

Report to the Cabinet

Report reference: C-064-2016/17

Date of meeting: 9 March 2017



**Epping Forest
District Council**

Portfolio: Housing

Subject: Covenants and Appropriations – Hillhouse,
Waltham Abbey

Responsible Officer: Alan Hall (01992 564004)

Democratic Services: Gary Woodhall (01992 564470)

Recommendations:

(1) That, as an improvement that will contribute towards improving the social well-being of the local area;

(a) The Council's land at Hillhouse, Waltham Abbey, shown on the plan in the attached Appendix, be appropriated for planning purposes, in order to facilitate the development of the proposed new Epping Forest District Council (EFDC) Leisure Centre on the land; and

(b) The Council agrees to the request from Essex County Council to release the covenants on the County Council's adjoining land (also shown on the plan in the attached Appendix) - currently restricting the use of the land for the purposes of the Education Acts or as playing fields and prohibiting any of the land to be fenced off - in order to allow the land to be developed to provide a new independent living scheme to meet the housing and care needs of older residents from the Epping Forest District and a new health centre to help meet the primary care needs of residents from the local area.

Executive Summary:

The Council has been working in close partnership with Essex County Council (ECC) and NHS England (NHS) to develop land in EFDC's and ECC's ownership at Hillhouse, Waltham Abbey, to provide a new Leisure Centre (EFDC), Independent Living Scheme for older people (ECC) and Health Centre (NHS).

The two areas of land had covenants placed on them when the land was originally acquired from the GLC. Therefore, in order to enable the land to be developed in accordance with the recent Outline Planning Permission, EFDC's land needs to be appropriated for planning purposes and the covenants on the ECC land need to be released, for which EFDC has received a formal request from ECC.

A detailed joint financial appraisal by EFDC's affordable housing and viability consultants has established that ECC's land has no value for the proposed developments and, in fact, the development has a deficit of around £657,000, which will therefore require ECC to provide a capital subsidy of around £715,000 to enable the development to go ahead.

Reasons for Proposed Decision:

The Council's land needs to be appropriated for planning purposes and the covenants on ECC's land need to be released, in order for the land to be developed for the purposes for which Outline Planning Permission has been received.

Other Options for Action:

The main alternative options appear to be:

(a) Not to appropriate EFDC's land for planning purposes, but this would open up the Council to a legal challenge in the future, which could delay the construction of the Leisure Centre – which could be very expensive if construction works have commenced.

(b) Not to release the covenant on ECC's land – but this would be in conflict with the partnership approach taken to the development of Hillhouse throughout to date and, in any event, would probably result in ECC making an application for the release to the Upper Tribunal, which could quite possibly be successful and could result in EFDC having to pay ECC's legal costs if the Tribunal considered EFDC's refusal to have been unreasonable.

(c) Seek a payment from ECC for the release of the covenant – however, unlike other sites in the District where requests have been received, it has been established that the proposed development on ECC's land has a negative value, which will require ECC to provide a significant capital subsidy. Furthermore, if this was a condition of the proposed release, again, it is likely that ECC will make a successful application to the Upper Tribunal which, again, could result in EFDC having to pay ECC's legal costs if the Tribunal considered EFDC's response to have been unreasonable.

Report:

1. As the Cabinet will be aware, the Council has been working in close partnership over the past two years with Essex County Council (ECC) and NHS England (NHS) to jointly commission and fund:

- A Master Plan for the development of a "community hub" on both EFDC-owned and ECC-owned land at Hillhouse, Waltham Abbey; and
- The submission of an Outline Planning Application for the development proposals.

2. The Cabinet has previously considered and endorsed the Master Plan and the submission of a joint Outline Planning Application, the latter of which was approved by the District Development Management Committee in November 2016.

3. The agreed development proposals include the following:

- a new leisure centre and swimming pool to replace the existing Waltham Abbey Swimming Pool at Roundhills - with a 25m pool with 6 lanes, plus a learner pool, a studio for movement/dance activities, and a multi-use community space;
- an Independent Living (sometimes referred to as Extra Care) Scheme – comprising 60 one and two bedroom self-contained flats for people over 55 years of age with identified care and support needs, with at least 40% of the flats provided as affordable rented housing (at no more than 80% of market rents for the area,

including service charges), with the remainder provided as market housing – with first priority for both tenures given to residents from the Epping Forest District;

- a new health centre providing new, modern accommodation, to replace the existing Maynard Court Doctors Surgery - to enable a wider range of health services to be provided for the benefit of the local community and to provide an opportunity for the practice to increase GP and nurse training on site;
- the retention of around half of the existing playing fields as informal recreation space; and
- the provision of a financial contribution towards alternative sports/recreation provision to be provided elsewhere in Waltham Abbey, to compensate for the loss of informal recreation space at Hillhouse.

4. At its meeting in December 2016, the Cabinet selected a preferred contractor for the new Leisure Management Contract, which includes a requirement for the contractor to build the new Leisure Centre for the Council on the Council's land.

5. The Hillhouse site currently comprises the following three areas, to the west and north-west of the Hillhouse shopping parade (which does not comprise part of the proposed development area):

- 1.72Ha of playing fields to the north owned by ECC – shown on the plan in the attached Appendix;
- 1.44ha of playing fields to the south owned by EFDC – also shown on the plan in the Appendix; and
- The Hillhouse Community Centre and a circular car park (both owned by EFDC, with Waltham Abbey TC being the long leaseholders of the Community Centre) to the south-east of the playing fields.

Appropriation of the Council Owned Land

6. The Council's land was purchased by the Waltham Holy Cross Urban District Council from the Greater London Council (GLC) in 1974 for use as public open space. A covenant was imposed on the Urban District Council (UDC) that the land could not be used for any purpose other than for public walks, pleasure grounds or playing fields.

7. The land was transferred from the UDC to EFDC on re-organisation later in 1974 and, subsequently, following the abolition of the GLC, the benefit of the covenant passed to EFDC as well. Since its purchase, the land has been used as open space, including use as football pitches, dog-walking and other informal leisure uses. Until recently, a local football club (Abbey Youth FC), used the land for football matches and training, although arrangements have now been made for them to use other pitches in Waltham Abbey.

8. As a result of the master-planning process and subsequent Outline Planning Permission, the development will therefore contribute towards a better use of the land for leisure purposes, which will lead to the promotion and improvement of the social wellbeing of the area. For this reason, and following legal advice from the Council's Legal Team, it is considered that the proposed development will satisfy the requirements of Section 226 of the Town and Country Planning Act 1990 (as amended) and that the land should be appropriated for planning purposes since:

- the appropriation of the land will facilitate the carrying out of the development, redevelopment or improvement on or in relation to the land; and
- the proposed development is likely to contribute to achieving the promotion and improvement of the economic, social or environmental well-being of part of the local area.

9. Under the Act, the Council and its Leisure Management Contractor are authorised to erect, construct, carry out or maintain any building or work on land which has been appropriated for planning purposes, or use such land (provided there is a planning permission), even if that work or use involves a breach of the covenant imposed restricting the use of the land.

10. In accordance with the requirements of the Act, a notice of the Council's intention to appropriate the land for planning purposes was placed in a local newspaper (the Hertford Mercury) on 15 and 22 September 2016, following which no representations were received.

11. It is therefore recommended that the Cabinet formally resolves to appropriate the Council's land at Hillhouse, Waltham Abbey, as marked on the plan attached at Appendix 1, for planning purposes, in order to facilitate the development of the proposed new EFDC Leisure Centre on the land, as an improvement that will contribute towards improving the social well-being of the local area.

Covenants on Essex County Council Owned Land

12. Similarly, ECC acquired land at Hillhouse from the GLC in 1976. The land was purchased for the purposes of the Education Acts and Children's Act 1948 and, unlike EFDC's land, is not therefore classified as public open space.

13. Covenants were imposed on the land at the time of acquisition that require the land:

- to be used for the purposes of the Education Acts or, at times when this is not required for that purpose, as playing fields by the public at large; and
- not to be fenced off, except as necessary during the maintenance of the playing fields.

14. EFDC is the successor in title to the GLC for the purposes of enforcing covenants on land. Therefore, following receipt of the Outline Planning Permission, and as always planned as part of the partnership approach to the development of the area, ECC has now formally requested EFDC to release these covenants on the County Council's land, to enable the development of the Independent Living Scheme and new Health Centre to proceed.

15. The S106 Agreement for the proposed Independent Living Scheme at Hillhouse will require residents to be in need of at least 6 hours care per week. ECC's most recent assessment of need for independent living accommodation in the Epping Forest District is that 143 market and 44 affordable rented independent living homes are required by 2020.

16. In order to assess whether or not there is any value to ECC from undertaking these developments, EFDC and ECC jointly-commissioned Kift Consulting Ltd (with whom EFDC already has a contract to provide it with advice on viability and developments) to undertake a financial appraisal of the proposed developments, based on the requirement that at least

40% of the independent living flats will be provided as affordable rented housing to applicants living in the Epping Forest District (which always reduces development values significantly).

17. As a result, the appraisal has established that, after taking account of both all the costs and all the income from market sales and the affordable housing, the proposed development on ECC's land will have a deficit of £657,000 and, therefore, for the scheme to be financially viable, Kift Consulting estimates that ECC will, in fact, need to provide a capital subsidy of around £715,000. ECC has committed to provide this capital subsidy from a county-wide budget that it has established to enable such independent living schemes to be developed across Essex.

Resource Implications:

Nil – although EFDC could be required to meet ECC's legal costs if EFDC refuses ECC's request and ECC makes a successful application to the Upper Tribunal to have the covenant released.

Legal and Governance Implications:

EFDC's Legal Team has advised that, if the Council does not agree to a reasonable request for the covenant to be released, ECC could make an application to the Upper Tribunal of the Lands Chamber to release the covenant. The Upper Tribunal has the power to discharge a restrictive covenant in the various circumstances set out in section 84 of the Law of Property Act 1925. This includes where the following test is satisfied:

- the covenant impedes some reasonable use of the land;
- the covenant does not give anyone entitled to the benefit of it "any practical benefits of substantial value or advantage to them"; and
- money would be adequate compensation for any loss or disadvantage anyone entitled to the benefit would suffer from the discharge.

When it discharges a covenant, the Tribunal may order the person applying for the discharge to pay compensation. The compensation would either be for:

- any loss or disadvantage suffered due to the discharge; or
- any effect which the covenant had, at the time it was imposed, in reducing the consideration then received for the land affected by it.

The Legal Team advises that, if there is no practical benefit to the Council of the covenant, then no compensation would be payable, other than any amount by which the price of the land may have been decreased by the imposition of the covenants when the property was transferred in 1976.

They point out that Waltham Holy Cross Urban District Council acquired the neighbouring land (now in the ownership of EFDC) from the GLC in 1974. The covenants that the UDC gave at the time were for the benefit of the adjoining and neighbouring Ninefields Estate. Since ECC purchased their land in 1976, it would have purchased the land with the benefit of the covenant on EFDC's land and could, therefore, be entitled to enforce the covenant against the Council if it considered it appropriate. However, the same rules apply for the discharge of the covenant as for ECC.

Safer, Cleaner and Greener Implications:

As the Cabinet will be aware, the combined development proposal will result in a reduction in

the amount of recreation area retained at Hillhouse. However, this was considered as part of the Outline Planning Permission and considered to be acceptable.

Consultation Undertaken:

None.

Background Papers:

“Joint Financial Viability Feasibility on behalf of Epping Forest District Council & Essex County Council for the proposed Independent Living Scheme on land at Hillhouse, Waltham Abbey” by Kift Consulting Ltd, dated 23 January 2017

Risk Management

Equality Analysis

The Equality Act 2010 requires that the Public Sector Equality Duty is actively applied in decision-making. This means that the equality information provided to accompany this report is essential reading for all members involved in the consideration of this report. The equality information is provided in the Equality Analysis Record attached below.

