

CONFIDENTIAL **APPENDIX D**
BRIEF TO THE JOINT ADMINISTRATION
THE CASTLEVIEW SITE, LAND AT UPTON COURT PARK, SLOUGH

This brief has been prepared largely on the basis of a brief prepared by Steven Quayle in November 2006.

I have checked the current law on 17th September 2007 and can confirm both the relevant case law and legislation remains unchanged since November 2006.

1. Introduction

1.1 Upton Court Park was purchased by the Council from a Mr. Frederick Cornish by virtue of a Conveyance dated 15th May 1935. That conveyance contains several restrictive covenants. Two of those covenants are relevant for the purposes of this brief.

(a) that Upton Court Park 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.

1.2 The land retained by Frederick Cornish at the time of the Council's acquisition was subsequently sold by him. However, the covenants referred to are likely to benefit those properties either adjoining or in the vicinity of the eastern boundary of Upton Court Park.

1.3 On 29th March 2006 planning permission was granted by the Secretary of State on appeal to a developer, Kelobridge Limited, for a residential development on agricultural land lying to the east Upton Court Park. A copy of the planning permission is attached. This land (the development site) is shown edged red on the plan annexed.

1.4 The only way at present to access the development site is over a small part of Upton Court Park, shown coloured green on the plan. The Council therefore have a "ransom strip" which could be exploited with a significant capital receipt being a distinct possibility. However, in order to realise this it is necessary for the Council to override the third party interests (i.e. residents with the benefit of the restrictive covenants) to successfully exercise their statutory powers under the Local Government Act 1972 and the Town and Country Planning Act 1990. The statutory procedures and estimated time scales are set out below and, as can be seen, the process is not without its difficulties and uncertainties and whilst there is no guarantee of success there is a reasonable prospect that the Council will enable the development to proceed.

2. The Statutory Process – Local Government Act 1972

2.1 The Council holds the ransom strip for open space purposes. Section 122 of the Local Government Act 1972 requires that a local authority intending to appropriate open space for another statutory purpose (in this case from Leisure to Planning) must advertise that fact for two consecutive weeks in a local newspaper and consider any objections the public may have.

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- 2.2 The Council must ask itself whether the ransom strip is still required for open space purposes.
- 2.3 Members must consider not only the views of the public but also the use or uses to which the land has been put in the past, and take account of any public open space provision intended for the development site as a result of any planning permission. The land has primarily been used as a car park and has been so used for many years. A recent site visit has revealed that the land could be reasonably described as underused with no real amenity value given its poor condition. The planning permission provides for a minimum of 10% of the housing development site to laid out as public open space (see Formal Decision at Paragraph 20, condition 12 of the planning permission).
- 2.4 Counsel's advice was obtained in 2003 and that advice suggests the Authority could lawfully conclude that the ransom strip, i.e. the small area of Upton Court Park is not needed as public open space.
- 2.5 If it is concluded that the ransom strip should be appropriated to planning, then the Council can use Section 237 of the Town and Country Planning Act 1990 to override the restrictive covenants that benefit the owners/occupiers of properties adjoining or in the vicinity of the ransom strip by the payment of compensation. Preliminary searches at the Land Registry of random adjoining properties have revealed that the benefit of the restrictive covenants has not passed to the current owners. Further searches are being conducted at present. Thus, at this stage the risk of any owner/occupier seeking to take advantage of the covenants seems remote. However, it only needs one person to challenge and, if that occurs, the Council would have to invoke Section 237 of the Town and Country Planning Act 1990.

3. The Statutory Process – Section 237 Town and Country Planning Act 1990

- 3.1 The underlying objective of Section 237 is that a local authority should be permitted to develop their land in the manner in which they, acting properly, consider will best serve the public interest, provided that work is done in accordance with planning permission and is subject to the payment of compensation. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes, and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237 is the result of that balancing exercise.
- 3.2 The compensation for work within Section 237 is for "injurious effect" arising out of works carried out on the land and not for the effect of the use of land subsequent to those works.
- 3.3 If it does become necessary to override the restrictive covenants to facilitate the development of the site the major obstacle the Council must overcome is the High Court case of Thames Water Utilities Limited –v- Oxford City Council (1997). Although this is a little known case its decision is of significant importance on the interpretation of Section 237. In summary the case decided that Section 237 did not apply to user of land and therefore a local authority could not rely on it to permit a use in contravention of restrictive covenants. If the principle is

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applied to our case Section 237 would permit the construction of a road in contravention of the restrictive covenants (on payment of compensation) but not the subsequent use of it by motor vehicles.

- 3.4 This High Court decision (which is the only decision on the interpretation of Section 237) must be overturned by the Council in order to further any objective to facilitate the development of the site. To do this the Council must seek a declaration in the High Court that the decision was wrongly decided. If this fails it will be necessary to seek permission to go to the Court of Appeal. Counsel has stated there is a reasonable prospect of overturning the Thames Water decision.

3.5 At present it seems unlikely that the Council will need to invoke the complicated and time consuming procedure under Section 237 and may simply take the precaution of seeking a restrictive covenant indemnity policy. A quote is being sought from Zurich Municipal.

4. Timescales

- 4.1 In the unlikely event of the need for High Court action, it would not be realistic to say the process referred to above would take less than twelve months.
- 4.2 In summary the estimated timescales for each stage are as follows :-
- a) Advertise the proposed appropriation of the ransom strip from public open space to a planning purpose and consideration of any objections received – three months.
 - b) Seek and obtain a restrictive covenant indemnity policy – three months (concurrent with (a)).
 - c) If necessary draft and subsequently issue High Court proceedings – one month
 - d) High Court hearing – six months
 - e) Prepare for and obtain Court of Appeal decision (if appropriate) – six months.

5. Conclusion

- 5.1 If the Council wishes to achieve residential development on the development site then there are a number of potential hurdles to overcome. The major hurdle (if relevant) is to overcome the High Court decision in the Thames Water case, because if the Council fail to do so and try to proceed, then those residents (if any) with the benefit of the restrictive covenants could seek an injunction to prevent the subsequent use of the land.
- 5.2 The exact number of residents who have the benefit of the covenants is unknown and will not be clear until the legal processes have commenced but some sample records have been obtained from the Land Registry. Those records indicate that the properties concerned do not have the benefit of the restrictive covenants.

September 2007.
Elizabeth Jenkins
Legal Services
Department of Law and Corporate Governance

**Summary of Legal Processes – The Castleview Site,
Land at Upton Court Park, Slough**

I set out below a summary of the legal processes that may need to be followed prior to the Council being able to sell the land as shown coloured green on the plan attached.

- 1) The land currently forms part of Upton Court Park and it is held for open space purposes. If it is to be developed then the Council must “appropriate it” for the purposes of planning. Under Local Government legislation this transfer from one statutory purpose to another must be advertised for two consecutive weeks in a local newspaper and the Cabinet must consider any objections the public may have as to the loss of open space.
- 2) As the land is part of Upton Court Park there are two covenants which may hinder the development of the land. In brief they are:-
 - a) The use is limited to the provision of public walks, paths, pleasure grounds or playing fields.
 - b) That nothing should be done that may be or become a nuisance/annoyance.
- 3) If nobody has the benefit of those restrictive covenants (enquiries to date of H.M. Land Registry have revealed that no property has the benefit) then any development may proceed unhindered if the Cabinet agree to dispose of the land for development purposes ie the construction of the road to facilitate residential development on the Castleview site which has planning permission.
- 4) However, if somebody does come forward and proves they have the benefit of the restrictive covenants referred to then the Council must utilise the planning legislation to have the covenants overturned in the courts. This may take some time, possibly up to fifteen months. If the court found in the Council’s favour and permitted the Council to, in effect, override the covenants then those residents with the benefit of them would obtain compensation.

The key to whether the transaction takes place quickly or not will be whether any person steps forward and claims the benefit of the covenants.

October 2007

Steven Quayle

SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **DATE:** 26th November 2007

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PART I **KEY DECISION**

LAND AT UPTON COURT PARK – OFFER RECEIVED.

1 Purpose of Report

This report advises Cabinet of an offer received for the council's land at Upton Court Park and seeks Cabinet's instructions.

2 Recommendation(s)/Proposed Action

Cabinet is requested to resolve that

- (a) The provisions of the s.106 agreement between the council and Kelobridge Limited (attached as Appendix B) be noted.
- (b) The offer received from the owners of Castlevue be noted and that officers be instructed to negotiate to establish whether better terms can be obtained.
- (c) The legal advice in respect of the covenant as set out in Appendix C be noted and that officers take all necessary steps to appropriate the council's land for planning purposes.
- (d) A further report be brought to cabinet on the outcome of the negotiations.

In making their decision, Members are reminded of the need for them to meet their fiduciary duty.

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**

Any capital receipt would be available to support the council's Medium Term Financial Strategy and would be available to fund capital investment.

(b) **Human Rights Act and Other Legal Implications**

The council is under no legal obligation to dispose of the land if it does not wish to do so but the offer received should be considered by members applying their fiduciary duty.

Fiduciary duty has been described as a duty to act in "*a fairly business like manner with reasonable skill and caution*"

The relevant principles established from case law can be summarised as follows:

- (a) Local authorities are under a special duty in the exercise of all their powers to consider the financial consequences for the rate and council tax payers. This duty is analogous to the fiduciary duty owed by a person in the position of trustee.
- (b) In considering the financial consequences of a decision, an authority is required to conduct a balancing exercise between the interests of those who will benefit from the proposed measure and the cost to rate and council tax payers.
- (c) Failure to have proper regard to their fiduciary duty renders a local authority decision liable to challenge on the grounds of illegality.
- (d) The fact that an authority may have an electoral mandate for their decision is irrelevant to the question of whether the act is ultra vires.

The restrictive covenants and the legal issues surrounding their potential impact on the development authorised by the planning permission referred to in paragraph 5.3 below is set out in Appendix C to this report."

5 **Supporting Information**

5.1 In July 2005 Cabinet considered whether to dispose of a part of Upton Court Park to facilitate the development of an adjoining, privately owned site. Cabinet decided not to proceed with any sale that time. The extent of the site, with the council's ownership shown hatched, is attached as Appendix A.

5.2 The owners of the adjoining site submitted a number of planning applications for

the residential development of their site. One included the council's land (in accordance with the approved Local Plan) and the remainder showed access via Castleview Road over land presently occupied by houses. The council, as local planning authority, refused all the applications and the applicant subsequently appealed.

- 5.3 The Planning Inspector dismissed the appeals relating to the Castleview Road access but upheld the appeal for access to the development site over the council's land.
- 5.4 In March 2006 the developer entered into an s.106 agreement pursuant to the Inspector's decision. The details of the agreement are summarised at Appendix B.
- 5.5 The value of the council's land had previously been reduced by the uncertainty over whether there was an alternative access and this diluted the "ransom" value. The planning decision effectively confirms that the council's land is the key to any development and this has enhanced the council's negotiating position.
- 5.6 In July 2006, the council received an unsolicited offer from the owners of the adjoining site. Cabinet considered this offer at its meeting on 23rd September 2006 and its decision is set out below:

The Cabinet received a report outlining an offer received for the Council's land at Upton Court Park and which sought Cabinet instructions on how to proceed with the offer. Members agreed that this item could be dealt with in Part I of the meeting if Members intended not to discuss the offer. The Cabinet felt that having weighed the potential capital receipt against the shortage of open space in Slough, the amenity value of the land, the cost of re-providing facilities, plus the adverse impact on the park and those who used the area, the site should not be sold. The proposed sale of this land had been discussed at previous Cabinet meetings and, whilst the Cabinet understood their fiduciary responsibility, a covenant was also in place on the land prohibiting development.

Resolved - That the offer be rejected.

- 5.7 A second unsolicited offer of £7,000,000 has been received from the adjoining owners. Their offer letter is attached as Appendix D. A subsequent letter from the developer's planning consultant (Appendix E) also sets out why the developer believes the reasons for refusing the last offer have been addressed.
- 5.8 There were four reasons given by Cabinet in 2006 for refusing the offer. Officers' comment on each based on present circumstances are set out below

Reason	Officer comment
"the shortage of open space in Slough"	Under the s.106 agreement the developer needs to replace the land lost through the proposed access way and provide new public open space as part of the development. The development will provide for a net increase of public open space of 2.28 acres.
"the amenity value of the land"	The land is presently an underused car park. Whilst it is technically public open space it offers little amenity other than as an ancillary use (i.e. car parking) to the park itself. The proposed scheme will relocate the car park and recycling facility further away from Castleview Road.
"the cost of re-providing facilities"	The facilities (car park, play area and recycling centre) will be provided by the developer at no cost to the council.
"the adverse impact on the park and those who used (sic) the area"	The area affected represents a very small proportion of the overall park area. Users of the park and surrounding area will have access to a net increase in public open space and new children's play areas. This is a subjective judgement but arguably the vast majority of park users will not be adversely affected.

- 5.9 Whilst no formal valuation of the land has been undertaken, if instructed to do so, officers would expect to negotiate a final sum higher than the initial offer.
- 5.10 In October 2007, Planning Committee approved the master plan for the proposed development (using the access over the council's land).
- 5.11 **Members are advised that to be able to consider the matter and properly exercise their fiduciary duty that they should personally visit the site to understand the possible impact of this land being sold.**

6 Comments of Other Committees

None

**LEGAL ISSUES – RESTRICTIVE COVENANTS ON
LAND AT UPTON COURT PARK, SLOUGH**

1. Introduction

- 1.1 It is common for a seller of land/property to impose restrictions (restrictive covenants) on the land/property he is selling which limit its physical development or use. This ensures the purchaser will not do anything which spoils the enjoyment of the land/property he, the seller, has retained.
- 1.2 However if the seller then disposes of the retained land/property the benefit of the restrictive covenants will not pass to the purchaser(s) unless expressed to do so in the Conveyance/Transfer.
- 1.3 Upton Court Park was purchased by the Council from a Mr. Frederick Cornish by virtue of a Conveyance dated 15th May 1935. That conveyance contains several restrictive covenants. Two of those covenants are relevant for the purposes of this paper namely:-
- (a) that Upton Court Park 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 legal text of the restrictive covenants contained in the Conveyance is appended hereto.

- 1.4 The land retained by Frederick Cornish at the time of the Council's acquisition was subsequently sold by him. The only properties likely to benefit from the covenants are those properties either adjoining or in the vicinity of the eastern boundary of Upton Court Park, i.e. Castleview Road. It is also possible that Upton Court Farm may benefit from the covenants. The exact number of property owners who have the benefit of the covenants (if any) is unknown and will not be clear until the legal processes set out below have commenced but 20 sample records from HM Land Registry do not reveal a single property having the benefit of the covenants.
- 1.5 On 29th March 2006 planning permission was granted by the Secretary of State on appeal to a developer, Kelobridge Limited, for a residential development on agricultural land lying to the east of Upton Court Park. A copy of the planning permission is attached. This land (the development site) is shown edged black on the site plan (Appendix A).
- 1.6 The only authorised way at present to access the development site is over a small part of Upton Court Park, shown hatched black on the plan (Access

Land). The Council therefore have land which can be exploited with a significant capital receipt being a distinct possibility. However, in order to realise this it is necessary for the Council to override any third party interests (i.e. residents with the expressed benefit of the restrictive covenants) to successfully exercise their statutory powers under the Local Government Act 1972 and Section 237 of the Town and Country Planning Act 1990. It should be noted that this action would only affect the Access Land (or the relevant part of it) and NOT the remainder of Upton Court Park. The statutory procedures and estimated timescales, based on the current information available, are set out below and as can be seen, are not without difficulties and uncertainties. However whilst there is no guarantee of success there is a reasonable prospect that the Council can enable the development to proceed.

2. The Statutory Processes

Step 1

- 2.1 The Council holds the Access Land for open space purposes. Section 122 of the Local Government Act 1972 requires that a local authority intending to appropriate open space for another statutory purpose (in this case from Leisure to Planning) must advertise that fact for two consecutive weeks in a local newspaper and consider any objections the public may have.
- 2.2 The Council must ask itself whether the Access Land is still required for open space purposes.
- 2.3 Members must consider not only the views of the public but also the use or uses to which the Access Land has been put in the past, and take account of any public open space provision intended for the development site as a result of the planning permission. The land has primarily been used as a car park and has been so used for many years. A recent site visit has revealed that the Access Land could be reasonably described as underused with no real amenity value given its poor condition. The planning permission provides for a minimum of 10% of the housing development site to laid out as public open space (see Paragraph 20, condition 12 of the planning permission).
- 2.4 If it is concluded that the Access Land should be appropriated to planning, then the Council can proceed to Step 2 below.

Step 2

- 2.5 If no-one appears to have the benefit of the covenants the purchase of a restrictive covenant indemnity policy might be sufficient to enable the Access Land to be developed. These insurance policies are common place where restrictive covenants may be breached and the risk in value terms is small but much will depend on whether an insurance company will take on the risk and at what cost. If this option is not viable or one or more properties benefit from the covenants then action under Section 237 would be appropriate.
- 2.6 The underlying objective of Section 237 is that a local authority should be permitted to develop their land in the manner in which they, acting properly, consider will best serve the public interest, provided that work is done in

accordance with planning permission and is subject to the payment of compensation. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237 is the result of that balancing exercise.

- 2.7 The compensation for work within Section 237 is for "injurious effect" arising out of works carried out on the land and not for the effect of the use of land subsequent to those works.
- 2.8 To override the restrictive covenants to facilitate the development of the development site the major obstacle the Council must overcome is the High Court case of Thames Water Utilities Limited –v- Oxford City Council (1997). Although this is a little known case its decision is of significant importance on the interpretation of Section 237. In summary the case decided that Section 237 did not apply to user of land and therefore a local authority could not rely on it to permit a use in contravention of restrictive covenants. If the principle is applied to our case Section 237 would permit the construction of an access road in contravention of the restrictive covenants (on payment of compensation) but not the subsequent use of it by motor vehicles.
- 2.9 This High Court decision (which is the only decision on the interpretation of Section 237) must be overturned by the Council in order to further any objective to facilitate the development of the development site. To do this the Council must seek a declaration in the High Court that the decision was wrongly decided. If this fails it will be necessary to seek permission to go to the Court of Appeal. There is a reasonable prospect of overturning the Thames Water Case particularly as the Department of Communities and Local Government are consulting on amendments to Section 237 which seek to overcome the High Court decision. However it is unknown when this will become law, if at all.

3. Timescales

- 3.1 It would unrealistic to say that if all of the processes referred to above were necessary the process would take less than twelve months.
- 3.2 In summary the estimated timescales are as follows :-
- a) Advertise the proposed appropriation of the Access Land from public open space to a planning purpose and consideration of any objections received – three months.
 - b) Draft and subsequently issue High Court proceedings – one month
 - c) High Court hearing – six months
 - d) Prepare for and obtain Court of Appeal decision (if appropriate) – six months.
- 3.3 However please note that items (b) (c) and (d) are unlikely to be necessary if (1) no property has the benefit of the covenants as a restrictive covenant indemnity policy should be sufficient to alleviate any concerns or (2) Section 237 was amended by Parliament.

Note to Cabinet for meeting on 10th March 2008

Following representations made by Councillor Dhillon and The Covenant Movement further legal advice has been sought on the issue of the covenants on Upton Court Park Land. ✓

That advice is that provided adjoining owners are able to provide proof of their claims, they will have the benefit of the covenants even though there are no express assignments of the covenants shown on their title deeds and the covenant itself does not say it is to benefit the retained land. However this advice does not change the position taken in the report namely, that if the covenants are to be released an application has to be made to the Lands Tribunal. ✓

The area of land over which it is proposed to release the covenants is a relatively small area. The covenants will remain intact on the remainder of the park. This means that the "public walks paths pleasure grounds or playing fields" referred to in the covenants will continue to exist. There is no question of the covenants being removed from the whole of the park and then being re-imposed which has been suggested. The area in respect of which an application may be made to release the covenants is currently a disused car park and surrounding scrub area. ✓

It would appear that some of the houses in the area are on land originally owned by Mr Cornish who sold the park land to the Council and imposed the covenants. In compiling the report for Cabinet various searches of properties in the area were undertaken at the Land Registry. None of those search results revealed that any property had the benefit of the "public walks" covenant although some did reveal that the properties had the benefit of other covenants from Mr Cornish over the parkland such as covenants relating to drainage. ✓

When the land was sold to the Council, Upton Court Park was only part of Mr Cornish's land holding. In the conveyance to the Council, two conveyances dated 22.7.27 and 24.6.33 are mentioned. These will identify which properties would have the benefit of the covenants. The Covenant Movement has provided a copy of the plan to the conveyance dated 22.7.27. (attached as Appendix A) but have not provided a copy of the conveyance dated 24.6.33. ✓

This additional advice and information does not alter the position that the Council can apply to the Lands Tribunal for the release of the covenants on the disused car park and surrounding scrub land. Such application would be publicised and it would be open to those who can prove they have the benefit of the covenants to object. The Tribunal would hold hearings and make a determination if the covenants should be released from this piece of land and if any compensation is payable. It also does not alter the position that the development complained of does have planning permission and the developers have obtained other access routes albeit not as favourable for their development.

Jill Bell
Assistant Director Legal & Procurement Services

SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **DATE:** 10th March, 2008

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PART I
NON KEY DECISION

PROPOSED APPROPRIATION OF LAND AT UPTON COURT PARK, SLOUGH, BERKSHIRE

1. Purpose of Report

1.1 The purpose of this report is for:-

- (a) Members to consider the substantial number of objections received to the proposed appropriation of the land (the Access Land) to planning purposes shown hatched black on Appendix A to this report.
- (b) To decide whether or not the Access Land is no longer required as part of Upton Court Park.

2. Recommendations/Proposed Action

2.1 The Cabinet is requested to consider the objections raised in the context of the factual, planning and legal background set out in this report and resolve accordingly.

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 a efficient, effective and economic in everything it does

Aims

5.1 Improve financial and asset planning, monitoring and stewardship.

4. Other Implications

(a) Financial

The appropriation of the Access Land to planning purposes does not in itself have significant financial implications as it is merely a transfer of the land from one statutory purpose ie open space to another ie planning.

However, if the Access Land is appropriated for planning purposes to facilitate residential development on land known as the "Castlevue Site" then a significant capital receipt could be generated to fund part of the Council's Capital Programme.

(b) Human Rights Act and Other Legal Implications

A local authority as a landowner may hold its land for a variety of statutory purposes eg leisure, housing or planning. Section 122 of the Local Government Act 1972 (as amended) 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.

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.

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.

Thus the Cabinet must consider all of the factual, legal and planning circumstances and in that context decide whether the Access Land is no longer required as open space within Upton Court Park.

5. Background/Supporting Information

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. 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 B.

5.2 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 more than 12 years so that the users are likely to have acquired by prescription rights of vehicular access along the road.

- 5.3 It is evident that the use of the road does not directly relate to the purposes of the restrictive covenant ie the provision of the public walks, paths, 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.
- 5.4 It should be noted that the Council would be unable to dig up the road and use it directly for playing fields in the light of the rights which appear to have accrued to the owl sanctuary, the electricity sub-station and the rugby club. 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.
- 5.5 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.
- 5.6 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.

The Planning Position

- 5.7 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.
- 5.8 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. Thus the principle of residential development on the Castlevue Site serviced by a road through the Access Land is well established.
- 5.9 Whilst applications for residential development on the Castlevue Site were refused by the Local Planning Authority in 2004/2005 outline planning permission for residential development on the Castlevue Site with access through the Access Land was granted by the Secretary of State on appeal subject to a number of conditions. The planning permission is annexed to this report at Appendix C.
- 5.10 A number of the conditions are considered relevant for the purposes of this report. Members should note the following:-
- (a) The developers must 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) The developers are required to replace any trees lost as part of the construction of the road which will service the proposed residential development.(Condition 10)

- (c) The existing car park and recycling facilities which forms part of the Access Land must be relocated. (Condition14)

The Objections

- 5.11 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 have responded. None of the letters were in favour of appropriating the land from open space to planning purposes.
- 5.12 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.
- 5.13 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”.

The first five bullet points generated the most objections and Officer comment on each of the objections referred to above is set out in Appendix D to this report.

6. Conclusion

- 6.1 As can be seen there is a wealth of public objection to the proposed appropriation but 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 Members must decide whether in the factual, legal and planning circumstances set out above and a consideration of 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.

7. Appendices

- (A) Plan of Access Land.
- (B) Extract from a Conveyance dated 15th May, 1935 between Frederick Cornish (1) and the Urban District of Slough (2).
- (C) Planning Permission for the Castleview Site.
- (D) Officer comment on the objections received from members of the public.

**LEGAL ISSUES – RESTRICTIVE COVENANTS ON
LAND AT UPTON COURT PARK, SLOUGH**

1. Introduction

- 1.1 It is common for a seller of land/property to impose restrictions (restrictive covenants) on the land/property he is selling which limit its physical development or use. This ensures the purchaser will not do anything which spoils the enjoyment of the land/property he, the seller, has retained.
- 1.2 However if the seller then disposes of the retained land/property the benefit of the restrictive covenants will not pass to the purchaser(s) unless expressed to do so in the Conveyance/Transfer.
- 1.3 Upton Court Park was purchased by the Council from a Mr. Frederick Cornish by virtue of a Conveyance dated 15th May 1935. That conveyance contains several restrictive covenants. Two of those covenants are relevant for the purposes of this paper namely:-
- (a) that Upton Court Park 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 legal text of the restrictive covenants contained in the Conveyance is appended hereto.

- 1.4 The land retained by Frederick Cornish at the time of the Council's acquisition was subsequently sold by him. The only properties likely to benefit from the covenants are those properties either adjoining or in the vicinity of the eastern boundary of Upton Court Park, i.e. Castleview Road. It is also possible that Upton Court Farm may benefit from the covenants. The exact number of property owners who have the benefit of the covenants (if any) is unknown and will not be clear until the legal processes set out below have commenced but 20 sample records from HM Land Registry do not reveal a single property having the benefit of the covenants.
- 1.5 On 29th March 2006 planning permission was granted by the Secretary of State on appeal to a developer, Kelobridge Limited, for a residential development on agricultural land lying to the east of Upton Court Park. A copy of the planning permission is attached. This land (the development site) is shown edged black on the site plan (Appendix A).
- 1.6 The only authorised way at present to access the development site is over a small part of Upton Court Park, shown hatched black on the plan (Access

Land). The Council therefore have land which can be exploited with a significant capital receipt being a distinct possibility. However, in order to realise this it is necessary for the Council to override any third party interests (i.e. residents with the expressed benefit of the restrictive covenants) to successfully exercise their statutory powers under the Local Government Act 1972 and Section 237 of the Town and Country Planning Act 1990. It should be noted that this action would only affect the Access Land (or the relevant part of it) and NOT the remainder of Upton Court Park. The statutory procedures and estimated timescales, based on the current information available, are set out below and, as can be seen, are not without difficulties and uncertainties. However whilst there is no guarantee of success there is a reasonable prospect that the Council can enable the development to proceed.

2. The Statutory Processes

Step 1

- 2.1 The Council holds the Access Land for open space purposes. Section 122 of the Local Government Act 1972 requires that a local authority intending to appropriate open space for another statutory purpose (in this case from Leisure to Planning) must advertise that fact for two consecutive weeks in a local newspaper and consider any objections the public may have.
- 2.2 The Council must ask itself whether the Access Land is still required for open space purposes.
- 2.3 Members must consider not only the views of the public but also the use or uses to which the Access Land has been put in the past, and take account of any public open space provision intended for the development site as a result of the planning permission. The land has primarily been used as a car park and has been so used for many years. A recent site visit has revealed that the Access Land could be reasonably described as underused with no real amenity value given its poor condition. The planning permission provides for a minimum of 10% of the housing development site to laid out as public open space (see synopsis of s.106 agreement at Appendix A).
- 2.4 If it is concluded that the Access Land should be appropriated to planning, then the Council can proceed to Step 2 below.

Step 2

- 2.5 If no-one appears to have the benefit of the covenants the purchase of a restrictive covenant indemnity policy might be sufficient to enable the Access Land to be developed. These insurance policies are common place where restrictive covenants may be breached and the risk in value terms is small but much will depend on whether an insurance company will take on the risk and at what cost. If this option is not viable or one or more properties benefit from the covenants then action under Section 237 would be appropriate.
- 2.6 The underlying objective of Section 237 is that a local authority should be permitted to develop their land in the manner in which they, acting properly, consider will best serve the public interest, provided that work is done in accordance with planning permission and is subject to the payment of

compensation. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237 is the result of that balancing exercise.

- 2.7 The compensation for work within Section 237 is for “injurious effect” arising out of works carried out on the land and not for the effect of the use of land subsequent to those works.
- 2.8 To override the restrictive covenants to facilitate the development of the development site the major obstacle the Council must overcome is the High Court case of Thames Water Utilities Limited –v- Oxford City Council (1997). Although this is a little known case its decision is of significant importance on the interpretation of Section 237. In summary the case decided that Section 237 did not apply to user of land and therefore a local authority could not rely on it to permit a use in contravention of restrictive covenants. If the principle is applied to our case Section 237 would permit the construction of an access road in contravention of the restrictive covenants (on payment of compensation) but not the subsequent use of it by motor vehicles.
- 2.9 This High Court decision (which is the only decision on the interpretation of Section 237) must be overturned by the Council in order to further any objective to facilitate the development of the development site. To do this the Council must seek a declaration in the High Court that the decision was wrongly decided. If this fails it will be necessary to seek permission to go to the Court of Appeal. There is a reasonable prospect of overturning the Thames Water Case particularly as the Department of Communities and Local Government are consulting on amendments to Section 237 which seek to overcome the High Court decision. However it is unknown when this will become law, if at all.

3. Timescales

- 3.1 It would unrealistic to say that if all of the processes referred to above were necessary the process would take less than twelve months.
- 3.2 In summary the estimated timescales are as follows :-
 - a) Advertise the proposed appropriation of the Access Land from public open space to a planning purpose and consideration of any objections received – three months.
 - b) Draft and subsequently issue High Court proceedings – one month
 - c) High Court hearing – six months
 - d) Prepare for and obtain Court of Appeal decision (if appropriate) – six months.
- 3.3 However please note that items (b) (c) and (d) are unlikely to be necessary if (1) no property has the benefit of the covenants as a restrictive covenant indemnity policy should be sufficient to alleviate any concerns or (2) Section 237 was amended by Parliament.

4. Conclusion

- 4.1 If the Council concludes that residential development on the development site is appropriate then there are a number of potential hurdles to overcome not least the Thames Water decision. However it is considered that these issues can be overcome by utilising the law empowering local authorities to facilitate development as set out above.

**OFFICER COMMENT ON RESIDENTS OBJECTIONS TO THE PROPOSED
APPROPRIATION**

1. Breach of the Covenants in the 1935 Conveyance

It is true that the construction of a road over the Access Land to facilitate the residential development at the Castleview site will breach the first covenant referred to in Appendix B to this report and may arguably be a nuisance or annoyance to those owners of properties that have the benefit of the covenant as set down by Frederick Cornish.

However, Section 237 of the Town and Country Planning Act 1990 permits a local authority to develop its land in the manner in which it, acting properly, considers will best serve the public interest, provided that work is done in accordance with a planning permission and is subject to the payment of compensation. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes and the need to protect the interests of third parties i.e. those residents with the benefit of the restrictive covenants whose rights are interfered with by local authority development. The compensation for work carried out under Section 237 is for "injurious effect" arising out of works carried out on the land and not for the affect of the use of land subsequent to those works.

Thus if the Council resolved to appropriate the land for planning purposes and then disposed of it to facilitate the residential development the restrictive covenants can only be overridden if the Council can persuade a court to overturn the High Court case of Thames Valley Utilities Limited - v Oxford City Council (1997). Although this is a little known case its decision is of significant importance on the interpretation of Section 237. In summary the case decided that Section 237 did not apply to user of land and therefore a local authority could not rely on it to permit a use in contravention of a restrictive covenant. If the principle is applied to this case then Section 237 would permit the construction of a road in contravention of the restrictive covenants (on payment of compensation) but not the subsequent use of it by motor vehicles. In short before the Council can do anything the High Court or possibly the Court of Appeal have to overturn the Thames Water case to enable the Council to proceed.

2. Creation of Precedent for Future Development

A significant number of the objectors feared that if the Access Land was appropriated to planning purposes a precedent would be created which would threaten the remainder of Upton Court Park. Whilst this may be an understandable and natural concern to raise, the factual

situation with regard to the remainder of the park is substantially different because:-

- (a) Upton Court Park remains in the green belt.
- (b) It does not form part of any proposal site in the adopted Local Plan for Slough as earmarked for development.
- (c) There are no proposals by the Council to carry out development in the future.

3. The development will cause disturbance

This objection has been raised in respect of disturbance to the local community during and after the construction of the road and presumably the residential development on the Castlevue site. This is a planning matter and would have been addressed at the public inquiry when the appeal was heard in 2006.

4. Additional Traffic –Nuisance/Danger

The additional traffic generated by the proposed residential development served by a road constructed over the Access Land was canvassed at the public inquiry but the Secretary of State is satisfied that the development should proceed and granted planning permission accordingly as set out in Appendix C to this report.

5. Loss of Open Space/Use of the Park

It is clear that Upton Court Park is regularly used by local residents for all forms of leisure activity and by sports clubs including the Slough Rugby Club, and local hockey and cricket clubs.

However, Condition 12 of the Planning Permission addresses the loss of public open space by requiring the developer to provide a minimum of 10% of the housing development site area on the Castlevue site land as public open space.

6. Loss of Car Parking/Cycling facilities

This is addressed by Condition 14 of the Planning Permission.

7. Loss of Trees

This is addressed by Condition 10 of the Planning Permission.

8. The Development will be a Breach Trust

This objection is assumed to relate to the agreement between the Council and Frederick Cornish for the land only to be used for open space / leisure purposes. However Members attention is drawn to

comments contained in paragraph 1 of this schedule which sets out the position in respect of the restrictive covenants.

9. The Proposal is Unlawful

If the Council follow the statutory processes referred to in this report the proposal will not be unlawful.

10. The Council has Ulterior Motives

The whole process of the adoption of the Local Plan for Slough, the grant of planning permission by the Secretary of State, and the proposed appropriation has been conducted in an open and transparent manner

11. Devaluation of Property

This is an understandable objection but is not legally relevant in respect of this report.

12. Loss of Farm Land

This proposal does not result in the loss of any farmland as it only relates to the Access Land shown hatched black on Appendix A to this report. It is assumed that this objection relates to the loss of farm land by the proposed residential development on the Castleview site. This is factually correct but has been the result of a long and open public process.

13. Planning Related Objections

There were some objections that can be categorised as “planning objections” such as flood risk, overlooking, loss of light, overshadowing, vision intrusion, loss of view of the park, disturbance and smell but all of these issues would have been the subject of debate at the local plan inquiry and the public inquiry into the appeals relating to the proposed residential development.

SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **DATE:** 10th March 2008

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PART I **KEY DECISION**

LAND AT UPTON COURT PARK – OFFER RECEIVED.

1 Purpose of Report

This report advises Cabinet of the current position in relation to its land at Upton Court Park. In particular it provides details of the outcome of the public consultation, an update on the legal position and an update on current negotiations.

2 Recommendation(s)/Proposed Action

Cabinet is requested to resolve:-

- a) That the outcome of the public consultation be noted.
- b) That Officers be authorised to commence legal proceedings to overturn the Thames Water Utilities Limited -v- Oxford City Council (1997) case.
- c) That the principle of the sale of the council's land (shown hatched in appendix A of the preceding report, Agenda item 5 - Appropriation of Land at Upton Court Park from Open Space to Planning Purposes) be approved.
- d) That Officers continue negotiations to obtain the best terms obtainable and to report such terms back to Cabinet for consideration and decision.

NB In making their decision, Members are reminded of the need for them to meet their fiduciary duty.

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.

Aims

5.1 Improve financial and asset planning, monitoring and stewardship.

4 **Other Implications**

(a) Financial

Any capital receipt would be available to support the council's Medium Term Financial Strategy and would be available to fund capital investment.

The approved capital programme does not assume any receipt for this land. Any capital receipt could therefore be available to fund schemes presently on the "reserve list" or other new capital schemes.

(b) Human Rights Act and Other Legal Implications

The council is under no legal obligation to dispose of the land if it does not wish to do so but the offer received should be considered by members applying their fiduciary duty.

Fiduciary duty has been described as a duty to act in "*a fairly business like manner with reasonable skill and caution*"

The relevant principles established from case law can be summarised as follows:

(a) Local authorities are under a special duty in the exercise of all their powers to consider the financial consequences for the rate and council tax payers. This duty is analogous to the fiduciary duty owed by a person in the position of trustee.

(b) In considering the financial consequences of a decision, an authority is required to conduct a balancing exercise between the interests of those who will benefit from the proposed measure and the cost to rate and council tax payers.

(c) Failure to have proper regard to their fiduciary duty renders a local authority decision liable to challenge on the grounds of illegality.

(d) The fact that an authority may have an electoral mandate for their decision is irrelevant to the question of whether the act is ultra vires.

5 **Supporting Information**

5.1 In November 2007 Cabinet considered a report about part of Castleview Park which had been subject to an unsolicited offer of £7.0m from owner of an adjoining site. Cabinet's full decision is set out below:

(a) *That the provisions of the s.106 agreement between the Council and Kelobridge Limited be noted.*

- (b) *That the offer received from the owners of Castleview be noted and that officers be instructed to negotiate to establish whether better terms can be obtained.*
- (c) *That the legal advice in respect of the covenant as set out in Appendix C be noted and that officers take all necessary steps to appropriate the council's land for planning purposes.*
- (d) *That a further report be brought to Cabinet and the Overview and Scrutiny Committee on the outcome of the negotiations and the results of a general public consultation exercise seeking views on the principle of the sale and the benefits that a significant capital receipt may bring.*
- (e) *That the recommendations from Overview and Scrutiny Committee be noted.*

5.2 There were four reasons given by Cabinet in 2006 for refusing the offer. Officers' comment on each based on present circumstances are set out below

Reason	Officer comment
"the shortage of open space in Slough"	Under the s.106 agreement the developer needs to replace the land lost through the proposed access way and provide new public open space as part of the development. The development will provide for a net increase of public open space of 2.28 acres.
"the amenity value of the land"	The land is presently an underused car park. Whilst it is technically public open space it offers little amenity other than as an ancillary use (i.e. car parking) to the park itself. The proposed scheme will relocate the car park and recycling facility further away from Castleview Road.
"the cost of re-providing facilities"	The facilities (car park, play area and recycling centre) will be provided by the developer at no cost to the council.
"the adverse impact on the park and those who used (sic) the area"	The area affected represents a very small proportion of the overall park area. Users of the park and surrounding area will have access to a net increase in public open space and new children's play areas. This is a subjective judgement but arguably the vast majority of park users will not be adversely affected.

5.3 Following Cabinet's decision in November, officers have been undertaking a number of activities the outcome of which is summarised below.

Appropriation of land from leisure purposes to planning purposes

5.4 This is subject to a separate report considered earlier in the agenda as Cabinet needs to exercise its judgement on that issue independently of any financial considerations.

Public consultation

5.5 The Council employed QA Research to assist with the public consultation. The organisation provided proposals for two options: a citizens' jury and a series of six focus groups. Whilst both had their benefits, QA Research advised that the focus groups would be the most representative of the two approaches.

5.6 QA Research recruited a representative cross-section of the community to participate in the research.

5.7 The objectives of the research were agreed as

- To consult with a representative sample of Slough residents, via focus groups, on whether to sell or not to sell the strip of land at Castlevew to allow access to a proposed new development
- To ensure the sample is representative of the demographic and geographic make-up of Slough
- To ensure residents directly affected have their say, along with residents from other wards
- To inform the focus groups about the financial and other benefits and disadvantages of selling the Castlevew land
- To give detailed information to allow the groups to come to a conclusion that will inform local decision makers on what route to take in relation to the issue
- To ensure all the possible arguments are put forward and considered in the focus groups
- To ensure the consultation and subsequent report is neutral and facilitated and commissioned by agreed research company, QA Research

5.8 QA will formally present their findings to Cabinet at the meeting.

Legal position – covenant

5.9 For ease of reference the legal advice provided to Cabinet in November 2007 is attached at Appendix B of the Previous report – Agenda Item 5 Appropriation of Land at Upton Court Park from Open Space to Planning Purposes.

5.10 The legal position in relation to the process for remains unchanged. In order for the covenant to be overridden, and therefore used for access to the adjoining development, the council needs to exercise its statutory powers under s.237 of the Town and Country Planning Act 1990.

- 5.11 The Government appears to have acknowledged that the Thames Water case is illogical and is preventing legitimate development as there is a proposal in the current Planning Bill to change the law. The earliest the Planning Bill can become law is September 2008 (assuming it is dealt with before the summer recess).
- 5.12 There is no guarantee that the Bill will become law (or that the particular provision will be enshrined in any Planning Act). It is therefore recommended that the council proceeds to challenge the Thames Water case and, in parallel, monitors the progress of the Bill and its likely implementation date.

Planning position

- 5.13 Kelobridge has acquired a number of houses in Castleview Road to facilitate an alternative access to the development. In the event of planning permission being granted the value of the council's land would be significantly reduced.
- 5.14 It is understood that Kelobridge has prepared two revised applications to use Castleview Road as an access.
- 5.15 In October 2007, Planning Committee approved the master plan for the proposed development (using the access over the council's land).
- 5.16 A s.106 agreement was completed in respect of the scheme approved by the Planning Inspector. A summary of the agreement is attached as Appendix A but particular attention is drawn to the provision of 120 social housing units and the scope to provide a site for the reprovision of the Castleview school. There is no guarantee the same level of provision could be achieved in eventually permission is granted for access via Castleview Road.

Negotiations

- 5.17 The Council has employed its retained property consultants, Drivers Jonas, to advise on the valuation and negotiation issues.
- 5.18 The council's land is effectively a "ransom" strip. Typically in such circumstance the parties would agree a value for the land to be developed and then negotiate a percentage of this to be paid for the ransom. This case is complicated by the potential of an alternative access which means the developer believes the council only have a partial ransom. (i.e. that they can develop a certain number of units from Castleview Road/Blenheim Road without the council's land and therefore the ransom applies to difference in unit numbers between this scheme and a scheme using our land).
- 5.19 The strength of the council's negotiating position (and hence the price to be paid) is dependent on the strength or otherwise of the developer's case for the alternative access. To test this specialist advice has been sought to review technical planning, highways and noise issues in some detail.
- 5.20 Once this additional technical information is received full negotiations about price and other terms will commence. An update on the latest position will be

provided at the meeting.

- 5.21 Any further uncertainty about the council's position on the sale of the land will weaken the council's negotiation position and is more likely to drive the developers towards using the alternative access. It is therefore considered important that the council clearly sets its position about the principle of the sale of this land without caveats or qualifications (other than to price and other terms)

6 Conclusion

The council is free to sell this land subject to clarification of the law in relation to s.237 Town & Country Planning Act 1990 and the subsequent use of these powers. The proposed sale would enable the council to fund additional capital schemes or use the receipt for other purposes in accordance with the Medium Term Financial Strategy.

Members are advised that to be able to consider the matter and properly exercise their fiduciary duty that they should personally visit the site to understand the possible impact of this land being sold.

7 Comments of Other Committees

This report will be presented to the Overview and Scrutiny Committee on 28th February 2008. Any Comments received from the Committee will be circulated to Cabinet.

8 Appendices Attached

'A' Summary of s.106 agreement

9 Background Papers

Cabinet report 18th July 2005
Cabinet report 23rd September 2006
Cabinet report 26th November 2007

Minutes of Cabinet – 10th March 2008

98. **Proposed Appropriation of Land at Upton Court Park/Land at Upton Court Park - Offer Received**

The Chair advised that this item and the following item - Land at Upton Court Park – Offer Received – were related and that he intended to allow the debate on both items but that separate formal decisions would need to be made on each item at the appropriate time. The Chair indicated that he had had notice of a number of speakers and he intended to take these before the Cabinet Members debated the report.

Mr M Lund from QA Research made a presentation to the Cabinet outlining the results of the consultation exercise undertaken to ascertain the views of a sample of Slough Residents as to whether or not the strip of land at Castleview should be sold to enable access to the proposed new housing development. He outlined the methodology used and the main findings of the consultation. A report presenting the main findings of the consultation had been circulated to Members of the Cabinet on 22nd February 2007.

Following this Mr Jurkiw and Mr Sable addressed the Cabinet on behalf of the Castleview Residents Association. Mr Jurkiw had submitted a letter to Cabinet members along with a petition which read *“we the undersigned residents of Slough call on the Council and the Cabinet Commissioners not to seek to overturn legal precedent regarding the power to remove covenants on land in Upton Court Park for the following reasons:-*

- 1. The Land is held in trust on behalf of the people of Slough as a facility for leisure - not to sell to a developer who wants to build on former green belt land.*
- 2. If this precedent was set no public or private green space in Slough (or anywhere else) would be safe from developers no matter how well protected by covenants”.*

Mr Jurkiw explained how the signatures on the petition had been collected and made the point that the signatories were residents from across the Borough. He maintained that there was opposition to the sale of the land and concern that any green space provided would be part of the development and not open to the general public. In answer to a question about why he felt that access to any new green space would be difficult for members of the public he advised that there would be a road in front of it and that it would not be clearly visible. Mr R Sable indicated that he felt that the proposed sale was unethical and inappropriate development in the green belt. He also indicated that he had had difficulties in procuring the information he had requested from the Council. The Chair asked Mr Sable to let him have details of the information he had requested so that he could look into the matter.

Mr Mishiku of the Covenant Movement tabled a number of photographs and a copy conveyance dated 15th day of May 1935. He drew the Cabinet’s

attention to the Covenants which had been imposed by the vendor of the park land and which he maintained had been annexed to adjoining or neighbouring lands of the vendor. He estimated that possibly up to 1000 local residents in six roads close to the park may be entitled to the benefit of the covenants.

Cabinet Members asked Mr Mishiku for his view about any possible compensation payments and the likelihood of the covenants being lifted. Mr Mishiku stated that in his view the Covenants could only be lifted by the Lands Tribunal and that in many cases the Tribunal was asked to lift a covenant for a development that had already taken place and an injunction was applied for. He went on to say that there was a reluctance to remove buildings and people tended to be compensated but more recently the Lands Tribunal had ordered the demolition of existing buildings. Objectors invariably wanted the covenant upheld and were not seeking compensation. In his experience it was very difficult to overturn a covenant like this and he believed that the legal advice that had been given in the Cabinet report was flawed and unreliable.

Mr Cafolla, the Head of Castleview School, addressed the Cabinet on behalf of the School's Governing Body. The School agreed in principle for Castleview School to be relocated within Site 16 which would in their view have benefits for all and would accord with the Local Plan. Mr Cafolla outlined the current pressure on the school and the need for additional school places in the town. As Castleview was granted maintenance the Governors would be responsible for building any new school and there would therefore be no cost to the Council. The transport issues which had been raised could be resolved. Mr Cafolla summarised the benefits of the new school arguing that housing density on the development would be reduced and children in the catchment area could attend their catchment school. In his view Councillors' fiduciary duty overrode all other objections, however well founded, as the greater good for the community outweighed localised use.

Cabinet Commissioners asked for clarification as, although it was recognised that the proposed site would be an improvement to the existing school, the S.106 Agreement was "like for like" (ie a 2 FE school) and there would therefore be extra costs associated with the provision of an extra form of entry which Mr Cafolla had argued as being necessary. The Head advised that the S.106 Agreement had originally been "like for like" but that as things had developed and there had been a massive influx of people into Slough the School would now need to be a three form entry. The School was in detailed discussions with the planning department to establish whether there would be enough social housing and density to raise sufficient money to fund a three form entry school on Site 16.

Some concern was also expressed that transport and traffic difficulties would not be solved but merely moved to a different location and in addition to the traffic associated with the development local residents would have school traffic to contend with.

The Chair invited Councillor Swindlehurst, Chair of the Overview and Scrutiny Committee, to present the Committee's recommendations. The Committee

had noted the recommendations to the Cabinet with regard to the proposed appropriation of Land at Upton Court Park and, with regard to the offer received for land at Upton Court Park had resolved –

- (a) that the recommendations to Cabinet be endorsed and
- (b) that a proportion of the capital receipt for the sale of the land be allocated to the needs of the immediate area with the remainder being allocated for the general benefit of the Borough the local benefits to include e.g. improvement to the transport infrastructure, environmental improvements, improvements to youth services or the provision of a medical centre in the area.

In answer to a question Councillor Swindlehurst advised that the Committee had considered the possibility of the covenants not being lifted but had felt that it was more likely than not that they would on this small piece of land.

A Member speaking under Rule 30 drew attention to Councillor's fiduciary duty. The new School would be provided free and the Council had received an offer for the land. If the Council were to turn the offer down the developer could get an alternative access to the site and there could be danger of court action.

[The Chair reminded Members that the meeting was currently in Part 1 session and he wished it to remain so. He urged Members to limit their comments to matters that could be discussed in Part 1]

A Member present under Rule 30 confirmed that he had written to Cabinet Members setting out his concerns over the accuracy of the legal advice that had been given in the report. He believed the Cabinet were not in a position to accept the offer if it was unable to lift the covenants and argued that the offer should be rejected.

The Chair thanked all speakers for their contribution and advised that the matter was now open to debate to Cabinet members.

A number of points were made including:

- A concern that Site 16 had been identified for a 2 FE school and if the additional places required for a three form entry could not be provided for by the S106 Agreement there would be a duty for the local authority to fund these. Some members argued that it would not be value for money to spend more on the present school and a new school would give a good outcome and a new learning environment. The new school might generate a small amount of extra traffic but it was acknowledged that the access to the current school was difficult. Other members were concerned that there was no indication of the additional costs that may fall on the Authority if the replacement school was to be 3FE.
- It was acknowledged that the land in question could not be put back into the green belt and that the development would go ahead. Since the original

offer had been turned down all objections raised by the Council had been addressed. Some members argued that the Members of the Cabinet had a fiduciary duty to consider and should accept an offer for the sale of the land.

- Some members indicated that they would not be able to vote for a proposal to lift the covenants. The land had been given with the benefit of the covenants and it was felt that, once lifted, this would then be “thin edge of the wedge” and the Council would be setting a dangerous precedent. Others argued that the Council would not know whether the covenants could be lifted unless it was tested through the courts and that this should be done as a first stage. Some members favoured a proposal to pursue the lifting of the covenants through the courts and continuing negotiations with the developer but not agreeing to the sale of the land at this stage. This would allow a further consultation to be carried out when the facts were known.
- Some Members expressed concern that the Cabinet had been given conflicting legal advice. Advice had been given that the Council may be able to seek an indemnity to protect its position with regard to a challenge on the lifting of the covenants and had since been told that this was not possible. The Cabinet had also been advised that there were no beneficiaries of the covenants but had been told that evening that there may be up to 1000 beneficiaries. Any challenge from the beneficiaries was likely to be a lengthy process and the order of costs had not been provided to members in writing. Advice had been given that there was a 60% chance of the covenants being lifted but some members were unsure that this was still the case and, as it was not clear whether the land could be sold, they did not have enough information to make a decision. Other Members of the Cabinet argued that whilst there had been a discussion about the lack of clarity with regard to legal advice, the discussion should have taken place when the decision to put the land in the Local Plan had been made. The issue before Members that evening was the risk of not taking the right action.
- Other members argued that they needed additional information including –
 - the Planning Officer's view of the two new applications lodged by the developer to access the site by different means as it was felt that people were being 'frightened' into selling with the threat of the alternative access being granted.
 - the further negotiations the Cabinet had asked to take place with the developers on proposed terms and the technical assessment of the access issues that needed to be undertaken.
 - whether the developer could commit to return the park land back to Council ownership once the access road had been built.

- Some members drew attention to the fact that most respondents to the consultation were totally opposed to the proposed sale and that those who had said yes had based it on the fact that the development was so far advanced and an alternative access may be granted so that the Council "may as well" get the money. Councillor Smith advised that the Conservative Party had run its own consultation and the options given to respondents were outlined. The majority of the respondents were opposed to the acceptance of all offers.

The Director of Resources reminded Members of their fiduciary duty to act in a fairly business like manner, this duty had been set out in full on page 80 of the agenda and Members attention was drawn to this.

The Director of Resources confirmed during the debate that the offer being considered had been received in writing, a full summary of the S.106 Agreement had been set out in the report and that the 'ransom strip' was not designated as green belt land.

The Director of Law and Corporate Governance advised that the legal issues with regard to restrictive covenants were summarised in the report and the exact number of property owners who would have the benefit of the covenants (if any) was unknown and would not be clear until the legal processes had commenced. Members had in the past been advised of the statutory process and timescale that needed to be undertaken to attempt to lift the covenants and these were not without difficulties and uncertainties but the only way the outcome would be known would be to test this through the courts.

The Chair advised that the Cabinet would need to take a decision on item 5 - The proposed appropriation of Land at Upton Court Park - and then proceed to take a decision on the offer received on the land.

The Director of Law and Corporate Governance advised that the Cabinet needed to decide whether or not the Access Land was no longer required as part of Upton Court Park Road, i.e. whether the current Access Land was needed as Open Space or not. If the decision was taken that it was not needed it could be appropriated from open space to planning purposes.

The Authority's intention to appropriate the land had been publicised in the local papers and the objections that had been received to the proposed appropriation had been circulated to all Cabinet Members. Over 100 residents had responded and none of the letters were in favour of appropriating the land from open space to planning purposes. Many of the objections related to matters which had already been established through the allocation of the Access Land as part of the proposal Site 16 in the Council's Local Plan for Slough and the planning permission granted on appeal by the Secretary of State in 2006. It was proposed and seconded that, having considered the objections, the Access Land was no longer required as part of the Open Space which formed Upton Court Park and that it should be

appropriated to planning purposes. This proposal was put to the vote and carried by 6 votes to 3.

[A named vote was requested and Members voted as follows:

For the proposal: Councillors Cryer, Edwards, Howard, Munkley, Smith and Wright

Against the proposal: Councillors Haines, Long and Stokes]

Resolved – That the land (the Access Land) as shown hatched on Appendix B to the report be appropriated from Open Space to Planning purposes.

99. Land at Upton Court Park - Offer Received

The following proposal was moved and seconded:-

“That the Cabinet resolve –

- (a) That the outcome of the public consultation be noted.
- (b) That Officers be authorised to commence legal proceedings to overturn the Thames Water Utilities Limited -v- Oxford City Council (1997) case.
- (c) That the principle of the sale of the land is not agreed at this stage but Officers continue to negotiate with Kelobridge and a final decisions be made when the price and final terms are known”.

Some Members of the Cabinet queried the need for the Authority to spend public funds commencing legal proceedings to overturn the Thames Water case as there was a proposal in the current Planning Bill to change the law. The Chief Executive advised that the agreement to commence legal proceedings would give clarity and the earliest the Planning Bill could become law was September 2008 (assuming it was dealt with before the summer recess) and there was also no guarantee that the Bill would become law or that particular provision would be enshrined in any planning act. It was therefore recommended that the Council proceed to challenge the Thames Water case and, in parallel, monitor the progress of the Bill and its likely implementation date.

In debating the specific proposal Members of the Cabinet made a number of points including –

- Support for the proposal as it would allow the Council to consult with the residents again when the final position was known.
- A concern about the costs of re-provision of Castleview School at 3FE. The Assistant Director of Property Services reminded Councillors that the S106 Agreement covered the re-provision of the school at 2FE and that additional

school places required by the Authority would need to be funded by the Authority.

- A concern that the proposed legal action would not only take in the region of 18 months and would also be costly and a waste of public money. Officers advised that the likely costs of the legal proceedings would be in the region of £50-60,000 and that it was possible that negotiations could secure that this would be underwritten by the developer. Any legal proceedings that had been commenced could be withdrawn at any time should the Bill become law. Some Members argued that it was not the responsibility of this Council to overturn the case and did not support the allocation of public money to do this.
- Some Cabinet Members indicated that they would not be able to vote for a proposal that would seek to break the covenants. Other Members stressed that if the Council did not pursue this through the courts the position would never be clarified and the matter could be taken out of the Council's hands.

The Director of Resources reminded Members of their fiduciary duty and that, if the Cabinet were minded not to accept the principle of the sale of the land, Members would need to clearly indicate the reasons/ grounds for their decision.

The proposal was put to the vote and lost by 6 votes to 3.

[A named vote was requested and Members voted as follows:

For the proposal: Councillors Cryer, Howard, Munkley

Against the proposal: Councillors Edwards, Haines, Long, Smith, Stokes
and Wright]]

Resolved – That the proposal be rejected.



SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **DATE:** 27th May 2008

CONTACT OFFICER: Andrew Blake-Herbert, Strategic Director of Resources
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PART I

LAND AT UPTON COURT PARK – OFFER RECEIVED.

1 Purpose of Report

The Leader of the council has requested that Cabinet be given an opportunity to consider the offer received for the council's land. This report sets out the background and seeks Cabinet's instructions on what action, if any, to take.

2 Recommendation(s)/Proposed Action

Cabinet is requested to resolve that:

- (a) The contents of the report is noted;
- (b) Whether it feels officers should be instructed to take further action to progress the possible sale of the council's land;

If Cabinet is minded to take further steps to sell the council's land, it is requested to resolve that:

- (c) The principle of the sale of the council's land (shown hatched in appendix A) be approved;
- (d) Officers be authorised to commence legal proceedings to overturn the Thames Water Utilities Limited –v- Oxford City Council (1997) case;
- (e) Officers recommence negotiations to obtain the best terms obtainable and to report such terms back to Cabinet for consideration and decision.

NB In making their decision, Members are reminded of the need for them to

meet their fiduciary duty.

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

Any capital receipt would be available to support the council's Medium Term Financial Strategy and would be available to fund capital investment.

The approved capital programme does not assume any receipt for this land. Any capital receipt could therefore be available to fund schemes presently on the "reserve list" or other new capital schemes.

(b) Human Rights Act and Other Legal Implications

The council is under no legal obligation to dispose of the land if it does not wish to do so but the offer received should be considered by members applying their fiduciary duty.

Fiduciary duty has been described as a duty to act in "*a fairly business like manner with reasonable skill and caution*"

The relevant principles established from case law can be summarised as follows:

(a) Local authorities are under a special duty in the exercise of all their powers to consider the financial consequences for the rate and council tax payers. This duty is analogous to the fiduciary duty owed by a person in the position of trustee.

(b) In considering the financial consequences of a decision, an authority is required to conduct a balancing exercise between the interests of those who will benefit from the proposed measure and the cost to rate and council tax payers.

(c) Failure to have proper regard to their fiduciary duty renders a local authority decision liable to challenge on the grounds of illegality.

(d) The fact that an authority may have an electoral mandate for their decision is irrelevant to the question of whether the act is ultra vires.

There are issues around a covenant that is attached to the land. Appendix B.

5 **Supporting Information**

- 5.1 In March 2008 Cabinet considered a report about the sale of Upton Court Park which had been subject to an unsolicited offer of £7.0m from the owner of an adjoining site. In a separate report, Cabinet was asked to consider whether to appropriate the land from lesiure use to planning use.
- 5.2 Cabinet agreed to the appropriation of the land to planning use, The recommendations that proceeidngs be commenced to overturn Thames Water Utilities Limited –v- Oxford City Council (1997) case and to continue negotiations were both rejected.
- 5.3 This report sets out the back ground and considers the information previously provided to cabinet which has been updated for further information that has come to light since.

Legal position – covenant

- 5.4 For ease of reference the legal advice provided to Cabinet in November 2007 is attached as Appendix B, this has been updated following discussions at the March cabinet meeting, to give a full picture of the latest issues.
- 5.5 The legal position in relation to the process remains unchanged. In order for the covenant to be overridden, and therefore used for access to the adjoining development, the council needs to exercise its statutory powers under s.237 of the Town and Country Planning Act 1990.
- 5.6 The Government appears to have acknowledged that the Thames Water case is illogical and is preventing legitimate development as there is a proposal in the current Planning Bill to change the law. The earliest the Planning Bill can become law is September 2008 (assuming it is dealt with before the summer recess). Further detail is contained I the Appendix B
- 5.7 There is no guarantee that the Bill will become law (or that the particular provision will be enshrined in any Planning Act). It is therefore recommended that the council proceeds to challenge the Thames Water case and, in parallel, monitors the progress of the Bill and its likely implementation date.

Planning position

- 5.8 Kelobridge has acquired a number of houses in Castleview Road to facilitate an alternative access to the development. In the event of planning permission being granted the value of the council's land would be significantly reduced.
- 5.9 A verbal update on this will be provided on the evening.
- 5.10 In October 2007, Planning Committee approved the master plan for the proposed development (using the access over the council's land).
- 5.11 A s.106 agreement was completed in respect of the scheme approved by the

Planning Inspector. A summary of the agreement is attached as Appendix C but particular attention is drawn to the provision of 120 social housing units and the scope to provide a site for the re-provision of the Castleview school. There is no guarantee the same level of provision could be achieved in eventually permission is granted for access via Castleview Road.

Conclusion

5.12 The council is free to sell this land subject to clarification of the law in relation to s.237 Town & Country Planning Act 1990 and the subsequent use of these powers. The proposed sale would enable the council to fund additional capital schemes or use the receipt for other purposes in accordance with the Medium Term Financial Strategy.

5.13 **Members are advised that to be able to consider the matter and properly exercise their fiduciary duty that they should personally visit the site to understand the possible impact of this land being sold.**

6 Comments of Other Committees

None

7 Appendices Attached

'A' Site plan
'B' Legal advice and extract from conveyance
'C' Summary of s.106 agreement

8 Background Papers

Cabinet report 18th July 2005
Cabinet report 23rd September 2006
Cabinet report 26th November 2007
Cabinet report 10th March 2008

Cabinet – Special Meeting held on Tuesday, 27th May, 2008.

Present:- Councillors Swindlehurst (Vice-Chair in the Chair), Bains, S Chaudhry, S K Dhaliwal, O'Connor, Parmar and Small.

Also present under Rule 30:- Councillor Dhillon.

Apologies for Absence:- Councillor Anderson.

PART I

1. Declarations of Interest

None were declared.

2. Manifesto

The new administration's manifesto for the 2008 local elections was submitted for information. The manifesto set the framework for the administration's priorities and individual Commissioners raised a number of matters of detail noting that, where appropriate, reports would be brought forward to the Cabinet with a view to implementing the proposals.

With regard to the concerns identified in respect of the refuse collection service, the Strategic Director of the Green and Built Environment commented that improvements had been implemented with effect from 12th May and she would be meeting with representatives of Slough Accord on 5th June. She requested that any ongoing concerns should be passed to her as soon as possible so that they could be raised at that time.

Resolved - That the manifesto commitments be noted and that appropriate reports be brought forward to the Cabinet in due course in respect of the new administration's priorities.

3. Land at Upton Court Park - Review of Options

The Assistant Director, Property Services reminded the Cabinet that a detailed report on this issue had been considered by the former Cabinet in March of this year and its decisions at that time were noted. The new administration had requested the opportunity to review the decisions, including the offer received from Kelobridge Ltd for the purchase of a small area of land at Upton Court Park for the purpose of providing an access road into the approved development site.

The Chair referred to a number of tabled documents, including letters from local residents, former Councillor Smith, the Covenant Movement and from the Castlevue Residents' Association, making representations on the issues before the Cabinet which were noted by Members. He also referred to the legal advice contained within Appendix B to the report in respect in particular of the restrictive covenants on land at Upton Court Park.

The legal position remained unchanged in that in order for the covenants to be overridden and the land used for access to the adjoining development, the Council needed to exercise its statutory powers under Section 237 of the Town and Country Planning Act 1990. It would be necessary for proceedings to be commenced to overturn the Thames Water Utilities Ltd v Oxford City Council (1997) case in order to enable this and instructions were being sought as to whether Officers should commence the necessary legal proceedings. It was further noted that the Government appeared to have acknowledged that the Thames Water case was illogical and was preventing legitimate development and there was a proposal in the current Planning Bill to change the law to this effect. However, the earliest that the Bill could become law was September, 2008 and there was as yet no guarantee that this would be achieved. Accordingly, it was suggested that if the Cabinet was so minded, the Council proceeded to challenge the case and, in parallel, monitor the progress of the Bill and its likely implementation date.

Prior to consideration of the report in detail, a Ward Councillor was given the opportunity to make representations on the matter. Local residents who had originally requested to address the Cabinet had withdrawn their request just before the meeting commenced.

The Chair reminded the Committee that the issue before the Cabinet was unrelated to the planning process which would be proceeding in tandem through the Planning Committee. The issue before the meeting was related to the Council's role as a landowner and the two issues needed to be kept completely separate.

Particular reference was made to the Council's fiduciary duty to consider the offer received. Whilst the Council was under no legal obligation to dispose of the land, the offer received needed to be properly considered by Members exercising this duty and a proper balancing exercise undertaken as regards the benefits and disadvantages to both the local residents and the Borough as a whole. In response to a question, it was noted that whilst the Council had no legal duty to consult on a land disposal, comprehensive consultation had taken place with local residents and reference was made to the work that had been undertaken through a firm of consultants, QA, who had established focus groups to gauge the views of both local residents and residents across the town on the proposal. Presentations had been made both to the Overview and Scrutiny Committee and to the Cabinet on the outcomes of this consultation in February and March of this year.

With regard to the issues raised in a tabled letter from former Councillor Smith concerning whether the land within the access strip was within the Green Belt or not, it was noted that the information given in the previous report had been incorrect although Officers had given the information in good faith at that time. It was however pointed out that the Planning Inspector had been fully aware of the Green Belt situation when he had taken his decision on the planning application and, in certain respects, the issue was academic in that he had allowed the use of the land for the access road and the land in question was predominantly tarmac with most of it being a car park.

The meeting was then opened up to general discussion and debate. Members noted the benefits of the proposed development including the provision of a new school. There was also concern at the likelihood that, if access was not granted through the site in question, then an alternative access would be constructed through existing buildings which would prove far more problematical to local residents. Given that planning permission had already been granted for the housing development, the general view of Members was that access across the strip in question was far preferable to other alternatives.

In coming to its decisions, the Cabinet noted that these were in principle decisions only at this stage and that Officers would be reporting back on the progress of negotiations with the developers prior to submitting a formal report to the Cabinet on the agreed terms.

Members requested that the issue of who took the lead role in the design and size of the replacement Castlevue School should be explored within the negotiations taking place with the developers given the current issue of availability of school places within the town and so as to ensure that the current school was fully involved in the design of the replacement building and maximum benefit was gained for the town.

Resolved –

(Councillor Bains abstaining in respect of (c), (d) and (e) below).

- (a) That the contents of the report be noted.
- (b) That Officers be requested to take further action to progress the possible sale of the Council's land.
- (c) That the principle of the sale of the Council's land (as shown hatched in Appendix A) be approved.
- (d) That Officers be authorised to commence legal proceedings to overturn the Thames Water Utilities Ltd v Oxford City Council (1997) case.
- (e) That Officers recommence negotiations to obtain the best terms obtainable, that the Cabinet be kept updated on the progress of the negotiations and that such terms be reported back to Cabinet for consideration and decision.
- (f) That Officers include within the scope of the negotiations, the issue of the lead role in the design and size of the replacement Castlevue School so as to ensure the best possible outcome for both the School and the Borough as a whole.

APPENDIX B

**LEGAL ISSUES – RESTRICTIVE COVENANTS ON
LAND AT UPTON COURT PARK, SLOUGH**

1. Introduction

- 1.1 It is common for a seller of land/property to impose restrictions (restrictive covenants) on the land/property he is selling which limit its physical development or use. This ensures the purchaser will not do anything which spoils the enjoyment of the land/property he, the seller, has retained.
- 1.2 If the seller then disposes of the retained land/property the benefit of the restrictive covenants will pass to the purchaser(s) unless the contrary intention clearly appears.
- 1.3 Upton Court Park was purchased by the Council from a Mr. Frederick Cornish by virtue of a Conveyance dated 15th May 1935. That conveyance contains several restrictive covenants. Two of those covenants are relevant for the purposes of this paper namely:-
 - (a) that Upton Court Park 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 legal text of the restrictive covenants contained in the Conveyance is appended hereto.

- 1.4 The land retained by Frederick Cornish at the time of the Council's acquisition was subsequently sold by him. The properties likely to benefit from the covenants are those properties which formed part of Mr Cornish's adjoining or neighbouring land (the 'retained land') and the exact number is unknown at present. Further legal research is under way to see if more precise information can be established. Whilst the restrictive covenants remain enforceable, this is subject to the adjoining or neighbouring owners establishing that they own land which fell within the retained land referred to as being benefited; and that such land is presently capable of being benefited by the covenants in the sense that it enhances the enjoyment and amenities of such land.
- 1.5 On 29th March 2006 planning permission was granted by the Secretary of State on appeal to a developer, Kelobridge Limited, for a residential development on agricultural land lying to the east of Upton Court Park. A copy of the planning permission is attached. This land (the development site) is shown edged black on the site plan (Appendix A).

- 1.6 The only authorised way at present to access the development site is over a small part of Upton Court Park, shown hatched black on the plan (Access Land). The Council therefore have land which can be exploited with a significant capital receipt being a distinct possibility. However, in order to realise this it is necessary for the Council to override any third party interests (i.e. residents with the benefit of the restrictive covenants) to successfully exercise their statutory powers under the Local Government Act 1972 and Section 237 of the Town and Country Planning Act 1990. It should be noted that this action would only affect the Access Land (or the relevant part of it) and not the remainder of Upton Court Park. The statutory procedures and estimated timescales, based on the current information available, are set out below and, as can be seen, are not without difficulties and uncertainties. However whilst there is no guarantee of success there is a reasonable prospect that the Council can enable the development to proceed.

2. The Statutory Processes

Step 1

- 2.1 The Access Land remains for planning purposes within the Green Belt. However, the Council held the Access Land for open space purposes until the Cabinet resolved at its meeting in March this year that it was no longer required for such purposes appropriated it to planning. This decision completed the statutory procedure under Section 122 of the Local Government Act 1972 (as amended).

Step 2

- 2.2 In order to override any third party interests i.e. the owners of properties which benefit from the restrictive covenants then action under Section 237 would be appropriate.
- 2.3 The underlying objective of Section 237 is that a local authority should be permitted to develop their land in the manner in which they, acting properly, consider will best serve the public interest, provided that work is done in accordance with planning permission and is subject to the payment of compensation. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237 is the result of that balancing exercise.
- 2.4 The compensation for work within Section 237 is for “injurious effect” arising out of works carried out on the land and not for the effect of the use of land subsequent to those works.
- 2.5 To override the restrictive covenants to facilitate the development of the development site the major obstacle the Council must overcome is the High Court case of Thames Water Utilities Limited –v- Oxford City Council (1997).

Although this is a little known case its decision is of significant importance on the interpretation of Section 237. In summary the case decided that Section 237 did not apply to user of land and therefore a local authority could not rely on it to permit a use in contravention of restrictive covenants. If the principle is applied to our case Section 237 would permit the construction of an access road in contravention of the restrictive covenants (on payment of compensation) but not the subsequent use of it by motor vehicles.

2.6 This High Court decision (which is the only decision on the interpretation of Section 237) must be overturned in order to further any objective to facilitate the development of the development site. To do this the Council has two options namely:-

- (a) seek a declaration in the High Court that the decision was wrongly decided. If this fails it will be necessary to seek permission to go to the Court of Appeal, or
- (b) Await the enactment of the Planning Bill which seeks to amend Section 237 by applying its provisions to the subsequent owner of land which benefits from the restrictive covenants.

2.7 As an alternative to utilising Section 237 the Council could seek the discharge of the restrictive covenants under Section 84 of the Law of Property Act 1925 by application to the Lands Tribunal. However this route puts the onus on the Council to

- (a) to prove that the restrictive covenants were valid,
- (b) identify those local residents who had the benefit of the covenants,
- (c) prove that the covenants should be discharged because they are obsolete, and
- (d) prove that the local residents who had the benefit of the covenants would suffer no injury.

2.8 An opinion from John Hobson QC has been sought on the best and most appropriate approach to adopt in the circumstances and he has advised to await the Planning Bill becoming law.

3. Timescales

3.1 It would unrealistic to say that if any of the processes referred to above were adopted they would take less than twelve months.

3.2 In summary the estimated options and timescales are as follows :-

- (a) Application to Lands Tribunal – Onerous on the Council with more prospects for residents to succeed.

- (b) High Court Hearing – Draft and subsequently issue proceedings – one month up to 1-2 years
- (c) Planning Bill – Await amendments to Section 237 becoming law.

4. Conclusion

- 4.1 If the Council concludes that residential development on the development site is appropriate then there are a number of potential hurdles to overcome not least the Thames Water decision. However it is considered that these issues can be overcome by utilising the law empowering local authorities to facilitate development as set out above.

SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **DATE:** 7th July, 2008

CONTACT OFFICER: Steven Quayle, Director of Law & Corporate Governance
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WARDS: Upton/All

PORTFOLIO: Leader – Finance and Strategy

PART I NON-KEY DECISION

APPROPRIATION OF LAND AT UPTON COURT PARK, SLOUGH, BERKSHIRE

1. Purpose of Report

1.1 The purpose of this report is threefold namely:-

- (a) To inform Members of the Application for Leave to apply for Judicial Review of the decision of the Cabinet on 10th March, 2008 to appropriate the Council's land hatched black on the plan annexed hereto as Appendix A (the Access Land) from open space to planning purposes.
- (b) To summarise the advice received from John Hobson QC on the likelihood of successfully challenging the Judicial Review proceedings.
- (c) To recommend to the Cabinet to take the action set out in paragraph 2 of this report.

2. Recommendations/Proposed Action

- 2.1 The Cabinet is requested to note the issue of Judicial Review proceedings and the advice of John Hobson QC on the likelihood of success.
- 2.2 That, notwithstanding the strong legal position of the Council as set out below, the Cabinet resolves to revoke the decision of the Cabinet on 10th March, 2008 to appropriate the Access Land from open space to planning purposes.
- 2.3 That the Cabinet further resolve to give notice of the Council's intention to appropriate the Access Land which forms of part of Upton Court Park Upton from open space to planning purposes under the provisions of Section 122 of the Local Government Act 1972 (as amended) ("the 1972 Act") and to consider any objections to the proposed appropriation at its meeting in September, 2008.

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 recommendations contained in this report do not have any significant financial implications although there will be a small cost on publicising the Council's intention to appropriate the Access Land from open space purposes to planning purposes should the Cabinet follow the recommendation contained in paragraph 2.3 above.
- 4.2 If the Cabinet resolve to revoke the decision made on 10th March, 2008 the Judicial Review proceedings will no longer be necessary and accordingly the costs of resisting the application will not be incurred.

(b) Human Rights Act and Other Legal Implications

- 4.3 An Application for Leave to apply for Judicial Review of the decision of the Cabinet made on 10th March, 2008 to appropriate part of Upton Court Park from open space to planning purposes has been issued in the High Court of Justice (Administrative Court) by Rex Ankers and Richard Sable. The Claimants seek an order to quash the decision to appropriate the Access Land for planning purposes. These proceedings are being defended and the details of Queen's Counsel's advice is set out in paragraph 5 below.
- 4.4 A local authority as a land owner may hold its land for a variety of statutory purposes eg housing, planning or open space. Section 122 of 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 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.

5. Background/Supporting Information

- 5.1 The Local Plan for Slough was adopted in March, 2004 as the development plan for the Borough of Slough following a public inquiry. Under Proposal Site 16 within the Local Plan land known as the Castlevue Site was released from the Green Belt and allocated for residential purpose with the preferred road access being over the Access Land which forms part of Upton Court Park.
- 5.2 Upton Court Park was conveyed to the Council in 1935. The Conveyance was subject to restrictive covenants in particular providing that the land including the Access Land should not be used otherwise than for the provision of public walks,

paths, pleasure grounds or playing fields. Upton Court Park (which includes the Access Land) is within the Green Belt.

- 5.3 In 2004/05 the Council, as Local Planning Authority, refused applications for planning permission for residential development on the Castleview Site. However, on appeal, outline planning permission subject to conditions was granted by the Secretary of State on 29th March, 2006. The planning permission was for residential development on the Castleview Site with road access via the Access Land. One of the conditions of the outline planning permission was that the developers must provide a minimum of 10% of the development site as public open space to replace the open space which would be lost by the construction of a road on the Access Land.
- 5.4 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 required by the 1972 Act. 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 10th March meeting the Cabinet decided to appropriate the Access Land for planning purposes. It is this decision which is being 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.
- 5.5 The advice of John Hobson QC has been sought on the prospects of the Claimant's being successful in the Judicial Review proceedings and he has advised as follows:-

"The claim is misconceived and raises no arguable case for Judicial Review because the Green Belt status of the land was irrelevant to the decision to appropriate it under Section 122 of the 1972 Act. In particular:-

- (a) *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." The Green Belt status of the Access Land was not material to this issue.*
- (b) *Further, or in the alternative, the issue of whether residential development on the Green Belt land should be permitted had already been decided by the grant of planning permission by the Secretary of State on appeal and remains unaffected by the decision to appropriate the Access Land to planning purposes.*

"...The error in the advice was not a material error and did not render the decision unlawful."

- 5.6 The Council have recently filed the appropriate Acknowledgment of Service indicating it intends to contest the proceedings on the grounds referred to above.

5.7 Notwithstanding the advice set out in paragraph 5.5 above Officers have also been informed that there is a risk that the Claimants will get permission to proceed with the Judicial Review proceedings given that they are lay persons and there is a low threshold to overcome to enable the matter to proceed to a hearing. If permission is granted the case is unlikely to come before the Administrative Court for 12 months or so. In the circumstances the Council has been advised to rescind the decision of the Cabinet on 10th March, 2008 and to recommence the statutory procedures under Section 122 of the 1972 Act again with a view to considering afresh any objections raised at its meeting scheduled in September, 2008. The revocation of the decision will save costs and time and will clear up any residual doubt and uncertainty that may have arisen in the past particularly over the Green Belt status of the Access Land.

5.8 Needless to say all objections to the statutory consultation process will need to be considered by the Cabinet at its September meeting and Members must apply the legal test as set out in this report (including Appendix B) before any decision is made.

6. Conclusion

6.1 It is considered that it is sensible to revoke the decision of the Cabinet on 10th March, 2008 and to reconsult on the proposed appropriation of the Access Land from open space to planning purposes.

7. Appendices

Appendix 'A' - Plan of Access Land.

Appendix 'B' - Relevant statutory provisions – Section 122 Local Government Act 1972 (as amended).

Minutes of Cabinet – 7th July, 2008

25. Appropriation of Land at Upton Court Park, Slough, Berkshire

The Cabinet considered a report advising Members of the application for leave to apply for Judicial Review of the decision of the Cabinet on 10th March, 2008 to appropriate the Council's land as shown in the appendix to the report from open space to planning purposes. The report also summarised the advice received from John Hobson QC on the likelihood of successfully challenging the Judicial Review proceedings and recommending that the Cabinet revoke the decision of the 10th March, 2008 to appropriate the access land from open space to planning purposes and give notice of the Council's intention to appropriate the access land under the provisions of Section 122 of the Local Government Act 1972 (as amended).

The Director of Law and Corporate Governance introduced the report and reminded Members of the decision taken at the Cabinet on the meeting on the 10th March, 2008 to appropriate the Access Land from open space to planning purposes. During that meeting a number of questions had been raised with regard to the planning status of the Access Land and the Cabinet had been advised that the land had been released from the Green Belt. However, this was not the case and the decision was now being 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. In the light of this Officers had obtained advice on the Council's prospects of defending the claim. The advice of John Hobson QC was set out in the report, the conclusion of which was "the error in the advice was not a material error and did not render the decision unlawful". However, notwithstanding the advice from John Hobson QC, Officers had been informed that there was a risk that the claimants would get permission to proceed with the Judicial Review proceedings given that they were lay persons and there was a low threshold to overcome to enable the matter to proceed to a hearing. The Director advised that since the report had been written the claimants had been given leave to pursue the judicial review. The Order from the Honourable Mr Justice Collins read as follows:-

"The fact that the access land was in the Green Belt is arguably relevant to whether it was no longer required for open space (i.e. no development) quite apart from the assertion by three Councillors that the erroneous information lead them to vote in a way in which they would not have otherwise have voted."

Now that permission had been granted the case would proceed to a full hearing where a Judge would decide on the arguments presented. Notwithstanding the strong legal position of the Council it was John Hobson QC's opinion that the Council would be advised to rescind the decision of the Cabinet on 10th March, 2008 and to recommence the statutory procedures under Section 122 of the 1972 Act again with a view to considering afresh any objections raised at its meeting scheduled in September, 2008.

The revocation of the decision would save costs and time and would clear up any residual doubt and uncertainty that may have arisen in the past particularly over the Green Belt status of the access land. Rescinding the decision of the 10th March would have the same effect as a High Court Judge quashing the decision and therefore achieved that the claimants were seeking.

The Director indicated that a number of issues had been raised in correspondence which he intended to deal with:-

- There was a typographical error in paragraph 5.2 of the report. The second sentence beginning with "The conveyance" should read "... provision of public walks, **parks**, pleasure grounds or playing fields".
- A letter received from Mr Smith and others stated that the Planning Inspector had been misinformed about the planning status of the access land but that this was not the case.
- The existence of the Upton Court statutory Trust and restrictive covenants was correct but this needed to be considered at another time.
- The accuracy of the minutes of the Cabinet held on 27th May, 2008. The Director stressed that the minutes reflected what had been said at the meeting and not necessarily the accuracy of what was said.
- The Director asked the Head of Planning and Strategic Policy to comment on the position with regard to the Planning Inspector.

The Head of Planning and Strategic Policy confirmed that the Local Plan had been adopted in March, 2004. The main site and access was part of Proposed Site 16. The main site was proposed to be taken out of the Green Belt. The Access Land was shown as still within the Green Belt. The Planning Inspector had recommended approval of the planning application and was aware that part of the site was in the Green Belt. The Head of Planning and Strategic Policy read from paragraph 17 of Michael Clark's report that part of the site "... is also within the Green Belt" and he therefore was fully aware that it was in the Green Belt.

The Chair invited John Jurkiw to address the meeting on behalf of the Castleview Residents' Association. Mr Jurkiw made a number of points including:-

- The Council's legal team had advised on a number of occasions that the Green Belt status of the land was irrelevant. Justice Collins had now indicated otherwise.
- The majority of people interviewed by QA felt parkland was of more value than a capital receipt.

- People had been told that the parkland appropriation was a mere technicality.
- Just because outline planning permission had been granted the Cabinet did not need to provide access.
- Slough Borough Council had followed a bad procedure and if the Cabinet resolved to appropriate the land at their meeting in September he believed the residents had a good chance of challenging the decision.
- The legal team had said there was no benefit of the covenant and he believed the Council should approach the Land Tribunal for a judgment.
- The provision of a road way over the access land would make it dangerous.
- There would be a loss of mature trees.

The Chair thanked Mr Jurkiw for his comments.

The Chair sought an assurance that the Cabinet realised the true status of the access land i.e. that it was in the Green Belt and the Cabinet Members confirmed their understanding of this. The Chair stressed that their obligation was to exercise the rights of the landowner to look at options.

The Chair indicated that he had received a pre-decision call-in from Councillor Stokes on this matter. The call-in read as follows:-

1. **Incorrect information was given by Officers to the Cabinet meeting on the 10th March, 2008** – as a consequence of this incorrect information Cabinet Members took decisions that they would not have taken if they had been supplied with correct information.
2. **Subsequently Officers sought to minimise the impact of flawed advice to the Cabinet meeting on the 10th March, 2008 by suggesting that it was immaterial in any event** – Officers admitted that they had mistakenly stated that parkland had been removed from the Green Belt although it remained in the Green Belt. They subsequently argued that this mistake was not important because the status of the access land was not material to the issue. Mr Justice Collins when granting permission for a Judicial Review indicated that the mistake could be material to the issue (see item 4 below).
3. **Officers stated that the residents' complaints were misconceived and raised no arguable case for Judicial Review because the Inspector/Secretary of State had allowed access through the park** – Mr Justice Collins clearly disagreed with the Officers because he granted the request for a judicial review. Furthermore, the Inspector had been misled with regard to the Green Belt status in the same way that Cabinet Commissioners had been misled. It is arguable that the

Inspector could have reached different conclusions if he had been presented with accurate information.

4. **The case submitted by Slough Borough Council to the High Court of Justice Queen's Bench Division Administrative Court was rejected by Mr Justice Collins** – Officers argued that “the claim (by Rex Ankers and Richard Sable) is misconceived and raises no arguable case for a Judicial Review because the Green Belt was irrelevant to the decision to appropriate under Section 122. In particular:-

- (a) The only issue under Section 122 (1) was whether the access land was “no longer required for the purpose for which it is held immediately before the appropriation”. The Green Belt status of the access land was not material to this issue.
- (b) Further or in the alternative, the issue of whether residential development on Green Belt land should be permitted had already been decided by the grant of planning permission by the Secretary of State on appeal and remains unaffected by the decision to appropriate the access land for planning purposes”.

In rejecting the SBC case and granting permission for a Judicial Review Mr Justice Collins stated that “the fact that the access land was in the Green Belt is arguably relevant whether it was no longer required for open space (i.e. no development) quite apart from the assertion by three Councillors that erroneous information lead them to vote in a way in which they would not otherwise have voted.

5. **Other inaccurate information** – There is other inaccurate information (in relation to covenants, for example) that will prove an embarrassment to Slough Borough Council at the Judicial Review and should be scrutinised.

Councillor Stokes was invited to speak to his call-in and the points raised were taken in order.

- 1. Incorrect information was given by Officers to the Cabinet meeting on the 10th March, 2008. The Chair indicated that it was acknowledged that Councillor Stokes was unhappy with the decision made on the 10th March and the proposal before the Cabinet that evening was to revoke it which dealt with the issue raised.
- 2. Subsequently Officers sought to minimise the impact of flawed advice to the Cabinet on the 10th March, 2008 by suggesting that it was immaterial in any event. The Director of Law and Corporate Governance advised that Mr Justice Collins had suggested there was an argument to be heard. John Hobson

QC's opinion was that the error was irrelevant to the decision to appropriate. The Director emphasised that Mr Justice Collins had read the papers but had heard no arguments. The recommendation in front of the Cabinet that evening accepted that the Cabinet on the 10th March, 2008 had received incorrect information and the proposal was to revoke that decision and start afresh. This point was therefore dealt with if the decision was revoked.

3. Officers stated that the residents' complaints were misconceived and raised no arguable case for Judicial Review because the Inspector/ Secretary of State had allowed access through the park. Councillor Stokes pointed out that Mr Justice Collins had disagreed with this and that arguably there may be a case to be heard. He believed the Inspector had been misled and may have reached different conclusions. The Head of Planning and Strategic Policy clarified that the Planning Inspector had been made aware by several parties of the status of the Green Belt and had not been misled. The Director of Law and Corporate Governance stressed that people would be able to make observations following the publication of the statutory notice if the Cabinet agreed to start afresh.
4. The case submitted by Slough Borough Council to the High Court of Justice Queen's Bench Division Administrative Court was rejected by Mr Justice Collins. The Director of Law and Corporate Governance stressed that the Borough Council's case had not been rejected as the case had not yet been heard. In any event this point had been dealt with if the Cabinet resolved to quash the decision of the 10th March, 2008. The Chair sought an assurance from Councillor Stokes that he was happy for the Cabinet to quash the decision of the 10th March, 2008. Councillor Stokes indicated that he was not happy for the decision to be quashed but wanted a pre-decision scrutiny and Judicial Review of the matter. The Director of Law and Corporate Governance stressed that there had not been a judgment from Mr Justice Collins. He had made an Order, arguments had still to be put and the advice of John Hobson QC was set out in full in the report. He advised that there had not been a great deal of work done on the covenants issue as this was not yet the time and not a relevant issue at present. He indicated that it might be relevant when, and if, the Council decided to sell the land.

The Chair noted that Councillor Cryer had requested to speak on behalf of Councillor Long who had not been able to be present. Councillor Cryer read out a statement from Councillor Long which indicated:-

1. Bearing in mind the application to Court had been successful and incorrect information material to the decision had been given, the decision should be postponed until the legal position was clarified.
2. The covenant issue should be referred to the Lands Tribunal rather than there being an advert in the newspaper.

Another Member present under Rule 30 felt that the development seemed to be being pushed through in unseemly haste and that it should be postponed for legal advice and that the Planning Inspector had been misled over the status of the land. The Chair asked the Member whether the information that the Head of Planning and Strategic Policy had given at the meeting had been accepted. The Councillor indicated her view that if the Green Belt status of the land had been considered by the Planning Inspector he would have reached a different decision. The Head of Planning and Strategic Policy reaffirmed the information that the Inspector had been given and that he was well aware of the status of the land. He confirmed that the land in question was within the park and proposed as an access route. There was no proposal to build housing and there was planning permission for an access route only.

Members of the Cabinet generally felt that to revoke the decision of the 10th March, 2008 gave an opportunity for another consultation and to start afresh. The Chair indicated his view that all the matters raised in the pre-decision call-in had been dealt with if the Cabinet were to revoke its decision of the 10th March, 2008. Members of the Cabinet agreed with the proposals in the report and it was

Resolved –

- (a) That the issue of Judicial Review proceedings and the advice of John Hobson QC on the likelihood of success be noted.
- (b) That, notwithstanding the strong legal position of the Council as set out below, the Cabinet resolves to revoke the decision of the Cabinet on 10th March, 2008 to appropriate the Access Land from open space to planning purposes.
- (c) That notice of the Council's intention to appropriate the Access Land which forms of part of Upton Court Park Upton from open space to planning purposes under the provisions of Section 122 of the Local Government Act 1972 (as amended) ("the 1972 Act") be given and that any objections to the proposed appropriation be considered at the September, 2008 Cabinet meeting.

SLOUGH BOROUGH COUNCIL

REPORT TO: Cabinet **Date:** 23rd July 2008

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PART I
FOR DECISION

POST-DECISION SCRUTINY CALL-IN – APPROPRIATION OF LAND AT UPTON COURT PARK, SLOUGH, BERKSHIRE

1. **Purpose of Report**

To advise the Cabinet of the receipt of a post-decision scrutiny call-in on the decision taken by the Cabinet at its meeting on 7th July, 2008 to revoke the decision of the Cabinet on 10th March, 2008 to appropriate the Access Land from open space to planning purposes and to give notice of the Council's intention to appropriate the Access Land.

2. **Recommendation**

The Cabinet is requested to resolve whether or not the implementation of its decision taken on 7th July, 2008 with regard to the revoking the decision of the Cabinet on 10th March and giving notice of the Council's intention to appropriate the Access Land from open space to planning purposes should be delayed to enable scrutiny of this issue to take place.

3. **Key Priority Implications**

None as this report is administrative in nature.

4. **Other Implications**

None as this report is administrative in nature.

5. **Supporting Information**

5.1 The Cabinet at its meeting on 7th July, 2008 considered a report seeking a decision on Appropriation of Land at Upton Court Park Slough, Berkshire. Following consideration of the report and representations by Councillors and a member of the public, the Cabinet resolved as follows:-

“(a) That the issue of Judicial Review proceedings and the advice of John Hobson QC on the likelihood of success be noted.

- (b) That, notwithstanding the strong legal position of the Council as set out below, the Cabinet resolves to revoke the decision of the Cabinet on 10th March, 2008 to appropriate the Access Land from open space to planning purposes.
- (c) That notice of the Council's intention to appropriate the Access Land which forms of part of Upton Court Park Upton from open space to planning purposes under the provisions of Section 122 of the Local Government Act 1972 (as amended) ("the 1972 Act") be given and that any objections to the proposed appropriation be considered at the September, 2008 Cabinet meeting."

5.2 The Constitution provides for every Member of the Council to receive a copy of the decisions that the Cabinet has taken which are subject to a five working day delay before implementation. Any Member of the Council can call-in a Cabinet decision for post-decision scrutiny. The summary of the decisions taken by the Cabinet on 7th July was distributed to Members on the following day and implementation of the decisions was delayed until 16th July 2008.

5.3 A post-decision call-in has been received from Councillor Stokes within the time allowed in the following terms:-

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

Early on in the discussion Councillor Anderson said: - "The reason that we have reached our decision is" Before Councillor Anderson could complete his explanation for a pre-determined decision I challenged him on the grounds that the Cabinet had not even listened to the pre-decision arguments before seeking to close down discussion.

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

For example, former Councillor Dexter Smith had submitted a letter to the Chief Executive raising important issues of "inaccurate information", "false information", and "flawed argument". He requested that "these inaccuracies and concerns" should be brought "to the attention of the relevant officers and the Cabinet Commissioners" at the Cabinet Meeting on 7th July 2008. This was not done. Cabinet Commissioners were not given a copy of former Councillor Dexter Smith's letter. The Chief Executive did make some brief comments on the letter but ignored some of former Councillor Dexter Smith's main concerns. As a consequence Cabinet Commissioners remained uninformed and unaware of these concerns. Whether they would have wished to scrutinise these concerns is a matter of conjecture but as Cabinet Commissioners remained uninformed they were denied any opportunity to scrutinise the concerns.

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

For example the Head of the Planning Department was invited to make comments. He did so without producing any supporting documentation. Several references were made to "the Inspector's decision". There was confusion about dates and whether reference was being made to one decision, two decisions or three decisions, and how many Inspectors had been involved. Councillor Anderson, as the Chair, was confused about dates and incorrectly referred to "the Inspector's decision in 2004" (a mistake which he sought to correct subsequently).

Many of the issues under scrutiny were complex. Without adequate documentation and without time to read that documentation no effective scrutiny was possible and none took place. The Overview and Scrutiny Committee should consider the general need for adequate documentation, especially as some verbal advice from Officers has been found to be fallible.

4. Other information had been inaccurate and consequently misleading

For example, inaccurate information in relation to covenants, insurance cover and other matters has not been challenged and scrutinised. Furthermore the legal advice given to the Council has been unsatisfactory. John Hobson Q.C. stated that: "The claim (by residents) is misconceived and raises no arguable case for Judicial Review because the Green Belt was irrelevant to the decision to appropriate under Section 122 ..." In granting a Judicial Review Mr Justice Collins rejected the views of John Hobson Q.C. and said that: "The fact that the access land was in the Green Belt is arguably relevant to whether it was no longer required for open space (i.e. no development)" The quality of advice given to Members needs to be scrutinised.

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

At the Cabinet Meeting on 10/3/08 Commissioners were given the following advice by Officers: "This additional advice and information does not alter the position that the Council can apply to the Lands tribunal for the release of the covenants on the disused car park and surrounding scrub land. Such application would be publicised and it would be open to those who can prove they have the benefit of the covenants to object. The Tribunal would hold hearings and make a determination if the covenants should be released from this piece of land and if any compensation is payable. It also does not alter the position that the development complained of does have planning permission and the developers have obtained other access routes albeit not as favourable for their development".

This advice indicated that by making an application to the Lands Tribunal the Council would facilitate a proper judicial hearing. All parties would be able to give evidence to the Tribunal to establish their covenant rights and benefits and, if the Tribunal thought fit to vary the covenants, appropriate compensation would be awarded. The Cabinet may seek to avoid the Lands Tribunal and attempt to use a S.237 planning procedure to override legal rights normally dealt with by the Lands Tribunal where there would be a proper judicial consideration of the matter with evidence and expert witnesses. Some affected residents believe that such action by the Cabinet could contravene the provisions of the Human Rights Act 1998. (see Chapter 42: Article and Right to respect for private and family life and Part II - The First Protocol - Article 1- Protection of Property.)

Incidentally this advice assumed that the developers have other access routes for their proposed backland development. As at 10/3/2008 and even now, there is no planning permission outline for any "other access routes". There were also inaccuracies in the Officer's description of the Park Entrance and adjacent area which will be detailed through the Scrutiny process including a site visit."

- 5.4 Councillor Stokes also submitted the following information with his post-decision scrutiny call-in:-

'N.B. This is not a comprehensive list of issues I wish to raise at a post-decision scrutiny. I have raised sufficient issues to warrant a post-decision scrutiny. I will have other and supplementary points to raise. I will seek to call on the services and submissions of former Councillor Dexter Smith and others during the scrutiny process. I hope that the post-decision scrutiny will be adequately documented and will prove more thorough than the pre-decision scrutiny.'

5.4 Councillor's Buchanan, P Choudhry, Coad, Cryer, Dale-Gough, Dhillon, Finn, Haines, Hewitt, Khan, Jenkins, Long, Maclsaac, Munkley, Plimmer, Shine and Wright have indicated their support for the call-in received from Councillor Stokes.

5.5 A Post-Decision call-in has also been received from Councillors Coad and Dale-Gough within the time allowed in the following terms:

I consider we should be having an enquiry into the whole case before rushing into further ill advised action, especially in the light of the ruling of Mr Justice Collins who rejected legal advice given by Mr Steven Quayle, Head of Legal and John Hobson Q.C. regarding the relevance of matters given in Judicial Review Application and an enquiry into why Councillors have been given incorrect advice on a number of matters relating to this case for a prolonged period of time.

5.6 Action on receipt of a post-decision call-in

The Constitution provides for the Cabinet to determine, with advice from the relevant Commissioner/Chief Officer, whether or not the implementation of a decision should and can be delayed following the receipt of the post-decision call-in. In making this decision, the Cabinet will have regard to:-

- Whether the decision needs to be implemented by a particular date.
- Whether any particular deadlines have been imposed by or to the Council in terms of implementation and whether not meeting those deadlines could cause embarrassment and/or detriment to the Council or a third party in any way and the extent/risk of this.
- The timescale for submission of the call-in to the Overview and Scrutiny Committee/Scrutiny Panel and for those views to be reported to the Cabinet and whether this falls within a realistic timescale for deferring implementation of the decision.

5.5 If a decision is taken not to defer implementation of the decision, the reason for this decision will need to be clearly set out in minutes of the Cabinet and reported to the Overview and Scrutiny Committee. The call-in would also be reported to the Overview and Scrutiny Committee for post-decision scrutiny in the normal way.

6. Comments of the Strategic Director of Law and Corporate Governance

6.1 Comments on 1-4

It has been accepted and acknowledged by Officers that the Cabinet on 10th March 2008 was incorrectly advised that the Access Land had been removed from the Green Belt which was not the case (see para 5.2 Cabinet Report dated 7th July 2008). The reason for the factual error was that the Castlevue Site has been known as Proposed Site 16 for a considerable period of time and Officers assumed that the

whole of the Proposed Site had been removed from the Green Belt when the Local Plan was adopted in 2004.

- 6.2 It was in response to the launch of judicial review proceedings by Messrs Ankers and Sable that advice was sought from a senior planning and local government barrister, John Hobson QC on the impact of the error and further he was asked to settle (draft) the Council's response. The advice received is set out in paragraphs 5.5 – 5.7 (inclusive) of the report to the Cabinet on 7th July 2008. The words in italics form the substance of the Council's defence as set out in the Acknowledgement of Service.
- 6.3 Para 5.7 of the report makes it clear that “...*there is a risk that the claimants will get permission to proceed with the Judicial Review proceedings given that they are lay persons and there is a low threshold to overcome to enable the matter to proceed to a hearing.*”
- 6.4 That advice proved correct in light of the Order of Mr Justice Collins QC. However, the granting of permission to proceed does not mean the judicial review proceedings will succeed it simply means there is a case to be heard.

6.5 Comments on 5

- The first point is a matter for Councillor R Anderson.
- 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 of 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.
- The last two points refer principally to the restrictive covenants. No definitive advice has been given to Members of the Cabinet other than to set out the text of those covenants that may have to be dealt with should the cabinet decide to sell the Access Land and the possible mechanisms for doing so i.e. Section 237, Town & Country Planning Act 1990, The Thames Water Case, the proposed Planning Bill, amendments to Section 237 and the Lands Tribunal. However it is recognised that there are likely to be a large number of residents who have the benefit of the restrictive covenants than previously envisaged but it is important to note that there will be no need to address the covenant issue if the Council decide not to sell the Access Land.

- 6.6 Officers have indicated that this matter is complex and that “...*the process is not without its difficulties and uncertainties.*” but the decision of the Cabinet at its July 2008 meeting revokes/rescinds the resolution to appropriate the Access Land from open space to planning purposes. This means the Statutory Consultation process starts again and enables the Cabinet to look at the issue with “fresh eyes”.

6. **Conclusion**

The Cabinet is requested to determine whether or not the implementation of the decision set out above should and can be delayed.

7. **Background Papers**

Agenda and Minutes – Cabinet of 7th July, 2008.
Call-in received from Councillor Stokes

Cabinet – Meeting held on Wednesday, 23rd July, 2008.

Present:- Councillors Anderson (Chair), S Chaudhry, S K Dhaliwal, O'Connor, Parmar and Small.

Also present under Rule 30:- Councillors Coad, Dale-Gough, Maclsaac and Plimmer.

Apologies for Absence:- Councillor Bains and Swindlehurst.

PART I

35. Declarations of Interest

None.

36. Post-Decision Scrutiny Call-in - Appropriation of Land at Upton Court Park, Slough, Berkshire

The Cabinet considered a report setting out two post-decision scrutiny call-ins on the decision taken by the Cabinet at its meeting on 7th July, 2008 with regard to the Appropriation of Land at Upton Court Park. The Cabinet had resolved to revoke the decision made by the Cabinet on the 10th March, 2008 to appropriate the Access Land at Upton Court Park from open space to planning purposes and to give notice of the Council's intention to appropriate the Access Land.

The Leader confirmed with the Cabinet Members that they had all received the agenda for the meeting and, in addition, a letter from Councillor Stokes to the Assistant Director (Democratic Services) dated 20th July, 2008. The Leader advised that Councillor Stokes was unable to be present at the meeting and that he had been advised that Councillor Plimmer was attending to speak on his behalf.

Councillor Plimmer read out a statement on behalf of Councillor Stokes which raised issues with regard to:

- The flawed nature of the process and Councillor Stokes' view that any decision arising would be challengeable.
- Councillor Stokes' view that the meeting should have been scheduled at a time to allow him to speak as the primary individual responsible for the call-in.
- The significant factual inaccuracies in Cabinet reports and legal advice on the matter.
- A concern that Cabinet Members would be unlikely to be able to come to a decision that could be truly based on facts as none of the relevant documentation had yet been provided. Councillor Plimmer therefore suggested that a review of the process including how facts and legal

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advice came to be inaccurate took place so that Cabinet Members could be assured that they were making a decision on solid, legal and factual grounds. Councillor Plimmer then also drew attention to the points made in the letter from Councillor Stokes' letter of 20th July, 2008:

The Leader acknowledged that it was unfortunate that there was a diary clash. However, in his view the issue of scrutiny was not relevant, the issue was whether the Cabinet wished to revoke the decision taken on 10th March 2008 and start afresh. Councillor Anderson asked whether Councillor Plimmer had any objection to the decision of the Cabinet on 10th March, 2008 being revoked - Councillor Plimmer confirmed that Councillor Stokes wished the decision to be revoked.

The Leader advised that if the decision was taken to implement the Cabinet decision taken on the 7th July, 2008 notices would be published in August but a decision on the Appropriation would not be made until September. The publication of the notices would allow everyone to have their say and for all views to be fully considered by the Cabinet prior to a decision being made. In answer to a question, the Director of Law and Corporate Governance confirmed that there was no reason why Councillor Stokes could not present any objections he had to the September Cabinet meeting.

The Director of Law and Corporate Governance advised that Councillor Stokes had made a request for a significant amount of background information with regard to the land at Upton Court Park and had been asked to advise how he wished to proceed in viewing the information available.

The Leader drew the Cabinet's attention specifically to the matters raised by Councillor Stokes in his post-decision call-in.

1. The pre-decision call-in was conducted in a pre-determined manner. The Leader advised that this was not the case and there had been a full debate.
2. The pre-decision call-in was conducted in an incomplete and superficial manner. The Leader drew attention to the comments of the Director of Law and Corporate Governance in the report.
3. The lack of adequate and comprehensive documentation together with the consequent reliance on verbal comments led to confusion and inadequate analysis. The Leader advised that there was nothing to prevent Councillor Stokes from seeking this information and presenting it to the Overview and Scrutiny Committee.
4. Other information had been inaccurate and consequently misleading. The Leader advised that there had been a full debate at the meeting and that, as a result, a decision was taken to revoke the decision made by the Cabinet on 10th March, 2008.
5. The Cabinet seemed determined to avoid any land's tribunal procedure. The Director of Law and Corporate Governance advised that the previous Cabinet had been given a general picture with regard to restrictive covenants, Section 237 Planning Procedure and Payment of Compensation.

Cabinet - 23.07.08

Councillor Dale-Gough had submitted a call-in on the same issue and, when asked to speak, he indicated that a number of his questions had been answered, however, he was concerned over the decision the Cabinet took with regard to this Land on 27th May, 2008. He asked what progress was being made and the level of Compensation residents affected by the covenant might expect. The Director of Resources advised that the Cabinet had given officers authority to negotiate to progress the possible sale of the council's land but there was no authority to sell. The Director of Law and Corporate Governance advised that he could not predict the level of compensation that might apply with regard to the covenants.

Councillor Coad had also submitted a call-in on this item and stressed her view that the date of this meeting should have been changed to allow Councillor Stokes to attend. Councillor Coad drew attention to Best Practice in other authorities on Overview and Scrutiny and the right to documents. She was concerned that the documentation that had been requested would not be available by September. The Leader stressed that a decision would not be taken until September following consultation. The Overview and Scrutiny Committee could scrutinise the matter before this if it wished. Councillor Coad drew attention to the flawed information that had been given on a number of occasions. The Leader reminded her that only two errors had been made – one, with regard to the status of the land and the other, with regard to the issue of covenants. The Cabinet's decision to revoke the decision of 10th March took care of the status of the Access Land issue and the issue of who would have the benefit of covenants would not be relevant until a decision was taken to sell the Land.

The Leader sought an assurance from the Director of Law and Corporate Governance that there was time to get this matter back to the meeting of the Cabinet in September 2008 and the Director advised that the consultation would take place during the whole of August and that he was confident that the information would be available for the September meeting.

The Cabinet agreed unanimously that it would stand by its original decision and that there was no reason to delay its implementation, noting that there was nothing to preclude the Overview and Scrutiny Committee scrutinising the matter as a post-decision scrutiny.

Resolved – That the implementation of the decision taken on 7th July, 2008 with regard to the revocation of the decision of the Cabinet on 10th March, and giving notice of the Council's intention to appropriate the Access Land from open space to planning purposes be implemented forthwith.

Chair

(Note: The Meeting opened at 6.00 p.m. and closed at 6.40 p.m.)