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Accountancy ~ Internal Audit ~ Payroll



FINAL

Internal audit report 2015/16

Panorama Road Access

SWANAGE TOWN COUNCIL

Date: 5th February 2016

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Introduction

This report contains a note of the findings and recommendations made to Swanage Town Council following an audit review of the extent of access granted in 2007 to Suttle Quarries in relation to Panorama Road.

Although the access granted to Suttle Quarries was largely a renewal of a previous access agreement (albeit with some amendments), the grant of access has come under Council and public scrutiny recently following attempts by an oil/gas company who have been granted certain rights by Suttles to explore the potential for gas drilling on the former quarry site.

An audit was requested to document the decision-making behind the 2007 grant of access, and specifically to review the following risks:

1. The Council failed to take into account all matters which should have been taken into account at the time when the 2007 Deed of Release and Grant of Mutual Rights was granted, meaning that it did not obtain the best deal for the Council; and
2. The Council failed to use reasonable business acumen to future-proof the Deed of Grant, meaning that it could not re-open negotiations in the event of a change in title, use or any other major contract clause.

The audit work was carried out in October and December 2015.

Audit Opinion

I am able to offer **reasonable** assurance that the Council's grant of access rights over Panorama Road operated as it should. The range of assurance is full/reasonable/partial/none.

The Council appointed suitably qualified advisors to assist them with the drafting of the 1998 Deed of Grant and the 2007 Grant of Easement of Mutual Access Rights (as varied in 2013). The agreements followed on from a history of agreements relating to the site which enabled Suttle Quarries (or its earlier incarnations) to extract stone.

The consideration received for the access granted in 2007 appears insufficient when viewed in the context of developments in the area up to and including 2015. However, when the access was granted in 2007 it followed four years of work on the Jurassic Coast Project. Had the site been developed as planned, the access agreement would have been the key agreement to unlock a multi-partner educational and tourist attraction which would allow public access to the Regionally Important Geological Site (RIGS). Although the attraction was not subsequently developed, controlled access to the site remains.

The Council usually includes clauses limiting third parties' abilities to change the title of the lessee, or the use to which land is put. Such clauses are not in place in the 2007 Grant (as varied in 2013). This appears to be an oversight caused by the fact that the grant of access rights of this nature (allowing a third party to cross Council land to enable them to access and commercially exploit their own land) is unique amongst the Town Council's legal agreements. A recommendation has been made accordingly.

The records concerning the Jurassic Coast project are incomplete, which makes it more difficult for future generations to understand the reasons for decision-making. A recommendation has been made accordingly.

Recital of Legal Agreements

There have been several legal agreements in place between the Council and the operator of the quarry site in relation to the Swanage Quarries site and Panorama Road. It is helpful to set those out as part of this report in order that the context of the 2007 Deed and 2013 Variation can be better understood.

1955 Conveyance

The first agreement on file is the 22nd September 1955 sale of the Swanage Quarry site from Swanage Quarries Limited to the then Swanage Urban District Council, for purposes mentioned in the Public Health Act 1936 and the Housing Act 1936.

1986 Lease

The next agreement on file is a Lease dated 31st March 1986 between the Council and Mr CJ Suttle (the 1986 lease). This lease is for 14 years (to 2000) and allowed the tenant access to Swanage Quarries for the purposes of quarrying in return for an annual rental payment. The lease includes specific clauses relating to:

- Panorama Road (clause 13: 'The Tenant shall have access to the said land over the roadways coloured brown on the plan annexed hereto...'); and
- the assignment of the lease (clause 16: 'The Tenant shall not assign or otherwise part with the possession of the premises without the previous consent in writing of the Council. Such consent shall not be unreasonably withheld').

1998 Deed of Grant

The next agreement on file is a Deed of Grant dated 1998 between the Council and J Suttle Swanage Quarries (referred to as 'Suttles' in the rest of this report). The Deed is for 21 years (to 2019) and contained mutual grants of rights of way through the Council's and Company's respective premises.

The Company received a right of way across the Council's land running south from Panorama Road alongside the eastern edge of the caravan park.

In return, the Company:

- built an access road running from Panorama Road round the southern end of the Council's property to the Company's new quarry;
- paid a maintenance contribution towards the maintenance of the Panorama Road access (coloured brown on the related plan); and
- gave the Council access over its part of the road from the Council's property to the Council's part of the access road.

The 1998 Deed includes specific clauses relating to:

- Panorama Road (clause 3.1.3: 'A right of way...with or without vehicles over the existing private road and Panorama Road giving access to adopted highway Priests Road subject to conditions in Third Schedule');

- the assignment of the lease (clause 3.1: 'Council demises unto the Company full right and liberty for the company and (subject as hereinafter provided) its servants and licensees'); and
- in relation to the use of the land (Third Schedule: 'Rights of way shall be exercisable with commercial vehicles for stone extraction and reinstatement.').

2007 Deed of Release and Grant of Easements

The 1998 Deed of Grant is then extinguished by the 6th November 2007 Deed of Release and Grant of Easements. I understand that quarrying on the site ceased in 2000. The 2007 Deed came at a time when the Company and the Council were engaged in discussions about how best to exploit the site for future educational and tourism purposes (see 1.3 below for more detail).

The 2007 Deed runs for 50 years (to 2057) and again contains mutual grants of rights of way through the Council's and Company's respective premises. However, the 2007 Deed includes in s.4 a grant of access to the Council and its successors in title and all persons authorised by it (including the public) access to the exposed geological face (a site of Regionally Important Geological Significance or RIGS) which was created by Suttles as part of the clean-up of the former quarry site. In return for public access to this site, the Council granted access over its land 'for all purposes in connection with the use and enjoyment of the first property and/or second property and in particular... (but without prejudice to the generality of the foregoing) such right is to include commercial vehicles for stone extraction and reinstatement'.

2013 Deed of Variation

On 8th April 2013 there was a subsequent variation to the 2007 Deed, which clarifies that the Council and public access to visit to the second property (the site of the RIGS) is to visit the RIGS area only, as coloured yellow on plan.

Scope of Audit Testing

The audit focus is restricted to the current access agreement (2007, as amended by the 2013 variation), albeit against the context of a longer-term contractual relationship between the two parties to the Deed.

Detailed findings

Risk 1: The Council failed to take into account all matters which should have been taken into account at the time when the 2007 Deed of Release and Grant of Mutual Rights was granted, meaning that it did not obtain the best deal for the Council.

1.1 Confirm who was the Council's advisor in this matter. Check qualifications and experience.

The Council received legal advice in relation to the 2007 Deed from Jacobs & Reeves (Poole), a firm of Solicitors who, at the time of the 2007 Deed, had offices in four towns and 15 professional staff (including seven partners). The Council's approach has been to refer more significant leases to law firms outside of the Town (in order to avoid potential conflicts of interest), and Jacobs and Reeves have acted on many similar matters. The solicitor who carried out the work on the 2007 Deed is noted as being a specialist in business affairs and commercial property.

The 1998 Deed (on which the 2007 Deed was largely based) was drafted by Janice Pond LLB, a solicitor who was (at that time) based in Swanage. Ms Pond's specialisms include lease grants and extensions.

The legal advice appears to have been provided by appropriately qualified and experienced advisors.

As the 2013 Deed of Variation was relatively straightforward, no legal advice was sought. The decision not to seek legal advice has been challenged by a member of the public as part of a Freedom of Information request. The member of the public considered that the variation was ambiguous, and that the failure to take legal advice could mean that its implications were not fully considered. However, the Council's Valuer Graham Thorne FCIOB, FRICS stated that, 'I would not consider that the deed of variation entered into in 2013 would normally have had a payment attached to it as it only varied the possible route of the pedestrian access to the RIGS site rather than being able to impose any restrictions on what could happen in connection with the land'.

This would appear to confirm that no separate advice was required in relation to the 2013 Variation.

1.2 Check what work was carried out to establish the access required. Confirm sufficiency of work undertaken.

There was little additional work carried out in 2007 or 2013 to establish the access required across the roads, as both agreements built on earlier agreements. The physical access to the RIGS would have been identified during the drawing up of plans for the geological exposure site project.

In 2007 the deed (which was a more significant variation from the 1998 deed that it replaced) was reviewed by the Council's solicitors. In 2013 the variation was so minor that it was reviewed by Council officers only.

A review of the plans of the area indicates that the physical route of the access granted is the most logical. The access road runs alongside the eastern and southern boundaries of the Council's land in order to link Suttle's land back to the main road.

The additional terms in place alongside the physical access (such as responsibility for building and maintaining the access road, and times of day during which the access could be used) would have been the subject of negotiation between the parties.

Due to the existence of earlier leases, the physical location of the properties, and the planning carried out as part of the geological exposure site, it would appear that sufficient work was undertaken to establish the access required in 2007 and 2013.

1.3 Identify what consideration the Council received for the grant of access. Was it reasonable then? Is it reasonable now?

In return for the Council granting access rights over its land in 2007, it received access rights over land belonging to Suttles and the right to visit and enjoy a Regionally Important Geological Site (RIGS) owned by Suttles. The RIGS was created by the quarry company when it dressed and left exposed part of the quarry face in accordance with the restoration and aftercare scheme following stone extraction on the site.

Arguably, and in the context of an oil/gas company being granted both planning permission (by the District Council) and certain rights for gas exploration (by Suttles) over the land owned by Suttles and accessed via the Council's land, current access to the RIGS site does not appear to have value equivalent to the access granted by the Council. However, the rights granted in 2007 must be valued in the context of the Council's plans at that time (which concerned the creation of a regional geological attraction offering a mix of educational and tourist facilities), or risk requiring the Council to exercise an impossible degree of prescience in its dealings.

Plans for the area were mooted in a briefing note to a meeting of the Council's Planning Committee as early as 8th August 2003, when the Council was discussing the return of land it owned that had been leased by Suttles for the purpose of stone extraction. The briefing note identified that there was a proposal to link the Council's land to the land owned by Suttles which would create potential to form a working quarry or a site for viewing existing

exposed quarry faces (the RIGS site). These proposals would have formed part of a permanent land-based facility supporting interpretation of the Jurassic Coast World Heritage Site.

At a special meeting of Council on the same day, Members endorsed the proposals for a potential scheme that would link the use of the area as a land-based interpretation site for the Jurassic Coast, and agreed that the Clerk make representations to Dorset County Council (DCC) to seek their help and guidance and to request a 12 month extension to the restoration scheme requirements, whilst arranging for discussions with officers of DCC's World Heritage Site team and other local interested parties.

The Council subsequently established the 'Jurassic Coast Project working group'. This was chaired by the then Chairman of Council, Councillor AH Miller. Initially membership comprised a handful of Councillors along with Mr C Suttle (J Suttle Swanage Quarries Ltd) and Mr D Eyles (California Farm). Due to the importance of the project to the wider area, membership was subsequently expanded to include all members of the Council.

Mr Suttle identified in a January 2005 meeting of the working group his two-stage vision for the site. This included:

1. Complete restoration; facilitate footpath between entry to site and Swanage Town Council land; upgrade road for emergency access; construct monolithic feature and erect story boards (subject to planning permission); and
2. Open up the workshop so that the public can view staff working with stone; movement of business to production of goods; gradual change-over to fit with longevity of quarry.

There was also talk of using an existing building on the site for a visitor centre.

In an April 2005 meeting of the working group, the plans for the area were extended to include the potential use of rare-breed sheep (owned by Mr Eyles) to graze the land and help to restore its quality.

Although the documents on file in relation to the project are incomplete, there is also reference to a bid for Heritage Lottery Funding (which was not subsequently submitted).

Based on the documents that are available, it would appear that there was an active project to develop a tourist and educational attraction. The project ran for a period of at least four years before the 2007 grant of access was made to Suttles, and involved officers and Members of the Council in addition to several external partners. The grant of mutual access was essential to the success of the project, as without it the Council would not have been able to develop a tourist offering including access to the RIGS site and the ability for visitors to see how stone is worked in this area.

In that context, the consideration received for the grant of access appears reasonable.

Given the amount of effort expended between 2003 and 2007 on the Jurassic Coast project, and the absence of any substantial visitor attraction on the site to date, an obvious question for the Council is: Why didn't the project proceed?

From discussions with the Clerk, it would appear that a number of events occurred which resulted in the project's importance being significantly downgraded, to the extent that it is no longer a 'live' project for the Council.

Firstly, shortly before the deed of access was executed in 2007 Councillor AH Miller, who had been a vocal advocate of the project, stepped down from Council. It would appear that much of the impetus behind the project departed with him. Secondly, the Council's long-running debate with the Audit Commission over the legality of its ownership and operation of the Caravan Park entered its final phase, with officers and Members understandably focussed on trying to ensure they had all of the information needed to make the right decision. In addition, the building which had been planned for use as a visitor centre was found to be riddled with asbestos and had to be demolished.

It is important to note that although the Council's plans for a significant visitor attraction have not been realised, the grant of access does still exist, and does enable members of the public to continue to access and benefit from the RIGS. Access is controlled (as the site is next to a working quarry), but interested parties may visit if they book via the DIGS website and follow the Health & Safety requirements laid out by Suttles.

1.3a I recommend that the Council includes a file note with all lease agreements where non-commercial considerations exist. The note should document the minute or delegated authority used to agree the lease, and the reasons for agreeing non-commercial terms.

1.3b I recommend that the Council ensures that a full briefing note is provided and retained in relation to any working-party recommendations to formal Council meetings. The note could contain details of the background to the issue and the reasons for the recommendation(s) being made; along with a note of the officers, members and third parties involved in any discussions.

Risk 2: The Council failed to use reasonable business acumen to future-proof the Deed of Grant, meaning that it could not re-open negotiations in the event of a change in title, use or any other major contract clause.

2.1 Confirm whether standard terms were included. If not, establish why they were not included. Were they included in similar documents at that time? Confirm whether such terms are included as standard in grants, leases, licences etc. now?

A review of the 2007 Deed and the subsequent 2013 variation shows that there were no terms included to trigger the termination or re-negotiation of the lease terms in the event of a change to the parties to the deed, or a change in use. According to the Clerk, the majority of the Council's leases do include clauses to restrict assignment and change of use as they are drafted by external lawyers who include such terms as standard. It is not possible to prove why such clauses were absent from the 2007 Deed (and its earlier 1998 incarnation), but it would appear that the difference in treatment is an accident based on the fact that the Deed relates to a grant of access over the Council's land, rather than a lease or licence to occupy and use Council land.

The Clerk has stated that, although access rights have been granted to other third parties (for e.g. dropped kerbs to pavements), he is not aware of any other access rights that have been granted which would enable a third party to commercially exploit land.

As part of the audit, I asked a sample of other Town Councils within the area how they treat changes in successor or use. Of the Councils that responded by the date of the report:

1. Two did not have lease agreements. Both stated that, if they did have such agreements, they would consider differentiating between community and commercial users, with limitations being imposed on successors-in-title and changes in use for any commercial third parties;

2. Two did have lease agreements.

- One does not use standard clauses, but would expect to draw up a new lease if there was a change in title; and
- The other Council does have a standard clause allowing them to refuse title to pass (but, as with Swanage Town Council, they will not withhold permission unreasonably). The Council would expect to be able to refuse or at least re-negotiate the lease in the event of a change of use.

It is worth noting that, whilst the nature of materials being extracted would change if permission were granted for gas drilling, the 2007 Deed allows for access to Suttle's quarry 'for all purposes in connection with the use and enjoyment of the First Property and/or the Second Property'. Arguably the change in the nature of materials which may be extracted may not be sufficient to trigger a re-negotiation for change in use even if such a clause had been included.

2.1a I recommend that the Council review its grants, leases and licences to confirm that no similar access rights exist (which allow a third party to commercially exploit its land without restrictions on changes to title or use).

2.1b If any similar grants of access rights are found, I recommend that clauses restricting a change in title or use are inserted at the earliest opportunity.

Audit Recommendations

Recommendations made during the audit are shown in appendix one to this report.

Recommendations are graded as follows:

Rating	Significance
High	Either a critical business risk is not being adequately addressed or there is substantial non-conformity with regulations and accepted standards.
Medium	Either a key business risk is not being adequately addressed or there is a degree of non-conformity with regulations and accepted standards.
Low	Either minor non-conformity with procedure or opportunity to improve working practices further.

The number of recommendations made at this audit visit and their priority are summarised in the following table:

Rating	Number
High	0
Medium	4
Low	0
TOTAL	4

I would like to thank Martin Ayres, Town Clerk for his assistance during this audit.

Darkin Miller ~ Chartered Accountants
 2015/16 INTERNAL AUDIT OF SWANAGE TOWN COUNCIL
 DRAFT REPORT 3rd FEBRUARY 2016: PANORMA ROAD ACCESS

Appendix 1 – Recommendations and Action Plan

Recommendation number	Detail	Priority (Low/Medium/High)	Management Response	Responsible Officer	Due Date
1.3a – note of non-commercial considerations	I recommend that the Council includes a file note with all lease agreements where non-commercial considerations exist. The note should document the minute or delegated authority used to agree the lease, and the reasons for agreeing non-commercial terms.	M	Agreed. In all instances the granting of a lease will be determined by Full Council and any briefing note or report set out the grounds for agreeing non-commercial terms.	TH1	With immediate effect
1.3b – provision and retention of detailed briefing notes	I recommend that the Council ensures that a full briefing note is provided and retained in relation to any working-party recommendations to formal Council meetings. The note could contain details of the background to the issue and the reasons for the recommendation(s) being made; along with a note of the officers, members and third parties involved in any discussions.	M	Agreed.	TH1	With immediate effect
2.1a – review of property agreements for access rights	I recommend that the Council review its grants, leases and licences to confirm that no similar grants of access rights exist (which allow a third party to commercially exploit its land without restrictions on changes to title or use).	M	Agreed.	TH1	30 June 2016
2.1b – insertion of clauses	If any similar grants of access rights are found, I recommend that clauses restricting a change in title or use are inserted at the earliest opportunity.	M	Agreed.	TH1	In line with legal advice

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