

Report subject	Whitecliff Recreation Ground - Pavilion Redevelopment
Meeting date	27 th May 2020
Status	Public Report
Executive summary	<p>In December 2017 Borough of Poole Cabinet approved the commencement of procurement to seek a developer to deliver enhanced sports changing, permanent catering and public toilet facilities within Whitecliff Pavilion - see Appendix 1.</p> <p>Through the planning application process, approval has been granted to redevelop the pavilion. The tender to find an operator to design, build, manage & maintain the facility is live with a closing date 1 July. Consultation has been undertaken with stakeholders, ward councillors and the public.</p> <p>There are covenants on Whitecliff Recreation Ground which restrict the commercial uses of the space. They prevent the development of a full-service café appealing to a wider clientele. The developer will need maximum opportunity to build a successful business model for financial viability. The café will provide a service for all park users and the income will cross subsidise the cost of running the changing rooms and public toilets. The Council's Estates Team tried to negotiate the release of the covenants but negotiations failed when the Council were asked to indemnify against possible future claims from other parties.</p> <p>If Cabinet agree to the appropriation - and delegate authority to officers to make the award of contract to the successful bidder - when the tender closes the development can be commenced.</p>
Recommendations	<p>It is RECOMMENDED that:</p> <p>(a) Cabinet approve the appropriation of land at Whitecliff Recreation Ground for planning purposes.</p> <p>(b) Members delegate authority to officers, in consultation with the Portfolio Holder and Ward Councillors, to award contract to the successful bidder following close of Tender on 1 July and all subsequent decisions to enable the completion of the development.</p>
Reason for	a) To enable the redevelopment and funding of land and buildings known as Whitecliff Pavilion, approved by the

recommendations	Borough of Poole Cabinet 5 December 2017 - Appendix 1. b) Delegating authority to Officers to award a contract to the successful tenderer, following the tender process will ensure the development can progress in line with the conditions detailed in the legal contracts.
Portfolio Holder(s):	Cllr Felicity Rice, Environment and Climate Change
Corporate Director	Kate Ryan, Environment and Communities
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Wards	Parkstone
Classification	For Decision/Recommendation

Background

- 1) The Council owns land at Queen Elizabeth II Harbourside Park (Whitecliff), Whitecliff Road, Poole on which Whitecliff Pavilion is situated.
- 2) In 2015, following Cabinet recommendation to support medium term financial plan savings, Culture and Community Learning (Borough of Poole) was asked to explore alternative management options for sports facilities. Consultation was held with stakeholders including ward councillors to understand aspirations for the Pavilion.
- 3) Whitecliff Pavilion provides changing accommodation and social facilities for sports organisations and also encompasses public toilet facilities. It is in poor condition and requires significant levels of maintenance and investment to remain viable for continued use. Due to budgetary constraints the Council has been unable to provide the sufficient level of investment without which the pavilion will be rendered unusable and therefore surplus to the Councils requirements.
- 4) A market sounding exercise took place in March 2016 for Whitecliff Pavilion. Following this, further stakeholder consultation identified interest from commercial providers in developing and modernising the building and introducing an improved, permanent commercial catering offer to support the community uses.
- 5) A report to the Property Steering Group (PSG) in May 2016, outlined plans to develop this idea further. An additional progress report to the PSG in February 2017 resulted in support of a formal tender and the use of Section 106, Planning Obligations contributions.

- 6) Meetings with Ward Councillors took place in June 2016, April 2017, January 2018, and together with the Portfolio Holder, gave support to the project and to the use of planning obligations.
- 7) In May 2017 a public engagement event was held at the Pavilion to share the ideas and plans.
- 8) In August 2017, an application for outline planning was submitted and consent, with reserved matters, for a café, with sports changing rooms and public toilets was granted in Oct 2017. Reference: APP/17/01146/P. This process included a further period of statutory and public consultation.
- 9) In November 2017, Fields in Trust approved 'in principle' consent to the development.
- 10) In December 2017 Cabinet approved the commencement of procurement to deliver the proposed outline specification.
- 11) In June 2018, the Council was considering how to develop the project and as a lease for more than 7 years was being considered, an advertisement was placed in the Bournemouth Echo to indicate that a decision was to be made as to the disposal of an area of public open space in accordance with Section 123 of the Local Government Act 1972.
- 12) In November 2018, a Variation to Condition 4 of the original planning consent was approved by the Planning Committee. APP/18/01105/F, for extended opening hours until 9pm (summer) and 6pm (winter).
- 13) Various articles on the proposed redevelopment have appeared in the Bournemouth Echo.
- 14) The tender to find an operator went live in February 2020 and is advertised on supplyingthesouthwest.org.uk, the National Catering Association website and in the Echo. The closing date is 1 July.
- 15) The proposed development is to take place on land that is owned by the Council and has been for some time.
- 16) The Overview and Scrutiny Board discussed the report on 18 May 2020 and agreed that ward member involvement be prioritised throughout the development process due to the sensitivity surrounding the site.

Options Appraisal

- 17) Appropriation
 - a) Do not appropriate:

The land which forms part of the Queen Elizabeth II Harbourside Park was obtained pursuant to a deed of exchange dated 26 June 1917 from the Canford Estate (the 'Estate').

Within the deed of exchange the Council entered into a series of covenants in favour of the Estate which control the commercial uses which can be undertaken on the site. As written these would prevent the development of a full service café appealing to a wider clientele. The proposed café will provide a service for all park users and the income would cross subsidise the cost of providing and maintaining the changing rooms and public toilets.

The covenant restrictions will stay in place affecting the future viability of the catering business that will cross subsidise the cost of running the sports facilities and toilets.

Therefore this option was rejected.

b) Negotiate the release of the covenants with The Estate:

The Council has tried to negotiate a release of the covenant with the Estate. A fee of £1,500 plus fees and VAT capped at £2,500 has been agreed for the release which has been assessed as a reasonable fee in the circumstances. However this cannot be pursued since the Estate has made the release conditional on the provision of an indemnity as follows:

The land owned by the Estate that originally benefitted from the covenant has, at least in part, been sold off meaning that there are other potential beneficiaries who could enforce the same covenants (the 'wider' beneficiaries). The Estate has made it a condition of a release that in addition to the fee the Council indemnifies the Estate for claims made against them by the wider beneficiaries for releasing the covenant.

As the Estate will not share any information regarding the extent of the former Estate land which benefits from the covenant or provide details of the assurances the Estate gave transferees over the years in respect of maintaining and enforcing the covenants, it is not possible to assess the likely financial value of the indemnity being sought.

Further, the Council's legal services have considered alternative approaches and report that it is difficult for the Council to do its own legal due diligence on this point since the original conveyance is not specific as to the land benefiting from the covenants, beyond it protecting the extent of the original estate, at the date of the exchange. Further, the period of time since the original conveyances means that historical research would be required to establish what assurances have been given by the Estate to the various purchasers which would render this an extensive piece of legal work that would be time consuming, costly and in any event may prove inconclusive.

The Council would not be required to provide an indemnity if the land is appropriated so it is unreasonable for it to be a condition of giving a release by agreement. Therefore the Estate has been told that the request for an

indemnity is unreasonable and that it is the Council's intention to appropriate the land. This appropriation does not preclude the Estate from coming forwards at a later date and submitting a substantiated claim.

Therefore this option is also discounted.

c) Appropriate:

The Council has been in direct contact with the only currently identified beneficiary of the covenant, the Estate. The remaining possible beneficiaries have been consulted with by way of the planning application, the appropriation notices and the project web sites:

<https://www.poole.gov.uk/build/sports-and-fitness/whitecliff-recreation-ground-pavilion-development/>

<https://pooleprojects.net/harbourside-park/>

Once it became apparent that the initial negotiations had reached a stalemate the process of progressing the decision as to appropriation was commenced. This was done by advertising the Council's intention in the Bournemouth Echo over two consecutive weeks in July and August 2019. As a result, two people asked questions, but no objections were raised and no comments or claims were received from anyone claiming to be a beneficiary.

It is therefore recommended that the Council proceeds with the appropriation.

18) Delegation Approval:

Officers are seeking delegated approval to award contract, in consultation with the Portfolio Holder and Ward Councillors, to enable the post tender negotiations and decisions to be carried out within the timeframes set out in the tender documents and legal documents, which the operator will need to enter in to.

Summary of financial implications

- 19) Following appropriation, beneficiaries of the covenant are entitled to statutory compensation based on diminution in value of their land by the removal of the covenants.
- 20) A fee of £2,500 was agreed with the Estate for a release of the covenant by agreement. Following appropriation the Estate will have to submit a valuation calculated on the statutory basis to substantiate this sum.
- 21) The land owned by the Estate that originally benefitted from the covenant has, at least in part, been sold off so there are potentially beneficiaries other than the Estate (the 'wider beneficiaries'). The advertisement of the appropriation did not instigate any claims from the wider beneficiaries although this does not rule out receipt of claims in the future.

- 22) It is therefore not possible for the Council to quantify the amount of compensation at this stage but if statutory compensation becomes due it will be provided for out of the revenue generated by the development.
- 23) The tender seeks to modernise and enhance the pavilion which is in very poor condition. Without appropriation this may limit or generate no interest from the market. If we fail to find an operator for the facility the Council will retain financial liability for the changing rooms and public toilets which require significant investment. In 2017 this was identified as £12,900 per annum from the revenue budget and £104,000 worth of capital costs to address the defects.

Summary of legal implications

- 24) Under section 122 of the Local Government Act 1972, the Council may appropriate, for any purpose for which it could acquire land, any land which belongs to the Council and is no longer required for the purpose for which it is held immediately before the appropriation.
- 25) This is expressed to be subject to the rights of third parties, but section 204 of the Housing and Planning Act 2016 provides that appropriation for planning purposes converts such rights into a claim for compensation (under section 10, Compulsory Purchase Act 1965). As a result, building work may be carried out (by the Council or someone else), despite interference with such rights, provided it is in accordance with planning consent and the purposes for which the land was appropriated. Use of the land is similarly authorised (section 203 of the 2016 Act).
- 26) Appropriation for planning purposes must comply with at least one of two statutory tests (set out in section 226 of the Town and Country Planning Act 1990).
- 27) The first test is that the Council thinks:
 - (1) the appropriation will facilitate the carrying out of development, re-development or improvement on or in relation to the land, AND
 - (2) the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects-
 - (a) the promotion or improvement of the economic well-being of its area;
 - (b) the promotion or improvement of the social well-being of its area;
 - (c) the promotion or improvement of the environmental well-being of its area.

For this site it is felt that the first test could be successfully applied in the circumstances.
- 28) Beneficiaries of the covenants could stop interference with the restrictions placed for their benefit by seeking an injunction, which would prevent the proposed redevelopment. Appropriation for planning purposes eliminates this risk. Accordingly, limb (1) of the first test set out above is met.
- 29) The proposed development of the site will modernise, improve and expand the sports and public facilities and will be undertaken in accordance with the planning consent dated 3rd October 2017. It is therefore considered that appropriation for planning

purpose satisfies the second test.

- 30) It has been established that appropriation for planning purposes is compatible with the Human Rights Act 1998, since compensation is payable for the interference with any rights protected by the 1998 Act, and the interference is therefore proportionate.

Summary of human resources implications

- 31) None

Summary of sustainability impact

- 32) If appropriation is agreed and an operator is found then there will be a responsibility on them to minimise the impact of its activities on the environment and to meet or exceed all the environmental legislation that relates to the business. The operator will need to minimise waste, actively promote recycling, source and promote the product range to minimise the environmental impact of both product and distribution.
- 33) Once we know the final design then there could be further environmental enhancements to the building to combat climate change e.g. greater benefits with a new build as opposed to a refurbishment.
- 34) The development would encourage a central point in the community as a hub for individuals and groups to be active locally reducing the need to travel.

Summary of public health implications

- 35) The establishment of a viable business with refurbished or new facilities will enhance the area and provide an improved catering service, public toilets and sports changing experience. Enhanced social and catering facilities would be achieved, encouraging engagement and access to a range of current and new service users.
- 36) The proposed development would actively promote healthier lifestyles, encouraging informal and formal recreational activities for all and engage a range of user groups and individuals.

Summary of equality implications

- 37) The tender seeks to address any current barriers to facility access, services and information. Improved buildings will be compliant with the Equality Act 2010 benefitting service users with disabilities.
- 38) Bids will be assessed to evaluate the community value and benefits, including how bidders will contribute to an increase in recreational use of the site.

Summary of risk assessment

- 39) By appropriating and removing the restrictive covenants, the risk of the business being successful is increased as this will give maximum opportunity for financial viability by providing a full-service cafe which will appeal to a wider audience.
- 40) This risk is increased if the land and buildings are not appropriated for planning purposes as beneficiaries of these rights could stop interference with such rights by seeking an injunction, which would prevent the development.
- 41) Coronavirus and the uncertainty and impact on the economy may deter bids from potential operators from making a large financial investment at this time.

Background papers

[Planning Portal](#) – search Planning Application APP/17/01146/P

[Whitecliff Recreation Ground Pavilion Development web page](#)

Appendices

1. [Cabinet Report - Harbourside Park Facility Development – 5 December 2017](#)