

Broads Authority Independent Review of Complaints

December 2022

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Summary of Findings and Recommendations

The Broads Authority (the Authority) instructed VVV LLP to carry out an independent review of complaints made by Cllr Fuller, Leader of South Norfolk District Council in respect of the Authority. In Cllr. Fuller's letter dated 10th December 2021, which is being treated as a Stage 3 Complaint under the Authority's Complaints Process, he identified two parts of his complaint:

1. the Authority had wholly misdirected itself on the process it followed; and
2. not all of the issues raised had been dealt with or otherwise had no merit.

On the first point we do not consider that the Authority fundamentally misdirected itself or departed from its own procedures to a significant extent in respect of the Authority's complaints process and its response under that to Cllr Fuller's complaints. It was in line with its standard Complaints Process although we do have some points to make about the process. On the second we considered all the substantive matters raised and our findings and recommendations are summarised below.

Section 4. The Planning Issues and Decisions regarding Haddiscoe Cut

Finding 1. In our view, contrary to the Evidential Review and other assertions, the imposition of the condition was not an unlawful act. It is standard practice for conditions which are deemed appropriate to be imposed on any planning permission.

Finding 2. Whilst the intention was correct, the imposition of Condition 6 (as a condition and as drafted) was an error but minor in nature. The intention behind Condition 6 is relatively clear, i.e. a belt and braces approach to seek to avoid conferring any lawful use. But it should have been an informative rather than condition and worded better.

Finding 3. The applicant's agent was consulted on the condition.

Finding 4. The Authority was right to take the position it did regarding the applicant being responsible for pursuing either CLEUD / make a planning application to resolve the mooring issue with certainty given its view of the planning status of the site

Finding 5. There was no evidence to support the suggestion that the Authority had an ulterior motive for its actions (in respect of the way in which it approached and imposed Condition 6).

Section 5. The Planning Function

Finding 6. We did not find any evidence to support the allegation that the Broads Authority's planning function was not fit for purpose.

Finding 7. The evidence from published information on the Authority's website in the form of planning performance statistics, customer satisfaction surveys, and the position on the local plan, enforcement and the preparation of a design guide is of a local planning authority meeting the Government's targets.

Finding 8. There were differences of view on planning matters between a small group of local authority appointed members and the Authority's planning officers.

Recommendation 1. The Authority's ongoing statutory duty to achieve Best Value (continuous improvement) provides a suitable approach to address the specific issues raised in relation to the planning function.

Section 6. The Call-in Process/the Scheme of Delegation and the Redacted Emails

Finding 9. The suggestion that the Authority had acted unlawfully under S101(4) LGA 1972 as the effect of S101(4) is that any scheme of delegation which purports to prevent a calling in by members is Ultra Vires, is incorrect.

Finding 10. The issue of the redacted emails is a red herring in so far as the complaints in them were not the basis for the imposition of Condition 6. However, they were not dealt with well.

Recommendation 2. We recommend that the existing "call-in" arrangements for planning decisions should be reviewed and that when the interpretation of delegated powers in relation to such planning issues is challenged it should be a matter that the CEO and Chairman of the Planning Committee jointly take a role on, and if they cannot resolve the issue (or feel that it should be placed before members), the matter is placed before the Planning Committee.

Section 7. Other Constitutional Matters and Documents

Recommendation 3. We consider that the effective consolidation of the key documentation will be of benefit

Recommendation 4. The Audit and Risk Committee should take on the explicit role of considering members concerns regarding governance and generally oversight of the Authority's governance arrangements (via the Monitoring Officer). Code of Conduct matters should not be undertaken by the Audit and Risk Committee and should remain separated from that committee. Matters falling under the standards regime should be addressed by a separate standards committee, which could be the current Hearings Committee.

Section 8. Member Behaviour

Recommendation 5. The Monitoring Officer should consider issuing additional guidance / training regarding members interests and how the policing of behaviour and Code of Conduct matters is best addressed

Section 9 Governance (scrutiny, Glover Recommendations, the Task and Finish Group)

Recommendation 6. Local Authority appointees should be appointed through a similar merit-based process to that used by the Government for Secretary of State appointments. This reflects our view that there should be parity of treatment for all members, whether LA appointees or SoS appointees. The issue of an independent chair is also worthy of reflection provided s/he has a regional rather than national focus

Recommendation 7. Audit and Risk Committee, with their oversight of governance, should reflect upon issues regarding relationships and the underlying governance mechanisms behind those.

Section 10. Misconduct in Public Office

Finding 11. The alleged mishandling of these minor planning applications clearly did not meet the test of serious misconduct and was an inappropriate vehicle for raising such governance matters.

Section 11. Evidential Review

Finding 12. The allegations did not amount to a prima facie case of Misconduct in Public in Public Office.

Finding 13. The Evidential Review should not have been released to the Complainant.

Finding 14. The comments made by the police officer on governance matters at the Authority should not have been made.

12. The Complaints Process

Finding 15. We consider that the Monitoring Officer was appropriately involved and further we agree with his conclusions on the matter.

Finding 16. At the point when Cllr Fuller raised the issue relating to the matter needing to have gone to the Monitoring Officer, the Authority could and should have informed the complainant of the Monitoring Officer's involvement and his decision in relation to his investigation in so far as his role and the Authority's procedures required.

Recommendation 8. The Authority should review and change their complaints process removing the automatic obligation on the Monitoring Officer to investigate where there is a concern about unlawful behaviour or activity.

Recommendation 9. Members can raise governance concerns with Audit & Risk Committee and so should be able not raise such concerns through the complaints process or any other route. Indeed, the ability for members to raise any issue when acting in their capacity as a member of the Authority through the Authority's complaints is something to review.

1 The Review

- 1.1 The Broads Authority (the Authority) instructed VWV LLP to carry out an independent review of complaints made by Cllr Fuller, Leader of South Norfolk District Council in respect of the Authority. DEFRA were an interested party.
- 1.2 VWV are a full-service law firm with a specialism in public sector legal advice for over 25 years. The Review was led by Mark Heath.
- 1.3 Mark Heath has over 30 years of service within the public sector. Until December 2016, he worked at Southampton City Council. At Southampton, he was Solicitor to the Council (and Monitoring Officer) for 20 years. After that he held the positions of Director of Place and subsequently Chief Operating Officer. His legal experience includes drafting and reviewing constitutions, advising on standards and all aspects of local authority governance and decision making.
- 1.4 The Terms of Reference for the review were set by the Authority after consultation with DEFRA and Cllr Fuller and were as follows:

Complaint by Cllr Fuller, Leader of South Norfolk Council

Instructions and Terms of Reference for the Stage 3 Independent Review

On behalf of the Broads Authority and Defra we wish to instruct you to carry out an independent review of the complaints against the Broads Authority, as detailed by Councillor Fuller including but not limited to his correspondence of 30 October 2021 and 10 December 2021. Please document your findings in a report to the Monitoring Officer of the Broads Authority. The Monitoring Officer will provide a copy of the Draft report to the Chief Executive of the Broads Authority and Defra officials for their comments and to check for accuracy before it is finalised. We will then consider your report before replying to Councillor Fuller at Stage 3 of the Broads Authority's complaints process.

Chronology

On 9th June 2020, Cllr Fuller made a complaint under the misconduct in public office provisions to Norfolk Constabulary about the Authority's handling of two planning applications at Haddiscoe.

On 17th September 2020, Cllr Fuller responded to preliminary questions from the Constabulary's investigating officer.

On 2 June 2021, Norfolk Constabulary completed an evidential review into allegations of misconduct in public office by 3 Broads Authority officers with responsibility for Planning, and the Broads Authority's former Monitoring Officer.

On 6th July 2021, Cllr Fuller and other interested parties received the outcome of the investigation by the Constabulary

On 11 August 2021, Councillor Fuller OBE, Leader of South Norfolk District Council, wrote to Mr Dickson, Chairman of the Broads Authority, regarding Norfolk Constabulary's evidential review.

On 17 August 2021, Ms M-P Tighe, Director of Strategic Services at the Broads Authority, undertook an internal review of the processing and determining of planning applications BA/2019/0167/FUL and BA/2020/0045/COND.

On 23 August 2021, Norfolk Constabulary wrote to the Broads Authority concerning their evidential review.

On 15 September 2021, Raymond Crawford, an independent planning consultant was commissioned to review the Broads Authority's handling of the two applications at Haddiscoe Cut.

On 29 September 2021, Raymond Crawford, submitted his report into the applications at Haddiscoe Cut.

On 30 October 2021, Councillor Fuller wrote to all Members of the Broads Authority identifying himself as "the complainant" regarding "the circumstances surrounding two planning applications in 2019 and 2020 at Haddiscoe". The Broads Authority treated this as a Stage 2 Complaint under its complaints' procedure.

On 18 November 2021, Mr Rogers, the Broads Authority's Director of Operations, replied to Councillor Fuller's complaint of 30 October 2021.

On 10 December 2021, Councillor Fuller replied to Mr Rogers stating that "the Authority has wholly misdirected itself on process" and to challenge the finding that there was no evidence to support the allegations he had made.

On 4 January 2022, Dr Packman, Chief Executive of the Broads Authority, wrote to Councillor Fuller notifying him that the Monitoring Officer would be commissioning an independent review of the matters which were the subject of his complaint, before responding to him under Stage 3 of the complaints process.

Complaints process

The Broads Authority's standard complaints process is for the Chief Executive to review the complaint at Stage 3 and if the complaint concerns the Chief Executive, it is reviewed by the Chair of the Authority. The Broads Authority's complaints procedure can be viewed here –

<https://www.broads-authority.gov.uk/contact-us/comments-and-complaints/how-to-complain>

Councillor Fuller, in his letter of 10 December 2021, considered both the Chief Executive and Chairman to be predetermined in relation to the matters he had raised. Therefore, the Broads Authority is commissioning an independent review of all the matters raised by Councillor Fuller to enable me, as Monitoring Officer, to provide a Stage 3 response.

The Broads Authority and Defra officials are keen to learn any wider lessons from this sequence of events and therefore you are asked to comment on the Authority's complaints process and in the context of all the issues raised by Cllr Fuller make recommendations about how the Broads Authority's processes, policies, guidance and governance could be improved.

The interested parties in this investigation are the original complainant (Cllr Fuller), the subject of those complaints (the Authority) and DEFRA. These 3 interested parties will see the draft report and be given an opportunity to comment on it. It will be a matter for Mr

Heath to decide in due course whether the draft report requires to be shared with any other persons/parties before it is finalised.

- 1.5 Our approach in presenting our findings has been to address the issues that arose from the complaints, together with other issues that were raised with us that we consider worthy of review under several headings.
- 1.6 Namely:
 - 1.6.1 The planning issue/ decision.
 - 1.6.2 The planning function.
 - 1.6.3 The call-in process, the scheme of delegation and redacted emails.
 - 1.6.4 Other constitutional matters / documents.
 - 1.6.5 Member behaviour (the code of conduct, protocols and policing of such matters).
 - 1.6.6 Governance (scrutiny, Glover recommendations, the Task and Finish Report).
 - 1.6.7 Misconduct in Public Office.
 - 1.6.8 The Evidential Review.
 - 1.6.9 The Complaints Process.
- 1.7 We have addressed each of the issues individually, although there is some overlap between them. In presenting our findings, we have presented them under these various headings as they reflected the key issues as raised by Cllr Fuller and as we saw them. We also believe that grouping the key issues in this way makes this report more comprehensible.
- 1.8 For the avoidance of doubt, any findings within this report do not amount to the making of findings in respect of any formal processes which relate to either employees or members of the Authority.
- 1.9 We have supplied to the Authority's Monitoring Officer along with this report copies of the statements we took and the significant (in our judgement) documentary information which we were supplied with or sought and relied upon.
- 1.10 In terms of documentation we sought or were supplied with, we read them carefully and have felt able to quote from those documents where the information itself is in the public domain, where the passage of time and/or events have happened which mean that they can no longer claim to be confidential or where they were never confidential.
- 1.11 In terms of statements we took, everyone that we sought to interview made themselves available and co-operated in full.
- 1.12 We would like to thank everyone we interviewed for being suitably candid and direct with us.
- 1.13 We informed all who we interviewed that their statements or extracts from them might appear in our report which might be made public.
- 1.14 We have used our judgement and experience to reach the conclusions and recommendations in this report, based on the evidence we have collected and the

perceptions of the witnesses we have interviewed. Where accounts conflicted about a particular event we have, of necessity, relied on our own judgement and experience to reach a particular conclusion where one was required.

1.15 Prior to finalising the draft report, we sent a copy of this report to the Authority's Monitoring Officer in confidence, to check for factual inaccuracies and have corrected those only.

1.16 Our Terms of Reference also stated:

'The interested parties in this investigation are the original complainant (Cllr Fuller), the subject of those complaints (the Authority) and DEFRA. These 3 interested parties will see the draft report and be given an opportunity to comment on it

We therefore subsequently supplied draft copies to the Authority, to DEFRA and to the complainant and gave them an opportunity to comment on it. We were grateful for the time and trouble taken by all to give us their comments, we subsequently reviewed those comments and took them into account in finalising this Report.

2 The Broads Authority

- 2.1 The Authority is a body corporate. It performs the functions conferred on it by the Norfolk and Suffolk Broads Act 1988 and the Broads Authority Act 2009.
- 2.2 The Authority was set up through the Norfolk and Suffolk Broads Act 1988 and began operating as a Special Statutory Authority the following year. In passing the Act the Government recognised the Broads as having the same status as a national park.
- 2.3 The 21 members of the Authority are appointed by 8 local authorities and by the Secretary of State (SoS) and in addition 2 members are co-opted from the Authority's Navigation Committee. The SoS members and co-opted members of the Navigation Committee go through an appointment process.
- 2.4 The Authority has a duty to manage the Broads for the following three purposes:
 - 2.4.1 conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads;
 - 2.4.2 promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and
 - 2.4.3 protecting the interests of navigation.
- 2.5 A court case in 2015 made it clear that these three functions are not equal. No priority is set between them. It is therefore up to the Authority in any particular instance to decide on the relative priority of the functions.
- 2.6 The Authority's stated position on this is that they will always look for the potential win-win solution rather than setting their different functions at odds with each other.
- 2.7 In managing the area, the Authority must also have regard to:
 - 2.7.1 the national importance of the Broads as an area of natural beauty and one which affords opportunities for open-air recreation;
 - 2.7.2 the desirability of protecting the natural resources of the Broads from damage; and
 - 2.7.3 the needs of agriculture and forestry and the economic and social interests of those who live or work in the Broads.
- 2.8 The Authority also has the duty to maintain the navigation area for the purposes of navigation to such standard as appears to it to be reasonably required and take such steps to improve and develop it as it thinks fit. It may carry out works and do other things in relation to any adjacent waters in or over which it has sufficient rights or interest, for the improvement of navigation on those waters.
- 2.9 The Authority is a best value authority by virtue of Section 1(c) Local Government Act 1999.
- 2.10 The Authority is the sole district planning authority (LPA) in respect of the Broads. It is also a harbour and navigation authority.

- 2.11 The Authority has a duty to adopt a Code of Conduct for its members under the Localism Act 2011 (LA 2011). Also, it is a local authority for the purposes of Part III, Local Government Administration, of the Local Government Act 1974, and Investigations by the Local Government Ombudsman (the LGO) into maladministration, by members and/or officers.
- 2.12 It is also subject to regulation by DEFRA, and has powers of delegation.
- 2.13 The net annual expenditure of the Authority is around £7m.
- 2.14 In 2017, The Broads Authority had a peer review conducted by the Local Government Association to examine their leadership, policies, procedures and governance arrangements.

https://www.broads-authority.gov.uk/__data/assets/pdf_file/0023/245831/Broads-Authority-report-12.12.17.pdf

3 The Complaints Process and the Complaints

3.1 The Authority's Complaints process is set out on-line:

<https://www.broads-authority.gov.uk/contact-us/comments-and-complaints>

3.2 The Authority publishes guidance which sets out the process it will follow in relation to complaints:

https://www.broads-authority.gov.uk/__data/assets/pdf_file/0021/374313/Submitting-complaints,-compliments,-and-general-comments-public-guidance.pdf

3.3 This states in relation to the 3 stages of the process that the Authority has:

Stage 1: Complaint dealt with by a senior manager

The first stage is to get in touch with a senior manager responsible for the relevant area of work. You can contact the manager directly if you know who they are, or call us on 01603 610734. If you prefer, you can email us or use our online contact form (see 'Who to contact' below). If you make your complaint in writing, we will write back to you within 10 working days of receipt. A member of the Management Team may decide to take your complaint straight to the Stage 2 process. If this happens, we will let you know.

Stage 2: Complaint dealt with by Management Team

If you are not satisfied with the response under Stage 1, please complete our complaint form, which we will forward to the relevant member of our Management Team. We will send you an acknowledgement of your complaint within three working days of receipt. The member of Management Team will send you a detailed reply in writing within 10 working days, saying whether or not your complaint is upheld. If it is not possible to respond fully within this timescale they will explain why, and tell you when the response can be expected. The reply will also explain how you can take your complaint forward if you are not satisfied with our response. 2

Stage 3: Chief Executive's review

This is the final stage in our complaints process, and is only possible when the Stage 2 process has been completed. If you are not satisfied with our Stage 2 response, you can make a written request within 20 working day from receiving your Stage 2 response, asking the Chief Executive to review your complaint. If your complaint concerns the Chief Executive, it will be reviewed by the Chair of the Authority. We will acknowledge Stage 3 requests within three days of receipt, and send a detailed reply within 20 working days. If it is not possible to respond within this timescale we will explain why, and when the response can be expected.

3.4 We acted pursuant to the TOR we were set but were also mindful that we were undertaking Stage 3 of this process.

3.5 We would also note and have made reference to this later in our report that the same Guidance states,

Other types of complaints procedures

Our 3-stage complaints process covers most types of complaint from the public about our services and performance. However, a different approach will be used in certain circumstances. If your complaint falls into one of the categories below, please contact our Monitoring Officer for advice, or contact the relevant person or organisation directly.

.....

Unlawful behaviour or action

The Monitoring Officer will investigate a complaint if there is a concern about any unlawful behaviour or action by the Broads Authority itself. If a complaint suggests criminal behaviour, the matter will also be reported immediately to the Police.

- 3.6 Our ToR tasked us with looking into Cllr Fuller's concerns including but not limited to his letters of 30 October 2021 and 10 December 2021
- 3.7 We also took into account the letter of 18 November 2021 from Mr Rogers, the Broads Authority's Director of Operations, in which he replied to Councillor Fuller's complaint of 30 October 2021.

4 The Planning Issues and Decisions regarding Haddiscoe Cut

4.1 Many of those that we talked to were of the view that the underpinning issues were around governance rather than the handling of the planning matters at Haddiscoe Cut. However, it was certainly the trigger for the complaints we looked at. We also felt having investigated the handling of the planning matters at Haddiscoe Cut that there were issues which we should address in our report.

4.2 The history of Haddiscoe Cut in so far as it is relevant to our investigation and this report is as follows:

4.2.1 Application BA/2019/0167/FUL

- (a) This was an application for piling works along 126m of the river and was submitted in 2019.
- (b) The application was made by the Environment Agency.
- (c) The Norfolk and Suffolk Broads Act 1988 requires certain applications to be referred to the Navigation Committee before being determined, specifically those which may significantly affect the use or enjoyment of the whole or any part of the navigation area and which materially conflicts with any policy, plan, strategy or procedure of the Authority.
- (d) In this case the proposals were solely for piling works and did not relate to any navigational or mooring activity and it was decided that there was no requirement to refer it to the Navigation Committee.
- (e) The delegated decision report notes that the Navigation Committee Chair was consulted on the planning application. The Chair fed back that she did not think that Navigation Committee needed to see the application at a committee meeting.
- (f) The delegated report also notes that "discussions have taken place" with the agent to explain that there was no existing mooring use, and that any previous mooring use had ceased.
- (g) The Authority's planning officers considered that the policies related to moorings were not applicable/engaged as this was an application for piling and that there were no issues arising from the application which would significantly affect the use of the navigation area.
- (h) The application was determined under delegated authority. Upon determination, a condition was placed on the approval such that "*The planning permission hereby granted is for the installation of piling only and does not convey any mooring use. The piling shall not be used for the mooring of vessels at any time*" ("Condition 6").
- (i) The planning officer's view was and remains that the purpose of Condition 6 was not to restrict or alter the planning "status quo" but to make it clear to all, including the landowner, that the legal planning position in relation to the mooring had not changed. Condition 6 was not an imposition of a restriction or removal of any rights by the Authority.

- (j) The officers did say that with the benefit of hindsight Condition 6 could however have been worded more clearly to reflect that moorings had not been considered as they were not part of the application. The reason stated that Condition 6 was inserted for the avoidance of doubt, which was the case.
- (k) We have specifically addressed the issue of the Call-in / Scheme of Delegation later but in summary, the Authority's position was that the scheme of delegation forms part of the Authority's Constitution. In terms of the Scheme of Delegation in place in 2019, the default position was that all planning decisions were delegated from Members to Officers except for a specific set of applications and situations. There was a provision for Members to ask that an application be considered by Committee, but only where the Member "*provides a material planning reason of significant weight for that request in writing*". The scheme of delegation was similar in this respect to many others. The provision for some applications to be considered by the Committee at the request of Members was to enable that to happen where there were genuine planning reasons to do so.
- (l) In this instance, there did not appear to be any genuine planning reasons as far as the officers were concerned, and hence the decision was made to deal with the issue under delegated powers.

4.2.2 Application BA/2020/0045/COND

- (a) This application was submitted on behalf of the landowner and sought removal of condition 6.
- (b) This application was referred to the Navigation Committee because the issue of moorings was specific in the application and the application could potentially impact on the navigation area. Legal advice supported this.
- (c) The Authority's position was that the views of the Navigation Committee would guide their position on the application to remove the condition, having regard to the fact that the condition was attached simply because the issue of moorings had not been considered as part of the previous application.
- (d) The Navigation Committee raised no objection to the removal of the condition. They did not consider the removal of the planning condition would have a detrimental impact on navigation of the New Cut.
- (e) In relation to the redacted emails, these arose as a result of a request from Cllr Knight to provide evidence of complaints received in relation to moorings at Haddiscoe New Cut, which consisted of one email from 2009, and one email from 2010.
- (f) The Authority's Officers considered that there was commercially sensitive and personal information so redacted the email, and focused on responding to the request to provide evidence of complaints. With the benefit of hindsight, it was accepted that the emails were over redacted. However, the unredacted emails were provided to Cllr Knight on the day they were requested (18 May 2020).

- (g) The application was discussed at the Navigation Committee on 11 June 2020. The earlier meeting of the Navigation Committee would have been on the 23 April, but it was cancelled due to the pandemic lockdown and the Broads Authority were getting ready for online meetings (the procedures for remote meetings held under the Coronavirus Act 2020 were agreed by members on 22 May 2020).
- (h) Officers did the best they could to determine the application as quickly as possible and considered that there was no unnecessary delay due to officers' behaviour. They commented that bringing the matter to planning committee would have delayed the decision further.
- (i) The delegated decision approved the removal of condition 6.

4.2.3 The issues on this matter were referred to both in the documentary evidence we were supplied with and the statements that we took.

4.2.4 They address the point of view from the complainant, supported By Cllr Knight and the applicant's agent and that of the Authority from both the CEO, the Chair and the Planning Officers.

4.2.5 We have approached our analysis of this under a series of headings / questions capturing the key points raised with us albeit in our words.

4.2.6 **The status of Condition 6: was it unlawful?**

- (a) In our view, contrary to the Evidential Review and other assertions, the imposition of the condition was not an unlawful act. It is standard practice for conditions which are deemed appropriate to be imposed on any planning permission. The condition is not a pre-commencement condition, therefore, there is no legal requirement to consult with or notify the applicant. The claim that there was any kind of legal requirement that Condition 6 should have been in consultation with the applicant has no foundation.
- (b) The nature of the condition is open to challenge in terms of whether, in this circumstance, it wholly or partially satisfied the 6 tests set out in the National Planning Policy Framework (NPPF):
 - (i) necessary;
 - (ii) relevant to planning;
 - (iii) relevant to the development to be permitted;
 - (iv) enforceable;
 - (v) precise; and
 - (vi) reasonable in all other respects.

4.2.7 The intention behind Condition 6 is relatively clear, i.e. a belt and braces approach to seek to avoid conferring any lawful use. The evidence from the Authority's planning officers was that this was the case. However, such a condition could not in our view confer any lawful use. The condition went beyond what was necessary.

- 4.2.8 The application was not for a change of use nor the consolidation of an existing use, rather, it was purely for operational development. Had the application related to a change or consolidation of use, Condition 6 might have satisfied the above tests.
- 4.2.9 Unfortunately, out of what appears to us to be an abundance of caution, Condition 6 was attached.
- 4.2.10 It is wholly correct that the planning officers sought to convey that the permission did not confer any lawful use. But it would have been more appropriate if the issue which Condition 6 purported to address had been included in the planning permission as an informative point and worded differently.

4.3 The decision to impose Condition 6, was the view of the Authority as to the planning status of the land out of kilter with the norm in planning terms? It is contended that it was a restriction imposed without consultation. Was the Authority's view that the land didn't have established use correct and so its status was correctly reflected by the condition which was for the avoidance of doubt (so took nothing away)?

- 4.3.1 Whilst the intention was correct, the imposition of Condition 6 (as a condition and as drafted) was, even though it had been cleared with an external legal advisor, and with the benefit of hindsight, an error albeit of a minor nature.
- 4.3.2 With the benefit of hindsight, if the draft decision notice had been shared widely before issuing the decision notice this may well have flagged up the issue and the condition could have been removed and similar wording used in an informative attached to the decision notice. This might be a good practice point for the Authority to adopt in future.
- 4.3.3 The application did not relate to an established use and the Authority need not have concerned itself with the matter of established use in determining whether the operational development was acceptable, save to the extent that the operational development did not interfere with an existing use.
- 4.3.4 Condition 6 was added to avoid inference that permitting the operational development conferred or consolidated a use. The onus on demonstrating an established use is on an applicant. To secure a determination of a purported use, it is open to an applicant to apply for a Certificate of Lawfulness. This will be determined based on whether sufficiently clear and unambiguous evidence has been provided that demonstrates, on the balance of probability, that the use has been carried out for an uninterrupted 10-year period. We understand however that this was not an option given the interruption of mooring use because of the condition of the piling. We also note that enforcement action is not an option as boats have been moored here (albeit not continuously) for more than 10 years. However, in the absence of sufficient evidence and/or Certificate of Lawfulness, it is legitimate (and, indeed, proper) for the Authority to avoid inadvertently granting planning permission for something that has not been applied for nor appropriately evidenced.
- 4.3.5 The onus is squarely on the applicant to demonstrate the lawfulness of a purported use. A planning authority may take a view during determination of an application if it is abundantly clear from its own records that a use has been continuous for the requisite period to be immune from enforcement.

However, a photograph or, indeed, a series of photographs is just a snapshot or series of snapshots in time and it is entirely reasonable for a planning authority not to be drawn on making a conclusion in the absence of sufficiently clear and unambiguous evidence of use for an uninterrupted period of 10 consecutive years.

4.4 Was the authority as a planning authority right to take the position it did regarding the applicant being responsible for pursuing CLEUD / making a planning application to resolve the mooring issue with certainty given its view of the planning status of the site?

4.4.1 In our view the answer is yes.

4.5 Did the Authority have an ulterior motive for its actions (in respect of the way in which it approached and imposed Condition 6)?

4.5.1 Reference was made to the Authority's attempts to acquire land in the past for its own use and this being justification for the approach taken in imposing Condition 6 and the way in which that was done.

4.5.2 There was no direct evidence to support this. The assertion that the Authority had an ulterior motive was based on a view as to the previous conduct of the Authority regarding it protecting its own interests and connecting that as the rationale for how Condition 6 was applied. But there was no evidence to support this.

4.6 Conclusions

4.6.1 The imposition of Condition 6 was an error of a minor nature.

4.6.2 Any wording could, if not should have been included as an informative point rather than as a Condition.

4.6.3 If the stated reasoning for the informative point had been more along the lines of "for the avoidance of doubt, moorings have not been considered as they were not part of the application" or similar, this would have made it clearer that the planning position remained unchanged regarding moorings, and the issue of the evidential basis for imposing Condition 6 (on the mistaken belief that it was limiting or restricting otherwise lawful activity) or the basis for adding the informative point would not have arisen.

4.6.4 The planning status of the site remains unchanged, and there is no planning permission allowing moorings there, the planning position did not change through the inclusion of this condition (or its subsequent removal).

4.6.5 It is normal to remedy errors in the least controversial way. It was not within the Authority's gift to rescind the planning permission with the erroneous condition attached - without putting the Authority at significant financial risk which, in light of R (Usk Valley Conservation Group) v Brecon Beacons National Park Authority [2010] EWHC 2481 (Admin), is material to an authority's thinking in such matters.

4.6.6 The inclusion of the condition did not in any way modify or remove any key elements of the proposal which were the subject of the application.

- 4.6.7 The easiest way of dealing with this would be for the applicant to apply for a removal of the condition under Section 73 Town and Country Planning Act 1990.
- 4.6.8 Condition 6 did not materially alter the planning status of the land or inappropriately modify the development for which planning permission was sought and granted.
- 4.6.9 The permission was issued under delegated authority. The decision on the removal of the condition should similarly have been dealt with under delegated authority since it did not materially alter the development for which planning permission had been sought and granted.
- 4.6.10 In terms of the constitutional position, officers considered that it did not involve any matters of public controversy or questions of policy or any significant change from previous practice.
- 4.6.11 In our view officers acted in good faith and professionally throughout. The decision not to refer the matter to the committee is discussed further later. The assessment about the error on the imposition of Condition 6 is a fine judgment and was not in our view a fundamental or major error.

4.7 Final Points

- 4.7.1 This appears to be a case where an informative point rather than condition and better wording could have been used. Efforts were made to remedy the situation in the most risk averse and mutually beneficial way possible. Whilst it could certainly have been dealt with in a more efficient and effective manner, it is not an uncommon situation.
- 4.7.2 However, the approach to the condition was then compounded by a number of factors, how it was then approached and also the Evidential Review.
- 4.7.3 Elsewhere, we have made reference to reviewing and revising the Authority's scheme of delegation and call-in procedure. The Authority may also like to consider how they deal with errors in future to ensure that there is no loss in confidence in officers and to ensure transparency.
- 4.7.4 This planning matter regarding Condition 6 was then conflated with other matters / over-inflated and used to justify other allegations
- 4.7.5 We did note that those who sought the matter to be dealt with by members did so because they saw Condition 6 as materially changing the planning status of the land. The officers however did not see Condition 6 as having that characteristic. They saw it as maintaining and stressing the status quo. The debate around delegated powers must be seen in the context that the members who sought the matter to be referred to members for decision saw the effect of Condition 6 in quite a different way from the way that the officers saw it.
- 4.7.6 Had the wording / approach to Condition 6 been different, this may well not have been an issue.

4.7.7 The differences of view on planning matters between a small group of local authority appointed members and the planning officers of the Authority was a factor in this.

5 The Planning Function

5.1 We looked at two relatively minor planning applications and the issues arising from those. In speaking to the local authority members involved, they said that these were not isolated concerns that they held. The impression that those individuals gave us was that the planning function at the Authority was dysfunctional.

5.2 We did not find evidence of that. Our role takes us to many public bodies where there have been fundamental and significant failures, often resulting in Government intervention. To present this matter (and the Authority as a whole) in that context would be wrong.

5.3 By way of background, the Authority's website contains evidence of the performance of the planning function. For example:

[Local Plan for the Broads](#)

[Local Enforcement Plan](#)

[The Landscape Character Assessment](#)

[Draft Design Guide \(under consultation\)](#)

Planning statistics:

[planning statistics Q3 2022](#)

[planning statistics Q2 2022](#)

[planning statistics Q1 2022](#)

Customer satisfaction:

[Customer Satisfaction Survey 2022](#)

[Customer Satisfaction Survey 2021](#)

5.4 These demonstrate that the Authority is delivering a planning service that meets the targets and requirements set by the Government.

5.5 There were minor issues that arose at Haddiscoe that may have been handled better but hindsight creates the opportunity for us to make that point. In addition, as we discuss elsewhere, there are governance issues for the Authority to address which will prevent the current situation regarding governance concerns escalating.

5.6 Confidence in the planning function for some local authority members is a significant issue for them. This is something for the Authority to be mindful of, whether justified or not.

5.7 Initially we considered recommending a review of the planning function as a way of demonstrating that the function is fit for purpose. We have not taken that thought forward in our final report as:

5.7.1 the issues at hand are largely governance related, not planning a point made clearly by the Complainant and something that we also agreed with in looking at the matter as a whole; and

5.7.2 the planning issues arose in the context of two relatively minor applications in which there was a minor error.

- 5.8 We have therefore come to view that such a review is unwarranted and would be a disproportionate response.
- 5.9 We have discussed elsewhere the duty of Best Value under the Local Government Act 1999 that applies to the Authority. The duty is to deliver continuous improvement in all functions that bodies such as the Authority discharge. This includes planning.
- 5.10 That means the Authority must continue to deliver continuous improvement in its planning function.
- 5.11 How that is delivered is a matter for the Authority.
- 5.12 But that process, a statutory duty, when considered alongside our governance findings and recommendations, provides in our view an appropriate and proportionate approach to address such issues if any, in the planning function

6 The Call-In Process / the Scheme of Delegation and the Redacted Emails

6.1 During the planning process, the decision not to refer the matter to members but deal with it under duly authorised delegated powers was a matter of contention for some members.

6.2 The relevant provision in the Authority's constitution at the time stated:

“an officer need not exercise a delegated power in any particular case and must not if the matter involves any matters of public controversy or questions of policy not yet decided by the Authority or its committees or any significant change from previous practice.”

6.3 Officers said that there did not appear to be any genuine planning reasons, and hence the decision was made to deal with the issue under delegated powers.

“I followed the legal advice in relation to Members requests to call in the application, that “I do not see that these are of significant weight (in my experience as a Solicitor in Planning Law with over 12 years’ experience) and as a result the determination of BA/2020/0045/COND should continue as a delegated decision unless the Director of Strategic Services considers that the matter ought more appropriately be referred to the Committee for a decision.”

6.4 We make two points on this.

6.5 Firstly, a call-in process for planning decisions akin to that used by the Authority is very normal and to be found in many if not most local planning authorities. It allows the many day-to-day decisions to be made by officers but also members, subject to suitable process / system / criteria to request that a matter is not dealt with under the scheme of delegation but instead placed before members (a form of call in, it is sometimes called though this is not entirely a correct term to use). However, even if the criteria are met the officers still have the option should members request it or should officers consider it right to decline a delegation and refer it to members.

6.6 In this case officers took the precaution of seeking legal advice which stated that *“I do not see that these are of significant weight (in my experience as a Solicitor in Planning Law with over 12 years’ experience) and as a result the determination of BA/2020/0045/COND should continue as a delegated decision unless the Director of Strategic Services considers that the matter ought more appropriately be referred to the Committee for a decision.”*

6.7 Clearly that advice anticipated the option that despite any criteria not being met, it was still for officers to decide that the matter might more appropriately be referred to members.

6.8 With our benefit of hindsight, we feel that was the correct advice. The decision that was made was in our view quite lawful, but officers had the discretion to and could have decided to place the matter before members.

6.9 Ray Crawford in his independent review of the matter made the following points:

“Some of the correspondence is on the Authority’s website and it could be considered by some to be inappropriate and verging on bullying or harassment.”

“The provision for some applications to be considered by the Committee at the request of Members is to enable that to happen where there is a genuine planning reason to do so. In this instance, there did not appear to be any genuine planning reasons, and it is hard to

understand why some Members were so anxious that the application be reported to Committee unless they were concerned that Officers might reach a different decision to one they would wish.”

“The confrontation over this issue will not have helped the relationship between Officers and Members, but it is the duty of the Authority’s Officers to ensure that the Constitution is upheld and the procedures included within it are correctly followed. Indeed, not doing so could put the Authority at risk of challenge to the decisions made, either to the Local Government Ombudsman on an issue of procedure, or to the High Court on a matter of law.”

- 6.10 It was suggested to us that the Authority had acted unlawfully under S101(4) LGA 1972 as the effect of S101(4) is that any scheme of delegation which purports to prevent a calling in by members is Ultra Vires.
- 6.11 That is incorrect.
- 6.12 S101(4) makes it clear that delegation is permissible legally, but such an arrangement does not prevent the Authority (or committee) itself from exercising the relevant function. This means two things: first, that the Authority remains responsible (and this of course, is so of any principal who delegates because it is authority that is delegated and not responsibility) and the officer when they act does so for and in the name of the Authority; second, that the Authority can continue to perform the functions that it has delegated. On this second point, in *Goddard v Minister of Housing and Local Government (1958)*, the plaintiff challenged the validity of a compulsory purchase order made by a committee under delegated powers and put forward two contentions: one was that the council itself had never applied its mind to the issue, for the resolutions of the council’s committees were merely ‘rubber-stamped’, whereas the council was obliged by statute to ‘satisfy’ itself. The court held that the council, acting through its committee, was satisfied. The principle that an authority can continue to exercise the functions it has delegated could in practice lead to difficulties and possible confusion. The Authority must take care not to act in parallel with a matter which is also being dealt with by a delegatee and there should be a clear process/ decision/criteria by which the powers are withdrawn. It is extremely common to have such an arrangement within local planning authorities in relation to planning decisions that are to be dealt with by the planning committee or officers, and how members can have matters considered by planning committee rather than under delegated powers, although the criteria or triggers to enable call in will vary.
- 6.13 What S101(4) does not mean is that all call-ins must be allowed. The Authority has approved criteria. Until the authority changes those, the Officers have delegated powers from the Authority (though they may choose not to exercise a delegated power).
- 6.14 Consequently, their decision was neither unlawful nor *Wednesbury* unreasonable.
- 6.15 The Authority (and the members of the Authority) are accountable for the decisions they make, and the decisions made by those to whom they give delegated powers. The decision not to allow members to take the decision became an issue of far greater significance than it warranted. That should not have happened, and the Authority’s governance arrangements need amending to avoid a recurrence.
- 6.16 We recommend that the existing "call-in" arrangements should be reviewed. Some authorities involve a member such as (for planning) the Chair of Planning as a consultee to officers in determining requests and the Authority may wish to consider this. We also noted as did the Authority’s Task and Finish Group that the issue of interpretation of delegated powers falls to the CEO. It may be that that too should be reflected upon and could be a

matter that the CEO and Chairman jointly take a role on, and if they cannot resolve the issue (or feel that it should be placed before members of the Authority), the matter is placed before members.

Redacted Emails

- 6.17 The redacted emails were in our view largely red herrings. That is to say that they were not the reason behind the imposition of Condition 6. However, the way they were handled by all left much to be desired.
- 6.18 The imposition of condition 6 was for the avoidance of doubt. It was not in our view imposed because of complaints. However, once any reliance or perceived reliance was placed on that as a basis in whole or part for introducing the Condition, and that evidence was the redacted emails, the fact that they were redacted (yet still readable), did not relate to commercial transactions (the basis for the redaction) and did not evidentially support the imposition of the condition led to protracted correspondence between members and officers and considerable frustration.
- 6.19 It was a relatively minor matter but was considered significant by the Complainant as reflecting poor governance and undoubtedly fuelled the view for some that there was much more to this than in our view there was.

7 Other Constitutional Matters and Documents

- 7.1 Section 9P Local Government Act 2000 obliges local authorities (defined as county council in England, a district council or a London borough council) to prepare and keep up to date a constitution which must contain certain matters. Whilst the Broads Authority is not subject to this obligation, we feel that the effective consolidation of the key documentation will be of benefit. Pulling together such documentation in one place will enable members, including local authority members who will be familiar with such an approach, to find key information about the Governance of the Authority.
- 7.2 In addition, the Authority includes details of Governance documentation on the Authority's website. We suggest that a review of the website from a user perspective to assess accessibility / ease of use as well as revising and refreshing content would be helpful, and in particular:
- 7.2.1 the scheme of delegation [Scheme-of-Powers-delegated-to-Chief-Executive-and-other-authorised-officers.pdf \(broads-authority.gov.uk\)](#) ;
 - 7.2.2 the decision making structures - i.e. Committees etc but also the Chairs Group [Broads-Authority-committee-structure.pdf](#) ;
 - 7.2.3 the Member/Officer protocol [Protocol on Member and Officer Relations in the BA ba190517 \(broads-authority.gov.uk\)](#) ;
 - 7.2.4 the Code of Conduct for members, any relevant Protocols and/or supplementary guidance [Member Code of Conduct \(broads-authority.gov.uk\)](#) ; and
 - 7.2.5 members rights to access information, including confidential briefings.
- 7.3 In relation to the Chairs Group, we are aware that the Group was a by-product of the Peer Review carried out in 2017 in that following a workshop involving all members, a series of recommendations flowing from the Peer Review were considered and approved by the Broads Authority Board at its meeting on 11th May 2018. The Peer Review Team had recommended that the Authority provide more support for the leadership. They noted that there was a large amount of work for the Chair in particular and that ways to improve support to this role should be considered. As a result, the Board considered (and approved) a proposal to establish a Chairs and Vice-Chairs Group ("the Chairs Group).
- 7.4 We note that the Chair's Group is not decision making, however it is clearly influential. There is a view that its operation is not transparent to all members. We have mentioned governance matters raised with us but not directly related to the complaint such as this in section 9.11 of our report. This is therefore one of the other matters that Audit and Risk Committee may care to reflect upon.
- 7.5 The Audit and Risk Committee should expressly have the role of considering members concerns about governance as well as keeping the Authority's constitutional settlement and the transparency of those arrangements under review.
- 7.6 Explicitly giving members a place for members with Governance concerns / issues to raise them with other members is significant. Members are entitled to raise governance issues, and they need a place to do so. This would provide such a place. It is part of members' legitimate role to raise governance issues but how they do so (and where) can be an issue,

and we suggest was in this matter. This change will provide a clear route by which members can legitimately raise and discuss governance concerns.

- 7.7 Governance concerns from members should not be raised through the Authority's Complaints Process (designed to address concerns from citizens / service users) nor should they go to the police especially not as MIPO allegations unless they are of real significance and appropriate internal routes have been exhausted. This clarifies that for the future.
- 7.8 We would also recommend that Code of Conduct matters should continue to be separated from the Audit and Risk Committee.
- 7.9 We have noted that CPIFA have produced relevant guidance - "Audit Committees: practical guidance for local authorities and police".

7.10 Page 36 states:

"Dedicated focus

To ensure a focus on the core functions, the committee should not be combined with other council committees such as scrutiny or standards or policy and resources. A combined committee can result in the distinction between the functions of the committees becoming blurred. The audit committee is non-political and should contain co-opted independent members. These arrangements are different to those of scrutiny. While a standards committee is also non-political and may contain lay members, its focus is different. An appropriate lay member for the audit committee may not be suitable for the work of the standards committee and vice versa. More details on the membership of the committee and role of the co-opted independent member are available in Membership and effectiveness of the audit committee."

- 7.11 We believe that this approach is both sensible and applicable to the authority in looking at its governance arrangements going forward. Given the relatively small size of the Broads Authority, it would be acceptable and proportional for an audit committee to also undertake oversight of the constitution, they are both systems of internal control and therefore it makes sense that oversight is provided by the same committee.
- 7.12 However, matters falling under the standards regime should be addressed by a separate standards committee, which could be the current Hearings Committee.

8 Member Behaviour

- 8.1 During our investigation issues were raised with us relating to member behaviour which we feel need commenting on.
- 8.2 We should stress that we make no finding that there have been breaches of the Code of Conduct by Members, that is not the purpose of this report or nature of our work. But there are concerns about the conduct and behaviour of certain members especially in Planning Committee.
- 8.3 There are several points to this:
- 8.3.1 some members have business interests in the Broads. That is to be expected and indeed encouraged. Such a perspective needs to be heard within the Authority. However, it is important that the rules relating to what members with such business interests can / cannot do in terms of their role at the authority must be understood by all, policed and enforced;
 - 8.3.2 there have been concerns about members' behaviour at meetings of the Authority especially in planning committee. It is also clear that members given their background / the makeup of the Authority do not generally call out bad behaviour; and
 - 8.3.3 the non-political nature of the Authority (no political party groups and hence no group discipline within the Authority) means that the standard local authority political mechanisms for dealing with low level poor conduct are not available to the Chairman of the Authority.
- 8.4 We therefore recommend that whilst the Authority has refreshed its Code of Conduct, supplementary guidance on interests may be useful. We understand that the Authority adopted a new Code of Conduct based on the LGA Model Code of Conduct upon recommendation by the Monitoring Officer in July 2021. The Monitoring Officer has delivered member training on the new Code, including the registration and declaration of interests and dispensations. The new guidance on interests may well not need further training but we suggest that is left to the Monitoring Officer to judge. The policing of behaviour and Code of Conduct matters need resources to be deployed and we understand that the Authority has approved the appointment of an external solicitor with considerable experience in this area as its Monitoring Officer.
- 8.5 Training has been provided on the new Code of Conduct. Training is essential to enable Members to understand their obligations under the Code of Conduct for Members, expected behaviour including the registration of Interests and proper disclosure of interests when they arise and where required / necessary, withdrawal from decision making.
- 8.6 In Section 7 of this report, we recommended an enhanced role for Audit & Risk Committee in relation to governance and constitutional oversight. As a consequence Code of Conduct matters should be separated from the Audit & Risk and be undertaken by a Standards Committee.

9 Governance (scrutiny, Glover Recommendations, the Task and Finish Group)

- 9.1 Governance is not just limited to matters such as the wording of the Constitution but also the relationships between members and the organisation and members and officers underpinned by the mechanics of the constitutional settlement.
- 9.2 Governance operates differently in every public sector body. What is most important is the behaviours, values and attitudes that govern how individuals work together and the relationships. Particularly important here is the need for officers and members to work together to consider their options and decide on the right approach.
- 9.3 We have made a recommendation earlier in this report which if implemented will provide a clear route and process for members to raise governance issues. It was stated to us that the Authority's existing complaints process provided a route to raise such issues directly with the Monitoring Officer which was not done here. Also, the CEO and Chair provided an alternative route under the oversight of the Board. Others told us that they felt that they had nowhere else to go (and took advice as to the appropriateness of their actions).
- 9.4 Further we have recommended changes to the scheme of delegation to the "call in" regime.
- 9.5 Whilst these address the specifics, the underlying issue was in our view largely about relationships, and as such warrant some reflection by all.
- 9.6 All organisations will have relationships with tensions. Most organisations would collapse without those tensions. The Complainant referred to his relationship in his local authority where (and this is no different from that in virtually every local authority in the land) there is a healthy and appropriate tension between the political leadership and the senior officers. The Authority has councillors on it. They will come largely from a political background and may well bring their politics/ political behaviour with them. This will bring tensions. But they should not disrupt the normal reasonable conduct of business by the Authority.
- 9.7 We were told by the senior officers / members at the Authority that the role and presence of the LA appointed members was accepted and seen as beneficial but we were also told that the Authority is an apolitical / non-political body and that sometimes local politics does not fit with the way the Authority works.
- 9.8 Because of the composition of the Authority, there will be differences in terms of where some members come from (SS appointees, LA appointees) as well their backgrounds, values and priorities. But the desire for parity of treatment and approach towards all members was something that many raised albeit with differing perspectives why this was an issue and for whom and what they wanted as an outcome.
- 9.9 However, we identified on a number of occasions that an issue / the way in which a matter was dealt with reflected issues relating to relationships within the organisation. For example:
- 9.9.1 whilst it was certainly not unlawful, in relation to the delegation / call in procedures, the decision was made not to place the matter before members where the discretion to do so existed. We may have taken a different view on this, but the officers were quite entitled to take the view they did. But the subsequent degree and weight of challenge / response to this decision was (in our view) disproportionate ;

- 9.9.2 the flawed use of the redacted emails and the time / effort / energy taken to justify that and also the subsequent response;
 - 9.9.3 the allegation that the decision of the Authority to impose Condition 6 was self-serving and arose from a from a desire to secure a pecuniary advantage;
 - 9.9.4 the significance and level of distrust of some members in the planning function;
 - 9.9.5 the referral of an allegation of misconduct in public office to the police; and
 - 9.9.6 the lack of trust in some members as to their motives for the actions / decisions that they have taken at the Authority.
- 9.10 We consider there is some work to be done in relation to relationships.. This does not mean there will not be tensions / disagreements, that is the nature of public bodies like the Authority. But the relationships should be strong enough to withstand those. And the underpinning governance mechanics need to both support those relationships and also provide opportunities to raise issues or concerns in appropriate places, ways and times when necessary.
- 9.11 There were a number of areas raised with us to illustrate the governance concerns at the Authority, not all of which were relevant to the Complaint that we were investigating (for example, the operation of the Chair's Group) but our recommendations will give members an appropriate place to raise such concerns in future and for the Audit and Risk Committee to consider such issues.
- 9.12 In every good public authority, even though they will be of different sizes, different in nature, have different functions, all with different ways of working, it is possible to see clear articulation of the principles of accountability. It involves a recognition that officers are held to account by the members for their performance and delivery of properly agreed lawful policies. Members respect the advice given by professional officers even if it is sometimes uncomfortable. Good authorities have robust and regularly reviewed codes of conduct, protocols etc that regulate the relationships and expectations that members and officers have of each other but never need to refer to them. This is a fundamental part of the web and weft of local administration.
- 9.13 Parity of treatment of members whether SoS or LA appointees is part of that.
- 9.14 The Local Government Act 1999 gave (at least to some extent) this statutory effect when it established Best Value. Section 1(c) makes the Broads Authority a best value authority. Section 3 contains the General Duty that the Act places on all best value authorities including the Broads Authority. It states:
- "A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness".*
- 9.15 The Broads Authority's governance arrangements are regularly reviewed by Internal and External Audit, both external to the organisation. The responsibility for reviewing amendments to the governance arrangements lies with the Monitoring Officer and ultimately the Board. As we have mentioned elsewhere the Monitoring Officer has introduced a revised Code of Conduct and training for members. There is continuous improvement underway within the realm of governance.

- 9.16 The concept of continuous improvement means that the best value duty must be a process. In even the best performing authorities, errors will occur. Failures of policy or practice may result despite good intentions. An instance of this would not automatically mean a failure to comply with the best value duty. However, it must also mean that an authority will learn from its past performance, rectify defects, and not continue along a path when failure is evident. Such events should be clearly isolated and exceptional, rather than regular and repeated and should be immaterial in value or wider implications.
- 9.17 Applying this to governance (of there is evidence now of continuous improving) and taking account of the issues we have looked at, this duty gives the Audit and Risk Committee an appropriate lever and authority going forward.
- 9.18 The Landscapes Review, led by Julian Glover and published in September 2019, made a number of recommendations including the reform of the membership of National Park Boards to make them considerably smaller in size with all constituent members of those Boards appointed through a merit-based process. The Government has consulted widely on this early in 2022 its response to the Glover Report. It is not clear what approach the Government will take on Board size.”
- 9.19 There were two aspects from the Glover Report that we felt worthy of inclusion and reference by us in this report, as they resonated with comments that were made to us and/or reflected issues which we identified in our investigation:

9.19.1 Members

- (a) In terms of SoS appointees, DEFRA launch a public recruitment campaign inviting anyone interested and eligible to apply for membership of specific National Parks where there are vacancies. The Candidate Pack sets out the selection criteria and the process in full. Candidates must submit a CV and a personal statement setting out evidence to support how they satisfy the selection criteria. At the same time, the Defra Public Appointments Team appoint a panel of three to consider the applications. The panel will consist of the Chair of the relevant Authority, a senior Defra official, and one other who is usually a specialist in diversity, inclusion and equality. The panel shortlists the applications on the basis of the evidence provided, interviews the candidates over approximately 50 minutes each to test the strength of the evidence and generally assess the candidate. The process is rigorous and challenging. The panel is required to rate each candidate as either appointable or not appointable then submits the list of appointable candidates to the Secretary of State who makes the final decision on appointment.
- (b) It is a wholly merit and evidence-based system.
- (c) LA members can provide a valuable local insight and connections with their communities. But there is a marked contrast in the stringency applied to the process for SoS appointees, and that for Local Authority appointees.
- (d) We would suggest that LA appointees (and they are appointed not elected to the Authority) could have something of a similar process for appointment as identified as an option by the Government. The marked difference in approach is not we feel helpful, and although such an approach may well be challenging to implement, it would in our view be both appropriate and

provide some parity as to the requirements for appointment that both cadres of members should achieve (and be seen to achieve).

9.19.2 Chair

- (a) The appointment of an independent Chair would have some attraction to some. However, we would note that this is a regional body rather than a national one. With that in mind we do feel that it is important that the appointee should have that regional focus.

9.20 The Audit and Risk Committee's Task and Finish Group also looked into matters that we have examined. We suggest that their draft report is regarded as having been brought within this report and the recommendations we make.

9.21 We consider that having members governance concerns dealt with as complaints (the process of which we have also noted requires review) or by way of allegations of MIPO to the police is not acceptable.

10 Misconduct in Public Office

- 10.1 Misconduct in public office (MIPO) is an offence at common law triable only on indictment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.
- 10.2 It was an offence alleged by the complainant against three of the Authority's officers in relation to the handling of two minor planning applications and the subject of the evidential review.
- 10.3 The offence is committed when:
- 10.3.1 a public officer acting as such
 - 10.3.2 wilfully neglects to perform his/her duty and/or wilfully misconducts him/herself
 - 10.3.3 to such a degree as to amount to an abuse of the public's trust in the office holder
 - 10.3.4 without reasonable excuse or justification.
- 10.4 The courts have accepted that a Councillor holds a public office (R v Speechley [2004] EWCA Crim 3067).
- 10.5 To establish wilful neglect or misconduct there has to be awareness of the duty to act or subjective recklessness as to the existence of the duty; there must also be intent or subjective recklessness as to the omission or act of the defendant if the duty does arise.
- 10.6 The defendant's motive and the likely consequences of the breach viewed subjectively may be relevant to element.
- 10.7 Bad faith is not normally an element of the offence.
- 10.8 The offence is, in essence, one of abuse of the power or responsibilities of the office held. MIPO should be used for serious examples of misconduct when there is no appropriate statutory offence that would adequately describe the nature of the misconduct or give the court adequate sentencing powers.
- 10.9 The third element of the definition of the offence provides an important test when deciding whether to proceed with an offence of MIPO. Unless the misconduct in question amounts to such an abuse of trust, a prosecution for MIPO should not be considered.
- 10.10 The culpability '*... must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment*' (R v Dytham (1979) QB 722).
- 10.11 The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.
- 10.12 Examples of behaviour that have in the past fallen within the offence include:

10.12.1 wilful excesses of official authority;

10.12.2 'malicious' exercises of official authority;

10.12.3 wilful neglect of a public duty;

10.12.4 intentional infliction of bodily harm, imprisonment, or other injury upon a person; and

10.12.5 frauds and deceptions.

10.13 The threshold is rightly high, though as the Law Commission identified in their review of the offence, the consent of the Director of Public Prosecutions should be required to prosecute the offence, to ensure that the right cases are prosecuted, and to prevent vexatious private prosecutions.

10.14 The alleged mishandling of two minor planning applications did not meet the evidential test for MIPO and the complaint to the Police was an inappropriate vehicle to raise this matter.

11 The Evidential Review

- 11.1 Councillor Fuller placed reliance upon the Evidential Review carried out by the police as a basis for showing that there was wrongdoing at the Authority.
- 11.2 The Police have written to the Authority on 23 August 2021 and 17 September 2021.
- 11.3 We contacted the Chief Constable so that we understood the matter. He arranged for us to talk to a Detective Chief Superintendent on his behalf.
- 11.4 From that conversation, we understood that the Evidential Review consisted of assessing the allegations of MIPO made against officers in the Planning Department of the Broads Authority, by Cllr Fuller to the police, and deciding whether there was a criminal matter to be investigated. There was no criminal investigation, rather there was an evaluation of the material provided by Councillor Fuller. The evidence did not show a prima facie case of MIPO. Had there been a prima facie case, there would have been a criminal investigation and (amongst other things) the police would have then talked to the Authority.
- 11.5 The police did not speak to the Authority as there was no reason to do so since the allegations of Cllr Fuller did not amount to a prima facie case of MIPO. Nor should the Evidential Review have been released to Cllr Fuller.
- 11.6 The letters from the police (referred to in para 11.2 above) made it clear that the comments made by the police officer on governance matters at the Authority should not have been made and further that the Report should not have been released.
- 11.7 In short, the Evidential Review was an initial evaluation, the purpose of which was to assess whether or not there was a prima facie case of MIPO which required a criminal investigation.
- 11.8 There was not.
- 11.9 To afford the outcome of the evaluation more weight than that is in our view erroneous.
- 11.10 It should be noted that as we finalised our report, we were advised that the Information Commissioner's Office (ICO) had found that in respect of the Police sharing the Evidential Review with the Complainant, the Police had not complied with their legal data protection obligations because they sent the Review to a third party (the Complainant) without the knowledge or consent of third parties named in the Review.

12 The Complaints Process

- 12.1 In section 3 of this report we laid out the complaints process. There were several matters that arose in the relation to the process itself and the way it was applied to the complaints from Cllr Fuller that we felt warranted our comments.
- 12.2 Some comment was made on the status of the independent planning review undertaken by Mr Raymond Crawford in September 2021 on behalf of the Authority.
- 12.3 The CEO of the Authority explained this to us as follows:

"Once I had obtained legal advice on the Evidential Review and contacted the Acting Chief Constable I decided that, given the significant risks to the Authority's reputation, it would be wise to obtain very quickly an independent assessment of the handling of the two planning applications at Haddiscoe Cut to double check that they had been handled correctly by the Authority. I approached the East of England LGA, then the regional office of the LGA. Both pointed out that as Cllr Fuller was an important player with the LGA, they would be willing to assist but were aware of Cllr Fuller's considerable influence. The national office of the LGA suggested the Planning Advisory Service (PAS), being semi-independent, would be worth approaching and might be less open to political interference. I contacted an officer at PAS who advised that in the particular circumstances it would be advisable for them to provide access to the list of planning consultants they used, rather than commissioning them to carry out the work. They checked on the availability of their planning experts and as I wanted the review done very quickly, only two were available and Mr Crawford was one of them.

The work was completed in two weeks. No tender or specification was required. The task was clear and urgent and the action was agreed with the Broads Authority's Chair. Mr Crawford's brief was to review the way in which the authority had handled the planning applications at Haddiscoe Cut.

Its purpose was to identify for me any deficiencies in the handling of the two applications which had prompted the serious allegation of misconduct in public office. When I commissioned the task, I did not envisage report and its conclusions being made public, but while it was being finalised the Police's Evidential Review was released to the local media, and I had no option but to use Mr Crawford's Planning Review to show the applications had been handled correctly and defend the reputation of the Broads Authority from an unwarranted and unjustified attack.

The independent review of the two applications was commissioned in the middle of September not in response to Stage 2 of Cllr Fuller's complaint which was later. Cllr Fuller wrote to all members of the Authority on 30th October, with an attached letter in which he made allegations and presented "a summary of the key points of his complaint to the Constabulary regarding the problems in the 'Haddiscoe' Cases for your information". The Authority wrote to him on 5 November, indicating that it had decided to treat his correspondence as a formal complaint in line with its Complaints Procedure. (The response to that Stage 2 Complaint was the letter written by the Authority's Director of Operations, Mr Rob Rogers and sent on 18 November 2021). "

- 12.4 In terms of the complaints process itself, a point raised by Cllr Fuller was that as he had alleged unlawful conduct, the matter had to be investigated by the Monitoring Officer (MO), but was not.

12.5 The Authority's complaints process states:

Other types of complaints procedures

Our 3-stage complaints process covers most types of complaint from the public about our services and performance. However, a different approach will be used in certain circumstances. If your complaint falls into one of the categories below, please contact our Monitoring Officer for advice, or contact the relevant person or organisation directly.

...

Unlawful behaviour or action

The Monitoring Officer will investigate a complaint if there is a concern about any unlawful behaviour or action by the Broads Authority itself. If a complaint suggests criminal behaviour, the matter will also be reported immediately to the Police.

- 12.6 The MO was never contacted by any complainant in relation to a complaint that fell within the parameters of a complaint (unlawful behaviour or action) that should have been referred to the MO as set out in the Authority's Complaints Procedure.
- 12.7 The position where such a complaint is made is clear - the MO will investigate.
- 12.8 We have to say that such an approach is unsustainable and not one we have seen before in any other complaints process. The MO should have the right to decide when they involve themselves and not because of (say) an alleged traffic violation, some other relatively trivial allegation or an unevicenced / unproven allegation of illegality.
- 12.9 In this matter, the MO considered that he did investigate.
- 12.10 He took action. He attended meetings, asked questions, considered external legal advice and received assurances. He was satisfied that the handling of the two planning applications had been reviewed, both internally (by the Authority's Ms Tighe, Director of Strategic Services) and externally (by Mr Crawford, an independent planning consultant), and that no serious concerns had been identified.
- 12.11 He had no reason to question the police finding in their report that there was insufficient evidence to substantiate the allegations they had received of MIPO against the Authority's personnel.
- 12.12 In the light of that, he considered that as MO, it would not have been feasible, or reasonable, for him to personally formally re-investigate the allegations made to the police after the police had spent 14 months considering the matter and determined to take no further action.
- 12.13 The MO has to exercise careful judgment in the exercise of their powers and duties at all times.
- 12.14 He was also satisfied that his reporting duty under Section 5 of the Local Government and Housing Act 1989 was not engaged.
- 12.15 External legal advice was sought by the Authority from counsel and external Solicitors
- 12.16 The MO incorporated Councillor Fuller's suggested amendments into the Terms of Reference for the independent review and Cllr Fuller appeared satisfied as to the decision to treat his correspondence as a Stage 3 complaint and to commission an independent review

into the concerns he had raised, on behalf of the Authority and Defra, to enable the MO to reply to his complaint

- 12.17 We agree that in the circumstances, the MO's task would have been to look at whether there was illegality. Given that the police (with all their resources) had determined that there was not, that was the answer and he was entitled to rely upon that.
- 12.18 The MO investigated the matter albeit that he was already aware of it and involved. The MO is quite entitled to rely upon a police investigation when the alleged illegality would lie with them to investigate anyway. The complaints process is in this regard worded to prevent a complaint being dealt with by the Authority that might raise an issue of illegality and prejudice to the Authority (or a police investigation) if progressed without that being very carefully considered. Hence the wording of the process and involvement of the MO. In most cases, in such an instance the response would be to refer the matter to the police for investigation. That would then impact upon whether the MO issued a S5 report. Here, that investigation had been done.
- 12.19 We agree with the approach adopted by the MO and consider the matter was investigated by the MO in a way we would expect, that is to say he made himself fully aware of the matter and being in possession of a completed police investigation which found no evidence of illegality determined that the S5 duty placed on the MO was not engaged. Further we consider that the MO would be quite entitled having reviewed the police investigation to come to the view that he did.
- 12.20 The MO was we feel appropriately involved and we do agree with his conclusion on the matter. However, Cllr Fuller was never advised that the MO had been involved, had looked at the issue, had reviewed the evidence including the evidential review and had formed a view in relation to his involvement (given the Authority's complaints process).
- 12.21 We do consider that the complainant should have been advised of this. At the point when Cllr Fuller raised the issue relating to the matter needing to have gone to the MO, the Authority could and should have informed the complainant of the MO's involvement and his decision in relation to his investigation in so far as his role and the Authority's procedures required.
- 12.22 The Authority's Complaints Process is in this respect unsatisfactory. We therefore recommend that the Authority should review and change this part of their Complaints Process removing the obligation on the MO to investigate any allegation.
- 12.23 We would also suggest that the Authority also reflects upon the remainder of its Complaints Process including how they communicate with complainants and the extent to which and when (if at all) members of the Authority should be able when acting in their capacity as members of the Authority utilise the Complaints Process. As a minimum, members concerns about governance processes within the Authority should now be referred to Audit and Risk Committee. As a consequence, the ability for members to use the Authority's Complaints Process to raise such concerns should be closed down.

13 Conclusion

- 13.1 Our report was produced for the Authority's MO to respond to Cllr Fuller at stage 3. We agreed that the MO would use our report as he deemed fit to respond accordingly.
- 13.2 As the Complainant and DEFRA received a copy of our draft report and made helpful comments on it (along with the Authority) as a result of which we reviewed and revised our report, they should also receive a copy of this final version of our report.
- 13.3 A summary of our findings and recommendations is set out at the front of this report
- 13.4 There are issues to be addressed. We were asked to set out how serious they were.
- 13.5 Our work has brought us into contact with public bodies like local authorities with significant problems. Some have been described as dysfunctional and some are subject to government intervention.
- 13.6 There is quite simply no comparison between them and the Broads Authority. The trigger point was two minor planning applications with a minor error. But as we have said the issues were not about the planning function but governance.
- 13.7 There are governance issues to be addressed. None are fundamental to the operation of the Authority. The Authority has scheduled a meeting to discuss how to implement the recommendations set out in this report. That is to be welcomed as it will enable the changes we suggest to be taken forward in a timely manner.
- 13.8 So in short, there are some governance issues. They need to be and will be addressed.
- 13.9 But any suggestion that there are significant fundamental problems at the Authority and that it is "failing" or similar would be completely incorrect.
- 13.10 Finally we were also invited to express what good or success (by which we interpret this as meaning effectively implemented improvement based upon our recommendations which derive from our findings) might look like to us.
- 13.11 Any answer needs to focus on our recommendations, as these are designed to assist the Authority in addressing those governance issues we identified.
- 13.12 Therefore put shortly, good / success has in our view the following characteristics:
- 13.12.1 the constitutional settlement and hence the effective transparent governance of the Authority delivers sound and lawful decision making, involving members as appropriate;
 - 13.12.2 appropriate roles and relationships between officers and all members of the Authority are acknowledged understood and respected by all;
 - 13.12.3 governance continues to be seen as a Best Value priority for the Authority with a drive towards continuous and ongoing improvement in governance (including relationships) led by the Audit and Risk Committee;
 - 13.12.4 there is confidence that members comply with the Code of Conduct, the Code is well understood, adhered to and effectively policed;

13.12.5 members have an appropriate place to raise concerns regarding governance issues at the Authority and do so; and

13.12.6 the constitution for the Authority is documented and available to all;