

To: **EXECUTIVE**  
**31<sup>th</sup> August 2021**

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**TOWN CENTRE REGENERATION**  
**Director of Resources**

**1 Purpose of Report**

- 1.1 In December 2020 the Council entered into a joint venture agreement with Countryside Properties (UK) Ltd forming Bracknell Forest Cambrium Partnership to redevelop a number of areas within the Town Centre.
- 1.2 Bracknell Forest Cambrium Partnership submitted a planning application (Reference 21/00233/FUL ) (“The Planning Application”) which was considered by the Planning Committee on 19<sup>th</sup> August 2021, which concerns the regeneration and redevelopment of an area of land at Coopers Hill ( “The Property”) and comprises 52 new family homes, including 25% affordable homes.
- 1.3 It was resolved that planning permission be granted (subject to the completion of an Agreement to secure relevant planning obligations) pursuant to the Planning Application on 19<sup>th</sup> August 2021 21/00233/FUL (“the Planning Permission”), and thus in order to facilitate the implementation of the Planning Permission, this report seeks the approval of the Executive for Bracknell Forest Borough Council to confirm its decision to appropriate the Property for planning purposes in accordance with Section 122 Local Government Act 1972, that certain property rights and interests affecting the Property such as easements and restrictive covenants will be overridden pursuant to Section 203 of the Housing and Planning Act 2016 once the Planning Permission is implemented and that statutory compensation may be agreed with any affected parties and all appropriate legal documentation completed in relation thereto.

**2 Recommendations**

- 2.1 To confirm the appropriation of the land at Coopers Hill edged red on the plan attached as exempt Annex B for planning purposes under Section 122(1) of the Local Government Act 1972 and to delegate all matters arising therefrom to the Borough Solicitor;
- 2.2 To note that the Property will be redeveloped pursuant to the Planning Permission or any variations to it or new planning permissions in respect of the Property) and that the provisions of s203-s206 of the Housing and Planning Act 2016 will apply to override rights, easements and covenants in favour of neighbouring and nearby properties that could be infringed by the development;
- 2.3 To give delegated authority to the Assistant Director; Property Services in consultation with the Borough Solicitor and the Executive Director: Resources to agree the settlement and documentation of any statutory claims with owners and occupiers of the neighbouring properties, together with any associated fees; to document any associated agreements, deeds of release etc that may be required and to note that the cost of the proposed settlement of compensation payments and associated fees affected by this scheme will be met by the the partnership (Bracknell Forest Cambrium Partnership, pursuant to the existing development agreements).

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### 3 Reasons for Recommendations

- 3.1 Without the exercise of the Council's appropriation powers, parties who are affected by the diminution of their rights to light or other easements being affected have the ability to bring injunction proceedings to prevent the development of the Property. This could potentially halt the project and would result in a delay to the delivery of the development.
- 3.2 As the Property is appropriated for planning purposes and the development of the Property will be in accordance with the Planning Permission section 203 Housing and Planning Act 2016 can be invoked to override existing rights without the possibility of injunctive legal proceedings potentially preventing development.
- 3.3 Pursuant to section 204, all affected parties with rights which are overridden are resolved by payment of statutory compensation.
- 3.4 The Council has made contact with all potentially affected parties by way of letter to inform them that the Council is to appropriate the Property for planning purposes; and in addition the Council has placed notices of intent to appropriate at key sites around the Coopers Hill site. A list of the potentially affected parties and a detailed breakdown of their interest and potential compensatory figure can be found in the exempt Annex A1 and A2. If a claim is made and if agreement on compensation payment is not reached with any party, the matter can be referred to the Upper Tribunal for determination. The Council has asked for potentially affected parties to contact the Council to advise of their potential claim by 24<sup>th</sup> August 2021.
- 3.5 **It was resolved to grant** Planning Permission subject to completion of an Agreement to secure relevant planning obligations on 19<sup>th</sup> August 2021. Appropriation for planning purposes is considered to be beneficial to unhinder the process of development by injunction. Appropriation is a useful tool generally for development as it provides protection against both known and unknown restrictions (the "unknown unknowns"). Appropriation of the Site as provided for under Section 122 of the Local Government Act 1972, permits the Council to engage Sections 203 and 204 of the Housing and Planning Act 2016 once there is planning consent in place, the effect of which is to prevent injunctions from being sought in respect of infringements of rights to light any other easements and rights. This power to override rights extends not only to the local authority, but also to any person deriving title under them following a disposal. This approach therefore prevents an injunction being issued by benefitting neighbouring or nearby landowners, which might delay or obstruct development. Neighbouring landowners instead have a right to compensation, in accordance with the terms of the Housing and Planning Act 2016 when the development is carried out and the relevant right is infringed.
- 3.6 The restrictive covenant on the Property contained within a conveyance dated 26<sup>th</sup> August 1958 and made between (1) Bracknell Development Corporation and (2) The County Council of The Administrative County of Berkshire ("the Restrictive Covenant") is being dealt with in a parallel process as regards the interest of Homes England. The Council has been in correspondence with Homes England who are the statutory successors to the original beneficiary of the Restrictive Covenant and a deed of release in respect of the Restrictive Covenant has been agreed between the Council and Homes England. The appropriation powers will not therefore be engaged in respect of Homes England's interest, although the powers will be so engaged for any other potential beneficiaries of the Restrictive Covenant.

#### **4 Alternative Options Considered**

- 4.1 The Executive could decide not to endorse the recommendations made in this report. This would mean that the Council may need to develop an alternative approach to development of the Property. The Business Case that informed the Executive's decision to progress a Joint Venture partnership in February 2019 indicated that alternative approaches would be less likely to deliver the agreed objectives.
- 4.2 Not to proceed with the exercise of the Council's rights of Appropriation at the Property, which may lead to delays in the development due to potential injunctions which may be brought by the possible beneficiaries of any rights or covenants

#### **5 Supporting Information**

- 5.1 It was resolved to grant a Planning Permission subject to the completion of an Agreement to secure relevant planning obligations on 19<sup>th</sup> August 2021 and through the planning process, the Council has engaged and consulted a wide range of consultees upon the potential impact of development through a comprehensive pre planning engagement. The development proposal of 52 units comprising of houses and low level flats has been subject to a range of public awareness and engagement exercises, including public engagement prior to the submission of the application to the local planning authority. Public engagement has taken place using a number of means, including: c2300 newsletters to residents, social media and hard print advertising, c60 letters directly to neighbours in adjacent properties. The partnership also held 2 public webinars and 4 meetings with other stakeholders.
- 5.2 Comments received through any of the public engagement approaches were considered as part of the project group and updated proposals were submitted to the local planning authority.
- 5.3 Relevant planning matters have been largely dealt with and overcome through the planning application process. A small number of objections were received to the scheme, several of which were from direct neighbours to the site. All of these planning related objections are expected to be resolved through the formal planning process and there should be no technical objections outstanding.
- 5.4 Objections received by the planning application included;
- Ecology – loss of trees
  - Highways issues – parking, increased traffic, pedestrian access
  - Overdevelopment of site
  - Overlooking
- Pre-planning discussions with the planning authority had been ongoing throughout the planning process and any consultee concerns have been addressed through minor amendments to the scheme. A Planning Statement provides a detailed assessment of the proposals for the redevelopment of the Property in relation to national, strategic and local planning policy and other material considerations and was included in the Planning Application and concluded that planning permission should be granted, considering the statutory development plan and any other material considerations..
- 5.5 The Council considered the Planning Application as Local Planning Authority and granted Planning Permission subject to completion of an Agreement to secure

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relevant planning obligations at its advisory meeting on 19th August 2021, which was then formally ratified in line with the Council's temporary delegation protocols introduced while face to face meetings cannot be undertaken due to Covid restrictions. There is no reason to think that planning permission will not now be granted relatively soon. Any challenge needs to be brought by Judicial Review which must be commenced within 6 weeks from the date of the grant of Planning Permission (which will be post completion of the planning obligations Agreement) Furthermore, the resolution to grant the Planning Permission subject to completion of the Agreement provided strong support that the development will be of benefit to the public (covered further below), which may be relevant to the question for a court as to whether or not to grant an injunction, but is by no means conclusive in light of current case law. Significant uncertainty therefore leads officers to consider that removing the risk of injunction is important in order to ensure delivery of the scheme and its wider social benefits.

### 5.6 Council's Statutory Powers

- a) Section 122 Local Government Act 1972 allows a Council to appropriate land for planning purposes, but only where it is no longer required for the purpose for which it is held immediately before the appropriation; and ii) the Council could in principle acquire the land for the 'new' purpose. To note S122 considerations are the precursor to S203 Housing and Planning Act 2016.
- b) In respect of the first of these requirements, when contemplating appropriation, a local authority must give specific consideration to the question of whether the land continues to be required for its existing purpose and in doing so, it must consider the comparative needs in the public interest for the existing use and the proposed new use. It is not necessary that the land should be surplus or unused.
- c) In respect of the second requirement for the application of section 122, in this case the new purposes are planning purposes. The Council has power to acquire land by agreement for planning purposes under section 227 of the Town and Country Planning Act 1990 to facilitate redevelopment if it is satisfied that the redevelopment would contribute to the achievement of the promotion of economic, social and/or environmental well-being of its area. The well-being benefits of the redevelopment are described in 5.17.
- d) Statute provides local planning authorities with a variety of powers to promote and facilitate development in their area, and central government encourages proactive use of these powers to facilitate regeneration and development
- e) S122 Local Government Act 1972 permits a principal council to appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned,
- f) S.203 of the Housing and Planning Act 2016 provides that where a Council acquires or appropriates land for planning purposes, easements and third-party rights may be overridden for the purposes of development of the land which is carried out in accordance with a planning permission. The easement or third-party are effectively converted from an injunctable property right into an

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entitlement to statutory compensation. This therefore permits the proposed development to proceed.

- g) Once appropriation has been undertaken by the Council, it can override third party rights in the land by virtue of S203 Housing and Planning Act 2016 and both the Council and any party deriving title to the land from the Council, such as successors, tenants and mortgagees benefit therefrom once a Planning Permission is granted.
- h) The third-party owner of a property right or easement is entitled to statutory compensation under S204 Housing and Planning Act 2016 which is calculated as the reduction, or diminution, of market value of their benefitting property due to the overriding of their interest. Although [s.204](#) does not explicitly fix a valuation date it appears likely to be the date (following appropriation and the grant of planning permission) when the statutory override of rights is triggered, i.e. when the works are carried out or the new use begins. Specialist valuation advice should always be sought, and should consider the nature of the interference, as any interference with the Human Rights of third parties must be justified in the public interest and proportionate, and the Council has indeed sought such advice, from Avison Young.

### 5.7 Considerations

The powers contained within the two aforementioned Acts are very useful in allowing beneficial development and regeneration to proceed, but it is recognised that use of the powers will have an impact on the private rights of third parties. It is therefore necessary to ensure that proper consideration and justification is undertaken prior to the decision to appropriate the land and to override third party rights. As part of this, the Council needs to consider a number of matters and to comply with best practice and government guidance. The following considerations have been reviewed in respect of the proposed appropriation of Coopers Hill.

#### **a) Is the use of powers required?**

The use of the powers is required to ensure that any overriding third party interests are satisfactorily dealt with. The Council has reached an agreement regarding release of the Restrictive Covenant. The Council has also reached agreement with all the other parties who have occupational interests in the Property by the re provision of facilities elsewhere that are equally commodious, or alternatively the Council has used its landlord and tenant powers to ensure vacant possession, and subsequently is providing assistance in relocating the displaced occupants.

#### **b) Will the use of powers facilitate carrying out of development?**

The use of these powers will facilitate the carrying out of the planned development of the Property via the Bracknell Forest Cambium Joint Venture Partnership with Countryside Properties. This will provide new family homes, including affordable homes, supporting the council vision for regeneration of Bracknell Town centre.

#### **c) Will the use of these powers deliver economic, social or environmental wellbeing benefits?**

The MHCLG 2019 guidance on use of compulsory purchase and the Crichel Down rules provides useful guidance. Officers are satisfied that the use of these powers will deliver economic, social or environmental wellbeing benefits as set out in para 5.9 below.

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**d) Is it possible to achieve the benefits without infringement?**

It is not possible to redevelop Coopers Hill for a residential led scheme without considering overriding third party interests

**e) Is it in the public Interest for the underlying development to proceed?**

Officers have carefully considered whether it is in the public interest for the underlying development to proceed, and are satisfied that it is, due to the continuing need for high quality affordable housing / necessity for making the best and most efficient use of publicly owned land and support the agreed principle of Bracknell Town centre regeneration.

**f) Do the public benefits proportional to the outweigh on private rights of the affected third party?**

Officers consider that the public benefits are substantial and outweigh the impact on other third parties of the interference with their private rights. In particular, that all benefitting parties have a right to statutory compensation for their loss and that assists in reaching this conclusion.

5.8 The use of these powers will deliver economic, social or environmental benefits through the proposed development at the Property via the Joint Venture. The principles of the Coopers Hill Development are to:

- Make town centre living available for families, but also appealing to first time buyers and the elderly, in a choice of residential unit types within walkable reach of the town centre, enabling residents to access the amenities and attractions of the town centre.
- To support the creation of an inclusive community.
- Coopers Hill to be a beacon for sustainable housing delivery, combining the best of suburban development principles into a town centre location and that this site is a benchmark for high quality housing provision.
- The site to retain a wooded environment through careful retention of existing mature trees and planting of new trees, creating a green and attractive setting for residential development including woodland spaces and communal shared play space.

5.9 The appropriation of the Sites being entered into with the joint venture and jointly being developed with Countryside UK (Properties) Ltd would support a number of priorities within the council plan by enabling development that would continue the successful regeneration of Bracknell town centre and secure delivery of the Council's agreed vision to; *"deliver high quality development that supports a thriving, 18 hour town centre and catalyses further regeneration in the area, and that serves the needs of all residents and businesses, including new community facilities and affordable housing, fostering a sense of local ownership"*.

In summary the key wellbeing benefits delivered by Coopers Hill development include

- 52 new family homes including 25% affordable homes (social wellbeing)
- The new homes to be sustainable and high-quality design (environmental and social benefits)
- The new homes to be designed to attract a mixed and balanced community (social benefits)
- New homes in the town centre, in close proximity to employment and leisure opportunities and reducing need for travel (economic, social and environmental benefits)

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- The development will be carefully landscaped, retaining existing trees and planting new trees (environmental benefits)
- Construction of the development will deliver new jobs in the area (economic benefits improving skills for local people, including support for young people via training and apprentices (economic benefits)
- Supports the council in delivering its strategic plan by the physical delivery of strategic regeneration vision for the town centre (economic benefit)
- Delivers residential uses that supports the ongoing regeneration of the town centre, contributing to economic development overall. (economic benefit)
- Allows the creation of a modern purpose-built youth facility (Bracken Walk) in a location which young people prefer (social benefit)

- 5.10** The project will thereafter move from the planning phase into the delivery phase including dealing with all the property aspects including rights and restrictive covenants.
- 5.11** Whilst the consultation undertaken by the Council in respect of the Planning Application was not directed towards the appropriation specifically, the consultation exercise has informed the scheme and this report and further public consultation is not considered necessary to enable the Council to form the view.
- 5.12** Furthermore, the resolution by the Council to grant Planning Permission (subject to the completion of an Agreement to secure relevant planning obligations) provides strong support that the development will be of benefit to the public, which may be relevant to the question for a court as to whether or not to grant an injunction, but is by no means conclusive in light of current case law. Further details are laid out in the exempt January 2021 report to Executive at a time when Appropriation was being considered to be implemented (subject to planning) in respect of Homes England's interest in the Restrictive Covenant
- 5.13** Appropriation requires more than a mere decision to hold land for a different purpose. Case law dictates that an authority cannot properly appropriate land to planning purposes unless it considers that the resulting interference with third party rights is necessary. A local authority cannot properly appropriate land to planning purposes unless it considers that it has good reason to interfere with third party rights which would be overridden by section 203 of the Housing and Planning Act 2016 as outlined below.
- 5.14** The DCLG's Guidance on Compulsory purchase process and The Crichel Down Rules (February 2018) advises that compulsory acquisition (a power which is different to s203 but similar in effect, both effectively disappropriate third parties of their land interests) "... should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes sufficiently justify... interfering with the human rights of those with interests in the land affected....".

### **Human Rights**

- 5.15** Furthermore, following the introduction of the Human Rights Act 1998 the Council is required to act in accordance with the European Convention on Human Rights (ECHR) in deciding whether or not to implement the arrangements. Article 1 of the First Protocol of the ECHR provides that every natural or legal person is entitled to peaceful enjoyment of their possessions ("human rights"). Appropriation of property engages s.203 to authorise interference with rights of light and other easements

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involves interference with a person's rights under this Article. However, the right to peaceful enjoyment of possessions provided under this Article is a qualified rather than absolute right, as the wording of Article 1 of Protocol 1 permits the deprivation of an individual's possessions where it is in the public interest and subject to the conditions provided for by law and by the general principles of international law.

- 5.16** Due to the necessity for the Council to comply with its obligations under Article 8 of the Human Rights Act 1998 where the Council appropriates land for planning purposes, the Council has contacted each of the affected property owners in writing of the Council's intention to appropriate and its effect on their rights of light. 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". 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 this context means that the interference must be no more than is necessary to achieve the identified legitimate aim, thereby striking a "fair balance" between the rights of the individual and the rights of the public. However, notwithstanding the overriding of their rights, compensation will still be available to those who are affected. On this basis it is considered that the public interest in facilitating the development of the Property outweighs the rights of the individuals to peaceful enjoyment of their possessions and to their homes and that the proposed use of s.203 powers results in a proportionate infringement.
- 5.17** Searches have identified utilities and infrastructure under the Property – discussions are ongoing with Thames Water to understand their requirements in due course and to enter into any further legal agreements as required. The compensation will not be at the same level as statutory compensation as Section 203 does not apply to statutory undertakers.

## **6 Consultation and Other Considerations**

### Legal Advice

The legal issues are dealt with within the body of the report regarding the Council having the statutory powers of appropriation under S122 Local Government Act 1972; and under S203 Housing and Planning Act 2016, to override existing third party rights; and by Section 204 of the Housing and Planning Act 2016, the Council is liable to pay compensation in accordance with the statutory provisions in respect of the interference with rights affected by the carrying out of building or maintenance works.

### Financial Advice

- 6.2** In exercising its statutory powers to appropriate the Property, the Council may incur compensation costs which are unquantified at this stage. Avison Young advisors to the Council have undertaken an exercise regarding the potential rights of properties close to Coopers Hill and the value of any compensation payable to affected parties. (Annex 1A and 1B). This indicates that infringed rights appear minimal and that compensation is unlikely to be payable to any party. However it would be prudent to expect that a small amount of legal expense may be incurred and to set aside a figure to be used to meet any claims.

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The survey costs from Avison Young are estimated to be around £7k plus VAT and paid out of existing LLP partnership budgets. The costs of the appropriation in total are to be borne jointly by Bracknell Forest Cambium Partnership. Any compensation costs will not be material in relation to the Council's expected financial benefit to be received from its land value and profit share.

### Other Consultation Responses

6.3 None

### Equalities Impact Assessment

6.4 Undertaken previously as part of the decision to enter this land for development

### Strategic Risk Management Issues

6.5 None

### Climate Change Implications

6.6 The recommendations in Section 2 above are expected to:

Have no impact on emissions of CO<sub>2</sub>.

Appropriation of the land will have no impact on emissions. However the development on the site will have regard to reducing the impact of the development through mitigation of build quality and design.

### Background Papers

Annex A1 – Confidential List of potential interest

Annex A2 Confidential Coopers Hill Map for Appropriation

Annex B Confidential Red line drawing Coopers Hill

### Contact for further information

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