

Committee: Cabinet

Agenda Item

Date: 7 September 2017

9

Title: Land at De Vigier Avenue, Saffron Walden

Portfolio Holder Cllr Howell

Key Decision: Yes

Summary

- 1) Cabinet at its meeting in 25 May 2017 resolved to dispose of the land at De Vigier Avenue, Saffron Walden. Following the statutory advertisement three objections to the sale have been received; one from Saffron Walden Town Council (SWTC) and two from members of the public. Members are required to review their decision in light of the objections.

Recommendations

- 2) The Cabinet is recommended to
- a) Resolve that the land at De Vigier Avenue is no longer required for its current purpose as public open space;
 - b) Approve the appropriation of this piece of land for planning purposes under S122 Local Government Act 1972
 - c) Approve the disposal of the land for planning purposes under S233 Town and Country Planning Act 1990; and instruct the Director of Finance and Corporate Services to agree the terms of the sale and complete the disposal process.

Financial Implications

- 3) Agreeing to the request of SWTC would mean the Council foregoing a significant capital receipt.

Background Papers

- 4) Cabinet report 25 May 2017

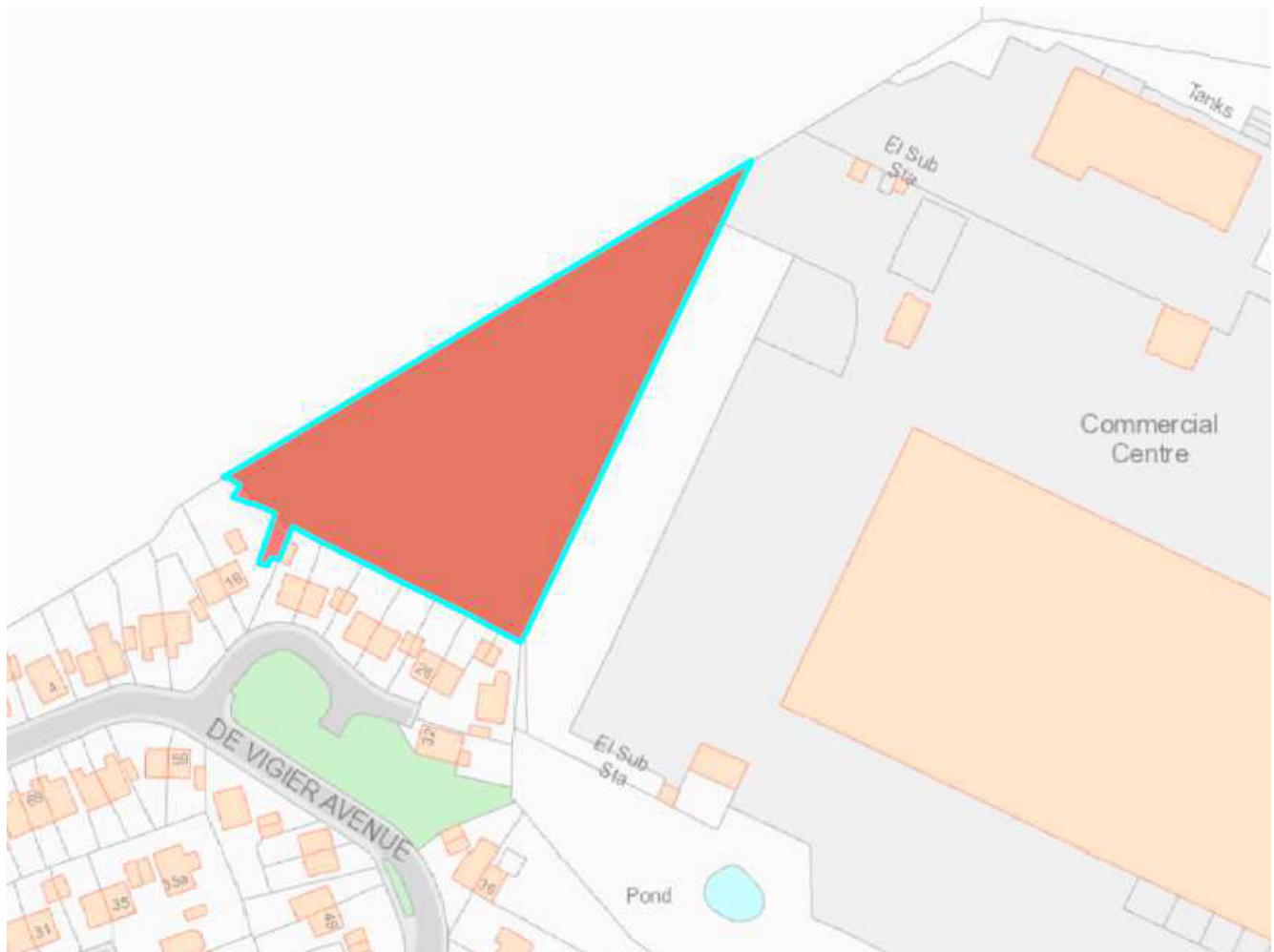
Impact

Communication/Consultation	Ward Members, Saffron Walden Town Council and the adjoining residents have been notified of the option for disposal. Meetings with the residents have been held by the Leader.
Community Safety	No specific implications
Equalities	None
Health and Safety	No specific implications
Human Rights/Legal Implications	No specific implications

Sustainability	No specific implications
Ward-specific impacts	Saffron Walden Castle
Workforce/Workplace	None

Background

- 5) The Council owns a piece of land, shown red below, at the end of De Vigier Avenue in Saffron Walden and adjacent to the former Ridgeons building supplies site. The approved development of the Ridgeons site has given the council an opportunity to consider the future of this land and the potential for it to be sold and incorporated into the adjoining mixed use development site, which is delivering new homes, space for businesses and open space.



- 6) At its meeting on 25 May 2017 the Cabinet agreed to dispose of the land to be sold for development purposes and delegated authority to the Director of Finance and Corporate Services to agree the terms of the sale.
- 7) Following a decision to dispose of this site, it was established that the land had been acquired by the Council as part of a planning obligation to provide public open space. The land has not been used as public open space since its acquisition, has been fenced off from the public for 29 years, was effectively landlocked and does not currently perform a recreational function.

- 8) As the Council acquired the land as public open space, it is obliged to follow a statutory procedure before it can appropriate it to other uses and dispose of it.

The statutory procedure for appropriating and disposing of land held as open space.

- 9) If Council-owned land is no longer required for the purpose for which it is held, the Council can appropriate it to a different use. It can also sell the land. However, there is a special procedure that needs to be followed before the Council can appropriate or sell land it holds as public open space.
- 10) Before deciding to appropriate or sell land held for open space purposes, the Council must advertise its intention in a local newspaper for two successive weeks and invite objections. It then must consider any objections received before making a final decision.
- 11) An advertisement was duly placed asking for any objections to be sent to the Council by 24 August. Three objections have been received. These are attached to the report and are summarised below.

Objections to appropriation/ disposal

Saffron Walden Town Council (SWTC)

- 12) Saffron Walden Town Council's objection is set out in Appendix One. SWTC objects to the disposal of the land. It refers to the "section 106" agreement from 1984 (in fact at that point a "section 52 agreement") which provides for the transfer of the land for use as public open space. The objection states that "it is currently used as such. This land is a discreet, wildlife area for flora and fauna and the disposal/sale of this land would have a negative impact on this natural environment". SWTC proposes that ownership is transferred to it for a nominal sum with a view to its future retention as public open space.

Robert Tongue on behalf of the Residents of De Vigier Avenue

- 13) Mr Tongue's objection is set out in Appendix Two. He states that the land in the Council's ownership

"is under covenant which is enforceable without any limit of time to be used as a public open space. A covenant shall be enforceable (without any limit of time) against any person deriving title from the original covenantor, which is yourselves, you have failed in your duty regards this, You have ignored the correct options open to you and instead of enforcing the covenant have decided to profit from this land with you current actions."

- 14) Mr Tongue also states his view that the proposed appropriation and disposal would infringe the rights of residents under the Human Rights Act. He cites specifically Protocol 1, Article 1 of the Convention, which states that a person has the right to peaceful enjoyment of all their possessions, which includes the home and other land. He also refers to Article 8, which provides for respect for the private and family life of individuals.

Mr Storah

- 15) Mr Storah's objection is set out in Appendix Three. He mentions the planning agreement from 1984 and considers that this "requires" the Council to keep the land as public open space. Mr Storah makes a substantive point about the value of the current use of the land. He says:

This land is a discreet, wildlife area for flora and fauna and the disposal/ sale of this land would have such a serious adverse impact on this small enclave of natural environment that it would effectively be totally obliterated from the local area.... The wiping away of natural wildlife habitat from this locality surely cannot be what the council is looking to achieve on behalf of its residents."

Officer comments on the objections

- 16) Members should pay careful objection to the points raised by objectors. Even if there is not a legal bar to disposal of the land, members need to consider the issues raised before reaching a final decision. However, there are some misunderstandings and misconceptions regarding the legal and procedural aspects.

- 17) **The covenant.** The covenant referred to by the objectors is a covenant given by the developer to transfer the land to the Council for public open space purposes. It is not a covenant given by the Council, or enforceable against the Council, to maintain the land as open space. That said, the Council has separate legal obligations to manage public open space in a manner compatible with its status, and not for other purposes. In relation to public open spaces, the primary protection is the Public Open Spaces Act 1910. However, appropriation of the land under section 122, Local Government Act, 1972, or disposal under section 233, Town and Country Planning Act, 1990 explicitly overrides protection given by this Act. The Interim Head of Legal Services advises that the covenant does not prevent the appropriation and disposal of this land, provided the statutory procedure is followed and objections are properly considered.

- 18) **The Human Rights Act.** In his objection, Mr Tongue has suggested that appropriation or disposal of the land would breach the rights of residents provided by the European Convention on Human Rights, specifically Article 8 and Article 1 of the first protocol to the Convention.

Article 8 states:

"Everyone has the right to respect for his private and family life, his home and his correspondence."

Article 1 of the first protocol states:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The Interim Head of Legal Services does not consider that these rights are relevant to the proposed appropriation and disposal of the land.

It is difficult to see how the disposal of the land would, in fact, impinge on the right to respect for privacy and family life. Residents may consider the land to be a beneficial amenity but the removal of the amenity, by itself, would not amount to an infringement of Article 8 rights.

Mr Tongue refers to the case of *Britton vs SOS*. He says that "the courts reappraised the purpose of the law and concluded that the protection of the countryside falls within the

interests of Article 8. Private and family life therefore encompasses not only the home but also the surroundings.” The case concerned a planning enforcement notice served against a community living in the countryside in “benders” (a form of tent) without the benefit of planning permission. Whilst the application of Article 8 was a consideration in that case, the enforcement action had a clear impact on the home and family life of the residents who were subject to the enforcement notice.

It is difficult to see the relevance of Article 1 of the first protocol. This is concerned with “peaceful enjoyment of... possessions”. Whilst the word “possessions” has been given a broad interpretation (extending, for instance, to rights held under a statutory licence), the residents have no similar right to possession in respect of the open space.

- 19) ***Preservation of the existing use.*** The local residents express a clear view that the open space use of the land should continue and SWTC has offered to take over the land to secure this. Irrespective of the history of the site, it would be open to the Council to decide that the merits of open space use should prevail over the merits of appropriation and disposal. It is, as explained below, a matter for the Cabinet to decide whether or not land is still required for a particular purpose, provided that it meets the principles of good decision making, sometimes referred to as the “Wednesbury principles”.

Making a decision

- 20) As part of making the appropriation decision, members should consider whether the land “is **no longer required** for the purpose for which it is held”; i.e. as public open space. This does not mean the same thing as deciding whether the land is redundant or superfluous as public open space. It is, in simple terms, a decision whether the broad public interest is in keeping the land as public open space or in appropriating it for planning purposes as a prelude to its disposal.
- 21) In reaching a decision, the following will be the main considerations:
- (a) The current and future benefit that retention of the land would have. The objectors have set out their views on the benefits of the current use. The Ridgeons development will allow access to the site and this could provide an opportunity to enhance the open space provision. SWTC has offered to take responsibility for the land. This option may need more investigation but potentially is one that UDC could pursue. On the other hand, the land has not been used as public open space since its acquisition, has been fenced off from the public for 29 years, was effectively landlocked and does not currently perform a recreational/ open space function. Within the planning application for housing on the adjacent Ridgeons site there are four separate open space areas proposed. The Council has agreed to ensure that the existing treeline will be retained as a landscape buffer between the existing homes and the new development, and offered to the Town Council.
 - (b) The appropriation of this land for planning purposes would allow it to be incorporated into the adjoining mixed use development site, providing new homes, areas for business and open space. The development of the adjoining site provides a one-off opportunity to maximise the potential use of the land, by creating suitable access to enable the land to be developed and provide additional housing, for which there is a need. In addition, although negotiations on a disposal price have not been concluded, there is potential for generating a significant capital receipt for the Council which, in itself, is a public benefit and a matter which the Council should consider, given its general fiduciary duty.
- 22) Members may identify other relevant considerations but, broadly, it is a question of weighing the pros and cons of the two ways forward against each other and reaching a balanced decision.

23) Taking account of all of the earlier information Cabinet is, therefore, being invited to reconsider its earlier decision.

Risk Analysis

Risk	Likelihood	Impact	Mitigating actions
Members fail to give proper consideration to the objections as required by S122 Local Government Act 1972 and S233 Town and Country Planning Act 1990	1- This report sets out the objections	4 – Failure to review the objection or making a decision in bad faith or that is unreasonable may lead to legal challenge	This report outlines the objections and asks members to review their decision.

1 = Little or no risk or impact

2 = Some risk or impact – action may be necessary.

3 = Significant risk or impact – action required

4 = Near certainty of risk occurring, catastrophic effect or failure of project.

Appendix One

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11th August 2017

**The Director of Finance and Corporate Services
Uttlesford District Council
Council Offices
London Road
Saffron Walden
Essex
CB11 4ER**

Dear Sir

Re: Notice of intended appropriation of land for planning purposes and notice of intended disposal of land – Land to the north of De Vigier Avenue, Saffron Walden, Essex

I refer to the above public notice placed in Saffron Walden Reporter newspaper on 3rd August 2017. This proposed disposal of land was discussed at the Town Council's Planning & Road Traffic Committee meeting on Thursday 10th August 2017 where the following response was agreed:

That Saffron Walden Town Council objects to the disposal of this land and notes the covenant from 1984 contained within the S106 agreement covering the original transfer of this land to Uttlesford District Council. This covenant protects the land as "public open space" and it is currently used as such. This land is a discreet, wildlife area for flora and fauna and the disposal / sale of this land would have a negative impact on this natural environment. A further copy of an extract from the S106 Agreement is enclosed for avoidance of doubt and to confirm the status of this land as public open space.

Saffron Walden Town Council requests that this land is transferred for a nominal sum to the Town Council who will ensure its future retention as a public open space in accordance with the covenant within the S106 Agreement.

The above response was unanimously agreed by the Planning & Road Traffic Committee meeting on 10th August 2017 and should be considered as the formal response from Saffron Walden Town Council in respect of the public notice.

Yours sincerely

**Lisa Courtney
Town Clerk**

NOW THIS DEED WITNESSETH as follows:-

- 1 This agreement is made in pursuance to Section 52 of the Town and Country Planning Act 1971
- 2 In consideration of the Council granting planning permission under reference number JTT/96/84 (hereinafter called "the planning permission") the Company hereby covenant with the Council pursuant to Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 to the intent that this covenant shall be enforceable without any limit of time against any person deriving title from the company to its said interest in the land that the Company will convey that
* part of the land more particularly shown edged green on the plan annexed hereto for use as a public open space * (hereinafter called "the green land") in fee simple together with a right of way over the land coloured red approximately 15 foot wide and for the purpose of gaining access to the land edged green and without charge to the Council subject to the matters contained or referred to in the conveyance insofar as they affect the green land but otherwise free from incumbrances.
- 3 The company will lay out and grade and sow with grass seed the green land at its own expense and will remove all building materials and refuse from the green land and ensure that there is sufficient top soil on the green land for the purposes of a public open space to the reasonable satisfaction of the Director of Planning of the Council for the time being
- 4 The green land shall be conveyed to the Council as hereinbefore provided as soon as eighteen plots are

Appendix Two

Re Land North of De Vigier Avenue Appropriation and Disposal.

I on behalf of the Residents of De Vigier Avenue and myself formally object to your proposal to appropriate for planning purposes and Disposal of land north of De Vigier Avenue.

This land in your ownership is under covenant which is enforceable without any limit of time to be used as a public open space.

A covenant shall be enforceable (without any limit of time) against any person deriving title from the original covenantor, which is yourselves, you have failed in your duty regards this,

You have ignored the correct options open to you and instead of enforcing the covenant have decided to profit from this land with your current actions.

We would also like to bring to your attention you are infringing our Human Rights.

Human Rights Act

Responsibilities of the council under the Human Rights Act, in particular Protocol 1, Article 1. This states that a person has the right to peaceful enjoyment of all their possessions, which includes the home and other land.

Additionally, Article 8 of the Human Rights Act states that a person has the substantive right to respect for their private and family life. In the case of *Britton vs SOS* the courts reappraised the purpose of the law and concluded that the protection of the countryside falls within the interests of Article 8. Private and family life therefore encompasses not only the home but also the surroundings

We consider the Land you are proposing to dispose of for housing our surroundings and your actions if carried out will be breaching our Human Rights.

regards

Robert Tongue

Chairman
De Vigier Avenue Residents Group

Appendix 3

Dear Sir

Re Notice of intended appropriation of land for planning purposes and notice of intended disposal of land - Land to the north of De Vigier Avenue, Saffron Walden

With reference to the above public notice placed in Saffron Walden Reporter newspaper on 3rd August 2017, I wish to object on the following basis.

There is a covenant dated 1984 contained within the S 106 agreement covering the original transfer of this land to Uttlesford District Council. This covenant protects the land as “public open space” and it is currently used as such. This land is a discreet, wildlife area for flora and fauna and the disposal/ sale of this land would have such a serious adverse impact on this small enclave of natural environment that it would effectively be totally obliterated from the local area.

The notice states that the land “is no longer required for the purposes for which it is held”. Clearly this statement is grammatically wrong but, if it is intended to mean it is not required, then that is incorrect. The land is required. It is required to continue in its current use – a use in which it has been since its acquisition by the district council.

The wiping away of natural wildlife habitat from this locality surely cannot be what the council is looking to achieve on behalf of its residents.

Yours sincerely

A Storah