

Committee:	Cabinet	Date:	Thursday 29 November 2018
Title:	Transfer and release of covenant, land at Parkers, Berden		
Portfolio Holder:	Councillor Julie Redfern, Portfolio Holder for Housing		
Report Author:	Roz Millership – Assistant Director Housing Health and Communities 01799 510516	Key decision:	No

Summary

1. This report seeks Members' consideration of the acquisition of the access road to the Council owned properties at Parkers, Berden and the release of a restrictive covenant in respect of the recreation ground, Berden that was imposed when the land was transferred to the Parish Council.

Recommendations

2. That Cabinet approves the acquisition of the access road at Parkers, Berden for £1 so that the Council is placed in the position it had intended when the recreation ground was sold to the Parish Council in 1997
3. That the request from Berden Parish Council to retain a 1m strip from the access road is declined
4. That the request from Berden Parish Council to release the restrictive covenant in respect of the recreation ground is declined as the land was transferred to the Parish Council at nominal value on the basis that the land would be used for recreation purposes. The removal of the covenant may lead to the loss of an amenity for the community as without the covenant in place, there will be no restriction on the future use of the land other than through the planning process
5. That if Berden Parish Council do not agree to transfer the road to the Council without the covenant release that an application is made to the Land Registry for registration of a right of way for the benefit of the Council's properties

Financial Implications

6. The Council do not own the land that provides the only vehicular access to its council houses at Parkers, Berden, and no right of way was expressly retained over the road. The acquisition of the road would return the Council to the position it had intended when transferring the recreation ground to the Parish Council. If the Council acquires the road at nominal value there is no financial outlay in respect of the purchase and it would enable the Council to take control of the road which provides the only vehicular access to the properties.

The financial implications will relate to the maintenance responsibilities for the repair and upkeep of the road but the adjoining owners at 2 Parkers are liable to contribute toward the cost of this and in any future transfers of the remaining properties, the owners will also be liable to contribute towards the cost. The Parish Council will also require their legal costs to be paid.

The Council has already assumed maintenance liabilities for the road as it has continued to carry out maintenance and repairs.

Background Papers

- The following papers were referred to by the author in the preparation of this report and are available for inspection from the author of the report.

Plan showing the access road edged red
 Correspondence from Berden Parish Council
 Official Copies showing current ownership
 A copy of the transfer of 4 July 1997

Impact

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Communication/Consultation	Berden Parish Council
Community Safety	N/A
Equalities	N/A
Health and Safety	N/A
Human Rights/Legal Implications	A Transfer will need to be completed for the transfer of the land to the Council The Council is under a statutory duty under Section 123 Local Government Act 1972 to obtain best value in respect of disposals of land.
Sustainability	N/A
Ward-specific impacts	Berden
Workforce/Workplace	Legal

Situation

- The Council have been approached by Berden Parish Council in respect of ownership of the road that provides the vehicular access to the council houses at Berden. The road is shown outlined in red on the attached plan.

10. It would appear that when the Council transferred the recreation ground that adjoins the road at Parkers to Berden Parish Council on 4 July 1997, the road was inadvertently included in the transfer. It is believed that this was not the intention of the Council, as the road provides the only access to the houses at Parkers, and no right of way for the benefit of those houses was expressly retained in the transfer. Berden Parish Council initially contacted the Council as there was concern over future maintenance liabilities for the road, as the road is within their legal title and they did not wish to be responsible for the upkeep of the road. Correspondence on the original legal file from 1996 shows the road was not included in the original proposal.
11. However, the plan referred to in the 1997 transfer included the road and the Land Registry will not deal with this as a rectification as no error has been made by the Land Registry. If the parties agree that the road was included in the transfer in error, the Land Registry will require a formal transfer of the land back to the Council.
12. Initially Berden Parish Council indicated that they would be prepared to transfer the road back to the Council for nil consideration in light of the fact that it had been transferred to them in error. Subsequently they have requested evidence that the road was transferred to them in error, as they disagree that this is the case. The Council has paperwork that indicates that the access road was not intended to be included in the transfer (copy correspondence attached).
13. Berden Parish Council have made an offer to transfer the road to the Council on the following terms:-
 - Transfer the road for £1.00 but retaining a 1 metre strip at the western end of the road, between the road and the adjoining field. It is believed that the Parish Council wish to retain the 1 metre strip of land so that they retain a degree of control over future access from neighbouring land. This strip is shown on the attached plan as the strip between points A and B. If they retain the 1 metre strip it will also act as a potential ransom to any future development of the adjoining land if access is needed over the road to the public highway (assuming no rights currently exist). The Parish Council would be in a position to require a substantial sum for the grant of access over the retained strip. The Council would be in the same position for the remainder of the access road (again assuming no existing rights exist).
 - The Parish Council also require the removal of the restrictive covenant in respect of the use of the recreation ground that was included in the 1997 transfer. The original covenant said:

"THE Parish Council hereby covenants with the District Council pursuant to Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 as follows:-

(a) Not to use the land hereby conveyed other than for the purposes of a croquet pitch and bowling green or for such other recreational purposes as the District Council may approve in writing (such approval

not to be unreasonably withheld or delayed)

(b) not to erect any buildings or other structures on the land hereby conveyed other than a shed or other similar building which shall not be used other than for the storage of play equipment and/or grounds maintenance equipment or machinery ancillary to the uses set out in sub-paragraph (a) of this Clause”.

14. The Parish Council have requested that the restrictive covenant be removed in its entirety. The legal effect of such a release is that the Parish Council would then be free to use the land for any purpose or sell the same for redevelopment, subject only to planning control. If the covenant is released, the District Council would retain no control over it as the former owner / adjoining land owner. The future use/development of the land would be determined under the planning process.
15. The land was originally transferred to the Parish Council in 1997 for £3,000 based on the then current open market value of the land for its use as a recreation ground.
16. The Council has a duty under Section 123 of the Local Government Act 1972 to obtain best value for any disposal of land and therefore the restrictive covenant was included to reflect the consideration paid at the time of the transfer to the Parish Council and to ensure that the land was used for recreation purposes in the future. Its removal may lead to the loss of this amenity for the community.
17. The Parish Council has not shared with the council what alternative use for the recreation ground is being proposed and why this may necessitate the removal of the covenant.
18. Without any clear information from the Parish Council regarding their proposals for the recreation ground a decision on the removal of the restrictive covenant cannot be made.
19. It should be noted that the release of the covenant will potentially significantly enhance the value of the land if planning permission is obtained for a more valuable use. If the road is to be transferred to the Council on the condition that the Council releases the restrictive covenant on the recreation land, the Council will need to consider the value of the respective land interests to satisfy its statutory duty under Section 123 Local Government Act 1972.
20. The Council would need to obtain a valuation by an independent surveyor to assess the value of the respective interests for the transfer of the access road and the release of the covenant. If the Council is minded to agree a release of the covenant, the Council would need to ensure that it complies with its statutory duties in respect of best value for release of the covenant.
21. The Council is under no obligation to take a transfer of the road back although to do so will put the Council in the position it had intended when transferring the recreation ground to the Parish Council. The original proposal was for the Council to take a transfer of the road at a nominal sum (£1) and relieve the

Parish Council of any maintenance responsibilities for the road and services, as this was the Parish Council's main concern at the time they approached the Council.

22. The Council has in fact continued to maintain the road since the 1997 transfer and has not recharged any costs to the Parish Council or the owner of 2 Parkers.
23. The Council is currently dealing with a sale under the Right to Buy of 4 Parkers which is affected by the situation regarding the access road. There is therefore a need to resolve the access issue.
24. If the Council does not take a transfer of the road, the legal position as to rights of way over the road is not currently documented. The Parish Council purchased the land subject to the rights that had already been granted to the owner of no.2 Parkers in the sale of that property under the Right to Buy which was completed on 2nd March 1983
25. The Council's tenants have continued to use the road to gain access to the properties and it is considered that a right of way could be claimed over the road due to long user since the transfer in 1997. An application to the Land Registry could be made for the right of way to be noted against the Parish Council's title and for the benefit of the right of way to be added to the Council's title, although the Parish Council could object to such an application and if disputed it would need to be adjudicated by the Land Registry or court.

Risk Analysis

Risk	Likelihood	Impact	Mitigating actions
<p>The Council do not own the access road to its properties and currently exercise rights that are not formally documented. The lack of ownership or formal rights of way could affect the future use / sale of the properties</p>	<p>1. The Council could claim a prescriptive right of way as rights of way have been exercised for at least 20 years, and an implied right to maintain the road or there may be a case for a claim for an easement of necessity if the properties cannot be accessed</p>	<p>2. It will make the sale of the properties harder to deal with, along with issues of maintenance and other users</p>	<p>Agree to the transfer of the road to the Council</p>

	without using the road		
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- 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.