third of the whole number of members of the council are present at the meeting; but, notwithstanding anything in that paragraph, in no case shall the quorum be less than three.

The whole number of members of Kings Hill Parish Council is twelve, therefore for the quorum for a meeting of the Full Council is four. Even if how the arrangements of the meeting were conducted on the morning of 17th March 2020 were deemed to be acceptable, the meeting did not have enough members present to take decisions in any case.

3. Disagreement

Cllrs Petty and Zahidi have insisted that the legislation that dictates a council quorum² refers to the number of seated councillors, not whole membership therefore they are claiming that as there are only eight seated councillors the legal quorum is three and therefore the four 'co-optees' are councillors.

Confusion has been created by the circulation of a genuine error by the Deputy Clerk where a post on Facebook responded to a public complaint and stated that a quorum is two thirds, and not one third. This was a genuine typo and was corrected within one minute of being posted however one of the 'co-optees' had already screenshot the error and posted publicly inferring that the council was incompetent. Further confusion was then created by Cllr Petty claiming at the June Full Council meeting that an email sent from the clerk to a member of the public (sent on 12th March 2020) constitutes advice to the council and advises that a quorum is three. (The email trail is included in Appendix 1).

Cllr Petty read out part of this email at the meeting and stated that the line (highlighted in green) verifies that the meeting on March 17th 2020 was quorate and the email from the clerk is classed as advice to the council and confirms only three councillors are required.

The clerk has never advised the council that three members are required for full council. The email refers to a previous meeting did not go ahead due to three 'councillors' and the 'chairman' not attending. The words had been

² Local Government Act Sch12 s12

misinterpreted to bolster the argument that the co-option meeting was lawful.

When adding up a quorum mathematically officers have calculated using the chairman as a member and each individual councillor as a member, hence three councillors plus the chairman equals FOUR members.

The email is not composed in a style or with the detailed legislation that would be expected to be received as technical advice to the council. It is written in good faith and is summarily advising that four members did not attend...three councillors plus one chairman. The remainder of LGA1972 schedule 12 s12 is omitted from the highlighted line not through any misinterpretation of the law, just because it was not typed in.

All of this aside, an explanatory email to a member of the public cannot be relied upon by a councillor as legal advice for arranging a meeting at their own volition.

4. Monitoring Officer Advice

Following the continued reluctance of the councillors to accept the advice of KALC and upon receipt of a solicitor's letter from one of the appointed co-option candidates, the Chairman, Vice Chairman and Clerk organised a virtual meeting with the Local Monitoring Officer (LMO) to seek assistance.

The LMO advised that his view on the quorum legislation was available in a public report, which calculates quorum on whole membership not vacant seats and validates the council's view and KALC advice. The LMO suggested that if the council requires a formal legal view then a local government barrister could be instructed to provide this information to finalise the matter.

The LMO also confirmed that the only challenge to a council decision is through Judicial Review in court. The court looks at the procedural basis of decisions and makes judgements about adherence to legal procedures as set down by Parliament. Broadly, in order to succeed, the claimant (the person or body bringing the case) will need to show that either:

- the person or body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so; or
- a decision or action that has been taken is 'beyond the powers' (in Latin, 'ultra vires') of the person or body responsible for it.

There are three categories of public law wrongs which are commonly used and which will be considered in turn:

- (a) Illegality;
- (b) Fairness; and
- (c) Irrationality and proportionality.

Judicial Review may be appropriate where there is no alternative remedy available and the claim must be filed no later than three months after the grounds upon which the claim is based first arose.

The deadline for judicial review of this meeting has now passed and as the meeting has been agreed to be 're-run' this could be considered an alternative remedy to resolve the disagreement.

The worst-case scenario for the council, in such a Judicial Review case, would be that had a claim been lodged and had the judge ruled the meeting was lawful the resulting conclusion would be for the co-option meeting to be held again, effectively a 're-run'.

Ultimately, the point is that a Judicial Review case cannot take a decision for the council and appoint the four 'co-optees', it can only judge the lawfulness of the decision and the decision making process, and order a 're-run' of that decision making process which would mean interviewing candidates again and the council taking a vote on who to appoint as councillors.

5. Instructing a Local Government Barrister

The LMO suggested KHPC consult an experienced and accomplished barrister to comment on the lawfulness issue. The clerk approached chambers for a quotation, but as this barrister does not accept instruction via public access, we contacted Surrey Hills solicitors to ask them to approach the barrister, to obtain a cost for the parish council.

Surrey Hills followed this instruction but also gave this advice:

'I can of course instruct Counsel to advise, however if it is merely on the point of whether the meeting regarding the co-option was quorate this will be an expensive exercise for a point which is clear.'

Paragraph 12 of schedule 12 of the Local Government Act 1972 states that in order for a council meeting to be quorate, at least one-third of the whole number of members of the council must be present at the meeting; but that in no case shall the quorum be less than three.

The position is slightly different if it is a meeting of a committee rather than the council, and/or if some members have been disqualified or the number of "seated" members is so low that the minimum of 3 cannot be achieved, but it is my understanding this is not the position in this instance. Please let me know if it is.

If the Council would like me to draft instructions to Counsel I can do so and obtain a fee estimate from Chambers, but given that ■ is almost 20 years this will not be cheap, and is something a more junior barrister can deal with, albeit not necessary in my view.

As I mentioned previously, the only way to challenge a decision of the Council is by way of a judicial review, and judicial review proceedings must be brought within 3 months of the decision being challenged, and promptly in

any event. As at today's date the Council has not even received a letter before action, if and when it does this would be a more appropriate time to incur the additional cost of instructing a barrister for advice, if necessary.'

6. Recommendations

The council is recommended to consider if it requires a formal legal view from an experienced barrister to confirm the lawfulness of the meeting on 17th March 2020. All professional advice up to this point confirms that the meeting was unlawful, and the co-option meeting is planned to be 're-run' which would be the remedy if the meeting was deemed lawful.

To obtain further advice would only serve to confirm, or not, the lawfulness of the meeting, it would not result in the four 'co-optees' being appointed to the council or guarantee what the 're-run' co-option process outcome would be.

7. Financial Implications

The counsel advice has been costed at circa £1250+VAT. The council does not have a reserve for such expenditure and does not have enough funds in its professional fees budget to cover this cost therefore the council would need to consider how it vired funds from an alternative budget.

8. Other Implications

The actions of March 17th 2020 have so far cost the parish council £1020 in legal fees, with further fees pending, and have racked up hours of officer time responding to challenges and updating members.

An additional £1250 in legal fees (possibly more if again the legal advice is challenged) and this still will not result in the four candidates being appointed as councillors. The decision would need to be re-run and all candidates being interviewed again for the council to take a lawful decision, which is already planned. The council should consider the effect on the already strained parish finances before agreeing to obtaining counsel advice.

9. Decision required:

To consider obtaining professional legal advice to conclude the councillor disagreement as to the lawfulness of the co-option meeting held on March 17th 2020.

Appendix 1 – Email to member of public.

Contact Officer: Julie Miller, Clerk and Responsible Financial Officer

Date: 7th July 2020