

Committee:	Cabinet	Date:	27 May 2020
Title:	Land west of Woodside Way Great Dunmow		
Portfolio Holder:	Cllr Evans, Cabinet Member for Planning and the Local Plan		
Report Author:	Roger Harborough, Director - Public Services rharborough@uttlesford.gov.uk Tel: 01799 510457	Key decision:	Yes

Summary

1. As well as having powers to control development, the Council also has powers to help enable development to go ahead. Sometimes schemes which are acceptable or desirable in planning terms cannot be implemented because of private land ownership rights. The Council has powers, for example, to use compulsory purchase powers to help with site assembly.
2. Sometimes, approved development cannot be implemented because of restrictive covenants. The Council, as planning authority, has statutory powers to override restrictive covenants to enable development to go ahead, subject to payment of compensation. Where the land affected by covenants is owned by the Council, it does this is by “appropriating” the land to planning purposes. This means a decision to change the stated purpose for which the Council owns the land.
3. The Council has given planning permission for development of land near Dunmow. The permission is for development of up to 790 dwellings on a 53.2 ha site to the west of Woodside Way. The development included the provision of a primary school, a community building, sports pitches and pavilions. The development will help to provide housing in Uttlesford and will also lead to the provision of valuable community facilities.
4. The planning consent and the associated s106 agreement provides for access across Council land adjoining Woodside Way. In the section 106 agreement, UDC promises to permit access across its land and to dedicate the access road as public highway. However, a covenant imposed by a neighbouring landowner limits the Council’s rights. The neighbouring owner is seeking an injunction to prevent the Council granting full access across its land and to prevent the Council dedicating the access road as public highway.
5. This report recommends that the Council uses its statutory powers under section 203, Planning and Compulsory Purchase Act, 2016, to appropriate the land needed for the access in order to override the restrictive covenant. This will allow the development to go ahead as agreed. The owner of the adjoining land would no longer be able to seek to stop the access and public highway

dedication but would still be entitled to claim compensation for any loss suffered.

6. The land in question is currently held for open space purposes and therefore special protection applies. There is a two-stage process for appropriating open space land to another purpose. The first is to make a decision in principle, to advertise this and to invite objections. The second stage is to give proper consideration to any objections received and then to decide whether or not to go ahead with the appropriation.
7. The Cabinet is being asked to make the first stage “in principle” decision to appropriate the land. It will need to consider at a future meeting any representations made before making a final decision.

Recommendations

8. That the Cabinet
 - 1) Resolves, in principle, to appropriate the land shown edged red on the plan annexed to this report from its current purpose as public open space to planning purposes under section 122, Local Government Act, 1972;
 - 2) Advertises the proposed appropriation to planning purposes and considers any objections before reaching a final decision;
 - 3) Resolves, subject to appropriation for planning purposes, to use powers under section 203, Housing and Planning Act, 2016 to override the covenants attaching to the land which inhibit the use and dedication of land as highway as provided for in planning application UTT/13/2107/OP and in the association section 106 planning agreement.

Financial Implications

9. The owner of the third party rights will have a claim for compensation, which will be assessed on the basis of the loss of value of its land resulting from a breach of a contractual restriction on the Council's Land.. As explained from paragraph 54 of this report, there are ongoing legal proceedings relating to this matter and it is not possible to share the Council's professional advice on compensation in public, Members of the Cabinet have been briefed separately. If they wish to discuss valuation issues, or issues related to the litigation, they are advised to resolve to exclude the press and public.
10. There is a provision in the Council's accounts in respect of liabilities relating to claims against the council in the courts. Should the outcome of legal action be a costs order and compensation exceeding the advised levels, these would need to be funded from within the council's revenue budget and reserves, with consequent implications for its priorities for proposed spending and ability to fund services.

Background Papers

The following papers were referred to by the author in the preparation of this report and are available for inspection using the planning application search facility on the council's [website](#).

Outline planning application UTT/13/2107/OP and related applications for reserved matters.

Planning application for access off B1256 Stortford Road

Impact

Communication/Consultation	Consultation was carried out on planning applications for the development and the Local Plan. Communication with the landowners and potential developers has taken place.
Community Safety	
Equalities	
Health and Safety	
Human Rights/Legal Implications	There is a conflict between the council's obligations to dedicate land as highway and the restrictive covenant by which it is bound. It is proposed to use planning powers to appropriate the land and to extinguish the restrictions. The Human Rights implications are considered in para 48 below
Sustainability	
Ward-specific impacts	Dunmow North
Workforce/Workplace	Compensation could impact on the council's ability to fund services, which would have implications for its workforce.

Situation

The Planning Approval

11. Outline planning permission was granted on 27 October 2015 for a development of up to 790 dwellings on a 53.2 ha site to the west of Woodside

- Way. Land is allocated for the provision of a primary school, a community building, sports pitches and pavilions. Indicative drawings indicate an access point onto the B1256 and a further access point onto Woodside Way.
12. A site of 2.1ha for a new primary school which would be sufficient to enable a 2 form entry school is to be provided. A site of 0.5ha is allocated for a community centre and sports pavilion.
 13. The remainder of the site would be open space with 3.42ha of amenity greenspace, 5.21ha for sports pitches, including two pavilions, 1ha of allotments, to be provided in two areas within the site, and 10.93ha of natural/semi natural greenspace. Included within the open space is provision for two Local Equipped Areas for Play and 1 Neighbourhood Equipped Area. The indicative sports pitch provision shows 8 x junior football pitches (2 x mini soccer U7 and U8, 2 x mini soccer U9 and U10, 2 9v9 U11 and U12, 1 x 11 a side U13 and U14 and 1 x 11 a side U15 and U16), 1 senior football pitch and a junior and a senior cricket pitch. These would be provided in two areas within the site with the senior cricket pitch, senior football pitch and the U15 and U16 junior pitch being shown indicatively on the western part of the site. The other junior facilities are shown indicatively to be provided on the eastern part of the site.
 14. The outline application showed indicative access points from the B1256 and from Woodside Way.
 15. Two reserved matters applications have been approved. These relate to the Woodside Way junction, the roundabout on Stortford Road, and the principal spine road and site accesses.
 16. The site access from Woodside Way is across a strip of amenity land running along the west of Woodside Way. This is land owned by the Council, but which is subject to covenants. Pursuant to the grant of planning consent, the Council entered into a section 106 agreement with the developer providing for the developer to carry out highways works on the land and for the dedication of the land as public highway. Bellway Homes has recently completed purchase of the Siemens land and is seeking clarity as to how the council intends to approach the issue of its obligation to dedicate land for highway purposes. Bellway Homes is keen to resolve the legal issues so that it can bring forward the land for development and begin construction on the new homes and related access and other infrastructure.
 17. Appropriation of open space totalling 1051.24 square metres, including approximately 700 square metres of tree planting, a concrete agricultural access track and marginal strips, is needed for the approved highway link into the development site from Woodside Way. This land for the link road represents approximately 1% of the linear open spaces owned by the council associated with Woodlands Park and Woodside Way.

The Council's Land

18. The land which is the subject of the proposed appropriation was acquired by the Council from Wickford Development Company Ltd pursuant to a section 106 agreement in connection with Wickford's ongoing residential development at Woodlands Park, Great Dunmow. The land ("the Council's Land") was acquired by a transfer dated 17 February 2010 ("the 2010 Transfer"), which imposed a number of restrictions upon that land, for the benefit of Wickford's development site. They included the following restrictive covenants by the Council:
 - a. Not to use the Council's Land or any parts thereof for any purpose other than as a public open space, or if required by Wickford for highway purposes;
 - b. Not without the consent of Wickford (in its absolute discretion) to permit access to the Council's Land via any other adjoining or neighbouring land or property;
 - c. Not without the consent of Wickford (in its absolute discretion) to use the Council's Land or any part thereof for the purposes of a road or other right of way which shall give access to other adjoining or neighbouring land.
19. The 2010 Transfer also contained a covenant by the Council to hold the Council's Land upon trust for the perpetual use by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act 1906.
20. The Council's Land consists of a belt of informal planting alongside the Great Dunmow by-pass Woodside Way, traversed by an agricultural access. The permitted development includes a spine road traversing the Council's Land, replacing the existing agricultural access.
21. Under the terms of a Section 106 Agreement dated 22 October 2015 the Council agreed with the owners of the development site and the applicant/promoter (BDW Trading Limited) to dedicate the land upon which the proposed main access to Woodside Way was to be constructed *as highway*, immediately upon receipt of notice of intended implementation and (if required) to dedicate any other land within its ownership in the vicinity that was required to safeguard any sightlines properly required by the highway authority for the junctions for such access.
22. The Council has agreed to dedicate land as highway (or to safeguard sightlines) which lies within the Council's Land. On the face of it, its agreement to dedicate is in breach of the restrictive covenants in the 2010 Transfer.
23. However the 2010 Transfer is also subject to existing reserved development rights for approximately 75% of the development site ("the Trembath Land"). These rights entitle the owners of *that* part of the site, subject to the grant of the necessary planning consent and without payment or compensation

therefor, to a right of access and to construct and maintain a road or roads and to pass over and across for all purposes.

24. Whilst Wickford acknowledges the reserved rights for the benefit of the Trembath Land, it objects to the proposed use of any part of the Council's Land for the purposes of access to the remaining 25% of the development site ("the Other Land").
25. Although the 2010 land transfer to the Council provides for the perpetual use of the land by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act 1906, it is important to note the following points:
 - a. The land which is the subject of the proposed appropriation is a small part of the land transferred in 2010. There are no proposals to change the status of the remainder of the land transferred
 - b. The land in question is already subject to access rights to the Trembath land and these take precedence over the open space provisions in the 2010 transfer.

Considerations

26. The Council is authorised by Section 122 of the Local Government Act 1972 to appropriate land within its ownership for any purpose for which it is authorised to acquire land by agreement. Where land has been appropriated for planning purposes, the consequence is that the erection, construction or carrying out of any building or other works on such land is authorised, if done in accordance with planning permission, notwithstanding that it may involve interference with third party rights.
27. Before the land can be appropriated under Section 122, the land must no longer be required for the purpose for which it was held immediately prior to appropriation.

Appropriation of open space land for planning purposes

28. The Council has powers to "appropriate" land it holds to a different purpose if it is "no longer required" for the purpose for which it is held. In this case, the proposed appropriation is from use as open space land to use for planning purposes.
29. 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 to facilitate the neighbouring residential development for which approval has been given. The report addresses the benefits of facilitating the development and the limited amenity value of the land.

30. There is a special procedure that needs to be followed before the Council can appropriate or sell land it holds as public open space. 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. Subject to approval of the recommendations in this report, officers will arrange for advertisements to be placed and will report objections to the appropriation to a future Cabinet meeting. The Cabinet will need to consider any objections before a final decision is made.

Overriding existing third party rights

31. Section 203 of the Housing & Planning Act 2016 (“Section 203”) provides that where land is appropriated for planning purposes then existing rights, which could prevent the development of that land from being carried out in accordance with the planning permission, can be overridden, subject to payment of compensation to the affected parties.
32. Appropriation of the land for planning purposes will enable the construction of the approved access to the development on the land and the implementation of the provisions of the section 106 agreement.
33. The power contained in Section 203 does not remove the legitimate rights of those persons taking the benefit of the easements or other rights to compensation arising from the interference with such rights, but it does remove rights to prevent development from proceeding by reliance on covenants.
34. In making a decision as to whether to support the recommendations and to use the Council’s powers of appropriation for the planning purpose of the development of the land west of Woodside Way, the following matters are relevant considerations to take into account.

Whether the appropriation will facilitate the carrying out of the development of land west of Woodside Way

35. Appropriation of open space totalling 1051.24 sq metres is needed for the approved highway link into the development site from Woodside Way.
36. By engaging S203, the Developer has sufficient certainty that an injunction cannot defeat the proposed development by precluding any connection for vehicles between development on the Trembath land and development on the Siemens land.
37. Following the appropriation of the land, the Council’s obligations will be discharged under the S106 Agreement.
38. Therefore appropriation is a key condition, which needs to be satisfied if the development is to proceed in accordance with the planning permission.

Whether the appropriation will contribute the promotion or improvement of the economic social or environmental well being of the area.

39. The development of land west of Woodside Way is in the interests of the proper planning of the area. It is a site allocated for homes and related facilities in the submitted Local Plan, which is currently at the public examination stage. The Inspectors' letter received following the first set of hearings as part of the Local Plan Examination deals with importance of more housing in existing sustainable settlements in the delivery of market and affordable housing to meet the objectively assessed housing needs of the district.
40. This strategic site is anticipated to make a significant contribution to the 5 year land supply position in the district as well as accommodating the supporting infrastructure needed for the development. It is one of the largest single sources of future housing supply in the district, outside of the proposed Garden Communities. [Uttlesford's stated position](#) with regard the five year housing land supply is that for the purpose of determining planning applications the Council is able to demonstrate a supply of 2.68 years between 2019/20 and 2023/24. This is based on the annual housing requirement of 715 dwellings per annum (as calculated using the standard methodology in the NPPF), and applies a 5% buffer brought forward from later in the plan period. This calculation indicates that the overall target in the next five years is 3,754 homes, of which the Council anticipates 2,015 will be completed. The statement anticipates first completions at Land West of Woodside Way in 2021/22, and forecasts delivery of 180 homes in total from this site in the five year period 2019/20 to 2023/24 (i.e. 180 of the supply of 2,015 homes indicated above). Facilitating the delivery of this site is key to demonstrating the Council's existing 2.68 years of supply, and the overall supply of homes to meet the housing requirement in the emerging Local Plan.
41. The facilities, in particular the new primary school, sports pitches and pavilions, will enhance the range of amenities currently available in the town. Whilst provided to address needs arising from the 790 new homes, these facilities will be available to the wider community of Great Dunmow and surrounding area.
42. Whilst approximately 0.1 hectares of existing open space land including 0.07 hectares of existing semi mature tree planting would be lost to the committed highway access, the link would enable a development providing 9.3 hectares of natural/ semi natural greenspace.
43. The proposed development is therefore likely to contribute to achieving the promotion or improvement of the economic, social or environmental wellbeing of this part of the district.

Whether it is in the public interest that the development of land west of Woodside Way as proposed in the planning permission should be carried out

44. As the principal committed strategic site forming an extension to an existing sustainable settlement, land west of Woodside Way is integral to any

development strategy to meet the objectively assessed market and affordable housing needs of the district, especially because it has the benefit of a planning permission.

45. Planning permission has also been granted to obtain access to the Siemens land from the B1256 Stortford Road which bounds the site to the south so that its development would not be dependent on vehicular access via Woodside Way. It therefore has the potential to be developed entirely separately from the Trembath land. This would mean though that the Trembath land and the Bellway land would not be developed as a single integrated seamless scheme maximising the potential for internal movements and trips to nearby destinations such as the Tesco store and existing primary schools by walking and cycling, and potentially enabling the development as a whole to be served by public transport. In terms of good planning, this would be a sub optimal solution.

Whether the appropriation will facilitate the carrying out of the development of the land West of Woodside Way in accordance with the planning permission

46. This is the purpose of the proposed appropriation.

Whether the use of S203 is proportionate with any interference with the human rights of those people affected

47. Human Rights issues arise in respect of the proposed arrangements. The Government guidance “Compulsory purchase process and the Crichel Down Rules: guidance” advises that compulsory acquisition (and therefore, by analogy, appropriation for planning purposes under s.122(1) LGA 1972 or Section 122 (2A) LGA 1972, which have the effect, by virtue of s.237 TCPA 1990, of infringing Convention Rights) should consider:

“...When making and confirming an order, acquiring authorities and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. The officers’ report seeking authorisation for the compulsory purchase order should address human rights issues...”

48. Furthermore, under the Human Rights Act 1998 the Council is required to act in accordance with the European Convention on Human Rights (“ECHR”) in deciding whether to implement the arrangements. Article 1 of the First Protocol of the ECHR provides that every natural or legal person be entitled to peaceful enjoyment of his or her possessions. Engagement of Section 203, to allow interference with private rights, involves interference with a person’s rights under this Article. However, the right to peaceful enjoyment of possessions under Article 1 is a qualified rather than absolute right, as the wording permits the deprivation of an individual’s possessions where it is in the public interest and is subject to the conditions provided for by law, and (in relation to the right to respect for private and family life and a person’s home) Article 8(2) allows for interference which is “in accordance with the law and is necessary in a

democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health and morals, or for the protection of the rights and freedoms of others.”

49. There must therefore be a balancing exercise between the public interest and the individual's rights whereby any interference in the individual's rights must be necessary and proportionate. “Proportionate” in a context means that the interference must be no more than is necessary to achieve the identified legitimate aim. A “fair balance” must be struck between the rights of the individual and the rights of the public. It is for the Council to consider the issues raised in this report and to strike that “fair balance” in coming to its decision.
50. In the present case it is considered that the public interest in facilitating the Development outweighs the rights of the individuals to peaceful enjoyment of their possessions, and that the proposed use of Section 203 powers amounts to a proportionate interference in all the circumstances. In this regard, the availability of compensation to those who are deprived of their Third Party Rights is of relevance to the issue of proportionality, particularly where any potential detriment, as in this case, will be economic.
51. The public benefits arising from the development are set out in paras 39-43 and the consideration of the public interest is demonstrated in paras 44-45 of this report.

The appropriation of the land required for the highway access must be appropriated for planning purposes

52. The appropriation of land is required to enable implementation of development in accordance with the planning permission. The access arrangements to the site from the local highway network including the secondary priority junction access onto Woodside Way, and for sustainable transport modes, were assessed as respectively minor adverse on the road network (with mitigation) and minor adverse on pedestrian trips (with mitigation).

Whether interference with the identified third party rights is necessary and reasonable to allow the development to be carried out and alternatively whether agreement could be reached reliably for those rights, on reasonable terms and within a satisfactory timescale.

53. The secondary access to the site from Woodlands Way is necessary to limit the effect of traffic generated by the development. It is reasonable because the report to the Planning Committee said that the construction impacts with the proposed mitigation measures are likely to result in a neutral/negligible impact during the construction phase. This is the period when use of the secondary access is most likely to have any perceptible impact on the third party's interests.

Whether the benefits arising from the development could be achieved without giving rise to infringement of the third party rights identified

54. The development of the Trembath land and realisation of the associated benefits could be achieved without infringement of the third party rights because of the retained rights. However, the council would still need to appropriate the land used as open space to enable the highway link to be provided over that land. The link could be provided as a section of private road (to adoptable standards) but not adopted as a public highway, but this would require agreement with BDW, as the developers of the Trembath land, and Bellway, including agreement on not connecting the Bellway land to the link road across the Trembath land. This is a matter that the Council could not properly control.

Powers under Section 203, Housing and Planning Act, 2016

55. In order to use the powers set out in section 203, a number of conditions must be met:
- i. The land must have become vested in or acquired by the Council on or after 13 July 2016 or appropriated by the Council for planning purposes. This report proposes the appropriation of the land for planning purposes.
 - ii. There is planning consent for the building or maintenance work or use to be facilitated by the use of section 203 powers. The consent of 27 October 2015 gives consent to the development and use of the land for access and for the development of the adjoining site. The purpose of the appropriation is to facilitate implementation of the access provisions in the section 106 agreement made pursuant to the planning consent of October 2016.
 - iii. The Council could acquire the land compulsorily for the purposes of building or maintenance work for the purposes of building or maintenance work or for the purposes of erecting or constructing a building or carrying out any works or for the use. The Council has powers of compulsory purchase to acquire land for planning purposes under section 226, Town and Country Planning Act, 1990. (Although the Council already owns the land, for the purpose of identifying whether compulsory purchase powers exist, the Council is treated as if it does not own the land.)
 - iv. The building or maintenance work or use is for purposes related to the purposes for which the land was vested in or acquired or appropriated by the Council. The works and use to be facilitated by section 203 is directly related to the purposes for which the appropriation is proposed.

Litigation between Wickford Homes Ltd and the Council.

56. Wickford Homes Ltd has made an application in the High Court for an injunction and damages against UDC Whilst Wickford acknowledges the

reserved rights for the benefit of the Trembath Land, it objects to the proposed use of any part of the Council's Land for the purposes of access to the remaining 25% of the development site ("the Other Land"). In the legal proceedings it claims an injunction to prohibit the Council from allowing the Council's Land to be used for the purposes of a road giving access to the Other Land. Alternatively, Wickford claims damages against the Council in lieu/instead of an injunction, for breach of the restrictive covenants in the 2010 Transfer.

57. The Council is defending the claim. The court application is yet to be heard but steps are being taken to progress directions to set a timetable for bring the matter to trial. Determining the dispute through the High Court is likely to take significantly longer and incur greater costs (including costs to the public purse) and risk than addressing the key issue through use of appropriation powers and reliance on section 203, Housing and Planning Act, 2016.
58. If the matter proceeds to trial and Wickford succeed in obtaining an injunction, this will prevent the development of the adjoining site in accordance with the 2015 planning consent and in accordance with the section 106 agreement. Grant of an injunction is within the discretion of the courts and Wickford is claiming damages as an alternative. However, use of section 203 powers by the Council gives a right to Wickford, in any case, to pursue a claim for compensation to the extent of interference with its rights.
59. In the officers' view, use of section 203 powers provide a simpler statutory route to resolving the dispute with Wickford Homes whilst preserving Wickford's right to claim compensation for any adverse effect.
60. It should be noted that the Council may be exposed to significant litigation from third parties if it is unable to deliver on the binding obligations contained in the section 106 agreement.

Risk Analysis

Risk	Likelihood	Impact	Mitigating actions
Compensation exceeds the provision is the council's accounts	2 - The compensation sum is determined by negotiation, and the respective professional advice to each of the parties is at each end of a	3 - Significant	The council is advised by leading counsel and an experienced valuer.

	substantial range. In the event of no agreement being reached the matter would be settled by binding arbitration		
Failure to fulfil the council's planning obligations under the S106 agreement relating to land west of Woodside Way	4 – Compliance with the covenant imposed by Wickford could put the council in breach of the S106. Wickford has commenced court action to secure an injunction preventing breach of the covenant.	4 – The council would be exposed to claims for very substantial damages	Strategy is proposed to avoid this scenario as advised by counsel and external legal advisors

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.