

# **River Safety Management at Wharfemeadows Park, Otley**

## **Scrutiny Inquiry Report**

# Introduction and Scope



## Introduction

1. Following the tragic drowning of two young men at Roundhay Park in 2005 an interdepartmental group was established to address the issues raised by the incident. The group was formed to deal with:
  - Preparation for the Coroner's Inquest
  - Implementation of any recommendations from the Inquest
  - Commissioning of a RoSPA report on Water Health and Safety in Leeds City Council
  - Development of a programme of risk assessments for Council water areas
  - Development of a Water Health and Safety Policy for the City Council
  - Development of educational information on water safety, particularly for adolescents and teenagers
2. On 9<sup>th</sup> February 2007 Executive Board approved and adopted a Policy on the Safety Management of Open Water, endorsed the 'Wise up to Water' Lifesaving Water Safety Project for young people and approved provision within the Capital Programme to ensure that the result of the remaining risk assessments could be implemented
3. An element of this latter approval resulted in the Executive Board agreeing to erect a fence around an expanse of water in Wharfemeadows Park, Otley.
4. It is well known that this element of the Executive Board decision of February 2007 prompted local protests.
5. A group was formed, known as the Wharfemeadows Action Group, (WAG) to oppose the plans. This group submitted a deputation to full Council (18<sup>th</sup> April 2007) and was also involved in discussions with the relevant Area Committee.
6. There was also public discussion suggesting that the Executive Board's decision was in some way legally flawed.
7. In response to the concerns raised the Council sought legal reassurances that the decision it had taken was correct and agreed to revisit the decision taking into account local views.
8. In 16<sup>th</sup> May 2007 the Executive Board received a further report outlining the need for water safety measures at Wharfemeadows Park, Manor Park and Tittybottle Park.
9. The Executive Board, subsequently on consideration of this May report resolved that

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consideration of proposals to improve water safety at Wharfemeadows Park, Manor Park and Tittybotle Park be deferred to the June meeting of the Executive Board, excepting that the Chief Recreation Officer be requested to progress fencing proposals by the river in the vicinities of the weir and the children's play area.

10. On 13<sup>th</sup> June 2007 the Executive Board received further reports. These included the presentation of the May report identifying the need for water safety at Wharfemeadows and details of public meetings held on 10<sup>th</sup> May 2007 and exhibitions between 8<sup>th</sup> and 11<sup>th</sup> June 2007 in Otley
11. Following consideration of these reports the Executive Board resolved that the scheme to erect signage and to fence parts of the parks adjacent to the River Wharfe as identified in the May 2007 report be implemented as soon as was practically possible.
12. In July 2007 Scrutiny Board (Culture and Leisure) received a request for scrutiny from the Wharfemeadows Action Group relating to the proposed fencing arrangements within Wharfemeadows Park. Following a full presentation by WAG the Scrutiny Board agreed to undertake a Scrutiny Inquiry.

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13. The terms of reference for this Inquiry were agreed by the Scrutiny Board at its September 2007 meeting. The Scrutiny Board agreed to scrutinise the recent decisions of the Executive Board regarding Wharfemeadows, the grounds for those decisions, the advice submitted and to make recommendations thereon the following:
  - The consultation process undertaken with regard to water safety at Wharfemeadows Park.
  - Details of the decision making process, the options considered, the advice received and position of the Council following RoSPA's recommendations:
  - Legal advice given to the Council
  - Executive Board reports
  - RoSPA's recommendations and relevant reports
  - Any risk assessments undertaken previously with regard to sites with water assets
  - Relevant statistics on accidents relating to the River Wharfe and Wharfemeadows Park specifically.

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- Coroner's report relating to Roundhay Park fatal incident
- The Water Safety Strategy

14 This Inquiry has tended to focus on Wharfemeadows and has not dealt with in any great detail the wider Water Safety Strategy. This report presents the findings of the Scrutiny Board.

# Conclusions & Recommendations



1. We feel it is important at the outset to acknowledge the genuine public concern the decision to fence off parts of the river has raised in some quarters. We acknowledge the hard work of WAG in being a conduit for that feeling. We would like to thank WAG representatives for the manner in which they have presented its evidence to us and are grateful for the timely production of written reports and other pieces of evidence all of which we have found extremely useful.
2. Similarly we acknowledge the input of officers and thank representatives from RoSPA for their professional input. We would like to say at this point that Members who attended our site visit were extremely impressed with Wharfemeadows Park and we would like to record our thanks and congratulations to Parks and Countryside staff.
3. WAG argues that the decision in February 2007 to put up fencing was based on (to quote WAG) the “fundamentally flawed RoSPA December 2006” report.
4. WAG argues that the legal advice underpinning this report was wrong and was either ignored or accepted by various officers. WAG argues that when this advice was presented to the Executive Board a false picture of the Council’s responsibilities was created.
5. Much has also been said of the Executive Board being under pressure to act as it did due to the ‘threat’ of possible ‘Corporate manslaughter’ prosecutions
6. Similarly there has been confusion as to the Coroner’s recommendations following the Roundhay Park tragedy. It has been widely reported in the media and said in Full Council that the Council received an instruction to carry out risk assessments.
7. It is the view of WAG that the advice given to the Executive Board that not to heed the safety advice in RoSPA’s report and the Roundhay Coroner’s report could result in corporate manslaughter charges was incorrect and should not have been given. This advice, together with the inaccurate legal advice, WAG argues, played a significant role in colouring the views of the Executive Board Members.
8. It is true that the December 2006 RoSPA report quotes a case (Tomlinson v Congleton Borough Council) and in quoting this case does not fully explain the subsequent successful appeal. This is unfortunate and Members can sympathise with the view that

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it puts RoSPA's competence to advise on safety matters on trial.

9. It is unfortunate that the original error by RoSPA was not picked up by officers. However it is important to state that we have been advised by our own legal department that the decision in the Tomlinson Case does *not* define Leeds City Council's duty of care and that it was *not* a consideration when determining the Council's responsibilities and certainly did *not* form part of any officer advice to the Executive Board. This is reinforced by the fact that RoSPA were not commissioned by the Council to offer legal advice nor has legal advice been sought by the Council from RoSPA.
10. In terms of officers advising Executive Board that not to heed the advice of RoSPA could result in Corporate Manslaughter charges, we cannot find evidence to support that this advice was actually given. We are told by officers that this was not a matter raised in the February 2007 Executive Board report. However we accept that some of this discussion could have been fuelled by discussion in full Council in February 2007 where Members talked of the possible threat as justification for the Executive Board decision.

11. In terms of the supposed recommendations made by the Roundhay Coroner, again this is incorrect and no evidence has been presented to the Working Group or Scrutiny Board to suggest otherwise. We note that the correct recommendation of the Coroner was presented in the February 2007 Executive Board report.
12. What is unfortunate is that the Council at the point of the February 2007 Executive Board decision had not carried out its own risk assessment at Wharfemeadows and was reliant on RoSPA's assessment. With the subsequent criticism of RoSPA it is understandable why WAG has suggested that the City Council misled itself. However we do acknowledge that the risks identified by RoSPA were not unknown to officers. Indeed it was officers from Parks and Countryside who had suggested the site, visited with RoSPA and gave input into the site discussions that formed the risk assessment report. It is acceptable to use experts and we acknowledge that this was not at the expense of abdicating responsibility and accountability for decisions made.
13. In hindsight it would have been better to have incorporated RoSPA's advice into our own risk

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assessment. This would have also helped play down RoSPA's perceived influence in the decision making process.

14. WAG has also questioned the legitimacy of appointing RoSPA to help the Authority undertake risk assessments. We have heard of the expertise RoSPA can provide in these areas and therefore do not have an issue with RoSPA assisting the Council. We say this however on the clear understanding that risk assessments and consequent decisions and action lies solely with the Council and not RoSPA. The Council are the responsible body, not RoSPA. We accept that officers have never stated that RoSPA have a regulatory responsibility. It is unfortunate that the subsequent message was that RoSPA told the City Council to erect the fencing. In our view more could have been done to challenge this perception.
15. WAG has also queried the decision to Commission RoSPA to examine Wharfemeadows Park. In this regard we are satisfied that this area of water had been of concern to officers and provided a good example of an urban park area with fast running water to undertake a site specific assessment.
16. Notwithstanding our comment in paragraph 12 above, we have been advised that it is legally perfectly proper to revisit risk assessments. We note that this was done by Council officers on 30<sup>th</sup> March 2007 and reported to a further Executive Board report in May 2007. We also note that in giving evidence to the Scrutiny Board, the RoSPA representative stated that he was unhappy with elements of the December 2006 RoSPA report and that changes were subsequently made, resulting in the April 2007 RoSPA report. This was the report the City Council finally acted on. However, we note with some concern that the existence of different 'versions' of the RoSPA report would appear to have confused the decision making process.
17. We note that following this report and the subsequent June 2007 report Members reaffirmed their February 2007 decision with some modifications. These being;
  - Not to fence near the steps
  - Not to fence from children's playground down to the white bridge
18. We acknowledge that as a local authority, addressing matters of public safety is one of our key responsibilities - but doing so 'as far is reasonably practicable' and

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applying the principles of 'sensible risk management'

19. It is fair to say that there is often little 'objective science' in conducting risk assessments for situations such as this. As they are often based upon professional judgement. The law requires that 'competent people' are utilised to inform such assessments – which is why the Council employed RoSPA and utilised its own Officers. Only a court can ultimately decide on liability if an accident has occurred.

20. We share the Health and Safety Executive's view sensible risk management **is** about:

- Ensuring that workers and the public are properly protected;
- Providing overall benefit to society by balancing benefits and risks, with a focus on reducing real risks – both those which arise more often and those with serious consequences ;
- Enabling innovation and learning not stifling them;
- Ensuring that those who create risks manage them responsibly and understand that failure to manage real risks responsibly is likely to lead to robust action;
- Enabling individuals to understand that as well as the right to protection, they also have to exercise responsibility

- Reducing not eliminating risk.

21. We would strongly argue that sensible risk management **is not** about:

- Creating a totally risk free society
- Generating useless paperwork mountains
- Scaring people by exaggerating or publicising trivial risks
- Stopping important recreational and learning activities for individuals where the risks are managed
- Reducing protection of people from risks that cause real harm and suffering.

22. WAG and others, including certain Members of this Scrutiny Board, believe that the decision taken to fence off parts of the River Wharfe are not proportionate to the risk nor to any legal imperative. Conversely we have heard from our own professional and experienced officers and from RoSPA that the measures are sound and legitimately arise from our legal obligation to carry out a risk assessment and address the risks identified in such assessments as far as reasonably practical.

23. There is a view that the relatively short stretch of fencing of the River Wharfe at Wharfemeadows

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in Otley does not prevent or restrict activities as these areas are not legitimate points of access. The steps, which are a point of access and used for feeding water fowl and an integral feature of the park, are to be left unfenced.

24. The only non financial 'cost' put forward in the fenced areas is one of visual amenity, which in any case is subjective. This would not provide any useful mitigation should an accident occur.
25. We concede however that we are unlikely to reach a consensus neither within the Scrutiny Board nor within the public at large, as to whether the fencing should have been erected. There are those who oppose all fencing, those who agree fully and there are those who argue that the fencing should be around a limited identified area. It has to be said that following our own site visit Members present identified areas that required urgent fencing.
26. We have quite rightly listened to what WAG has had to say. However we could have easily obtained the views of the many people who are supportive of the measures taken by the Council. Indeed when Members went on a recent site visit as part of this Inquiry we were privy to numerous comments of support for the

fence. We note that the Executive Board has also seen letters of support.

27. Our job has not been to arbitrate on a professional health and safety issue. The issue at point as far as we are concerned is to satisfy ourselves that the Executive Board made its decision with all necessary, available and accurate information before it.
28. For the sake of clarity we asked for an officer summary of the Coroners inquest report and all legal advice in terms of the Council's liability including Counsel's advice. We believe the clearest explanation of the legal advice can be found in Appendix 5 of the May 2007 Executive report. This properly summarised Counsel's advice. We appended this advice in full.
29. We have also seen copies of the risk assessments for Wharfemeadows although we concede that we are not competent as a Scrutiny Board to professionally comment on these.
30. On all accounts faced with the legal advice and the evidence from the risk assessments, the Executive Board made the decision it did in all good faith with all available and appropriate information before it.

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31. We do not therefore concur with WAG's proposition that the Executive Board was somehow misled into making this decision either through inaccurate legal advice or bogus threats of potential manslaughter charges and non recommendations from the Coroner.
32. Having said that there does remain two areas of concern which we would wish to comment on. The first is that of consultation and the manner in which this whole issue has been handled. The second relates to transparency of decision making.
33. With regards to consultation, we have received written evidence from Councillor Jim Spencer, Leader of Otley Town Council and from Greg Mulholland MP for Leeds North West. Both submissions clearly show a level of anger over how this matter has been handled. The Chair has also met with the Leader of Otley Town Council.
34. Councillor Spencer talks of "shock and surprise of the Town Council" to find that the City Council had plans to "radically alter the look, aesthetics and impact of the park...and the City Council had not made contact with the Town Hall to consult or discuss the serious issues".
35. Councillor Spencer states that the first the Town Council knew of any proposals to fence of the river was when he read an article in the 28<sup>th</sup> December 2006 edition of the Wharfedale & Airedale Observer. The Town Council was understandably angered about the lack of consultation.
36. Councillor Spencer states that the first official contact he received on the matter was 7<sup>th</sup> February 2007. This is two days before the Executive Board meeting of 9<sup>th</sup> February 2007 and after the Executive Board papers were in the public domain.
37. Councillor Spencer goes on to say that it was not until 10<sup>th</sup> May 2007 that a public meeting on the City Council's decision was held. This was despite the growing anger within Otley on the lack of consultation.
38. Councillor Spencer told us that at this public meeting passions were running very high. It is his view that as a consultation meeting it was a "waste of time" and showed a complete "lack of interest of the City in the opinion of the Town Council and its community and also the strength of the feeling of the community".
39. A similar view was also expressed by Greg Mulholland MP, who has complained of a lack of

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consultation with the people of Otley and Otley Town Council both *before* the City Council took its original decision and after. Mr Mulholland claims that the consultation was neither full nor proper nor was it genuine. By way of evidence for this view point Mr Mulholland quoted extracts from correspondence between Councillor Spencer and senior City Council Councillors.

40. In his letter dated 10<sup>th</sup> May 2007 to Councillor Jim Spencer, Councillor Andrew Carter states, “we have no intention of making a decision on the proposals for Wharfemeadows at the Executive Board meeting next week (16<sup>th</sup> May 2007). In actual fact, a decision was taken to go ahead with part of the scheme following that meeting.
41. Councillor Mark Harris in a letter to Councillor Jim Spencer on 17<sup>th</sup> May 2007 states, “At the Executive Board yesterday, the Leader of Council announced that we would continue the immediate fencing of the river adjacent to the weir and the children’s playground”
42. That to us confirms that a decision was made during a period when other consultation was supposed to be taking place.
43. Councillor Harris’s letter of 17<sup>th</sup> May 2007 also states “Everything else is still the subject of consultation with the people of Otley”.
44. We noted that further consultation did take place between 8<sup>th</sup> to 11<sup>th</sup> June in the form of exhibitions prior to the final decision taken at the Executive Board meeting on 13<sup>th</sup> June 2007.
45. It is our view that more could have been done and sooner to inform the residents of Leeds and of Otley, in particular, of the City Council’s intentions
46. We have been presented with little evidence that there was a concerted effort to win over ‘hearts and minds’ on this issue prior to February 2007. This is evidenced by the fact that Otley Town Council heard of the City council’s proposals via the local media in December 2006.
47. It is clear that in the minds of Otley Town Council, the City Council has totally disregarded not just its views on the fence but also its legitimate right to be consulted in a timely and appropriate manner - which is perhaps more worrying.
48. It is Councillor Spencer’s view that given the content of the final fencing scheme many of the initial worries expressed by the town have now been addressed.

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However these could have been resolved prior to the original February 2007 Executive Board decision had early dialogue taken place. Instead a situation was allowed to develop and gain a momentum all of its own resulting in frustration and mistrust.

49. We would draw the Executive Board's attention to the '*Charter between Leeds City Council and the Parish and Town Councils within the administrative area of Leeds City Council*', particularly Section Three – *Working in Partnership*. This was agreed by the Executive Board in October 2006.
50. Section 3.4 of this Charter states; "*Consultation will be used to involve local councils in decisions of the City Council that affect local communities. Consultation between the partners of this Charter is a two-way process, which can only be effective where there is a sense of partnership and mutual trust. Consultation will not be used as a form of advance warning or of public relations*". We believe that the Council has fallen short on this undertaking.
51. The Charter also states that, "*Sometimes it will be necessary for the City Council to take decisions based on considerations which extend beyond an individual community. In these cases the*

*decisions may not reflect the local view, even though suggestions and opinions will have been considered.* (paragraph 3.7)

52. We fully acknowledge that this will be the case on occasions. As such we have concerns regarding the use of the phrase 'consultation' throughout the Council's dealing with the public on this matter. It would appear from the legal advice given that in a situation where the safety of the public is the overriding issue the City Council has a duty to act rather than consult. Therefore any "consultation" must be limited.
53. Furthermore, on those limited occasions where discussions did take place there appears to have been some degree of false hope given that "consultation" meant an opportunity to amend the Executive Board decision. Similarly we do not believe that some of the statements made by some Executive Board Members in correspondence shown us, to be helpful. In our mind these statements perpetuated a notion that consultation meant a possible influence over the final decision. This was never the case.
54. Consultation at best was about the type of fence to be erected and to a certain degree the areas to be fenced. Indeed consideration was given to an

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alternative fence line running along the main park path from Bridge Street to Farnley Lane and locking the park in times of spate or flood. We were advised that on evaluation of the risk assessment this did not reduce the potential hazard and risk rating of children and young people slipping/tripping from the embankment wall top into the river. In addition it was the view of officers that predicting flood and spate situations was difficult because the river has substantial variances in flow and height. Of concern also was the fact that there are many entrances to the park and resources may not be available at the right time to implement physical actions on the ground.

55. However it remained that the decision to implement the results of the risk assessment was never up for debate. This should have been clear at the outset and more effort spent on giving proper reason for the decision. Again early discussions with the Town Council might have avoided the tensions which arose in the community.
56. The overriding lesson coming out of this is the need to ensure that the spirit of the agreed Charter is adhered to. There will be other issues in the future facing the City and Town and Parish Council's

and there must not be a repeat of this ill feeling.

## Recommendation 1

That the Charter between Leeds City Council and the Parish and Town Councils within the administrative area of Leeds City Council', particularly Section Three – Working in Partnership, is strictly adhered to.

Section Three states "*Consultation will be used to involve local councils in decisions of the City Council that affect local communities. Consultation between the partners of this Charter is a two-way process, which can only be effective where there is a sense of partnership and mutual trust.*"

57. The second area of concern was the initial decision by officers not to make public the full legal advice, including Counsel's opinion on this matter.
58. It is our view that the core driver of the Executive Board decision was the Council's legal duty of care once in receipt of a risk assessment and legal advice from officers. It is our view that, in the spirit of open and transparent decision making, this legal advice should have been in the public domain at an early stage.
59. We are pleased therefore that the Chief Executive has reviewed this and has agreed that Counsel's

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preliminary advice and chronology of events can now be made public.

60. However we would recommend that as a matter of course all legal advice should be in the public domain and withheld only under exceptional circumstances.

## Recommendation 2

That all legal advice obtained by the Council is publicly available save in circumstances to be determined by the Council's Monitoring Officer. The reasons for any non public disclosure should be made clear by the Monitoring Officer.

61. We would also wish to comment on the recording of legal advice. When we requested to have sight of Counsel's written opinion and our own solicitors instruction, we were initially informed that no such written advice existed. This would seem to have arisen due to a misunderstanding that what was being requested was any formal written concluded opinion arising from the initial oral advice given by Counsel in conference with leading elected members. This turned out not to be the case and subsequently written preliminary or informal advice was received from Counsel and written

instructions were given by Leeds City Council solicitors. We have been offered an explanation as to how this misunderstanding occurred and in turn we have expressed our frustrations of this experience at the highest level.

62. Whilst not integral to our main findings we believe a future occurrence of this would be avoided if, as a matter of practice, requests for Counsel's advice are made in written form save in exceptional and urgent circumstances.

## Recommendation 3

That all requests for Counsel's advice are made in written form save in exceptional and urgent circumstances.

63. Finally we would like to make a general observation about the role of Scrutiny in the Council's decision making process. We are of the view that this is one instance where 'pre Scrutiny' of a decision would have been helpful and given the Executive Board the opportunity to test opinion.
64. We acknowledge that the onus to identify decisions that would benefit from such 'pre scrutiny' does not rest solely with the

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Executive and is as much the responsibility of individual Scrutiny Boards. We therefore recommend that both the Executive and Scrutiny Boards work in partnership to identify those future decisions where Scrutiny input prior to the decision being made can add value to the overall process and the decision made.

## Recommendation 4

That the Executive Board and Scrutiny Boards work in partnership to identify future decisions where Scrutiny input prior to the decision being made can add value to the overall process and the decision made.

***Please Note:** Further to this report being agreed by the Scrutiny Board (Culture and Leisure) on 14 January 2008 and the declaration made at that meeting, a minority report has been produced by Councillor Atha. This is attached at Appendix 2.*

# Evidence



## Monitoring arrangements

Standard arrangements for monitoring the outcome of the Board's recommendations will apply.

The decision-makers to whom the recommendations are addressed will be asked to submit a formal response to the recommendations, including an action plan and timetable, normally within two months.

Following this the Scrutiny Board will determine any further detailed monitoring, over and above the standard quarterly monitoring of all scrutiny recommendations.

## Reports and Publications Submitted

- 1) RoSPA Report: Water Safety Audit – September 2005
- 2) RoSPA Report: Generic Water Safety Assessment – December 2006
- 3) RoSPA Report: Generic Water Safety Assessment (amended) – December 2006
- 4) Executive Board Report (Item 13) and Minutes – 9 February 2007
- 5) Executive Board Report (Item 19) and Minutes – 13 June 2007
- 6) Executive Board Report (Item 7) and Minutes – 16 May 2007
- 7) Executive Board Report (Item 20) and Minutes – 22 August 2007
- 8) Full Council: verbatim minutes – 21 February 2007
- 9) Full Council: Wharfemeadows Action Group (WAG) Deputation – 18 April 2007
- 10) Full Council: verbatim minutes – 20 June 2007
- 11) Wharfemeadows Action Group briefing paper – July 2007
- 12) Wharfemeadows Action Group supplementary evidence – August 2007
- 13) Wharfemeadows Action Group further evidence – November 2007
- 14) Wharfemeadows fencing proposals site plan – 19 January 2007
- 15) WAG's Public Address to the Culture & Leisure Scrutiny Board – 16 July 2007
- 16) Notes arising from inquests (Head of Community Services and Litigation) – 22 June 2006
- 17) Wharfemeadows Park Fencing – Chronology (September 2007)
- 18) Note from Head of Community Services and Litigation (Leeds City Council) – 6 September 2007
- 19) Charter between Leeds City Council and Parish and Town Councils – revised October 2007
- 20) Counsel's Advice and Chronology of Events – 3 October 2007
- 21) Note from Head of Community Services and Litigation (Leeds City Council) on Counsel's Advice and Chronology of Events – 4 November 2007
- 22) Proposed draft findings/ recommendations from Cllr. Bernard Atha – 20 November 2007

# Evidence



## Reports and Publications Submitted (continued)

23) Correspondence from:

- Coroner's Office – 3 July 2006;
- Chief Recreation Officer (Leeds City Council) – 5 July 2006;
- Leeds City Council's Assistant Chief Executive (Corporate Governance) – 17 April 2007;
- WAG/ Cllr. Andrew Carter (e-mail) – 25 April 2007;
- WAG – 2 May 2007;
- Ian Andrew (e-mail) – 10 June 2007
- Otley Town Council – 12 July 2007;
- Greg Mulholland MP – 13 July 2007;
- WAG (e-mail)– 25 August 2007;
- WAG – 11 September 2007;
- Head of Community Services and Litigation (e-mail) – 29 September 2007
- Head of Community Services and Litigation (Leeds City Council) / Assistant Chief Executive (Corporate Governance) (e-mail) – 5 October 2007;
- WAG (e-mail)– 5 November 2007;
- Otley Town Council (e-mail) – 23 November 2007;
- Greg Mulholland MP – 23 November 2007;
- Cllr. Ted Hanley – 30 November 2007;
- Cllr. Ted Hanley – 4 December 2007;
- Greg Mulholland MP (e-mail) – 5 December 2007;
- Cllr. Ted Hanley – 12 December 2007.

# Evidence



## Witnesses Heard

- Wharfemeadows Action Group (WAG)
- Cllr. John Procter (Leeds City Council Executive Board Member)
- Cllr. Jim Spencer (Leader of Otley Town Council)
- Peter Cornall, Head of Water and Leisure Safety, ROSPA
- Paul Rogerson, Chief Executive – Leeds City Council
- Denise Preston, Chief Recreation Officer – Leeds City Council
- Ian Spafford, Head of Community Services and Litigation – Leeds City Council
- Chris Ingham, Human Resources Manager (Safety, Well-being and Attendance) – Leeds City Council
- Sean Flesher, Parks and Countryside Principal Area Manager (West) – Leeds City Council

## Dates of Scrutiny

- 16 July 2007 – Culture & Leisure Scrutiny Board
- 15 August 2007 – working group meeting
- 22 August 2007 – working group site visit (Wharfemeadows Park)
- 29 August 2007 – working group meeting
- 10 September 2007 – Culture & Leisure Scrutiny Board
- 1 October 2007 – working group meeting
- 8 October 2007 – Culture & Leisure Scrutiny Board
- 5 November 2007 – working group meeting
- 12 November 2007 – Culture & Leisure Scrutiny Board
- 3 December 2007 – meeting between Leader of Otley Town Council and Chair of Culture & Leisure Scrutiny Board
- 10 December 2007 – Culture & Leisure Scrutiny Board
- 19 December 2007 – working group meeting

# Appendix 1



## EXECUTIVE BOARD – MAY 2007:

### Report on River Safety Management at Wharfemeadows Park, Manor Park And Tittybottle Park, Otley (Appendix 5)

#### Relevant legislation

The Council's basic legal duties are set out in the Occupiers' Liability Acts 1957 and 1984. The earlier Act deals with "visitors" and the later Act deals with "trespassers".

The Occupiers' Liability Act 1957 provides:-

- "(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he was invited or permitted by the occupier to be there.
- (3) The circumstances relevant for the present purpose include the degree of care and of want of care which ordinarily would be looked for in such a visitor, so that (for example) in proper cases –
- a) an occupier must be prepared for children to be less careful than adults: and,
  - b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
- (4) In determining whether the occupier of the premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) –
- a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
  - b) where damage is caused to a visitor by a danger due to the faulty execution of any work or construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
- (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question

# Appendix 1



## EXECUTIVE BOARD – MAY 2007:

### Report on River Safety Management at Wharfemeadows Park, Manor Park And Tittybottle Park, Otley (Appendix 5)

whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another”.

The Occupiers Liability Act 1984 provides:

- “1(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in the sub-section (1) above. If –
- a) he is aware of the danger or has reasonable grounds to believe that it exists;
  - b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned (or that he may come into the vicinity of the danger) (in either case, whether he has lawful authority for being in that vicinity or not); and
  - c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
- (4) Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.
- (5) Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged, by taking such steps as are reasonable in the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.
- (6) No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question of whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).”

#### Legal position regarding corporate killing

There has also been some public speculation that the Council position is that it must fence off the relevant part of the river because of fears by the Council (and/or its members and officers) of prosecution being brought for gross negligence manslaughter (sometimes known as corporate killing). Although new legal provisions are in the pipeline in relation to this area, the current law is that the offence is committed where there is a breach of duty which causes the death and the breach is so “gross” as to be properly categorised as being criminal. Individuals may be liable to prosecution where their actions are directly connected with and cause

# Appendix 1



## EXECUTIVE BOARD – MAY 2007:

### Report on River Safety Management at Wharfemeadows Park, Manor Park And Tittybottle Park, Otley (Appendix 5)

the breach. This can and has included senior Council officials (as the well known Barrow-in-Furness case illustrated). This could also include conceivably (but remotely) elected members who represent the “controlling mind” of the Council i.e. the Executive Board. However if the Executive Board were to fail to act on clear advice of officers regarding preventative measures to ensure the safety of the public and that failure to implement such measures was causative of their death, then arguably the elected members could face prosecution for manslaughter. This prospect would necessarily depend on the precise circumstances of the causative breach, the link between that breach and the actions of the Executive Board; and whether the law was still as it presently is or whether the new proposed Bill was law. In reality however it is not a situation that should ever be allowed to become even a remote possibility. The new Corporate Killing Bill focuses on the organisation and the way in which it manages and organises its activities. If the way it does so causes a person’s death and the breach of duty is gross then the organisation and/or individual will be liable to prosecution for manslaughter. This clearly will not happen if the Council and its members and officers act within the law as set out above and to a large extent is irrelevant as a consideration.

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### Finding 1

It is hard to believe that a senior officer could not remember even after six months interval if he had prepared a written brief for the QC or even if the QC had provided any written advice.

On 6<sup>th</sup> September 2007 the officer wrote in a Note to the Scrutiny Board members: "He (Counsel) did not give any written advice and was not asked to do so". The officer later said: "Even if there had been a written opinion that would have been legally privileged" words which reinforce the statement that there was no written Counsel's opinion/advice.

On 28<sup>th</sup> September the chairman again asked the officer if there were written instructions to Counsel and a note or report of the Counsel's advice. The officer replied that there were no such written reports according to the evidence of the chairman. The officer said he could not remember "off the top of his head" whether he had prepared formal instructions. He further said that there was no note of the meeting endorsed by Counsel. On Saturday 29<sup>th</sup> September in an e mail to the chair the officer said he remembered "that I did prepare written instructions and asked Counsel to advise in conference". He conceded further in the same e-mail that Counsel did provide further advice and hence to that effect there is something in writing from Counsel"

The brief for Counsel which he said he could not remember preparing consisted of six sheets of A4 paper and the written briefs he termed "something in writing" which he had said did not exist and could not remember consisted of seven pages dated 21<sup>st</sup> March 2007 and sixteen pages dated 28<sup>th</sup> March 2007.

The officer attributed the confusion to not being clear as to what Scrutiny required and it appeared that the request for this information had not been transmitted in the clear and precise manner Scrutiny had required.

Experiences like this can cause acute concern that Scrutiny could be misled, that requests for information are not treated with the respect they require and that officers could be wrongfully thought to be not acting at the level of probity to which we have become accustomed .

### Recommendation

That requests by Scrutiny are made precisely, as they were in this case in writing, and followed precisely so that specifically worded requests are not amended or translated and that this particular matter and the concern it has aroused be drawn to the attention of the Chief Executive Officer.

That Counsel's Opinions and advice should be sought on the basis that these are paid for by the public and should be accessible to the public except in those cases where ethics, personal or commercial or financial sensitivities or the needs of the effective dispensation of justice require secrecy or confidentiality. The presumption should be – "open to the public".

The reasons for non disclosure should be made clear by the monitoring officer who should deal on a case by case basis with requests for public access or release.

### Finding 2

Cllr Harris's public statement suggested that the matter had not been handled effectively. In areas of great sensitivity particularly in the outer areas of the 120 square

## MINORITY REPORT SUBMITTED BY COUNCILLOR ATHA

miles of the City of Leeds where communities feel distanced from the Centre greater care should be exercised in ensuring that there is full and open consultation over a period which is commensurate with the deemed importance locally of the issue in question.

The fact that there has been a major petition, a major protest group established, a constant blizzard of e mails and letters to the press and from the local MP indicate that the consultation carried out on this occasion was quite inadequate to the requirements of the particular case.

### Recommendation

Council Departments must always consult with residents in localities specifically affected by their plans in an open and timely manner over a period sufficiently extended to ensure that the consultation is genuine.

### Finding 3

One can sympathise with officers who are concerned that they might be made scapegoats for accidents or incidents which may occur as a result of their actions or inactions. In this case from whatever source the notion arose officers could have been led to believe and Councillors were led to believe that the responsibility for a death or accident might fall on their shoulder if such an eventuality occurred. The same applies to Executive Board Members when they are told or are led to believe that they could face charges of corporate homicide.

It may be that if their attention had been properly drawn to the dicta of the highest leading legal authorities namely the Law Lords in the House of Lords in the case of Tomlinson instead of being directed to the Court of Appeal decision the policy which emerged would not have needed to be so expensive and extensive.

The following are sample dicta in the Tomlinson Case which could have informed the legal opinion and go to the root of the duty of care owed; namely "such care as in all the circumstances of the case is reasonable".

**Lord Scott:** "Why should the Council be discouraged by the law of tort from providing facilities for young men and women to enjoy themselves in this way. Of course there is some risk of accidents arising out of the joie de vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone."

**Lord Hobhouse** referring to the use of the lake in the case in question:

"It is necessary to put these few incidents in context. The park had been open to the public since 1982. Some 160,000 people visited the park in a year. Upto 200 would be bathing in the mere on a fine day. Yet the number of incidents involving the mere were so few. It is a fallacy to say that because drowning is a serious matter that there is a serious risk of drowning. In truth the risk of drowning was very low indeed."

**Lord Hoffman** at section 13 of his judgement pointed out that the duty to a trespasser under the 1984 Act was a lesser duty to a visitor under the 1957 Act." I can see no difference between a person who comes on land without permission or invitation and one who having come on land with permission does something which he has not been given permission to do".

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At S34 he said :” The Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury the Council was under a duty to do what was necessary to prevent it. But this is in my opinion an oversimplification. Even in the case of the duty owed to a lawful visitor under the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to “such care as in all the circumstances of the case is reasonable” depend on upon assessing, as in the case of common law negligence, not only the likelihood of that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measure. These factors have to be balanced against each other.”

At s 37 He said referring to previous cases: “And it may lead to the conclusion that even though injury is foreseeable, as it was in Bolton v Stone ( case of a cricket ball being hit out of the field into someone’s garden) it is still in the circumstances reasonable to do nothing about it.”

At s41 “I do not however regard the financial cost as a significant item in the balancing exercise which the court has to undertake. There are two other related considerations which are far more important. The first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the Council should be entitled to allow people the full capacity to decide whether to take the risk”.

At s45 “I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake on the land. Of course the landowner may for his own reasons wish to prohibit such activities. But the law does not require him to do so.”

At s 46 “I think there is an important question of freedom at stake. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. A duty to protect against obvious risk or self inflicted harm only exists in cases in which there is no genuine informed choice as in the case of employees, or some lack of capacity such as the inability of children to recognise danger”.

### **Recommendation**

Assurances to the staff of the Council’s support to prevent any unfair scapegoating should be made public.

Robust detailed and sound legal advice should be obtained and recorded for their protection.

### **Finding 4.**

This case indicates the weakness of the Scrutiny system in which a scrutiny exercise is being conducted after the issues under Scrutiny have been settled. A case of considering the possibility of closing the stable doors long after the horse has gone.

### **Recommendation**

In cases where there is a period of extensive consultation on a matter which might be contentious or where there is that likelihood the matter should be referred to Scrutiny before a decision is made.

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### Finding 5.

A substantial responsibility for health and safety falls on the shoulders of the Leisure Services staff in nearly all the aspects of their work in parks, events sports etc. In particular the case of safety of individuals relative to water features is particularly taxing.

### Recommendation

A water safety policy should be devised which accepts where there is water there will be accidents including fatalities and that it is impossible to prevent such sad events occurring. In devising the safety strategy the following inter alia should be considered and incorporated: visual amenity, effect on the environment, statistics of accidents and fatalities, obvious danger of the water, public access, the use of adequate signage, sense of proportion, alternative uses of resources and above all a full and detailed legal explanation of the Council's obligations under the law.

The Water Safety policy of the Leisure Services be referred to members for their comments.

### Finding 6

The decision to fence was taken initially at the February 2007 Board based on a fundamentally wrong interpretation of the law. This interpretation was not corrected. It is reported that Board members were warned of dangers of charges of corporate homicide and a statement to this effect was made in Council. For whatever reason Councillors Proctor and Downes both referred to the danger of their being made liable for someone's death on a corporate manslaughter charge, and attributed their decision to fence on this fear. This would appear to be an entirely false understanding of the law as it is and will be if the current Bill is passed.

### Recommendation

That Legal services review the advice given in this and future cases to ensure up-to-date advice is given though it be noted that the legal officer concerned has denied making any statement which could lead to the conclusion that corporate homicide was a realistic possibility which one is reasonably constrained to believe to be the case.

### Finding 7

WAG, the local pressure group, complain with validity that the hearings they have attended have been heavily weighted against the public voice. "We have not been invited to be present when certain officers and perhaps other witnesses have been questioned by the Scrutiny Board Working Party. When we made our initial submission to the Board, Councillor Procter and the Chief Recreation Officer were given immediate rights of reply and made assertions that have not been challenged subsequently as far as we know. This is not a level playing field"

There is no doubt that many people in Otley feel that the decision making process was flawed, that the views of the residents of Otley have been ignored, that the Council Officers and Executive Board members have had an undue influence on proceedings and that Scrutiny has not provided the kind of scrutiny for which they hoped.

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Whether these views are justified is a matter of opinion. That they are held is a cause for concern as such wide spread views damage the good relations which should exist between the residents and the officer and executive cadre who are seen rightly or wrongly by some to be arrogant and dismissive of the views of the local community.

### Finding 8

The following are excerpts from the verbatim report of Council held in February 2007:

#### Councillor Downes (Verbatim Report)

“The recommendation from ROSPA, the legal advice taken- and I sought to check this- was that if the Council did not accept the recommendations from ROSPA it would mean that senior Councillors and senior officers should – this is in the legal advice given – if there was a tragic accident in the River Wharfe, if the recommendations had not been followed then those people who had taken the decision not to implement the recommendations could be charged with corporate manslaughter under the laws of this land. The result would mean that they could end up in prison”.

#### Cllr Procter (Verbatim Report)

“There were many people who were prepared to say very bold things at Exec Board. When they realised that actually suddenly it was the members of the Exec Board that could be in the Coroner’s Court facing action, facing corporate manslaughter charges in the future, suddenly some voted in favour of it and I can understand why. Because it is a very tricky issue.”

Councillor Downes described the proposals as crazy and such as no one in Otley supported them yet even he was clearly and honestly believing that the threat of corporate manslaughter charges was real.

Councillor Procter spent even more time outlining this danger, the above quote being a fragment of his speech stressing the threat was real.

The lawyer involved in the case denies any responsibility for such fears and does not know the source. It could be based on the ROSPA report which totally misrepresented the law as outlined in Thompson. It could be that it was not a real threat in the minds of those desiring to justify the proposals who were using the alleged threat as a device to excuse or justify the fencing.

No evidence has been adduced of any legal advice which said there was such a real threat. Only Councillor Procter and Councillor Downes could explain the cause of their concerns.

### Recommendation

That in future where this danger is discussed and is likely to influence Executive Board decisions appropriate advice be sought from lawyers eminent in this field of the law who have briefed themselves on the current legal situation.