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BRIEF TO ADVISE

Belfast City Council ('the Council')

Re: Call-in of a decision by the Council's Strategic Policy and Resources Committee on
24th September 2021

Counsel's Opinion

Introduction

1. I am asked to advise Belfast City Council ("the Council") in relation to the proposed call-in of a decision by the Council's Strategic Policy and Resources Committee ("The Committee") on 24th September 2021, in respect of signage at the Olympia Leisure Centre.

2. The Chief Executive has received a call-in requisition signed by 10 members of the Council in relation to the above outlined decision. The call-in requisition seeks that the decision be called in under:
 - i) Section 41(1)(a) of the Local Government (NI) Act 2014, and
 - ii) Section 41(1)(b) of the Local Government (NI) Act 2014

(herein after the Local Government (NI) Act 2014 will be referred to as "the 2014 Act")

3. I am asked to provide an opinion, pursuant to section 41(2) of the 2014 Act, on whether the call-in has merit.

The Committee decision

4. On 24th September 2021 the Committee considered agenda item 2(f) "consultation on signage – Andersonstown, Lisnasharragh, Olympia and Templemore Leisure Centres- Options Paper." The minute of the meeting records that the City Solicitor submitted a report setting out options for languages to be used in signage in the
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named leisure centre facilities. The minute of the meeting records that the Committee was reminded of relevant background to the agenda item, namely an earlier decision of the Council, taken on 11th October 2019, to have a city wide consultation to inform the approach to be adopted in respect of the named leisure centres. The Committee was also reminded that it had, at its meeting on 24th January 2020, granted approval to erect bilingual external and internal directional signage in Andersonstown Leisure Centre.

5. Mr J Kramer, an independent equality consultant, had been commissioned by the Council in respect of the consultation and he was in attendance at the Committee meeting of 24th September. The minutes record that he outlined the findings of the consultation exercise. Mr Kramer also prepared three reports: 1) "Independent Report: Consultation on the Council decision to erect Bilingual/Multilingual External Naming and Internal Directional Signage in Andersonstown, Lisnasharragh, Olympia and Templemore Leisure Centres" (22 January 2020); 2) Executive summary of the first mentioned report, and 3) Addendum report: Olympia Leisure Centre (undated). All three reports were provided to the Committee in respect of this decision.

6. The Committee was presented with seven options¹ for consideration. Members were also reminded that they may wish to consider an alternative proposal which they were free to formulate².

7. The minute of the Committee meeting records that, after discussion, it was moved by Councillor Beattie and seconded by Councillor Murphy, that the Committee agrees:
 - i. to erect bilingual external naming and internal directional signage at Olympia Leisure Centre, with a report on the detail and appearance of that signage to be submitted to a future meeting;
 - ii. that a report on linguistic accessibility at Lisnasharragh and Templemore Leisure Centres be submitted to a future meeting; and
 - iii. that a multi-lingual welcome sign be erected in the entrance/reception area of all leisure centres.

8. It is also recorded that Alderman Kingston, seconded by Councillor Bunting, proposed that the Committee agree to defer consideration of the linguistic signage at Olympia leisure centre to allow for further engagement with the community. On a vote, that proposal was declared lost.

9. The original proposal, by Councillor Beattie, was then voted upon. Twelve members voted for and six against. The proposal was declared carried. The minute also notes

¹ Per paragraph 3.5 of the Committee Report

² Per paragraph 3.7 of the Committee Report

that the Committee agreed to adopt the recommendation to proceed with pictorial signage.

Relevant Statutory Provisions

10. Section 41(1) of the 2014 Act requires that the Council:

“must make provision requiring reconsideration of a decision if 15 per cent. of members of the council (rounded up to the next highest whole number of necessary) present to the clerk of the council a requisition on either or both of the following grounds-

“(a) that the decision was not arrived at after a proper consideration of the relevant facts and issues;

(b) that the decision would disproportionately affect adversely any section of the inhabitants of the district.”

11. Section 41(4) of the 2014 Act defines a “decision” as being a decision of the council, or a committee of the council, including a decision to make a recommendation.

12. The requirement that 15% of members present the requisition equates to a requirement for at least 9 members to present a requisition in order to constitute a valid call in. As the subject call-in request is signed by 10 members of Council, it meets this procedural requirement.

Ground 41(1)(a) of the 2014 Act: that the decision was not arrived at after a proper consideration of the relevant facts and issues

13. This is a procedural test. The principle that decision makers must take into account relevant considerations, and conversely must exclude irrelevant considerations from their mind, is one which is well established in public law terms.

14. In the seminal case of Associated Provincial Picture Houses Ltd v Wednesbury Corporation³, Lord Greene expressed the requirement this way:

“A person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’.”

³ [1947] 4 All ER 68

15. A decision maker must therefore sufficiently inform itself about the matter before it makes a decision. However, equally well-established is the principle that the weight to be attached to a particular consideration is a matter for the evaluation of the decision maker.

16. I therefore consider the test under Section 41(1) with these well-known public law principles in mind. The requisition for call-in lists seven reasons under this ground. I consider each in turn below.

i. Failure (adequately or at all) to consider the cost implications of replacing the signage at Olympia before making this decision.

17. The report presented to Committee notes, at paragraph 3.8 “there will be potential costs implications if a decision is made to replace existing signage.” Mr Kramer’s main report also notes, at paragraph 5.22, that the cost of signage had been raised by a respondent to the consultation in respect of Olympia. The Committee was therefore aware that there would be a cost implication to replace existing signage. Inasmuch as those seeking call in contend that specific costs were “entirely unknown” to the Committee, I am instructed that the City Solicitor did inform the Committee of indicative costs orally at the meeting on 24th September 2021. I therefore find there to be no merit in this ground.

ii. Lack of EQIA before making this decision

iii. Failure (adequately or at all) to review the Section 75 screening outcome before making this decision

iv. The equality screening report was not in front of the committee when it made this decision.

18. I consider these grounds together, as they collectively raise equality issues and are conveniently considered together.

19. In the Council’s Equality Scheme, which is published pursuant to Schedule 9 of the Northern Ireland Act 1998, states that it uses screening and equality impact assessments to assess the impact of proposed policies on the S.75 categories.⁴ The Scheme also states that screening is completed “*at the earliest opportunity in the policy development /review process. Policies which we propose to adopt will be subject to screening prior to implementation.*”⁵ Screening concludes whether the likely impact of the policy is major or minor in respect of any of the S75 categories. A policy can be screened in for EQIA, screened out with mitigation, or screened out without mitigation.

20. Section 75 of the Northern Ireland Act 1998 requires Belfast City Council, as a public authority, to comply with two statutory duties:

⁴ See chapter 4 of the Council’s Equality Scheme

⁵ Paragraph 4.5 of the Council’s Equality Scheme

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- i) The duty to promote equality of opportunity and
 - ii) The good relations duty.

21. The duty to promote equality of opportunity is set out in Section 75(1) of the Northern Ireland Act 1998 which provides:

*“(1)A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—
(a)between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
(b)between men and women generally;
(c)between persons with a disability and persons without;
and
(d)between persons with dependants and persons without”*

22. The good relations duty is set out in Section 75(2) of the Northern Ireland Act 1998 which provides:

“(2)Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.”

(Hereinafter these duties will be referred to collectively as *“the Section 75 obligations”*)

23. The Section 75 obligations are principally procedural obligations as to how decisions are reached and not substantive obligations, that is to say that they do not prescribe what the resultant decision must be. They require that the decision maker “have due regard to” and ‘have regard to” the matters set out, but they do not require a particular outcome.

24. Voluminous case law in this area has grappled with the question-what does the duty to have “due regard” require in reality? In R (on the application of Baker and others) v Secretary of State for Communities and Local Government⁶ Dyson LJ considered that question,

“What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the

⁶ [2008] EWCA Civ 141

disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.”

25. Giving the judgment of the Divisional Court, R (Brown) v Secretary of State for Work and Pensions⁷ Aikens LJ, stated that the duty to have “due regard” requires a “conscious approach and state of mind”⁸. Significantly, in that case the Court concluded that, the duty under the Disability Discrimination Act 1998 to “have due regard” to, inter alia, “the need to promote equality of opportunity between disabled persons and other persons”, does not impose a requirement to conduct a full equality impact assessment. Rather,

“At the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability.”

26. The report presented to Committee advised, at paragraph 3.8 that “a draft Equality screening report had been completed and a final screening form will follow this Council decision.” It appears that the draft screening document was provided to consultees as part of the public consultation process. The draft equality screening document was appended to the public consultation form and consultees were invited to comment on the draft screening document⁹.
27. Whilst the existence of the draft screening form were noted in the independent report, along with the comments on same which arose from the consultation¹⁰, the actual outcome of the screening report was, regrettably, not explicitly stated in Mr Kramer’s independent report. Nor was it appended to the report with the remainder of the consultation form. Therefore, it does appear that the Committee was not provided with a copy of the draft screening document. Neither the report to Committee nor Mr Kramer’s independent report state whether the policy was screened in, screened out with mitigation or screened out with mitigation. I return to the effect of this at paragraph [29] below.
28. It is further contended that a full EQIA was required. It is important to remember that a full EQIA is not required in order to fulfil the duties to have “due regard to” and “regard to” the Section 75 matters, as noted in Brown above. Under the Council’s Equality Scheme, it may of course be that the result of a decision is “screened out” following the screening exercise and no EQIA is carried out. As long as any such screening decision is rational and procedurally fair, that is acceptable. As

⁷ [2008] EWHC 3158 (Admin)

⁸ Ibid at 91

⁹ See for example, paragraphs 3.4, 4.11, 1.4 of the independent report, and appendix

¹⁰ See for example paragraph 4.11

stated above, what is required is not any one particular result, but that the decision maker conduct a screening exercise so that it can properly inform itself and may consciously analyse the matter with the S.75 duty in mind. I therefore do not consider that the Committee was obliged to consider a full EQIA report before coming to its decision.

29. Returning to screening, whilst that is regrettable that the Committee was not provided with the draft screening document, I do not consider the result of that omission to be that *“the decision was not arrived at after a proper consideration of the relevant facts and issues”*, which is what is required by section 41(1)(a). The Council engaged Mr Kramer, an independent equality consultant, who produced a detailed report and addendum report. Both were presented to the Committee. Appended to the main report was advice from the Equality Commission for NI in respect of the Irish language. Extensive public consultation took place¹¹. A meeting took place with the Council’s equality consultative forum on 10.12.19 and a summary of the discussions that took place in the equality context are contained in the report. The conclusions section of the independent report specifically turns to equality considerations and how a public authority should take into account consultation carried out¹² and set out analysis of the consultation in respect of same.

30. I therefore consider, on balance and in this particular case, that the extensive detail of the independent report was sufficient to ensure that the Committee properly considered the relevant equality facts and issues. It cannot be said that the Committee did not have due regard to the equality issues in respect of this decision. I therefore find no merit in this ground of call in.

v. The decision is inconsistent with, or contrary to, the Council’s Language Strategy

31. Whilst this ground is included as a procedural ground of challenge, I do not consider it to be properly categorised as a procedural ground. There is no doubt that that Committee did consider the Council’s Language Strategy, which was specifically brought to its attention in the independent report¹³. Inasmuch as this is a complaint that the decision is contrary to the Language Strategy, I consider that further in respect of the Article 41(1)(b) grounds below.

vi. Failure (adequately or at all) to consider the fact that there is a community space within Olympia.

vii. Failure (adequately or at all) to consult with groups which use the community space at Olympia.

¹¹ See for example paragraphs 1.3, 2.1 and 3.1 of the independent report

¹² See paragraphs 5.9- 5.22

¹³ See for example, paragraph 1.2, and references throughout the report.

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32. These grounds are conveniently considered together. The Blackstaff Residents' Association is the community group which is said avails of the community use referred to by those seeking call in.
33. It is clear that extensive public consultation took place prior to the decision. The consultation measures are set out at part 3 of the independent report. It is clear that there was a general press release in respect of the consultation, updates *via* social media, and events at the leisure centre itself. Leisure centre staff were also specifically engaged by staff sessions. 3,393 responses were submitted to the consultation. Further to the presentation of the consultation report to SP&R Committee on 24 January 2020, on 12 February 2012, a meeting was convened in City Hall by DUP Councillor Tracy Kelly. This was the subject of the addendum report prepared by Mr Kramer. It was said to be primarily to voice concerns regarding the possible naming of Olympia, as well as the lack of local input into the decision-making process to date. The meeting was attended by representatives of communities local to Olympia (i.e. Blackstaff and Windsor), together with DUP elected members and staff officers. Appendix 1 of the Independent report notes that representatives of the Blackstaff Residents Association attended that meeting. Given the extensive nature of consultation, it appears that those who wished to respond, which includes those who use the community space, were given ample opportunity to do so. I find no merit in this ground of call in.

Ground 41(1)(b) of the 2014 Act: that the decision would disproportionately affect adversely any section of inhabitants of the district.

34. I turn now to consider the grounds of call in under section 41(1)(b) of the 2014 Act. There are a number of elements to the test under Section 41(1)(b) test. There must be (i) an adverse effect; (ii) this must be on a specified section of the inhabitants of the district; and (iii) the effect on them must be disproportionate.
35. Test (ii) can be addressed briefly and so I consider it first. The requisition states the section of inhabitants of the district which is adversely affected by the decision to be: 1. *“the community of Blackstaff/ the Village;* 2. The Protestant community; 3. The British Community. 4. The Northern Irish community. Standing Order 48(4) defines the *“section of the inhabitants of the district”* for the purposes of Section 41(1)(b) of the Local Government (NI) Act as being:
- “any section of the inhabitants that is clearly identifiable by location, interest or other category including those categories [identified]¹⁴ in section 75(1) of the Northern Ireland Act 1998.”*
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36. The citizens identified in categories 1-4 are clearly identified sections of the inhabitants of the district and so test (ii) is met.

37. I turn now to consider tests (i) and (iii) above.

38. In respect of both tests, I recall that the language used by the statute is “*that the decision would disproportionately affect adversely any section of the inhabitants of the district*”. I emphasise the words “*the decision*” in this context because I consider that the focus must be on the actual effect of the decision made by the Committee. In this case, the effect of the decision will be the erection of bilingual external naming and internal directional signage at Olympia Leisure Centre. The first question is whether that will create and adverse impact?

39. Having carefully reviewed the independent report and addendum prepared by Mr Kramer, I conclude that an adverse impact is established. It is perhaps most clearly stated in the addendum report prepared by Mr Kramer, which states:

“the potential for major adverse impact on good relations, and possibly also equality of opportunity, cannot be ignored” and

“the sentiments expressed by those present would indicate strong local support for English Only signage, along with concern that community relations could be potentially damaged if bilingual signage was to be installed.”

40. The addendum report contained a petition which was signed by 571 people, containing the following sentiment:

“We the undersigned, object to the proposal to have dual language signage at Olympia Leisure Centre which includes Irish and excludes Ulster-Scots and many other languages spoken in the Blackstaff and Windsor area and throughout South Belfast.

The proposal in our view, is discriminatory, divisive and even offensive. It fails to recognise the diverse nature of the local area with many languages being spoken.”

41. Of note, Mr Kramer’s main report, at paragraph 5.6 states:

“...the adverse impacts were alluded to by a number of respondents who suggested either that good relations generally may be damaged by the imposition of a Council decision on a local facility or that a centre may be less welcoming to members of certain communities depending on the languages on display.¹⁵”

¹⁵ Paragraph 5.6

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42. The report set out the finding that the majority of those who expressed an opinion on the consultation stated a preference for English and Irish external naming signage at each of the four centres. However paragraph 4.3 warns “ *this headline figure should not ignore deep divisions across the sample and in particular in terms of preferences by national identity and community background.*”
43. Paragraph 4.4 notes the contrast between those who identified as Catholic and those who identified as Protestant- with 80.1% of the former advocating signage in English and Irish, and 88.7% of the latter advocating English only signage. Paragraph 4.5 notes the feeling among some of those who objected as the use of Irish language to “posed a threat to their culture and heritage.”
44. In light of the above, I consider that it has been established that the signage will have an adverse impact. That is demonstrated by those who identified as Protestant and who objected strongly to the signage during the consultation process, and those who regard it as a threat to their culture and heritage. Mr Kramer explicitly noted the potential for major adverse impact.
45. The next question therefore is whether the adverse effect is disproportionate. There are well established legal tools to analyse the proportionality of a measure. The concept of proportionality, in the legal context, has been imported from jurisprudence European Convention of Human Rights. The essence of the concept in that context is that any interference with Convention rights must be proportionate to the legitimate aim pursued. In that context, the following questions are asked:
- i. Is the objective sufficiently important to justify limiting a fundamental right?
 - ii. Are the measures designed to meet the objective rationally connected to it?
 - iii. Are the means used no more than necessary to accomplish the objective (de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69)
46. In *Azienda Agro-Zootecnica Franchini Sarl v Regione Puglia* Case [C-2/10](#) EU:C:2011:502, [2011] ECR I-6561, the CJEU said proportionality:
- “requires that measures adopted by Member States in this field do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued ...”(para 73)
47. Whilst proportionality has its genesis in European law, it is a concept which is has been utilised by the UK courts in assessing the domestic lawfulness of decisions of
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public authorities (see for example Pham v Secretary of State for the Home Department [2015] UKSC 19). I therefore approach my assessment of the proportionality of the adverse impact in this case with these foundational principles in mind.

48. In seeking to identify whether the adverse impact is proportionate, it is necessary to consider the reason for the decision. In this regard Mr Kramer's report is instructive. It states that "this signage and naming decision represents one element of the outworking of the Council's Language Strategy 2018-2023.¹⁶" That is echoed in the Special Council Minute of 11.10.2019, which is appended to Mr Kramer's report.

49. Mr Kramer's report sets out the aims of the Language Strategy, one of which is "to enhance good relations within the city through the promotion of linguistic diversity and to celebrate the significance of language in the history and culture of the city." Mr Kramer goes on to note that the Council's Language Framework includes a commitment to adopt the use of Irish and Ulster-Scots in signs, and in particular "where it will be seen primarily by users of Irish/Ulster-Scots".

50. The report notes that the local area is "now culturally very diverse and that users of the centre come from a variety of new communities, as well as from across the city." The call in requisition form states that the community background in the Blackstaff ward splits as follows:

" Protestant 71.5 % -v- Catholic 15.01 %
British 63.21 -v- Irish 10.06 -v- Northern Irish 26.46"

51. The independent report does demonstrate that significant opposition by local residents, which is particularly evident in the addendum report. I particularly bear in mind that the decision in respect of signage is an outworking of the Language Strategy. A clearly expressed aim of the Strategy is to enhance good relations. In that context, Mr Kramer's assessment of the potential for the decision to have a "major adverse impact on good relations" is significant. I also bear in mind the Language Strategy's commitment to adopt the use of Irish and Ulster-Scots in signs, and in particular "where it will be seen primarily by users of Irish/Ulster-Scots." I have seen no evidence that the signage at Olympia will be seen primarily by users of Irish. Whilst that is not a single determining factor, it must be balanced against the very significant adverse feeling expressed by the local community to such signage. Whilst it is acknowledged that the intention is for the leisure centre to draw patrons from the wider city, the immediate local context must also be considered. In particular the use of Olympia Leisure Centre by a community residents association, as referenced at paragraphs [32]-[33] above is a significant factor. Representatives from the Blackstaff Residents' Association are noted to have attended a meeting at City Hall on 12th February 2021 at which it is recorded that representatives

¹⁶ Paragraph 1.2 independent report

“unanimously agreed that naming signage in Olympia should be in English Only, and expressed grave concerns as to the potential damage to good relations, locally and city-wide, should bilingual signage be imposed against what were described as the wishes of local residents”¹⁷.

52. Having concluded that an adverse impact is established- and having carefully considered the aim behind the decision (an outworking of the Language Strategy), and the Language Strategy’s commitment to good relations and to adopting Irish signs particularly where they will be seen by users of Irish, and bearing in mind the findings of independent report and the addendum report- I consider that it has been established that the decision will have a disproportionate adverse impact on the identified inhabitants. I therefore find there to be merit in the call in.

Conclusion

53. Under Standing Order 48(8) the effect of my opinion is that the clerk shall:
- i. Furnish this opinion to members; and
 - ii. Include the decision on the agenda for the next available meeting of the council, at which it will be taken by a qualified majority.
54. In any reconsideration decision, the Council should bear in mind its duties under section 75 of the Northern Ireland Act 1998 and its Equality Scheme. I emphasise that the above is a legal assessment of effect of the decision in the context of the particular assessment required by Section 41(1)(b) of the 2014 Act and is without prejudice to any future assessment of the potential effects of the decision by the Council in any screening exercise conducted by the council under its equality scheme, or in respect of the consideration of the independent report. I recommend that when this matter is reconsidered, members be provided with Mr Kramer’s reports, and a copy of the draft screening decision.

Denise Kiley
Bar Library
8th December 2021

¹⁷ John Kramer, Addendum report
