

Appendices

Planning
Decision notice.



NORTHAMPTON
BOROUGH COUNCIL

Cabinet Member Decision

Report Title	Release of Restrictive Covenant
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AGENDA STATUS: PUBLIC

Expected Date of Decision:

Within Policy: Yes

Policy Document: No

Directorate: Economy and Assets

Cabinet Member: Cllr Tim Hadland, Regeneration & Enterprise

Ward: West Hunsbury

1. Purpose

- 1.1 To determine the release of a restrictive covenant limiting the use of the site of a closed public house, The Iron Stone Pub, Hunsbury Hill Road, Northampton.

2. Recommendations

That the Portfolio Holder approves and notes:

- 2.1 The release of the freehold restrictive covenant prohibiting the use of the former Iron Stone Pub site to other than as a public house to enable the site to be brought forward for the development of housing which has planning permission under planning application N/2019/0234 and
- 2.2 That no premium is charged for the release of the restrictive covenant but subject to the owner of the Pub site and beneficiary of the release of the restrictive covenant meeting the Council's professional advisor and surveyor and legal costs.

- 2.3 The Council will benefit from Community Infrastructure Levy (CIL) as a result of the proposed housing development.

3. Issues and Choices

3.1 Report Background

- 3.1.1 The Iron Stone Public House (previously known as The Rose & Claret) is in private ownership, the full address is Hunsbury Hill Road, Northampton NN4 9UW. The public house has been closed approximately 8 years and has fallen into disrepair.
- 3.1.2 The owner of the Public House successfully obtained planning permission (reference N/2019/0234) in June 2019, for the demolition of the public house and to build flats of 11 residential units together with associated parking. However development of the site for residential purposes would breach a restrictive covenant noted on the Pub Site's Land Registry Title No. NN76637
- 3.1.3 The development is subject to the Community Infrastructure Levy (CIL). CIL is a charge levied by the local authority for new development in the area, it is an important tool for local authorities to use to help them deliver the infrastructure needed to support development in their area.
- 3.1.4 The Public House land was originally owned by the Northampton Development Corporation who sold it to a brewery in 1984 subject to a positive covenant to forthwith construct and erect a public house in accordance with plans and specifications approved by the Corporation and a restrictive covenant that no building other than a public house shall be erected on the property and that neither the property nor any part shall be used other than for the purposes of a fully licenced public house
- 3.1.5 It is not clear why the covenant restricting the future use of the land and building was imposed but it is assumed that at the time this fitted with the Development Corporation strategy.
- 3.1.6 The covenants were imposed for the benefit of the Development Corporation's "adjoining land". It is not clear what area of land this covered in 1984 but a large area of land surrounding the Pub site was subsequently transferred to the Council by the Development Corporation and so the Council now has the benefit of the 1984 restrictive covenant
- 3.1.7 However, in more recent times the pub has not been sustained by the community it serves, falling vacant and into disrepair. The site was purchased by the current owner from the brewery in 2013 and has remained vacant and boarded since this time. The public house is not listed as an Asset of Community Value under the Localism Act 2011.
- 3.1.8 The owner has applied to the Council to release the restrictive covenant to allow the proposed residential development to proceed. The Acting Director of Economy & Assets is of the opinion that the restrictive covenant is no longer of benefit to the Council whereas the proposed development meets both the Council's Corporate Plan objectives and would generate CIL payment to the Council which would support local infrastructure development

- 3.1.9 The Council is obliged by statute to obtain the best consideration reasonably obtainable (S123 Local Government Act 1972). To assist the Council in ascertaining what if any consideration (premium) should be paid for the release of the restrictive covenant, the Council procured a RICS registered firm to undertake a development appraisal to ascertain a negotiating price for the release of the restrictive covenant. The owner of the site paid for this appraisal. It was completed in October 2019.
- 3.1.10 The process to determine any value for the release of the covenant is based upon ascertaining the residual value of the development, i.e. the land price paid by the developer to ensure the site is viable. The valuer made reasonable assumptions and the outcome of the review was to determine the site had limited residual value, a value which was less than the purchase price the owner had paid for the site and therefore there was no consideration for the release of the covenant.
- 3.1.11 The valuer suggested therefore that negotiations with the owner should be based on Stokes v Cambridge Principle – a case that determined the value of a ransom strip. Therefore, a negotiating price was put forward to the owner, who disagreed with the valuation and therefore the amount demanded, stating that there is no value in the scheme other than the value the Council will obtain through CIL. Negotiations have therefore ended without an agreement.
- 3.1.12 Assets asked Legal Services to assist and review the Stokes v Cambridge Principle and Legal Services have considered the question at paragraph 4.3 below and their advice on the issue is contained therein.
- 3.1.13 As the valuation was completed in October 2019 the Council procured a recent review of the valuation due to the impact of COVID19, and further information obtained from planning on the potential costs of CIL. The review concluded the same result as the original valuation, that being there was limited justification for the payment of any premium for the site.
- 3.1.14 The owner of the Public House is a tenant of a nearby Council owned shop, and is purchasing this shop from the Council. There is no direct connection linking the public house to the shop and the Council retains land in between the two sites, therefore no special value, but the valuer was made aware of the shop transaction.
- 3.1.15 The owner cannot develop the Pub site until the restrictive covenant is either modified or released therefore the Pub site continues to accommodate a derelict pub and the parties remain in negotiations over the value to be attached to the release of the restrictive covenant.
- 3.1.16 The next steps open to the owner of the site would be to apply to the Lands Tribunal under S84 Law of Property Act 1925 for the restrictive covenant to be released or modified on the basis that it is now obsolete and/or preventing the reasonable use and enjoyment of land (the public interest test rules).
- 3.1.17 As the Council has already agreed in principle to the change of use of the site, by granting Planning Permission and as the Council's corporate objectives support the need for more residential housing. This is likely to add support to the Owner's application to the Land's Tribunal and if successful, any potential damages awarded to the Council as a consequence are likely to be minimal (see paragraph 3.1.9. above).
- 3.1.18 The Owner might also decide to proceed with the development in breach of the restrictive covenant. Any court proceedings taken by the Council for an injunction to

prevent this would not necessarily be successful for the same reasons given in paragraph 3.1.14 and any damages would be limited to the loss of value to the Council's neighbouring land, i.e. minimal or none at all.

3.1.19 It would be more beneficial and cost effective for the parties to agree a resolution between themselves

3.2 Issues

3.2.1 The issue is whether the Council should release the covenant for nil premium. The Council has taken professional advice and is entitled to act on this advice, this advice being that there is little justification for charging a premium for the release of the covenant.

3.3 Choices (Options)

3.3.1 The Council could continue do nothing which could result in:

- the site remaining a derelict pub. This would not support the Corporate Plan
- The owner eventually making a successful application to the Lands Tribunal for the restrictive covenant to be varied or released (see paragraph 3.1.9.3 and 3.1.13)
- The owner proceeding with the development without a release and the Council then facing the possibility of costly litigation with an uncertain outcome to try and enforce compliance with the restrictive covenant (see paragraph 3.1.14)

3.3.2 The Council could agree to modify rather than release the restrictive covenant to allow residential development generally or a more limited modification, for example, to allow only this particular development. This limited approach is not considered necessary as a review of any future development proposals will be adequately covered under the planning permission process.

3.3.3 The Council could choose to agree to release the restrictive covenant for nil consideration but subject to the owner paying the Council's professional fees, as outlined above. This will release the restriction on the land to facilitate the residential development. This is the recommended option in this particular case

4. Implications (including financial implications)

4.1 Policy

4.1.1 This report and decision is not intended to create a policy. This matter has been considered on its individual merits and any future requests to release or modify a covenant will be determine in the same way.

4.2 Resources and Risk

- 4.2.1 All professional costs incurred in releasing the restrictive covenant are to be met by the Owner of the site

4.3 Legal

- 4.3.1 The Council has the power to modify or release restrictive covenants of which it has the benefit. The Council is also under a duty pursuant to the provisions of section 123(2) of the Local Government Act 1972 discussed above to obtain the best consideration reasonably obtainable.
- 4.3.2 It is noted at paragraphs 3.1.9 and 3.1.13 that in compliance with its best consideration duty the Council has been in receipt of and subsequently confirmed independently by way of second valuation a RICS "Red Book" Valuation.
- 4.3.3 As noted in paragraph 3.1.11 above Legal Services have been asked to consider the principle from *Stokes v Cambridge* in light of the a RICS "Red Book" Valuation report recommendations referred to above and received by the Assets Department.
- 4.3.4 *Stokes v Cambridge* is a compulsory purchase case which established the principle that a ransom strip was worth one third of the increase in the value of the benefiting land, and subsequently, the case has been relied upon as a guide for negotiating parties in order to determine ransom value.
- 4.3.5 Nonetheless subsequent case law and several judicial references to the application of the "Stokes" case have confirmed that the decision serves only as guidance rather than as a hard-and-fast rule, as a principle of valuation and not of law.
- 4.3.6 In summary the Council has complied with its duty under the provisions of the Local Government Act 1972 and that the recommendation contained within the a RICS "Red Book" Valuation is a principle of valuation and not of law.
- 4.3.6.1 Where the courts have considered the release of restrictive covenants where a local authority has granted planning consent for certain development, this has been interpreted by the court to mean that the covenant impedes some reasonable user of the land and secures no practical benefit, so the covenant has been released without payment of compensation on the basis the local authority would suffer no loss. The local authority's application to calculate compensation based on the *Stokes*

one third principle being rejected by the court as not an appropriate means of assessing compensation in such cases.

4.4 Equality

4.4.1 None

4.5 Consultees (Internal and External)

4.5.1 Ward Counsellor, Planning, Finance, Legal.

4.6 How the Proposals deliver Priority Outcomes

4.6.1 The recommendation aligns to the corporate priorities, a stronger economy and resilient communities.

4.7 Other Implications

4.7.1

We are not aware of any other implications arising from the recommendations contained within this report

5. Background Papers

None

Kevin Langley
Acting Director of Economy and Assets

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Cabinet Member:

I declare no conflict of interest applies

I agree the report's recommendations

I do not agree the report's recommendations

I agree the report's recommendations subject to the following amendments:

The reason for the decision is as follows:

Cabinet Member for

Signature: Tim Hedderley

Date: 18.12.20