

OFFICER RESPONSES TO ISSUES RAISED

1. The pre-decision call-in was conducted in a pre-determined manner

1.1 This is a political comment and a matter for Councillor Anderson.

2. The pre-decision call-in was conducted in an incomplete and superficial manner

2.1 This matter was first considered by the Cabinet at its meeting on 23rd July, 2008 where the following response was given namely:-

“The Chief Executive did not make any comments on the contents of the letter from Mr Dexter Smith. The Director of Law and Corporate Governance referred to the letter and together with the Head of Planning and Strategic Policy dealt with the matters not directly dealt with in the report i.e.

(a) The planning status of the Access Land when the Planning Inspector considered whether or not to grant outline planning permission for residential development.

(b) The accuracy or otherwise of the minutes of the Cabinet meeting held on 27th May, 2008.

As referred to above the Head of Planning and Strategic Policy read out paragraphs from documents that were before the Planning Inspector to demonstrate that the Inspector was aware that the Access Land remained within the Green Belt.”

2.2. Since then the Cabinet has been given additional confirmation at the meeting on 24th September 2008 and the relevant Appendix is attached as Appendix C1.

3. The lack of adequate and comprehensive documentation together with the consequent reliance on verbal comments led to confusion and inadequate analysis.

3.1 The only example given has been answered in paragraph 2 above.

4. Other information had been inaccurate and misleading

(a) The Green Belt Status of the Access Land

4.1 Officers fully accept that at the meeting on 10th March, 2008 Cabinet Members were wrongly advised that the Access Land was no longer within the green belt.

4.2 At the Cabinet meeting it was not considered that there was a need for a Planning Officer to attend for the following reasons:-

- (a) The planning position relating to the Castleview Site and the Access Land had been settled on 29th March, 2006 when the Secretary of State granted planning permission on appeal for residential development.
 - (b) As a result of the planning permission there was “authority” for the Access Land to be developed as a road irrespective of whether the Access Land had green belt status or not.
 - (c) The report before the Cabinet on 10th March, 2008 concerned the functional status of the Access Land rather than its planning status i.e. was the Access Land still required for use as open space and if not should it be appropriated for planning purposes?
- 4.3 The text of the Local Plan for Slough refers to Proposal Site 16 as a housing site i.e. removed from the green belt and Officers outside of the planning service assumed that this included the Access Land. However as it turns out this was not the case because the proposals map (as opposed to the text of the Local Plan) shows the Access Land remains within the green belt.
- 4.4 The factual error made by the Officers has already been acknowledged and is clearly regrettable but all those present at the Cabinet at the time thought that the status of the Castleview Site and the preferred access i.e. the Access Land had the same status.
- (b) The Judicial Review Proceedings
- 4.5 As a result of the factual error made by the Officers at the Cabinet on 10th March, 2008 the Castleview Residents’ Association (Messrs Ankers and Sable) launched judicial review proceedings seeking to quash the resolution of the Cabinet appropriating the Access Land from open space to planning purposes. These proceedings were supported by some Members of the then Cabinet.
- 4.6 There are normally two stages to judicial review proceedings namely:-
- (a) the permission stage.
 - (b) the hearing stage.
- 4.7 The permission stage is where a Judge simply looks at the paperwork and considers whether or not there is an arguable case which requires a full hearing. This legal hurdle is not an onerous one particularly where some of the decision makers are supporting the Claimants. Advice from Queen’s Counsel was sought on the prospects of resisting the judicial review proceedings and in addition Counsel was asked to “settle” (draft) the Council’s defence. The wording of the Council’s defence and the advice given was set out in paragraphs 5.5 to 5.7 (inclusive) of the report to the Cabinet on 7th July, 2008.
- 4.8 Some Members have indicated that the advice given was flawed in light of the decision of Mr Justice Collins granting permission for the Claimants to proceed to a hearing on the basis that the green belt status was arguably relevant to appropriation.

- 4.9 However, that is not the case because it was made clear when reading the paragraphs as a whole that there was a risk that the Claimants would get permission to proceed for two reasons:-
- (a) that they were lay persons, and
 - (b) there was a low threshold to overcome to enable the matter to proceed to a hearing.
- 4.10 That advice proved to be correct given the order of Mr Justice Collins.
- 4.11 What Queen's Counsel was clear about was that if the matter proceeded to a hearing then the Council would have succeeded in resisting the claim by arguing that the status of the Access Land was irrelevant when considering the proposed appropriation.
- (c) The Restrictive Covenants
- 4.12 It is accepted and acknowledged that the legal advice on the enforceability of the restrictive covenants was incorrect. The issue was raised on 5th March, 2008 by the Covenant Movement (i.e. after the report to the Cabinet of 10th March, 2008 had been published) but the note submitted to the Commissioners (prior to the Cabinet meeting of 10th March, 2008 dated March, 2008) set out the correct position. The matter was repeated to the Cabinet at its meeting on 27th May 2008 (please refer to Appendix B to the report of Andrew Blake-Herbert, Strategic Director of Resources and Andy Algar, Assistant Director, Property Services).
- 4.13 However whilst the error is regrettable it is important to recognise that, notwithstanding the error, the Council has not been prejudiced in any way. Whilst a possible breach of the restrictive covenants needed to be highlighted the enforceability of those restrictive covenants would only have become an issue if:-
- (i) The Access Land had been appropriated from open space to planning purposes and
 - (ii) The Council had sold the Access Land to the developer and
 - (iii) The developer implemented the planning permission.
- 4.14. Needless to say at the date of this report only (i) has actually occurred.
- 4.15 In February 2005 Commissioners were advised in a Briefing Paper setting out the issues that if the Council wished to sell the Access Land the restrictive covenant which limited its use would have to be extinguished and the Council had statutory powers to do this. The Briefing Paper then summarised the difficulties that the Council would encounter in light of the Thames Water Case (not specifically mentioned by name in the document). (see paragraphs 3.3, 3.4, 3.6 and 3.7 in the document at Appendix D).
- 4.16 In November, 2006 and then again in September, 2007 further Briefing Papers were submitted which again summarised the legal issues that would or may need to be addressed. In outline these documents set out :-

- the restrictive covenants which burdened Upton Court Park (and thus the Access Land) (paragraph 1.1).
- in general terms that the restrictive covenants would be likely to benefit properties adjoining or in the vicinity of the eastern boundary of Upton Court Park.
- the statutory procedure relating to the appropriation of land from open space to planning purposes (paragraphs 2.1 to 2.5 inclusive).
- the statutory process required to override the restrictive covenants (paragraph 3.1 to 3.5 inclusive).
- a summary of the Thames Water case (paragraphs 3.3 and 3.4).
- the enforceability of the restrictive covenants and the possible purchase of a restrictive covenant indemnity policy (paragraphs 2.5 and 3.5).

4.17 The 2007 Briefing Paper does not suggest that the legal processes would be straightforward and that the covenant issue would be resolved through a restrictive covenant indemnity policy because the document contains a number of clear caveats (set out in the paragraphs in the 2007 Briefing Paper referred to in paragraph 4.16 above).

4.18 When the Cabinet considered the report submitted by the Strategic Director of Finance and Property and the Assistant Director, Property Services on 26th November 2007 the legal issues set out in the Briefing Paper dated September, 2007 were repeated in Appendix E to that report but updated to take into account the following:-

- (i) Appendix E was more explicit in that it was made clear in paragraph 1.2 that the restrictive covenants would not pass to the purchaser(s) unless expressed to do so in the conveyance/transfer (This is the legal advice which we now know was incorrect).
- (ii) It was made clear in paragraph 1.4 that 20 sample records from HM Land Registry did not reveal a single property with the benefit of the covenants (based on the advice in (i) above).
- (iii) For the first time a possible amendment to Section 237 of the Town and Country Planning Act 1990 (as amended) was referred to in paragraph 2.9.

4.19 In February, 2008 Appendix E which had been annexed to the report to the Cabinet on 26th November, 2007 was attached to the Briefing Note prepared by the Assistant Director, Property Services, the Director of Law and Corporate Governance and the Head of Communications. This Briefing Note updated the Commissioners generally but also explained the current position on two important issues. Firstly it was made clear that the Council had been unsuccessful in obtaining restrictive covenant indemnity insurance. Secondly the Commissioners were informed that there were proposals in the Planning Bill seeking to amend

Section 237 to, in effect, overcome the difficulties arising out of the Thames Water Case.

- 4.20 The report to the Cabinet on 10th March, 2008 contained the incorrect legal advice on the enforceability of the restrictive covenants. On 5th March, 2008 (i.e. after the report had been published) the Covenant Movement wrote to the Council challenging the legal advice put forward in the report and it was this that led Officers to seek advice from Counsel on the accuracy of the matters raised by the Covenant Movement. The advice received on 7th March, 2008 confirmed the accuracy of the points made by the Covenant Movement.
- 4.21 As a consequence of that the Assistant Director (Legal and Procurement Services) circulated the note to Cabinet Members which has already been referred to in paragraph 4.12 above.
- 4.22 The note also confirmed that if the covenants were to be released an application could be made to the Lands Tribunal. It follows from this that whilst the subject matter of the two reports that were submitted to the Cabinet on 10th March, 2008 did not seek any resolution about the possible breach of the restrictive covenants, the Commissioners did have before them the correct legal advice at the time the meeting was held.

5. The Cabinet seems determined to avoid any Lands Tribunal procedure

- 5.1 This has no direct bearing on any of the decisions taken by the Cabinet to date. However the Briefing Papers have consistently set out the legal powers the Council has to override the restrictive covenants. Section 237 has been advised as the most appropriate procedure to adopt should the Council ever decide to sell the Access Land to facilitate the residential development of the Castleview Site as the exercise of the power overrides the restrictive covenants on the payment of compensation.