1. Implications from a Property Law perspective

1.1 However, even if by granting a lease the Council could absolve itself of its duties as an occupier, this would not mean necessarily that a decision to do so would be within the Council's powers. Under sec 123(1) of the Local Government Act 1972, a local authority has the power to dispose of land held by them 'in any manner they wish'. Under sec 123(2A) this is qualified by the requirement to advertise their intention to dispose of land consisting or forming part of an open space, and to 'consider any objections to the proposed disposal which may be made to them'. Decisions to dispose of land may not always be treated as the exercise of a public law function. However, in R (on the application of Isle Lodge Amenity Committee) v Kettering BC [2002] the court held it was sufficient to make the matter a public matter that land had been given to the authority for use as a public open space. Therefore, the claimants had a legitimate expectation that the authority would reach its decision rationally and fairly. Given that significant parts of the Park were conveyed to the Council for open space uses, or in trust for those uses, and that any lease to the Otley Town Council would not be a disposal of surplus property which could then be put to other (private) purposes, but would be to another public body on terms requiring the continued use of the premises for recreational purposes, it seems certain that this would make any disposal a public matter, and so subject to the usual public law requirements.

1.2 Where there is to be a continuing public use of property, it is clear that the implications of a disposal for those affected by it, will be a relevant factor in determining whether a decision to dispose is ultra vires. In R v Tameside BC ex parte Governors of Audenshaw High School [1990], a sale and leaseback scheme was held to be ultra vires on the ground, inter alia, that the Council had failed to consider the educational implications of the scheme for the pupils..

1.3 If the Council, having considered a proper risk assessment taking everything into account, and having decided what actions were appropriate to discharge its legal duty in this matter, then purported to dispose on terms which did not secure that the Town Council, (as an occupier under the same legal duty), itself carried out those actions, that would seem to be irrational and so ultra vires.

1.4 Even if that conclusion is incorrect, it is necessary to consider whether such a disposal would in fact absolve the Council of legal liability. As mentioned above, if the Council continued to retain some degree of control over the leased premises, for example if the Council controlled access to the premises or continued to have repair obligations, it may still have a sufficient degree of control to retain the duties of an occupier. Furthermore, whilst a landlord owes no general duty of care to the tenant or to third parties, the Council has full knowledge of the potential risks arising from the public use of these premises. Therefore, if the Council did not dispose on terms which required these works to be carried out, or did so, but then failed to enforce those terms against the

Town Council, it would seem inconceivable that a duty of care to Park users would not arise.

1.5 [This may be particularly be the case, given the Council built the Park. It may well be that a common law duty of care would arise in relation to those persons reasonably expected to be affected by the structure of the Park – Adams & Anor v Rhymney Valley DC [1999], where the court accepted there was a common law duty of care, as well as a statutory duty under the Defective Premises Act 1972].

1.6 In the event of an accident, it seems that the actions taken by the Council could also be challenged as a breach of Convention rights. It has been held that the right to life under Article 2 (comprised in schedule1, Human Rights Act 1998) extends to a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction, and this is to be construed in the context of any activity, whether public or not, in which the right to life may be at stake. In Oneryildiz v Turkey [2004], where the ECHR found the Turkish authorities knew or ought to have known that there was a real and immediate risk to persons living near a municipal rubbish tip, 'they consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals….especially as they themselves had set up the site, and authorised its operation, which gave rise to the risk in question'. Consequently, in the knowledge of the immediate risks to Park users, to dispose on terms which did not require the necessary works to be carried out, or to do so, but then not to enforce those terms would seem to be a breach of the positive obligation imposed by Article 2, (and sec 6 Human Rights Act 1998).

1.7 In respect of those parts of the Park held under the Open Spaces Act 1906, it may also be the case that irrespective of the grant of a lease, the Council will be under a continuing duty under sec 10 of that Act to maintain and keep the open space… in a good and decent state'.

1.8 If the Council sought to enter into a management agreement with the Town Council, the Council would have to consider whether the terms of such an agreement were consistent with its duties under sec 10 of the 1906 Act, and with the power to manage land in sec 120(1)(b) of the Local Government Act 1972 for 'the benefit, improvement or development of their area' – R v Sefton MBC, ex p. British Association of Shooting and Conservation Ltd [1998], and R v Somerset County Council, ex p. Fewings [1995]. It has been held that decisions of this nature have to be based on an objective judgment about what would be conducive to the better management of the estate. Again it would seem in relation to either function that a decision the effect of which was that the immediate risks to public enjoyment of the Park were addressed less effectively than if the Council had undertaken the necessary works itself, without any counterbalancing benefit to the management of the Park, would be difficult to reconcile with these duties.

2. Implications from a Health and Safety Law Perspective

2.1 The remarks above are compounded when the matter is looked at from this perspective.

2.2 Leading Counsel advises in terms of the health and safety implications the proposed transfer would solve nothing. Leeds City Council will almost certainly still remain liable to discharge the primary statutory duties which would arise out of the continued operation and use of the site.

2.3 Upon the understanding that Leeds City Council staff continue to operate the site, the primary duties of care which are owed by all employers not only to employees but also to other persons affected by their operation under the Health and Safety at Work, etc Act 1974 would remain and they would be "non-delegable". In other words the City Council would have handed over the site but still have the legal burden of ensuring the safety of staff and visitors alike (Wilsons and Clyde Coal Company Limited v English (1938) AC 57 and Kondis v State Transport Authority (1987) AC 906).

2.4 In addition to its duties as an "employer" the City Council would probably also owe duties as a "occupier" too depending on what land it is proposed should be transferred to the Town Council and onwhat terms. Whilst such duties as an occupier may be transferred, Otley Town Council would probably not want to take on those areas which created the most hazards. As has already been established in the view of officers there are already significant hazards on site (with which Counsel concurs from a legal perspective) and Otley Town Council would make itself liable for those too if it became a joint occupier with the City Council. The legal position in this regard arises from the Occupiers Liability Acts 1957 and 1984 under which the Council's legal responsibility is well analysed in the previous report to the Executive Board.

2.5 Whilst exemption clauses and warning signs can be affected in negating the duties of an occupier in certain circumstances, the Board's attention is drawn to the analysis of the decision of the House of Lords in the previous report to the Executive Board regarding Tomlinson v Congleton Borough Council (2004) AC 46 and the duties which arise in respect of dangers "due to the state of the premises" under the 1984 Act. Here there are clearly identified dangers which arise out of the "state of the premises" and they must be addressed before any transfer could be properly considered (See Keown v Coventry NHS Trust (2006) 1WLR 953.

2.6 The reality is that a proposal re.lease/management agreement is unlikely to lead to a solution of the problem which currently faces the City Council as advised by Counsel with regard to its legal responsibilities and which would certainly face both members and officers of the City Council in the event of a fatality or prosecution in the future (and Counsel points out that the HSE may be minded to observe what action is being taken by the City Council having regard to the history of the other cases involving the Council in relation to stretches of open water eg the Stainforth Beck/Royds School fatality in the Yorkshire Dales).