

## Agenda Item 23

**CABINET**

**9 January 2013**

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### Lovering Farm

#### Exempt Information

Para 3 Schedule 12A information relating to the finance or business affairs of any particular person

#### Summary

The trigger for transferral of an Open Space intended to support the delivery of has been reached and the developer is keen to progress. The Open Space was agreed via an historical Section 106 agreement at a time when no maintenance contribution was required.

#### Recommendation

**As per the recommendation of Asset Management Forum to accept the transfer the site along with the voluntary maintenance contribution offered by the developer.**

#### a) Reasons for Recommendation

The original Section 106 agreement required a transfer of Open Space the Council. The Open Space should have had certain works undertaken but without any maintenance fee. A level of compromise has been negotiated with the developer but the required works have not been completed, however a substantial maintenance fee has been offered that exceeds the costs of the works. An alternative source of funding to pay for the works has also been identified.

#### b) Alternative Options

- i. Not to take on the asset and face potential legal proceedings
- ii. To try and force the developer to bring up to standard but potentially lose the maintenance contribution.

#### c) Risk Considerations

There are risks both financial and reputational.

If we do not take on the asset and renege on our commitment we will undermine our commitment to Exmouth to facilitate the provision of the Valley Parks. It would also weaken our position in any future negotiations in legal agreements. We will have set a precedent of not abiding by our obligations.

Financially we would lose the offer of £150,000.00 and potentially be forced to take on the site anyway. We could also be faced with legal costs.

#### **d) Policy and Budgetary Considerations**

The Council adopted a commitment to Valley Parks in support of ongoing Town Council work. In addition we supported the prioritisation of a public consultation for allocation of Section 106 receipts in 2011. A variety of projects within the Council's jurisdiction have been delivered with the delivery of others tied up in additional legal agreements.

#### **e) Date for Review of Decision**

N/A

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## **1 History**

- 1.1 The concept of linear Valley Parks in Exmouth has been in the public domain for a number of years and is identified on the Local Plan as - the Valley Parks, Exmouth. The Local Plan states 'that development within the Valley Parks will not be permitted other than that to provide a safe corridor for pedestrians and cyclists, and for outdoor recreation.'
- 1.2 The Exmouth Valley Parks project was been awarded £100,000 of Section 106 sports capital money to be spent on 'supporting the scheme'. This money was subject to a very extensive participative budgeting consultation in which the community prioritised the projects that they wanted to see delivered within the town of Exmouth. The delivery of the Valley Parks competed with the Mamhead Slipway/water access proposals but won a significant 70% of voters support.
- 1.3 A section 106 Agreement dated 13 March 1992 made between the Council and the developer made provision 'to provide public open space at the Lovering Farm Estate, Exmouth, free of charge and free from encumbrances.'
- 1.4 The developer reached the appropriate triggers several years ago and tried to transfer the site (which forms a part of the Valley Parks) to the Council. As the section 106 agreement made no provision for ongoing maintenance costs the Head of Planning negotiated to reach a compromise regarding these costs. The site was assessed, Streetscene provided costings, and the developer agreed to pay a figure of £150,000.00 towards the maintenance costs of the site. Unfortunately a report did not come via either the Asset Management Forum or Cabinet and the land transfer is still to take place.

## **2 Current Day**

- 2.1 The developer contacted the Section 106 Officer In July of this year wanting to transfer the land and pay the maintenance contribution. He has tied, as a good will gesture, the £150,000.00 into a Unilateral Undertaking which prevents him implementing further permissions (without us asking or himself taking legal advice).
- 2.2 Streetscene, Planning Policy, Countryside and Development Management have sat down to confirm that we do still wish to take on the site and to request follow up works to be done in order to bring forward a report.

- 2.3 The site has had nothing done to maintain it since the initial agreement with the Head of Planning in 2009. It is now completely overgrown, full of dead trees and rubbish and unsafe. The cycle way which is meant to be provided as part of this site has been laid as sub base only and is now completely overgrown with brambles, with sections that have totally broken up. This cycle way does not link up and there is a section outside 45 Whitman Way where a bridge/boardwalk would be required to link with our land.
- 2.4 £150,000.00 commuted sum is not enough to bring the site up to an adoptable standard and maintain it for ten years. It is an important site if we want to provide the valley parks cycle/footpath link. If we don't adopt this site, we cannot join up this linkway.

### **3 Options**

- 3.1 The developer is frustrated with the delay and is not interested in further negotiation, he suggests that we either 'take or leave' the £150,000.00 maintenance contribution and would look to return to the original duties under the 1992 agreement and try to force us to take the site without any contribution at all.
- 3.2 There are 4 potential routes that we could go down and a clear steer is needed to ensure that the correct decision is made both to meet the community aspirations and to safeguard the Councils liabilities. The options are:
1. To renege on our responsibility under the section 106 agreement and to refuse to take on the site.
  2. To take on the site subject to the developer bringing up to an adoptable standard – refuse to take on otherwise
  3. To take on the site subject to the developer bringing up to the 2009 standard – refuse to take on otherwise
  4. To take on the site and look to existing section 106 receipts identified for the Valley Parks to bring up to standard.
- 3.3 This is an old legal agreement which is enforceable in perpetuity against the owner of the site.. We could refuse to take the site on the grounds that the owner did not bring it up to standard at the appropriate time. However, the developer can prove long-term communication with us regarding taking on the site and his reasonableness in agreement to a commuted maintenance sum, when legally he did not have to pay any at all.

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### **Legal Implications**

The requirement under the s.106 agreement is for the public open space land to be transferred to the Council within a year of first occupation of a dwelling or by 13 March 1997. Before transfer, the developer was to carry out all clearance and fencing works and removal of dead/dying trees to the satisfaction of the council. As the report indicates, these provisions have not been implemented. The developer cannot force the council to take the land, and the council cannot force the developer to make a long term maintenance contribution. If £150,000 represents the likely cost of clearance and fencing, then the developer has made an offer equivalent to his obligations under the section 106

agreement. Cabinet, as the committee with responsibility for land holdings, may decide whether it wishes to take on responsibility for the long term maintenance of this land. Any variation of existing planning (s.106) agreements [should that prove necessary] is a matter for development management officers /committee under local government legislation.

### **Financial Implications**

The financial implications are stated in the report.

### **Consultation on Reports to the Executive**

The issues raised in the report have been discussed at an Asset Management Forum Briefing meeting.

### **Background Papers**

- East Devon Local Plan 2006

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Cabinet  
9 January 2013