

## **Report to the Cabinet**

**Report reference:** C-025-2010/11  
**Date of meeting:** 13 September 2010



**Portfolio:** Legal and Estates

**Subject:** Replacement of Restrictive Covenants – Epping Forest College, Loughton

**Responsible Officer:** Rosaline Ferreira (01992 564409).

**Democratic Services Officer:** Gary Woodhall (01992 564470).

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### **Recommendations/Decisions Required:**

- (1) That the right of pre-emption in respect of the land shown edged thick black on Plan A (attached) and edged thick black on Plan C (attached), which are part of Epping Forest College, be recommended to the Council for unconditional release;**
- (2) That the release of the covenant which restricts the use of this land shown edged thick black on Plan A and replacement with a new covenant to allow the land to be used for residential care and/or nursing home and/or education be recommended to the Council for approval;**
- (3) That the delegation of authority to the Director of Corporate Support Services, in consultation with the Portfolio Holder for Legal and Estates, to negotiate any reasonable variation to the covenant which restricts the use of the land shown edged thick black on Plan C be recommended to the Council for approval; and**
- (4) That the delegation of authority to the Director of Corporate Support Services to agree minor variations to the new covenants, if necessary, be recommended to the Council for approval.**

### **Executive Summary:**

The Council has previously agreed the variation of the restrictive covenants and the release of the right of pre-emption in respect of Loughton Hall Site which previously had formed part of the College site. These same provisions affect this land which adjoins the Loughton Hall. Epping Forest College now wish to sell this has asked that the current restrictions on use be changed to allow residential care or nursing home development and/or an education use. It has also asked that the Council's option to purchase the land at full market value (a right of pre-emption) each time the property is sold is released. The College authorities state that they intend to provide sports facilities on a different area of land owned by the College at Borders Lane as shown edged thick black on Plan B attached and the College states that the local community will have access. These facilities will be provided at a future date when funds become available.

### **Reasons for Proposed Decision:**

The Council's right of pre-emption gives it the option to purchase the land at full market value whenever it is put up for sale. The covenants for use are very restrictive. The combination of these provisions makes it very difficult for the College to sell and greatly affects the value of the land. If the Council agrees to the release of the restrictive user clauses then it will enable the College to gain a better financial footing, which might facilitate the building of new sports

facilities in the future.

### **Other Options for Action:**

- Not to agree to the variation of the restrictive covenant as to use and not to release the right of pre-emption. The College could apply to the Lands Tribunal for the restrictive covenants to be released. It is likely that they would be released. The right of pre-emption could not be released in this way but the College can sell the land if the Council refuses to purchase. This would affect any premium the College could expect to receive for the land.
- To agree to the variation of the restrictive covenant as to use and to make the release of the right of pre-emption conditional upon the building of the sports facilities. Again this would affect the value of the land.
- To require the College to enter into a separate agreement that it constructs the alternative sports facilities within a time limit. The College will not agree to this.

### **Report:**

1. The College site was transferred in 1952 to Essex County Council (ECC) by the then London County Council (LCC). Through local government reorganisations the Epping Forest District Council now have the benefit of both the restrictive covenants and the right of pre-emption. The Loughton College are bound by the covenants and rights of pre-emption.

2. The two covenants and the right of pre-emption are set out below:

*(a) Not without the previous consent of the Council to use or allow to be used the Land hereby conveyed or any part thereof for any purpose other than for the purposes of the Education Act 1944 and/or the National Health Services Act 1946.*

*(b) Not to erect any buildings on the land hereby conveyed or any part thereof except in accordance with layout and site plans first submitted to and approved by the Council but as regards elevational treatment this is not to be subject to approval but the Council are to be given an opportunity as Vendors and adjoining owners of examining the character of the proposed development.*

*(c) Not during the life or lives of any issue now living or His Late Majesty King George the Fifth or within twenty-one years next after the death of the last survivor of such issue to sell or (except for the purposes aforesaid) to appropriate or to part with the possession of the land hereby conveyed or any part thereof without first offering it for sale to the Council and if during the period aforesaid the Purchaser or its sequels in title shall cease to use the said land or any part thereof for the purposes referred to in paragraph (a) hereof written notice of such successor shall forthwith be given to the Council and the said land or the part thereof in respect of which such user as aforesaid shall have ceased shall at the same time be offered for sale to the Council and if the Council in any of such events decide to purchase within three months of the date of the offer the purchase money for the whole of the land or for any part thereof shall be calculated upon the basis of terms to be approved by the District Valuer in accordance with the statutory basis of compensation applicable to a compulsory purchase transaction ruling at the time together with in either case an additional sum in respect of any buildings standing upon the land assessed on the same basis of valuation PROVIDED ALWAYS that such re-sale to the Council shall be subject to the prior approval of the Ministry of Education or the Ministry of Health as the case may be.*

3. Covenants may be released or modified in a number of ways and the most used way is through the Lands Tribunal. In 1998 the Council sought specialist advice from Montagu Evans Chartered Surveyors on the removal of the restrictive covenant relating to the use of the land. A compensation payment would normally be payable to reflect the increase in the value of the land resulting from the development potential. The advice confirmed that if the Council refused

to release the covenant, the matter would be referred to the Lands tribunal who would be likely to agree to the release. The level of compensation would be restricted to the difference in the value of the land with and without the covenant when the transfer took place in 1952 accordingly it would be nominal.

4. A right of Pre-emption is not a restrictive covenant and cannot be discharged by the Lands Tribunal.

5. Cabinet's decision – Minute 55 – 7 September 2009 stated that:

(a) *the “right of pre-emption was to be conditional upon the construction of the new sports facilities when funding becomes available. The means of achieving this to be agreed by the Portfolio Holder for Legal and Estates and the Director of Corporate Support Services”;*

(b) *a new restrictive covenant to be imposed as to use;*

(c) *authority to be delegated to the Portfolio Holder and the Director of Corporate Support Services to agree to any minor variations.*

6. Council's decision – Minute 76 – 29 September 2009 adopted most of what Cabinet had decided with the exception to the release of the right of pre-emption and replaced it with the following:

(a) *that the release of the right of pre-emption in respect of an area of approximately 0.95 acres/0.38 hectares shown edged black only on the attached plan be agreed, subject to Epping Forest College entering into an agreement with the council which contains a contractual commitment by the College to provide new community sports facilities as a priority when funds become available;*

(b) *that the final terms of the contractual commitment be delegated to the Portfolio Holder for Legal and Estates for approval, in consultation with the Solicitor to the Council; and*

(c) *that in the event that an agreement cannot be finalised with the College, a further report be made to Cabinet before the right of pre-emption is released..*

7. The conditional release of the right of pre-emption has been rejected. The College Solicitors have stated that the Deed of Release will need to include a release of the right of pre-emption because the purchasers of the Sports Hall simply will not purchase it with such pre-emption right in place. The purchasers will have no power to compel the College to build the sports premises and it would affect the value of their land if they wished to sell and the right of pre-emption remained.

8. The solicitors have suggested a side letter. However, what has been offered is intended to be a statement of what is intended at this time and would not be contractual obligation enforceable in the future.

9. It has been suggested that we put in the Deed of Release the provision of “new community sports facilities as a priority when funds becomes available”. Again this would not be enforceable as the College is free to allocate their funds to other purposes.

10. If a side letter was to be used or the words mention in paragraph 9 included there will be no guarantee that the sports facilities would be built. It is also believed that the College would want the sale funds to go towards their debts whereas Members have indicated that they would like the sale proceeds to go towards the building of the new sports facilities on land on the south side of Borders Lane.

11. If the Council wished to impose an obligation on the College to provide these facilities which would bind subsequent owners of the College land it could require the College to enter

into a deed of Covenant

12. The problem with positive covenants is that it is necessary to impose a condition that property cannot be sold unless a similar deed of covenant is entered into with the purchasers on completion. However, the College has indicated that they do not wish to be legally bound to provide the sports facilities.

13. Further, the Planning Sub-Committee Area South – 16 June 2010 – application EPF/0533/10 – site address – Loughton Sports Centre – demolition of Loughton Sports Centre – proposal for 85 bed care home development with car parking and landscaped secure garden areas. (Revised application) – decision – refuse permission.

14. The College is in the process of selling some land shown edged thick black on Plan C to Essex University. The site (the car park) is approximately 1.4 acres and the proposal is for the land to be used for education purposes. The Council has therefore been informed that the request to remove the educational covenant does not apply in this instance. Essex University solicitors have reviewed the title and now they are saying they will not proceed with the purchase unless the right of pre-emption in favour of EFDC is removed. Essex University will be investing considerable funds in the site and their lenders will not proceed with an automatic right of pre-emption in place as they want the College to be able to offer the property to the open market in the event that a sale is required in the future. However, the situation may change with regard to the release of the covenant and therefore a recommendation has been included to allow the Council to respond quickly to the College.

15. The difference between the 1952 car parking land value and the unrestricted value is de minimis. Members would need to agree that the restrictive covenant (if necessary be varied) and the right of pre-emption could be released for social environmental or economic reasons.

#### **Resource Implications:**

##### Finance

None. The covenants are of no value.

##### Personnel

Legal Services

Valuation and Estate Management Service

##### Land

Covenant and right of pre-emption

#### **Legal and Governance Implications:**

Section 123 Local Government Act 1972 – best consideration for the land and property assets. Consent is given for sale of land (covenants are deemed to be a sale for this purpose) can be released for undervalue provided that they are for social economic or environmental reasons.

#### **Safer, Cleaner and Greener Implications:**

The buildings' lives have expired, are obsolete and could be replaced by new facilities to modern energy performance standards.

#### **Consultation Undertaken:**

None.

#### **Background Papers:**

Cabinet 's decision – Minute 55 – 7 September 2009

Council's decision – Minute 76 – 29 September 2009  
Planning Area South decision – Report item No 3 – application number EPF/0533/10 –  
16 June 2010-

**Impact Assessments:**

Risk Management

Loss of new sports facilities for the college and wider community.

Equality and Diversity:

No equality issues

*Did the initial assessment of the proposals contained in this report for relevance to the Council's general equality duties, reveal any potentially adverse equality implications?* No

*Where equality implications were identified through the initial assessment process, has a formal Equality Impact Assessment been undertaken?* No

*What equality implications were identified through the Equality Impact Assessment process?*  
N/A

*How have the equality implications identified through the Equality Impact Assessment been addressed in this report in order to avoid discrimination against any particular group?*  
N/A