

**CABINET**  
**26<sup>th</sup> April 2016**

**SOLICITOR TO THE COUNCIL**  
**EXEMPT REPORT NO. LEG1605**

**DISPOSAL OF LAND AT AVENUE FARM, FARNBOROUGH**

**PURPOSE**

The purpose of this report is seek authority to appropriate land, which is de facto open space, to be held for planning purposes; and then to dispose of the plots to one or more adjoining owners to allow the land to be used as garden land.

**BACKGROUND**

The four areas of tarmacked land known as Avenue Farm are shown in Appendix 1 in plan form with bold black edging and numbered 1-4. These comprise areas left over when the housing was built. This land is considered to be open space under section 336 (1) TCPA as it has been at various times used for some recreation although not formally laid out.

In 2008 Cabinet considered a report recommending the transfer of these areas to adjacent residents, as the areas were, and are still, in poor condition; costly to maintain, and given their secluded locations, are subject to regular anti-social behaviour, being difficult to keep clean due to fly-tipping, dog fouling, weeds and general litter. The 2008 report is set out at Appendix 2 for information. The disposal was approved by Cabinet but did not proceed probably due to legal difficulties caused by the former developer having the benefit of a covenant restricting the use of these areas to public open space.

Cabinet has previously received a report on an estates project to sell, subject to planning permission being granted, small areas of amenity land. There are a number of outstanding requests from the public to acquire such land and adjacent residents to these plots at Wilton Court have made a request to acquire the land to the rear of their properties being two thirds of the area marked 2 on the plan which has led to the matter being reconsidered. Planning permission has been obtained for the sale of these two areas hatched black on the plan, which process would have involved public consultation, and the issue has arisen as to how to address the covenant so that residents are not buying land which is required to be used as public open space.

**PROPOSAL**

The Solicitor to the Council has delegated power to sell such areas of amenity land once planning permission has been granted. Planning permission has been granted

for 2 areas in the plot marked 2 on the plan and a sale price agreed. Covenants will be imposed to prevent built development without further consent from the council. The difficulty in completing the sales is the covenant in favour of the developer of the estate that the plots should be open space. This covenant is personal to the developer and not for the benefit of the surrounding residents. If the land was incorporated as garden land then this would be a breach of the covenant and the developer of the estate might seek damages from the residents who acquire the plots were the breaches to come to their notice. In reality, the developer left the development many years ago and probably would be unaware of any incorporation of these plots into gardens. The council could approach the developer for consent to release the covenant but the developer is likely to ask for a sum of money to do so.

The alternative is a legal process which allows the covenant to be overreached and converts any rights of the developer into a claim for compensation were the developer to become aware of the breach. To achieve this it is necessary to appropriate the land from being held as open space to being held for planning purposes under section 232 of the TCPA. Before making such appropriation the council must publish a notice of the intention to do so for two consecutive weeks in a newspapers circulating in our area and consider any objections made. Section 233 of the TCPA then allows the council to dispose of such land to secure the best use of the land for a price that is best value. There is a requirement again to advertise the disposal in a local newspaper and consider objections. Both the appropriation and disposal can be covered in the same advert.

Section 237 TCPA will then authorise the breach of the restriction as to use of the land- i.e. the breach of the covenant and convert any claim into a right for compensation so long as the use is in accordance with the terms of the planning permission. Were a claim to be made by the developer for compensation then it would be for injurious affectation. Injurious affectation is the depreciation in value of the retained land as a result of the proposed use of the land as garden land . It is not thought that the developer has any retained land and therefore any claim for injurious affectation is unlikely to be founded, and even if it were, then using the land as garden land is not likely to lead to depreciation of the value of any land retained by the developer. More likely it will lead to a betterment, i.e. an increase in land value. It is therefore considered that it is appropriate to proceed by way of changing the land holding to a planning use, changing the planning use and then disposing of the land rather than trying to negotiate with an absentee developer.

## **PROPERTY IMPLICATIONS**

Maintenance of these areas is draining on the councils resources. In the 2008 cabinet report the cost of such maintenance was put at £100,000 over a ten year period (see para 3.1) and this will have increased with inflation in the intervening period.

## **FINANCIAL IMPLICATIONS**

The plots will be sold at best consideration and this will bring a capital receipt to the council. Two sales have currently been agreed , subject to planning permission being granted, of £25,650 for both areas being two thirds of plot 2.

## **LEGAL IMPLICATIONS**

The Council has power to appropriate land under section 232 of the Town and Country Planning Act 1990 (TCPA) and power to dispose of the land under section 233 TCPA . The covenant will be overreached when planning permission is implemented for the change of use of the land. Publication consultation will take place through newspaper advertisement as part of the TCPA procedures but publicity will already have taken place as part of the planning process.

## **RECOMMENDATION**

That Cabinet gives authority to the Solicitor to the Council

- Publish a notice under section 232 (4) and 233(4) of the Town and Country Planning Act giving notice of intention to appropriate public open space shown edged black on the attached plan and numbered 1-4 to land to be held for planning purposes and then to dispose of the land ;
- in consultation with the cabinet member for Corporate Services to consider any objections to the proposed appropriation and disposal ;
- subject to the consideration of any objections, to dispose of plots numbered 1-4 under section 233 TCPA to secure the best use of the land subject to obtaining best value and to imposing covenants to fence the land and preventing any built development upon the land without further council consent.

**Ann Greaves**

**Solicitor to the Council**