

SLOUGH BOROUGH COUNCIL

REPORT TO: Overview & Scrutiny Committee **DATE:** 17th September 2008

CONTACT OFFICER: Steven Quayle, Borough Secretary and Solicitor
(For all Enquiries) (01753) 875004

WARDS: Upton/All

PORTFOLIO: Resources

PART I **FOR CONSIDERATION & COMMENT**

PROPOSED APPROPRIATION OF LAND AT UPTON COURT PARK

1. Purpose of Report

- 1.1 The purpose of this report is for the Committee to comment on the following issues prior to consideration of the matter by Cabinet on 24th September:-
- (a) Members to consider the substantial number of objections received to the proposed appropriation of the Council's land (the Access Land) from open space to planning purposes shown hatched black on **Appendix A** to this report.
 - (b) Whether or not the Access Land is no longer required for open space purposes as part of Upton Court Park and if not whether it should be appropriated to planning purposes.

2. Recommendations/Proposed Action

- 2.1 The Committee is requested to consider the objections raised in the context of the factual, planning and legal background set out in this report and pass any comments thereon to the Cabinet.

3. Key Priorities – Taking Pride in Slough and Making a Difference to Communities and Our Environment

Priority 5 – Maintaining Excellent Governance within the Council to ensure it is efficient, effective and economic in everything it does

- 5.1 Improve financial and asset planning, monitoring and stewardship.

4. Other Implications

(a) Financial

- 4.1 The appropriation of the Access Land to planning purposes would not in itself have significant financial implications as it is a transfer of the land from one statutory purpose i.e. open space to another i.e. planning.

4.2 However, if the Access Land is appropriated for planning purposes to facilitate residential development on land known as the “Castleview Site” then a significant capital receipt could be generated to fund part of the Council’s Capital Programme. However no decision has been taken to dispose of the Access Land to the developers but if this were proposed this would be the subject of a separate report to the Cabinet. There is nothing significant to report since the Cabinet meeting held on 27th May 2008.

(b) Human Rights Act and Other Legal Implications

4.3 A local authority as a land owner may hold its land for a variety of statutory purposes e.g. housing, planning or open space. Section 122 of the Local Government Act 1972 (“the 1972 Act”) permits a local authority to appropriate (transfer) its land from one statutory purpose to another where it concludes that the land is no longer required for the former purpose. However, where the land is currently used as open space a local authority cannot appropriate it for another purpose until its intention has been publicised in a notice and any objections received to the proposed appropriation have been considered. The relevant statutory provisions are contained in **Appendix B** to this report.

4.4 A local authority, acting in good faith, is the sole judge of the question whether or not any land is still required for the purpose for which it is held immediately before the appropriation and its decision cannot be challenged in the absence of bad faith.

4.5 Thus the Cabinet must consider all of the factual, legal and planning circumstances and in that context decide whether the Access Land which remains designated as Green Belt land is no longer required as open space within Upton Court Park. The Access Land represents 1.03% of Upton Court Park as it is today.

5. Background/Supporting Information

(a) Existing Uses of Access Land

5.1 Upton Court Park (which includes the Access Land) was purchased by the Council from a Mr Frederick Cornish in 1935. It is Green Belt land. The Conveyance contained several restrictive covenants. Two of those covenants provide in summary as follows:-

(a) That Upton Court Park (which will include the Access Land) should not be used otherwise than for the provision of public walks, paths, pleasure grounds or playing fields, including the provision of pavilions, other buildings and conveniences.

(b) Nothing should be done on the park that may be or become a nuisance or annoyance to Frederick Cornish.

The full text of the restrictive covenants referred to above are attached at **Appendix C**.

5.2 As will be seen from **Appendix C** the land is to not be used otherwise than for “*the provision of public walks parks pleasure grounds or playing fields under the Public Health Acts or any enactments amending those Acts*”. If the Access Land is held

for pleasure ground purposes under Section 164 of the Public Health Act 1875 and as a consequence of that is held in trust for the enjoyment of the public, then any appropriation of the land from open space to planning purposes will free the land from such trust (see Section 122 [2B] of the 1972 Act in **Appendix B**). Meanwhile it is anticipated that the developers' use of the Access Land in accordance with the planning permission would effectively override the restrictive covenants (subject to a right of compensation) following the Planning Bill becoming law in the next few months and introducing an amendment to Section 237 of the Town and Country Planning act 1990.

- 5.3 Much of the Access Land (but not all) has been laid out as a road serving the Slough Rugby Club, an owl sanctuary and an electricity service station. It is understood that this road has been so used for many years so that the users may have acquired rights of access along the road.
 - 5.4 It is evident that the use of the road does not directly relate to the purposes of the restrictive covenant i.e. the provision of the public walks, parks, etc and whilst its use for the benefit of the rugby club and more recently the cricket and hockey club might be said to be ancillary to the use of the park it is plain that access for a sub-station and owl sanctuary do not come within the terms of the covenant even indirectly.
 - 5.5 It should be noted that the Council would be unable to dig up the road and use it if the rights which appear to have accrued to the owl sanctuary, the electricity sub-station and the rugby club were substantiated.. The use of the road does indicate that as a matter of fact the land upon which the road is built has not been required for any of the express purposes of Upton Court Park itself for some time.
 - 5.6 Apart from the first part of the road which leads to one of the car parks situated in Upton Court Park the remainder and majority of the road is not used for accessing any of the playing field at Upton Court Park. Indeed, bollards are in place along the road which prevent persons parking to the side off the road to access the playing fields. The changing rooms for the playing fields are themselves some distance away and served by a different car park.
 - 5.7 The remainder of the Access Land comprises a car park (which some users of the park may use), a redundant cycling proficiency test area and grassland.
- (b) The Planning Position
- 5.8 The Local Plan for Slough was adopted in March, 2004 as the development plan for the Borough of Slough after a major public inquiry into all of the proposals. At this public inquiry the developers and local residents had an opportunity of commenting on the proposals being put forward.
 - 5.9 Proposal Site 16 which is the land known as the Castlevue Site was released from the Green Belt and allocated for residential purposes with the preferred access being over the Access Land which is the subject of this report. However as indicated above the Access Land was not released from the Green Belt and continues to have Green Belt status. Whilst the Green Belt status of the Access Land has now been said to be arguably relevant to the decision to which this report relates (see the Order of Mr Justice Collins (See **Appendix F**) it should also be

noted that the principle of residential development on the Castleview Site serviced by a road through the Access Land is well established.

- 5.10 Whilst applications for residential development on the Castleview Site were refused by the Local Planning Authority in 2004/2005 outline planning permission for residential development on the Castleview Site with access through the Access Land was granted by the Secretary of State on appeal subject to a number of conditions. The Green Belt status of the Access Land was known by the Planning Inspector who heard the appeal and extracts from his report and the comments of Mr G Wyld (Head of Planning & Strategic Policy) are shown at **Appendix E**. The planning permission is annexed to this report at **Appendix F**
- 5.11 It should be noted that if the Access Land were disposed of to the developer and the planning permission implemented the developer would have to:-
- (a) provide a minimum of 10% of the housing development site as public open space to replace the open space which will be lost by the construction of the road on the Access Land.(Condition 12)
 - (b) replace any trees lost as part of the construction of the road which will service the proposed residential development. (Condition 10)
 - (c) relocate the existing car park and recycling facilities which form part of the Access Land. (Condition14)

The Statutory Appropriation Process

- 5.12 As a result of the two statutory notices which appeared in the Slough Observer on the 4th and 11th January, 2008 well over 100 residents responded. None of the letters were in favour of appropriating the land from open space to planning purposes.
- 5.13 All of the letters received were placed in the Members' Room on Wednesday, 20th February and this was publicised in the Members' Information Bulletin issued on Friday, 22nd February, 2008.
- 5.14 It would be fair to say that the responses from the local residents were robust and included the following:-
- Development of the Access Land would breach covenants in the 1935 Conveyance.
 - The development of a small part of Upton Court Park would create a precedent for future development.
 - The development would cause disturbance to the local community during and after construction.
 - The additional traffic serving the residential development would be a nuisance and a danger.
 - Loss of open space/affect the use of Upton Court Park.

- The development would be a breach of trust.
- Loss of car parking/cycling facility.
- Flood risk.
- Loss of farm land.
- Residential development would create overlooking, loss of light, overshadowing, visual intrusion, disturbance and smell.
- Loss of trees.
- Loss of view of the Park.
- The proposal is unlawful.
- Devaluation of property.
- Ulterior motives.
- Slough becoming a “concrete jungle”.

5.15 At the meeting of the Cabinet on 10th March, 2008 Members of the then Cabinet considered a proposal to appropriate the Access Land for planning purposes under Section 122 of the 1972 Act on the basis that it was no longer required for its previous purpose i.e. that as open space. The report set out the considerable number of objections raised by the public as a result of the statutory consultation process but in the course of the Cabinet meeting Members were wrongly advised by Officers that the Access Land had been removed from the Green Belt which is not the case. At the meeting the Cabinet decided to appropriate the Access Land for planning purposes. This decision was challenged by way of Judicial Review proceedings on the grounds that erroneous advice was given i.e. that the Access Land was no longer in the Green Belt.

5.16 The advice of John Hobson QC was sought on the prospects of the Claimants being successful in the judicial review proceedings and he advised as follows:-

- (1) The Council could advance the argument that the Green Belt status of the land was irrelevant to the decision to appropriate it under Section 122 of the 1972 Act, on the basis that the only issue under section 122(1) was whether the Access Land was “no longer required for the purposes for which it is held immediately before the appropriation” and/or that any issue of whether residential development on the Green Belt land should be permitted had already been decided by the grant of planning permission.
- (2) If the judicial review proceeded to a substantive hearing, then the Council would probably succeed on the basis of these arguments.

(3) However, there was a real risk that the Claimants would be granted permission to seek judicial review because the threshold for permission is low and more latitude is sometimes given to lay Claimants.

(4) In the circumstances it would be wiser to revoke the previous decision to appropriate and for Cabinet to consider appropriation a second time. This would be much quicker than awaiting the outcome of judicial review proceedings and would minimise further legal costs.

5.17 In the event the Claimants were indeed granted permission by Mr Justice Collins. The terms of the Court order are set out in **Appendix F**.

5.18 On 7th July the Cabinet considered the position with regard to the appropriation and the pending judicial review proceedings and decided:-

5.18.1 to note the issue of Judicial Review proceedings and the advice of John Hobson QC on the likelihood of success.

5.18.2 that, notwithstanding the strong legal position of the Council as set out, to revoke the decision of the Cabinet on 10th March, 2008 to appropriate the Access Land from open space to planning purposes.

5.18.3 to further resolve to give notice of the Council's intention to appropriate the Access Land which forms of part of Upton Court Park from open space to planning purposes under the provisions of Section 122 of the Local Government Act 1972 (as amended) 1972 and to consider any objections to the proposed appropriation at its meeting in September, 2008.

5.19 As a result of the Cabinet decision of 7th July 2008 and its subsequent decision on 23rd July not to delay implementation two further statutory notices were published in the Slough Express and Slough Observer on the 1st and 8th August 2008.

5.20 Once again these notices have generated numerous further objections to the proposed appropriation. Each Cabinet Member has been provided with a folder (**Appendix G**) containing every objection letter/petition received from local residents as a result of both publications of the statutory notices i.e. those in January and those in August 2008 so that they can read in full the residents views. A summary with officer comment has also been provided.

6. Conclusion

6.1 As can be seen there is a wealth of public objection to the proposed appropriation and many of the objections relate to matters which have already been established through the allocation of the Access Land as part of Proposal Site 16 in the Council's own Local Plan for Slough and the planning permission granted on appeal by the Secretary of State in 2006.

6.2 The Cabinet must decide having considered the factual, legal and planning circumstances set out above and the significant number of objections received whether the Access Land is no longer required as part of the open space which

forms Upton Court Park and if so whether it should be appropriated for planning purposes.

7. **Appendices**

- A** Plan of Access Land
- B** Section 122, Local Government Act 1972 (as amended)
- C** Extract from a Conveyance dated 15th May, 1935 between Frederick Cornish (1) and the Urban District of Slough (2).
- D** Extracts from Planning Inspector's report dated 23rd February 2006 and comments of Mr G Wyld
- E** Planning Permission for the Castleview Site
- F** Order of Mr Justice Collins
- G** Bundle of Objection letters/petitions (**TO FOLLOW**).

Steven Quayle
Borough Secretary and Solicitor