

LAND AT HURST FARM, HURSTWOOD LANE, HAYWARDS HEATH

REPORT OF: Head of Corporate Resources
Contact Officer: Christopher Coppens, Property Lawyer and
David Kemp, Consultant Estates Surveyor
Email: christopher.coppens@midsussex.gov.uk
Tel: 01444 477213
Wards Affected: Haywards Heath - Franklands
Key Decision No
Report to: Cabinet
11th March 2019

Purpose of Report

1. To request Cabinet to approve:
 - (a) the disposal of:
 - (i) the parcel of land on the east side of Hurstwood Lane and lying to the south of Birch Way and Greenhill Park, Haywards Heath, West Sussex and coloured in pink on the attached plan to this report at Appendix D, (“the Primary School Land”) comprising an area of approximately 2.4 hectares, which forms part of an area of open space, to West Sussex County Council for the provision of a primary school with early years provision on the basis set out in the Exempt Appendix F to this report;
 - (ii) three parcels of land on the east side of Hurstwood Lane and lying to the south of Birch Way and Greenhill Park, Haywards Heath, West Sussex and coloured in blue, yellow and green within the thick black line boundary on the attached plan to this report at Appendix D, comprising an aggregated area of approximately 15.75 hectares to Haywards Heath Town Council, for the provision of a burial ground on the blue land (“the Burial Ground Land”), allotments on the yellow land (“the Allotment Land”), a country park and woodland on the green land (“the Country Park Land”) on the basis set out in the Exempt Appendix F to this report;
 - (iii) the creation of an access road and car park on the hatched land coloured in grey on the attached plan to this report at Appendix D (“the Access Road and Car Park Land”); and
 - (iv) in the light of part of the Burial Ground Land, the Allotment Land and the Country Park Land having been open for public use as informal open space, consider the objections received in response to the statutory advertisement.
 - (b) In the light of the considerations in (a)(iv) to decide whether to make the disposals in (a)(i) and (a)(ii) and to create the access road and car park, as part of a larger development scheme.

Summary

2. This report outlines proposals for the disposal of various parcels of land in connection with a proposed housing development on part of Hurst Farm and summarises the decisions previously made by the Council when the Council acquired the land. It explains the current status of the land, the Council's powers of disposal and seeks agreement, to the disposal of various parcels of Council owned land lying to the north-east of Hurstwood Lane, Haywards Heath comprising an area of 18.15 hectares on the basis set out in the Exempt Appendix F to this report for the provision of a school, burial ground, allotments and country park to facilitate, the erection of new homes as part of a larger development scheme briefly outlined in paragraphs 11 to 14 of this report.

Recommendations

3. ***Cabinet is recommended to:***
 - (a) ***note and consider the responses to the statutory advertisements placed in the Mid Sussex Times on 3rd and 10th January 2019 giving notice of the Council's intention to dispose of the Primary School Land shown coloured in pink on the plan, the Burial Ground Land shown coloured in blue on the plan, the Allotment Land shown coloured in yellow on the plan and the Country Park Land within the black line boundary shown coloured in green on the plan attached at Appendix D; and***
 - (b) ***authorise the Head of Corporate Resources and the Solicitor and Head of Regulatory Services to dispose of the Primary School Land to West Sussex County Council on the basis set out in the Exempt Appendix F to this report and on such other terms as the Solicitor and Head of Regulatory Services recommends to protect the Council's interests; and***
 - (c) ***authorise the Head of Corporate Resources and the Solicitor and Head of Regulatory Services to dispose of the Burial Ground Land, the Allotment Land and the Country Park Land to Haywards Heath Town Council on the basis set out in the Exempt Appendix F to this report and on such other terms as the Solicitor and Head of Regulatory Services recommends to protect the Council's interests; and***
 - (d) ***subject to agreeing appropriate terms for the future management and maintenance, authorise the Head of Corporate Resources to procure the provision of an access road and car park on the Access Road and Car Park Land.***

Background

4. In 1996, parts of Hurst Farm, Hurstwood Lane, Haywards Heath comprising the three lots of land in the vicinity of Hurstwood Lane shown for identification purposes only coloured in green, mauve and pink respectively on the plan attached to this report at Appendix B, were put on the market by Savills, Property Consultants, on behalf of the Secretary of State for Health. The land was described in the sale particulars as follows:

Lot 1: A pair of semi-detached cottages, Grade II Listed Sussex Barn and a range of additional buildings in approximately 2.2. acres lying to the south of the

proposed relief road and west of Hurstwood Farmhouse, which was then used for office purposes and was not part of the sale.

Lot 2: 49.06 acres of established pasture land and woodland to the north-west of Hurstwood Lane, including some modern farm buildings and a water pumping station.

Lot 3 45.19 acres of established pasture land, partly used for arable production in the past, together with an area of woodland to the south-east of Hurstwood Lane and mostly lying in Lewes District.

5. On the 3rd September 1996, the Council's Special Policy and Resources Committee received an exempt report on whether the Council should attempt to purchase part of Hurst Farm in the vicinity of Hurstwood Lane from the Secretary of State for Health. The report described the three lots of land as an important part of Haywards Heath and suggested that the land could be acquired with a view to protecting it from development in the longer term and providing an informal open space. The report stated that Lot 2 would appear to have the greatest potential if acquired by the Council. The report recommended that the Council should seek to purchase Lot 2. The Committee noted that the prospective purchaser of Lot 2 would be required to enter into an option to enable the necessary land to be available for the construction of the Haywards Heath Relief Road, in due course, and resolved that:

(1) *the Council should seek to purchase Lots 1, 2 and 3 as set out in Savills sale particulars for Hurst Farm, Hurstwood Lane, Haywards Heath;*

(2) *the Secretary and Solicitor to the Council be authorised to instruct a valuer to advise the Council on the proposed purchase;*

(3) *it be noted that, if the Council is successful, an assessment of the future retention, use and management of each Lot be considered by the appropriate Committee; and*

(4) *the Council's programme of Capital and Revenue Projects be amended as agreed by the Committee.*

6. On the 16th October 1996, the Council's Policy and Resources Committee received an exempt report, which informed the Committee that a Valuer had been appointed immediately following the September meeting, who had visited the site and after discussing the matter with Savills, had advised that the Council should submit three separate bids: one in respect of the whole site, Lots 1, 2 and 3; one in respect of Lots 2 and 3, and one in respect of Lot 2 only. Savills subsequently issued further particulars of sale in which it was stated that best and final bids should be submitted to them in a sealed envelope by noon on 20th September 1996, indicating that the Vendor was not bound to accept the highest or indeed any offer, and that a decision was expected to be made within 10 working days of the opening of tenders. Three bids on behalf of the Council, prepared in accordance with the Valuer's advice, were delivered to Savills on 19th September 1996. At the meeting of the 16th October 1996, the Committee were informed in an oral update by the Secretary and Solicitor to the Council that she was hopeful that the Council's bids for Lots 2 and 3 would be successful. The Committee resolved to note the report.

7. On the 27th November 1996, the Council's Leisure Services Committee received an exempt report on the Special Meeting of the Policy and Resources Committee held on 3rd September 1996 and the proposed purchase of Hurst Farm. They were informed that the Council's bid for Lots 2 and 3 had been successful, although an amended boundary for the eastern side of Lot 2 has been agreed, subject to agreement on a right of way to link, what would then be two parcels of land comprising Lot 2, and that if agreement could be reached the Council would purchase Lots 2 and 3 for the price of £231,117, subject to contract. The report noted that the future use of the land would need to be considered as part of the overall plan for informal open space in Haywards Heath, that accommodation works would be required to facilitate public access and stated that the land would continue to be managed as farm meadow land and pasture, the costs of which would be around £5,000. The Committee resolved to note the contents of the report.
8. On the 9th May 1997, the Council purchased the amended Lot 2 and the whole of Lot 3 from the Secretary of State for Health at the price of £231,117, subject to an option agreement made on the same date in respect of parts of Lot 2 to enable the Secretary of State to buy back the land necessary for the construction of the Haywards Heath Relief Road in due course. The option was exercised by the Secretary of State for Health's successors, the Urban Regeneration Agency (known as English Partnerships), on 14th December 2007 and the Haywards Heath Relief Road has been constructed, but awaits formal adoption by West Sussex County Council. As part of the same arrangement the large balancing pond constructed on part of the option land will be transferred back to the Council at nil consideration, subject to payment to the Council of a commuted maintenance sum to cover the future costs of maintaining the balancing pond.
9. Prior to the Council's purchase of Hurst Farm, the land was occupied by a local farmer for the purposes of grazing sheep under the terms of a grazing licence, which use commenced in or around March 1993 and was terminated by the Secretary of State for Health on or shortly before 9th May 1997.
10. Following completion of the Council's purchase and, in accordance with the earlier decisions of the Council made on the 3rd September 1996 namely, "*an assessment of the future retention, use and management of each Lot be considered by the appropriate Committee*" and on the 27th November 1996 namely, "*to continue with management of the land as farm meadow land and pasture*", the Council has entered into a series of licences with various local farmers to use and occupy the land edged and hatched in black on the attached plan marked "Hurst Farm Grazing Area" attached to this report at Appendix C, for the purposes of grazing sheep on the land, which use continues to the present day.
11. In April 2009, the Council entered into a letter of understanding with the owners of the Blue Land and the Yellow Land on the plan at Appendix A to promote the site edged in red on that plan for development.
12. On the 14th December 2016, the Council made the Haywards Heath Neighbourhood Plan, which includes the whole of the land acquired by the Council in 1997, as part of an allocation for 350 new homes recognising the need to provide sites for housing in accordance with Central Government requirements imposed on local authorities by successive Governments during the last 10 years.

13. On 30th June 2017, an application for outline planning permission (application reference DM/17/2739) for the development of up to 375 new homes, a 2 form entry primary school with Early Years provision, a new burial ground, allotments, Country Park, car parking, 'Green Way', new vehicular accesses and associated parking and landscaping was submitted by the Council jointly with Cross Stone Securities Limited.
14. On 9th August 2018, the Council's District Planning Committee considered a report on planning application DM/17/2739 and resolved:

"That permission is to be granted subject to the conditions listed in Appendix B, and additional conditions as listed in the Agenda Update Sheet, and the completion of a satisfactory legal agreement to secure the necessary affordable housing and infrastructure provision. In addition, that authority be delegated to Officers to negotiate and complete a satisfactory S106 planning obligation."

Present status and purpose

15. The Council has a general power to acquire land by agreement under Section 120(1) of the Local Government Act 1972, which provides as follows:

"For the purposes of:

- (a) any of their functions under this or any other enactment, or*
- (b) the benefit, improvement or development of their area,*

a principal council may acquire by agreement any land, whether situated inside or outside their area."

The Council is therefore, empowered to acquire land by agreement inside or outside the District of Mid Sussex for the purposes of any of the Council's functions or for the benefit, improvement or development of the District of Mid Sussex.

16. Section 120(2) of the Local Government Act 1972, provides that:

"A principal council may acquire by agreement any land for any purpose for which they are authorised by this or any other enactment to acquire land, notwithstanding that the land is not immediately required for that purpose; and, until it is required for the purpose for which it was acquired, any land acquired under this subsection may be used for the purpose of any of the council's functions."

The Council is therefore, empowered to acquire land by agreement even though it is not immediately required for the purpose for which it was acquired.

17. When land is acquired by a local authority for a statutory purpose or function, it continues to be held by the local authority for that purpose or function until it is formally appropriated to another purpose or function.
18. Where land is acquired by a local authority for a particular statutory purpose or function and the statute under which the land was acquired restricts its use to that particular statutory purpose then the land can only be used by the local authority for that statutory purpose and this is the case, notwithstanding its designation in the local plan or the existence of any planning permission granted in respect of the land.

19. Although the report of the 3rd September 1996, suggested that the land could be acquired for use as informal open space, neither the recommendation in that report nor the resolution passed on the 3rd September 1996, authorising the purchase of the land stipulated that the land would be acquired for that purpose and, indeed, the exempt minutes of the meetings held on the 3rd September 1996 and the 27th November 1996 clearly stipulate that the future retention, use and management of each part of the land is to be determined by the Council at a later date.
20. No further reports on the future retention, use and management of the land have been considered by the Council and consequently the land is held by the Council as strategic corporate investment farmland until the Council resolves to appropriate the land for some specific statutory purposes or function of the Council.

Council's powers of disposal

21. The Council has a general power to dispose of land under Section 123(1) of the Local Government Act 1972 ("the 1972 Act"), which provides that:

"Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish."

These powers are permissive and must be exercised strictly in accordance with the provisions of Section 123(2) and Section 123(2A) of the 1972 Act.

Terms of disposal

22. Section 123(2) of the 1972 Act, provides that:

"Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained."

Section 123(7) of the 1972 Act, provides that:

"For the purposes of this section a disposal of land is a disposal by way of a short tenancy if it consists:

- (a) of a grant of a term of not exceeding seven years, or*
- (b) of the assignment of a term which at the date of assignment has not more than seven years to run."*

23. Local authorities are therefore, given powers under Section 123 of the 1972 Act to dispose of land in any manner they wish, including sale of their freehold interest, granting a lease or assigning any unexpired term of a lease, and the granting of easements. The only constraint is that a disposal must be for the best consideration reasonably obtainable (except in the case of short tenancies of less than 7 years), unless the Secretary of State consents to the disposal.

24. Section 128(1) of the 1972 Act confers on the Secretary of State power to give a general consent for the purposes of land disposals by local authorities carried out under their powers in Part 7 of the 1972 Act. The Secretary of State's sole statutory function in respect of the exercise by local authorities of these disposal powers is to give or withhold consent to a proposed disposal in cases where his consent is required. General consent to dispose of land that can be disposed of under Section 123 of the 1972 Act is contained in Circular 06/03 Local Government Act 1972 General Disposal Consent (England) 2003.
25. The Consent removes the requirement for authorities to seek specific consent from the Secretary of State for any disposal of land, where the authority considers it will help it to secure the promotion or improvement of the economic, social or environmental well-being of its area and the difference between the unrestricted value of the interest to be disposed of and the consideration accepted ("the undervalue") is £2,000,000 (two million pounds) or less.
26. In determining whether or not to dispose of land for less than the best consideration reasonably obtainable, and whether or not any specific proposal to take such action falls within the terms of the Consent, the authority should ensure that it complies with normal and prudent commercial practices, including obtaining the view of a professionally qualified valuer as to the likely amount of the undervalue.
27. The meaning of "the best consideration reasonably obtainable" has been the subject of considerable judicial interpretation and the overriding duty to comply with normal and prudent commercial practices is well established.
28. The courts have held that consideration is confined to those elements of a transaction which are of commercial or monetary value and that the court will quash a decision to sell property where the authority has taken into account an irrelevant factor such as job creation, the creation of affordable housing units or payments promised under Section 106 of the Town and Country Planning Act 1990. Account could, however, be taken of nomination rights conferred on the Council by agreement.
29. At present the land is largely agricultural pasture land used for grazing sheep with limited public access. It is considered that the provision of a new primary school on the Primary School Land, the provision of a burial ground on the Burial Ground Land, the provision of allotments on the Allotment Land will contribute to social well-being and the provision of a country park managed as formal open space amenity land on the Country Park Land will encourage greater public use for recreational purposes and contribute to social and environmental well-being and therefore, these disposals will help the Council to secure the promotion or improvement of the economic, social or environmental well-being of its area and that the first test is therefore, satisfied.
30. The Council has obtained valuation advice from a qualified surveyor, which is set out in the Exempt Appendix F to this report and indicates that any undervalue in the proposed transactions is less than half the amount permitted by the general consent referred to in paragraph 25 above and therefore permitted in law.

Disposal of open space land

31. Section 123(2A) of the 1972 Act, provides that:

“A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.”

Open space is defined in Section 336(1) of the Town and Country Planning Act 1990 as *“any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground”* and it includes any land used informally by local inhabitants for recreation, although not formally laid out and not formally dedicated to public use under the Open Spaces Act 1906. Land that has been made available and used by local inhabitants for informal recreation is classed as *“de-facto open space”*. However, it must be noted that even if land is acquired for development as open space, if at the time of a proposed disposal, no steps have been taken to develop the land as open space and it had been successively let out for use inconsistent with use as open space, it will not be open space and Section 123(2A) will not apply.

32. The land at Hurst Farm acquired by the Council in 1997 was not acquired for use as open space, has never been laid out as a public garden, is not held or used for the purposes of public recreation and is not a disused burial ground. Public access to approximately 12.60 hectares of the land on the east side of Hurstwood Lane has been precluded by fencing and use of the land for grazing sheep since the Council acquired the land and before that, and therefore, the Primary School Land, the Burial Ground land and the Allotment Land do not constitute de-facto open space. However, limited public access to the land has occurred (in particular by dog walkers) from a public footpath running along the southern boundary of the Burial Ground Land and the Allotment Land. Consequently, sub-section 123(2A) of the 1972 Act applies and the Council is obliged to advertise its intention to dispose of the Primary School Land, the Burial Ground Land, the Allotment Land and the Country Park Land as they form part of an open space, albeit only informal access.

33. Section 123 deals with the disposal of land. There are similar requirements under Section 122 of the 1972 Act relating to the appropriation of land for different purposes. In particular, subsections 122(1) and 122(2A) of the 1972 Act state provides that:

“(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.

(2) ...

(2A) *A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.*

34. In the present case, section 122 of the 1972 Act has no application because the land has not been held by the Council as open space. Rather, the Council must consider the proposed disposals under Section 123 (2A) of the 1972 Act because some of the land has been used as de facto open space. Unlike section 122(1), where the power to appropriate land is limited to situations where the land *“is no longer required for the purpose for which it is held immediately before the appropriation”*, the requirement under section 123 is simply to consider any objections to the disposal.

Section 123 Advertisements and Objections

35. As some of the Country Park Land has not been subject to grazing agreements and as general public access to that limited area is likely to have taken place since the Council acquired the land in 1997, the Council has treated the land as “de facto open space” and has caused notice of its intention to dispose of the Primary School Land, the Burial Ground Land, the Allotment Land and the Country Park Land to be advertised in two consecutive weeks in the Mid Sussex Times, being a newspaper circulating in the area in which the Primary School Land, the Burial Ground Land, the Allotment Land and the Country Park Land is situated namely, on 3rd and 10th January 2019 inviting members of the public who may object to the disposal of the Primary School Land, the Burial Ground Land, the Allotment Land and the Country Park land to make their objections known to the Council by 31st January 2019.
36. The Council has received four letters of objection from two individuals in response to the statutory advertisements published on 3rd and 10th January 2018.
37. While there is undoubtedly a link between the planning application considered by the Council’s District Planning Committee on the 9th August 2018 and the need for this disposal report, it is important to remember that they are completely independent processes that must be followed by the Council and that, as a matter of public policy and law, we must not conflate planning issues with property issues and vice versa. The consideration of planning applications is not an executive function of the Council and they must be determined by the Local Planning Authority through the planning committees in accordance with planning policy and law; decisions concerning the acquisition, use, management and disposal of Council land is an executive function of the Council and must be determined by the Council’s Cabinet in accordance with the Council’s corporate policies and procedures and local government law.
38. A significant numbers of issues raised in the objections relate to planning issues, policy and procedure, and fail to address the central issue of whether the Primary School Land, the Burial Ground Land, the Allotment Land and the Country Park Land should be retained for its present purpose as strategic corporate investment farmland. Copies of objections are annexed to this report in Appendix E and Cabinet must consider the objections contained in each of them.
39. The following points set out in italics below are most pertinent to the issue of whether the land is *“no longer required for the purpose for which it is currently held”*.

Email dated 15th January 2019 from a representative of Fox Hill Residents Association:

“does this sale involve any Ancient Woodland and will its full protection be guaranteed?”

“How does this sale relate to the land that was acquired by MSDC for public amenity? I am also awaiting notification of an application to put a TRO on Hurstwood Lane. How does the sale of this land to WSCC affect this application?”

Letter sent by email on 30th January 2019 from a representative of Fox Hill Residents Association:

“Neither area of land has access to a public highway. Designated Ancient Woodland, which is afforded an increased level of protection, would be destroyed forever if the proposed outline application is achieved. In my opinion, the property department should be made aware of the importance of protecting this area of Ancient Woodland before simply disposing of it.”

“the status of Ancient Woodland and the presence of protected species such as kingfishers and crested newts”

These comments allude to the premise that the land should remain undeveloped by the Council. A majority of the land will remain undeveloped and the Country Park Land will attract greater public access.

Email dated 15th January 2019 from an individual raises concerns about the planning application, best value, conflicts of interest, protection of the public interest and public finances, and due diligence. These issues are addressed in other sections of this report and the Exempt Appendix F deals with land valuations. An initial response to this email was given explaining that the Public Notices published in the Mid Sussex Times on 3rd and 10th January 2019, were not concerned with the planning application, but to the issue of whether the Council should make the disposals recommended in this report.

A further email dated 19th January 2019 from the same individual requested that the following be brought to Cabinet’s attention:

“Except with the consent of the Secretary of State, a council shall not dispose of land under section 123, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.”

“The disposal advertised clearly fails to meet this very simple test. Your claim that this disposal is unrelated to the Hurst Farm application is either commercially naive or wilfully misleading, The disposal of these parcels of land provides very significant value to Cross Stone and others in facilitation of their proposed development and as a headline part of the planning gains for the application the land value gains generated rests entirely upon them. No evidence has been provided that the council has fully received from all interested parties the value created on their behalf by the disposal of the council’s assets. Without such, any disposal or loss of public/open access to this land does not deliver the full commercial value created to the taxpayer from the disposal of their assets and the best value that can reasonably be obtained has not been achieved”

The latter paragraph alludes to the premise that the land should remain undeveloped by the Council, unless the proposed disposal is made at full commercial value. The facilities proposed will be of benefit to future residents of the homes proposed in the planning application and to the wider community. Adjustments will be made in the Section 106 financial contributions for that development to ensure all landowners contribute to the benefit afforded to the rest of the proposed development by the disposals proposed in this report. Any undervalue is less than the General exemption in paragraph 25.

Policy Context

40. This proposal is brought to Cabinet against a background of Central Government asking councils to maximise the value of their assets and bring forward land for potential housing development.

Other Options Considered

41. The Council could consider retaining the land as strategic corporate investment farmland and/or designating the land as informal open space. Such a proposal would see the Council forgo a much needed capital receipt and remove an allocated site from housing development.

Financial Implications

42. There are currently financial pressures for the Council in delivering public services in the District. Capital receipts can be used to invest to deliver income to help maintain public services in the District including supporting economic growth and job creation.

Risk Management Implications

43. As with any decision concerning the exercise of statutory powers by a local authority, there is a risk of judicial review. Provided that the Council makes its decision in good faith and for proper reasons the risk of judicial review is small.
44. As with any other application, the planning application may be refused. The Council would have the right to appeal any such refusal to the same extent that any other applicant may appeal.
45. Any planning permission issued in respect of the land may be called in by the Secretary of State or be subject to application for judicial review to the same extent as any other planning permission.

Equality and customer service implications

46. As the land is held as strategic corporate investment farmland and public access to and use of the majority of the land has been precluded by existence of fencing and grazing sheep on the land, and as the current use for grazing sheep is permitted by way of a licence, the Council is entitled to determine, there are no equality and customer service implications arising from the proposed disposal of land that has been subject to the grazing licence arrangements. As regards those limited areas to which the public have likely enjoyed public access, given that the Town Council will be required to maintain those areas as open space land, as part of the Country Park the Council is entitled to determine that there are no equality and customer service implications arising from this report and the proposed disposals.

Other Material Implications

47. There are none, save as already disclosed in this report.

Background Papers

Legal File and earlier reports.