

## Wiltshire Council

### Cabinet

12 December 2017

---

**Subject:** Appropriation of land at Rabley Wood, Marlborough for planning purposes

**Cabinet Member:** Councillor Toby Sturgis – Cabinet Member for Planning and Strategic Asset Management

**Key Decision:** Yes

#### **Executive Summary**

The Council wishes to dispose of land at Rabley Wood Marlborough for housing development, including affordable housing and adjoining open space. The land was declared surplus and approval for disposal was given by the Cabinet (Capital Assets) Committee ('CCAC') on 24<sup>th</sup> July 2012.

The site is currently laid out and used as public open space. Alternative and more extensive open space for the area has been provided for in a planning permission granted by the Planning Inspectorate under appeal.

Under section 122 of the Local Government Act 1972, the Council can appropriate land it owns which is no longer required for the purpose it is currently held, provided that the proposed use is for any statutory purpose for which it is authorised to acquire land, one of which is for planning purposes (any use for which planning permission can be obtained).

The proposal is therefore to appropriate the site for planning purposes to enable the disposal, and development, to proceed.

#### **Proposal**

It is proposed that Cabinet appropriates for planning purposes the land at Rabley Wood Marlborough (as shown on the plan in Appendix 1 of the report) under section 122 of the Local Government Act 1972 which is currently held as open space.

#### **Reason for Proposal**

To ensure the land can be disposed of free of any rights and obligations arising from its use as public open space.

Alistair Cunningham, Corporate Director, Growth, Investment and Place,  
Corporate Leadership Team

## **Wiltshire Council**

### **Cabinet**

**12 December 2017**

---

**Subject: Appropriation of land at Rabley Wood, Marlborough for planning purposes**

**Cabinet member: Councillor Toby Sturgis, Cabinet Member for Planning and Strategic Asset Management**

**Key Decision: Yes**

#### **Purpose of Report**

1. To seek Cabinet's agreement to appropriate land, as identified in this report, for disposal of the Site.

#### **Background**

2. The Council is the freehold owner of land at Rabley Wood Marlborough ('the Site') currently laid out as open space with a small play area.
3. The Council entered into a Promotion Agreement with the adjoining landowner, Megalodon Limited, to obtain planning permission for residential development on the Site with re-provision of open space and recreation on part of Megalodon's adjoining land. That agreement has since been assigned to RBC Trustees (Guernsey) Limited as successors to Megalodon Limited. Outline planning permission for residential development with associated works on the Site and the adjoining land was granted to the Manton Estate (associated with Megalodon) by appeal on 20<sup>th</sup> July 2016. This includes provision of an alternative play area and multi-use games area on the Site, and alternative open space provision on the adjoining land.
4. As a result of the grant of outline planning permission with the alternative play area, multi-use games and open space provision on the new areas of land, this report considers the proposed appropriation of the Site for planning purposes to override potential issues regarding the fact the Site is currently used as open space.

#### **Main Considerations for the Council**

##### **Site specific issues**

5. The Site is affected by two Section 52 Agreements, dated 27<sup>th</sup> July 1983 (as varied, as to the area affected, by a deed dated 21<sup>st</sup> October 1993) and 24<sup>th</sup> December 1987 respectively (together referred to as 'the S52 Agreements'),

which contain obligations on the Council to lay out and maintain the Site as open space.

6. Legal advice from Counsel confirms that the original obligations under the terms of the S52 Agreements are no longer considered to be extant for planning purposes as the site has been laid out and transferred to the Council.
7. However, it is likely there are fiduciary duties on the Council, as a public authority, to maintain the Site as open space (within the meaning of section 336 of the Town and Country Planning Act 1990) to ensure that the planning obligations to mitigate the effects of the original development are maintained whilst necessary..
8. As a result of the recent grant of planning permission for development, the Planning Inspector has determined that the proposed alternative open space has met the planning obligations and therefore there is no underlying necessity for that fiduciary duty to remain.
9. In order to deal with the issues referred to in paragraphs 7 to 9, it is proposed that the Council exercises its powers under section 122 of the Local Government Act 1972 (see comment below) and the Site be appropriated for planning purposes. In other words, as the alternative site is available to meet the underlying planning obligations, then this Site is no longer needed for that purpose, and can be appropriated for any use for which planning permission can be obtained.
10. As a result of the appeal referred to in paragraph 4 above, planning permission has already been granted.

### **Legal powers**

11. "Appropriation" is a term given in local government legislation to an internal process of a council designed to allow councils flexibility in its use of land. It allows a council to use land that has been acquired for one purpose in suitable circumstances to be used for a different purpose.
12. Under section 122 of the Local Government Act 1972, the Council can "*appropriate for any purpose for which the council is authorised ...to acquire land... any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation*". The Council is authorised to acquire land for planning purposes. Once land is appropriated for planning purposes, section 241 of the Town and Country Planning Act 1990 provides that it can be used or developed in any manner permitted by grant of planning permission.
13. In this case, it is considered that the Site is no longer required for the purpose for which it was originally held and appropriation will facilitate development, redevelopment or improvement of the land.

14. Where land is appropriated for planning purposes, it will then be held by the Council under the statutory provisions within Part 9 of the Town and Country Planning Act 1990. The practical consequence of this (by virtue of Section 203 of the Housing and Planning Act 2016) is that the erection, construction or carrying out of any maintenance of any building or work on the land and subsequent use of the land is authorised under those planning powers, if the works are done in accordance with that planning permission..
15. The purpose of Section 203 of the Housing and Planning Act 2016 is to ensure that where land has been appropriated for planning purposes, then existing rights, which could prevent the development of that land from proceeding in accordance with the planning permission, can be overridden. The rights will be overridden whether the Council or a party deriving title from the Council undertakes the development.
16. The power contained in Section 203 of the Housing and Planning Act 2016 does not remove the legitimate rights of parties to compensation, which may arise from the interference with their rights, but it does remove the potential for excessive claims and it also removes the potential for such parties to frustrate the development by obtaining an injunction to prevent the interference with their rights. See also paragraph 20 below.
17. As the decision to appropriate is considered a key decision (as a matter which is commercially, politically or strategically sensitive) it falls to Cabinet to consider this.
18. Any decision of the Council can be judicially reviewed. Any judicial review must be lodged as soon as possible after the decision is made and, in any event, not later than three months after the date of the decision. The anticipated earliest date for disposing of the Site will therefore be three months after this decision to appropriate the Site.

### **Overview and Scrutiny Engagement**

19. The report has not been referred to the Overview and Scrutiny Committee as it accords with advice from external legal Counsel.

### **Safeguarding Implications**

21. None

### **Public Health Implications**

22. The appropriation itself has no public health implications. It is considered that the provision of alternative facilities will at minimum retain an equivalent public health standard

### **Procurement Implications**

23. None

### **Environmental Impact of the Proposal**

24. These have been considered as part of the application for planning consent, and there are no known environmental impacts of the proposal to appropriate.

### **Equalities Impact of the Proposal**

25. The appropriation itself has equalities implications. It is considered that the provision of alternative facilities will at minimum retain an equalities standard

### **Risk Assessment**

26. Appropriation of the land will not override the private right regarding maintenance of part of the site as open space arising under a covenant in the 1983 S52 Agreement. However, that is a personal right owed to F Rendell & Sons Limited, one of the parties to that agreement. This company would have had a right to compensation for interference with the right, but the company was dissolved on 1<sup>st</sup> February 2011.

### **Financial Implications**

27. The only risk of a claim for compensation under Section 203 of the Housing Act 2016 would have been from F Rendell & Sons Limited, which company has been dissolved as mentioned in paragraph 26 above. The Council is the freehold owner of the Site so the question of compensation should not arise otherwise.
28. After appropriation of the Site disposal of it will generate a substantial capital receipt for the Council. Disposal of the freehold title was authorised by CCAC in 2012.
29. No internal financial transfers, or budget changes, are required as a result of appropriation as there is no transfer from general fund to the housing revenue account, or vice versa.

### **Legal Implications**

30. The Council has taken external advice from Counsel on its legal powers for appropriating the Site for planning purposes. The legal implications and powers are summarised in the body of the report.

### **Options Considered**

31. Maintaining the Site as open space and not appropriating it for planning purposes. This is not recommended as it would not assist in meeting the Council's requirement for additional new housing, nor in meeting the Council's need to achieve capital receipts to assist in meeting its obligations to the public to continue to invest in public services.

32. If the disposal of the Site is to go ahead for development purposes, then the planning permission must be capable of being put into effect which requires varying the terms of the S52 Agreements or the appropriation of the Site for planning purpose, as set out in this report.
33. Varying the S52 Agreements is not recommended as these are not considered to be enforceable in any event, and this would not deal with any potential statutory or fiduciary duties of the Council, as referred to in paragraph 8, affecting the Site.
34. Appropriating the Site for planning purposes is the only action which can override any potential fiduciary duties, as referred to in paragraph 8, of the Council affecting the Site.

### **Conclusions**

35. The proposed appropriation for planning purposes of the Site is the recommended way of resolving the risks, in respect of rights, covenants and fiduciary duties affecting it, and enabling the disposal of the Site to go ahead.

**Alistair Cunningham**, Corporate Director, Growth, Investment and Place,  
Corporate Leadership Team

---

Report Author: Mark Hunnybun - Strategic Projects & Development Manager

19 December 2017

### **Background Papers**

None.

### **Appendices**

Appendix 1 – Rabley Wood, Marlborough site plan

# Appendix 1 – Rabley Wood, Marlborough site plan

