Report to the Council

Committee:	Cabinet	Date:	28 September 2010
Subject:	Epping Forest College, Loughton – Replacement Covenants	t Of Res	trictive
Portfolio Holder:	Councillor Lesley Wagland (Legal and Estates)	Item:	11

Recommending:

(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 released unconditional;

(2) That the release of the covenant which restricts the use of the 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 approved;

(3) That the Director of Corporate Support Services, in consultation with the Portfolio Holder for Legal and Estates, be authorised to negotiate any reasonable variation to the covenant which restricts the use of the land shown edged thick black on Plan C; and

(4) That the Director of Corporate Support Services be authorised to agree minor variations to the new covenants, if necessary.

Background

- 1. The current Epping Forest College site was transferred in 1952 to Essex County Council by the then London County Council (LCC). The transfer was subject to covenants and a right of pre-emption which are now vested in the District Council (as successor to the LCC in this case).
- 2. The covenants restrict the use of the land to use for the purposes of the Education Act 1944 and/or the National Health Services Act 1946 and require approval for the erection of any building.
- 3. 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.
- 4. Covenants may be released or modified in a number of ways but this is normally 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 at that time 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 minimal.

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

Previous Decisions

- 6. In 1998 the District Council agreed to a request from Epping Forest College to release the restrictive covenant free of charge from surplus land, comprising 7.9 acres/3.2 hectares. On 10 April 2006 approval was given to release the same covenant from an additional 5.93 acres/2.4 hectares to facilitate residential development and investment of the capital receipt into the redevelopment of the College campus.
- 7. On 18 December 2007 the Council resolved that its right of pre-emption be not exercised in relation to Loughton Hall and the Library site adjoining the College. It also agreed that the restrictive covenant affecting Loughton Hall be released and replaced with the following new covenants:

(a) prohibiting the use of the Hall for any purpose other than residential care home, community, education or health purposes; and

(b) specifically prohibiting the use of the Hall for any residential purpose other than as a residential care home.

- 8. On 9 June 2008 the Cabinet agreed that nursing home use be included in the restrictive covenant in addition to the residential care home, community, education or health purposes previously agreed.
- 9. In September 2009 the Council considered a proposal of the College to dispose of an area of land on which was located a sports hall, previously occupied by the Debden Community Association. The College had been approached by a healthcare provider, who wished to purchase the land in order to provide a residential healthcare facility for the elderly.
- 10. The Council at its meeting on 29 September 2009 agreed 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 be agreed, subject to Epping Forest College entering into an agreement with the Council which contained 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 the Cabinet before the right of pre-emption is released.

Current Situation

11. The conditional release of the right of pre-emption agreed by the Council in September 2009 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 rights in place. It is stated that the purchasers would 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.

- 12. A side letter has been suggested. However, what has been offered is intended to be a statement of what is intended at this time and would not be a contractual obligation enforceable in the future.
- 13. It has also been suggested that the Deed of Release include the provision of "new community sports facilities as a priority when funds become available". Again this would not be enforceable as the College would be free to allocate their funds to other purposes. If these words were included in a side letter there would 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 rather than the building of a new sports facility.
- 14. If the Council wishes to impose an obligation on the College to provide new sports facilities which would bind subsequent owners of the College land it could require the College to enter into a Deed of Covenant. 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. The College has indicated that they do not wish to be legally bound to provide the sports facilities.
- 15. Members will be aware that Area Plans Sub-Committee South at its meeting on 16 June 2010 refused planning permission for the demolition of Loughton Sports Centre and the erection of an 85 bed care home development with car parking and landscaped secure garden areas.
- 16. 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 educational purposes. The Council has therefore been informed that the request to remove the educational covenant does not apply in this instance. Essex University's solicitors have reviewed the title and are saying that they will not proceed with the purchase unless the right of pre-emption in favour of the District Council 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. The difference between the 1952 car parking land value and the unrestricted value is de minimis.

Reasons for Recommendations

17. 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 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 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 Which We Have Rejected

- 18. The Council could refuse the variation of the restrictive covenant as to use and not release the right of pre-emption. The College could apply to the Lands Tribunal for the restrictive covenants to be released and it is likely that they would be released. The right of pre-emption could not be released in this way but the College could sell the land if the Council refused to purchase it. This would affect any premium the College could expect to receive for the land.
- 19. The Council could 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.

20. The Council could require the College to enter into a separate agreement that it constructs the alternative sports facilities within a time limit. It is clear that the College will not agree to this.