

From: **Gary Cooke, Cabinet Member for Corporate and Democratic Services**
Rebecca Spore, Director of Infrastructure

To: **Property Sub-Committee - 21 March 2017**

Decision No. **17/00034**

Subject: **Appropriation of Land at Boughton Mount, Boughton Lane, Maidstone comprising Boughton Mount Hostel, Boughton Mount Grounds and former Maidstone SEC and Special Care Unit to override a restrictive covenant.**

Classification: **For Publication**

Past Pathway of Paper: **None**

Future Pathway of Paper: **Cabinet Member Decision**

Electoral Division: **Maidstone Rural South**

Summary: The report considers the proposed appropriation of Land at Boughton Mount, Maidstone comprising Boughton Mount Hostel, Boughton Mount Grounds and former Maidstone SEC and Special Care Unit to override a restrictive covenant

Recommendation: The Property Sub-Committee is asked to consider and endorse or make recommendations on the Cabinet Member's proposed decision to commence the appropriation procedure

1. Introduction

- 1.1 The KCC property comprises land and buildings within a site of approximately 11 acres including the former Maidstone SEC and Special Care unit (UPRN 01450300), Boughton Mount Hostel (UPRN 01450100) and Boughton Mount Grounds (UPRN 01450500). The buildings are generally situated in the northern part of the holding with former formal gardens, woodlands and Listed Ha Ha and Folly in the southern half.
- 1.2 The entire property was originally gifted to KCC in 1948 by Henrietta Foster Wheeler and Joan Foster Pickering with a covenant restricting the use of the property to "the education of delicate children". In 1963 this restriction was broadened to include use as a residential hostel and training centre under the National Health Act 1948 and Mental Health Act 1959 including horticultural training purposes. There is a prohibition against building within the gardens and woodland.
- 1.3 The property has been used by KCC for some years for the prescribed uses with the last use of this site by KCC terminating in approximately 2010 following which the land has remained vacant.

- 1.4 The property requires substantial expenditure to reinstate the existing buildings to acceptable modern standards so they are fit for purpose. The buildings have been boarded up but as it is an open site there have been occasions where illegal entry has taken place over the years while vacant. The entire property was fenced in 2016 following more regular trespassing issues.

2. Feasibility

- 2.1 KCC undertook a feasibility exercise in 2013 to consider the relocation of Five Acre Wood school to this site. Five Acre Wood is a special needs school located within 0.5 mile along Boughton Lane and which was in need of improved and extended facilities.
- 2.2 This exercise concluded that it was not feasible to develop the Boughton Mount site as a special needs school largely because the developable area within the site is constrained in area and in order to provide sufficient floor area to meet the current standards a two storey building would be required which significantly increased costs.
- 2.3 KCC has therefore decided that Five Acre Wood School is refurbished and extended on its current site and this work is well under way.
- 2.4 The property at Boughton Mount is considered surplus to operational requirements and this declaration is currently being formalised.

3. Restrictive Covenant Release

- 3.1 Without the release of the restrictive covenant it would not be possible to implement beneficial use of the site through development.
- 3.2 Discussions have been held with the family representatives related to the original donor of the land over several years as they are keen to see the land actively used for beneficial purposes. They would co-operate in releasing the restrictions on the basis that the net sale receipt is directed towards special needs education thus retaining the original nature of the gift.
- 3.3 Kent Legal Services have advised that although restrictive covenants usually relate to the land in this particular case they have also advised that the benefit of the covenant could also be held by the beneficiaries of the original donor through estate inheritance. This advice was also endorsed in Counsel's Opinion. KCC has therefore researched the respective Wills from the original donor identifying relevant beneficiaries through the generations to establish those living parties who would need to agree to the release of the restrictive covenant. This has demonstrated that at least eight parties (family and non-family) would need to be involved but there is an inherent risk that not all the parties are identified or are prepared to agree to the release. While agreement with these parties seems to offer a potential solution it is not completely failsafe.

- 3.4 Restrictive Indemnity Insurance cover can usually be obtained to cover restrictive covenant risk but these insurers stipulate that there is no contact whatsoever with any party likely to benefit from the restriction prior to cover being offered. Clearly this requirement cannot be met as discussions with some of the family representatives have been in hand for many years and so it is unlikely that adequate insurance could be arranged.
- 3.5 Continuing with the covenant release by agreement with the family in the absence of suitable insurance will not provide a guaranteed solution and this would materially affect the marketability of the land and restrict the ability to sell the property. This means that there is an unacceptable risk in continuing with this option.

4. Alternative solutions

- 4.1 Apart from the course already pursued in seeking agreement to the release with insurance cover, there are two further options available which are as follows:

4.1a Apply to the Lands Tribunal to seek release or modification of the restrictive covenant under Section 84 of the Law of Property Act 1925. There are four grounds for such an application to be pursued but only one of these is relevant for this property namely that there is agreement with the parties entitled to the benefit to discharge or modify the restriction. Essentially the Lands Tribunal will consider the application to override the restriction by agreement and although this can potentially reduce the risks mentioned earlier, this would entail significant cost and delay (at least a year or more) with uncertainty of the decision the Lands Tribunal would make when considering the application.

4.1b Utilise legislative powers granted to Public Authorities under a combination of the Town and Country Planning Act 1990 (now amended by provisions in the Housing and Planning Act 2016) and the Local Authorities Act 1972 to appropriate land subject to meeting certain criteria. If the criteria are met this process, known as appropriation, can provide a guaranteed outcome.

- 4.2 As the option stated in 4.1b provides certainty it offers the preferred solution. The family representatives have been kept fully informed and have no objection to this course of action as they appreciate it provides a failsafe outcome if approved.

5. The Appropriation process

- 5.1 Section 122 of the Local Government Act 1972 together with Section 237 of the Town and Country Planning Act 1990 (TCPA 1990) provide powers to Local Authorities to override easements or other restrictions when the property is held for planning purposes. Section 237 of the TCPA 1990 has recently been amended by Section 203 of the Housing and Planning Act 2016 which is a similar provision making such powers available to a wider number of public bodies. These powers have been used by other Authorities on numerous occasions. The effect of Section 203 is to

authorise the development notwithstanding any interference with those rights as the rights still exist but are overridden.

- 5.2 Section 203 also states that consideration be given to the extent to which the redevelopment may impact upon the human rights of owners and residents who may be affected and to balance those against the overall benefits to the community and from the regeneration of the area. The redevelopment could involve interference under article 1 of protocol 1 of the European Convention of Human Rights as well as article 8 but after due consideration it is believed that the balance of the public benefit substantially outweighs the protection of rights of the individuals who may be affected.
- 5.3 As a public authority KCC's entitlement to use these powers to override the restrictive covenant has been confirmed in Counsel's Opinion.
- 5.4 The four criteria which must be met to enable appropriation to be pursued are as follows:

5.4.1 The property is declared surplus

Occupation of the property by KCC for operational purposes ended in 2010. The feasibility exercise considering the development of a Special Needs school at this location in 2013 concluded that this was not an economic proposition. As a result the site is no longer required for operational purposes and is formally being declared surplus.

5.4.2 The property must be held for planning purposes

This requires that planning consent will be obtained for development to override the restriction although it is not a pre-requisite that consent is obtained prior to commencing the appropriation process. The earlier discussions with the family representatives considered residential development on the north/north-west part of the site only (the brown field element of the land) and it is intended that residential development will be pursued by KCC. The site is included in the list of sites for residential allocation currently under consideration by Maidstone Borough Council through the Regulation 19 consultation started in 2016 following a Call for Sites as part of the Local Plan review providing approximately 25/30 units.

5.4.3 The development should contribute towards any of the economic, social or environmental well-being of the area

The proposed residential development will add to the well-being of the area in economic terms due to employment generation and improvement of the local economy due to the presence and spending of increased local population. The development of part of this land will also improve social benefits as the redundant deteriorating site will be brought back to beneficial use and not be a target for vandalism and unwanted activities. The environment will be improved as the value created will allow the future restoration, management and preservation of the garden, Listed features and woodland areas to be fulfilled some of which will benefit the local public through local access.

5.4.4 Compensation for the loss of the benefit of the restrictive covenant will be payable.

Compensation will be assessed through formal independent valuation of the loss of the benefit of the restrictive covenant and will be payable to the beneficiaries of the covenant.

5.5 In summary all four criteria can be met with regard to this property.

6. Proposed development

6.1 Although the site comprises approximately 11 acres development is likely to be restricted through planning policy to the north/north-western area of the property comprising approximately 5 acres. Maidstone Borough Council are currently considering the formal allocation for approximately 25/30 units in the northern part of the site. Development would not be possible in the southern half of the site as this comprises woodland with some specimen trees.

6.2 Conceptual schemes have been considered along these lines during KCC's discussions with the family representatives and these will be evolved further as part of the consideration prior to any pre-application submission following successful appropriation. Supporting site surveys will need to be undertaken as part of the evolution of the scheme proposals and application process.

6.3 KCC is prepared to direct the net sale proceeds towards special needs education and primarily as a contribution towards the refurbishment of Five Acre Wood School as requested by the family representatives in order to preserve the nature of the original gift to KCC.

7. Procedure for appropriation

7.1 The procedure for the appropriation process must be strictly followed. Following endorsement to proceed there is a consultation period of six weeks in which notices are erected on site and placed in the local press for at least two weeks advising that it is intended that KCC progress appropriation seeking any comments from the public.

7.2 Following completion of this period any comments will be considered as part of the ratification process and, if approved, the Record of Decision confirms that appropriation has been concluded and the restriction will be overridden. Any future planning consent can then be implemented without fear of the restrictive covenant being upheld.

7.3 The KCC paperwork records that the restriction no longer applies and will be the evidence required to confirm this for KCC and future successors in title. Usually the Land Registry does not amend its records.

8. Consultation

8.1 The local KCC Member is being advised about the intended appropriation procedure.

9. Kent Legal Services

- 9.1 Kent Legal Services confirms the proposed appropriation procedure does meet all the criteria to enable the use of the land to be changed by overriding the restriction on the legal title. Kent Legal Services also endorses proceeding with the appropriation as the most effective means to secure the intended outcome for the site's future use.

10. Recommendation

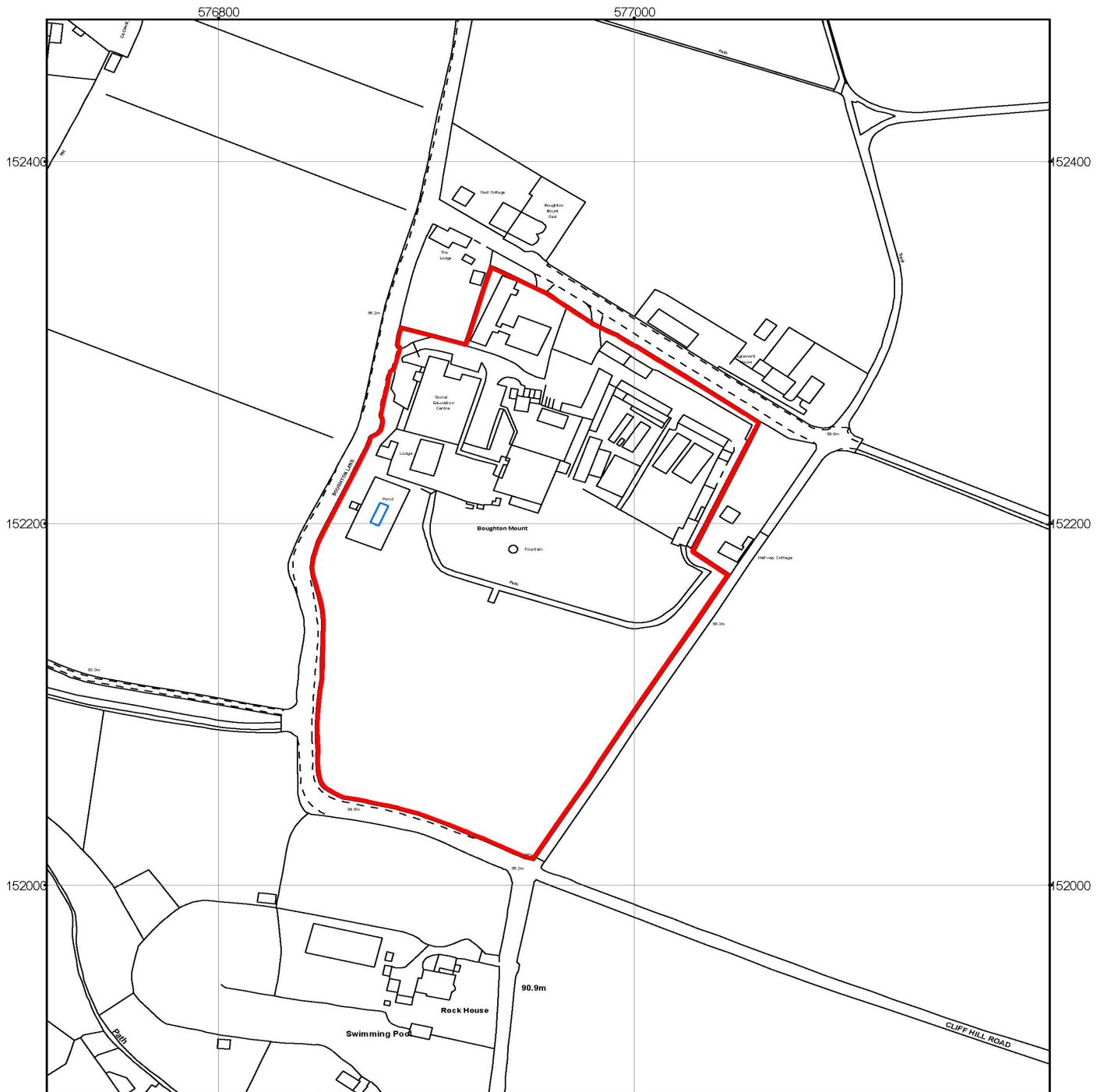
- 10.1 The Property Sub-Committee is asked to consider and endorse or make recommendations on the Cabinet Member's proposed decision to commence the appropriation procedure.

11. Background Documents

Site plan attached.

12. Contact details –

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**KCC FREEHOLD AT
 BOUGHTON MOUNT
 BOUGHTON LANE
 BOUGHTON MONCHELSEA
 ME17 2AN**

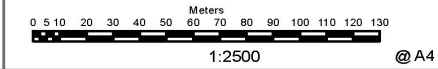
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