

CHESHIRE EAST COUNCIL

Cabinet Members for Communities & Regulatory Services and Prosperity & Economic Regeneration

Report of:	Strategic Director of Places and Organisational Capacity
Subject/Title:	Options for the Transfer of Alderley Edge Allotments
Portfolio Holders:	Councillors Rachel Bailey and Jamie Macrae

1.0 Report Summary

- 1.1 As part of the Council's localism aspirations a decision was taken by Cabinet in September 2011 to transfer a number of assets and services to the relevant town and parish councils. This included the transfer of allotments and gave authority to the Strategic Director (Places and Organisational Capacity), Section 151 Officer and the Monitoring Officer to finalise agreed legal and financial terms. This included Heyes Lane, Chorley Hall Lane and Beech Close allotment sites to Alderley Edge Parish Council.
- 1.2 As part of the process the Council published its notice of intention to dispose of all the allotment sites in February and March 2012. At a meeting of the delegated officers (listed in 1.1) on 16th April 2012 the decision as to whether to dispose of the sites in Alderley Edge was referred to the relevant portfolio holder(s). This was having considered a relatively large number of objections and public interest in the disposal.
- 1.3 Appendix A to this report summarises the main representations and objections made in writing in respect of the proposal to grant a long lease of each site to the Parish Council.
- 1.4 The report also provides background information on the stated aspirations of the Parish Council for possible alternative use of the allotment site at Heyes Lane which is adjacent to the Festival Hall. Appendix B is a statement of the representations made by the Parish Council as to the merits of the treatment of parcels of land in Alderley Edge as briefly described in section 10.9. The Allotment and Garden Society have made specific requests in terms of considering this transfer which are attached at Appendix C.

2.0 Decision Requested

- 2.1 It is recommended that Option 1 below is confirmed as the preferred option. That is that the allotment sites are transferred to the Parish Council by long lease containing restrictive covenants preserving their use as allotments. This recommendation has taken regard of the Cabinet decision in September 2011, council policy on transfer; the nature and volume of the

objections to any transfer of the allotment sites and the views of the Allotment and Garden Society and Parish Council.

2.2 Option 1

To dispose of the allotment sites in accordance with the agreed Cabinet decision on 5th September 2011 and by long lease of 125 years containing restrictive covenants preserving their use as allotments for nil value. This is in accordance with the anticipated method of transfer approved by Cabinet “with allotments likely to be transferred by long lease”. It is also consistent with transfers across Cheshire East. A restrictive covenant would prohibit the Parish Council from using the land other than for allotments, transferring the sites to a third party or creating sub-leases other than to an allotment society or allotment holders. See section 10.10.

2.3 Option 2.

To dispose of the allotments sites to the Parish Council as in Option 1 but also containing extra controls in favour of the Council as requested by Alderley Edge Allotments and Gardens Society (AEAGS). See Section 10.12. This provides an additional control by Cheshire East but could be against the spirit of the transfer process which is to devolve decision making to the most local tier of government. It is arguable that this would be interfering in the contractual relationship of landlord and tenant which will exist between the Allotment Society and the Parish Council.

2.4 Option 3

Cheshire East to retain the allotments sites given the level of objections. This would be inconsistent with Council policy on transfer and the prospect of applications to run the site(s) under the Community Right to Transfer would be an ongoing possibility. This is, therefore, only a short term option.

2.5 Option 4

To explore an alternative delivery model for all/any of the allotments sites which would include transfer as in option 1 above to an alternative community group. This is not in accordance with the Cabinet decision which was to offer the transferring assets to the relevant parish council. Only if the relevant local council did not wish to run the service/asset was the next step considered. The Cabinet report of September 2011 says “Where local councils decide not to take over the services proposed for transfer within this initiative, the future of such facilities needs to be determined.” If goes on to outline the possible solutions.

2.6 Option 5

To further consider the transfer of the freehold interest in the allotment sites to the Parish Council. If this is the preferred option then there are a number of legal considerations as to how this could be achieved fairly and without

breaching best value principles. These range from transfer with or without restrictive covenants; for a nil value to a range of capital receipt values; with or without an overage entitlement if there is a change of use or onward disposal. This option is different to the transfers being agreed across the remainder of Cheshire East and would need to consider that the original cabinet decision specifically noted that “there is a presumption that the transfer of assets will protect community use of the assets.” A freehold transfer without the restrictive covenant restricting use to allotments would require Secretary of State consent. See section 8.2.1

3.0 Reasons for Recommendations

- 3.1 In order to progress the Cabinet decision of September 2011 a decision on the best option for the Alderley Edge allotment sites is required. A number of significant assets have now transferred across Cheshire East, in accordance with the cabinet decision and in order to complete this first phase of transfer a way forward is required.

4.0 Wards Affected

- 4.1 Alderley Edge

5.0 Local Ward Members

- 5.1 Councillor Frank Keegan

6.0 Policy Implications including – Carbon Reduction - Health

- 6.1 The transfers are in line with the council policy of transfer and devolution of assets and services to Town and Parish councils.
- 6.2 This initiative aligns with the first priority of the Sustainable Community Strategy “nurturing strong communities” and is part of Cheshire East’s stated drive to ensure that working locally is at the heart of what it does.
- 6.3 National Policy is designed to decentralise government and give communities power to make a difference in their area. This initiative clearly aligns with this national drive.

7.0 Financial Implications (Authorised by the Director of Finance and Business Services)

- 7.1. The options to transfer the allotments to the parish council or alternative delivery model/ group (1, 2, 4) are in line with the original decision of Cabinet on 5th September 2011 and the financial implications have therefore previously been considered.
- 7.2 If option 3 was the preferred option i.e. to retain the allotments there is a small financial implication in that the management of the allotments would

remain the responsibility of Cheshire East. This is a marginal cost. This option would be a short term option as it introduces an inconsistency in policy where Cheshire East has decided to dispose/transfer of this type of asset.

- 7.3 If option 5 were to be pursued then the asset value would be transferring and therefore consideration of best value principles and the capital receipt values would need to be pursued to ensure the best financial solution for Cheshire East. This would require the on-going input of the Director of Finance and Business Services.

8.0 Legal Implications (Authorised by the Borough Solicitor)

- 8.1 The Council has taken legal advice from Bevan Brittan LLP, a firm with a strong reputation in the field of local government law, in respect of the public law and probity issues and considerations surrounding the linked transactions affecting five pieces of land in Alderley Edge described in section 10.7.

Bevan Brittan LLP's advice, which is confidential to the Council and to which legal professional privilege attaches, has been provided to the Portfolio Holder.

That advice includes, but is not limited to, advice on the following issues namely: best consideration, fiduciary duty, State aid and the effect of the Crichel Down Rules on land acquired to deliver the Alderley Edge and Nether Alderley Bypass.

Instructions to Bevan Brittan LLP included the information summarised in sections 10.7 – 10.9 and the representations of the Parish Council set out in Appendix C. However, at the time instructions were issued it was believed that PCT would be the operator of the medical centre the Parish Council wish to create within Festival Hall.

Aspects of Bevan Brittan LLP's advice pertinent to the decisions requested of the Portfolio Holder appear in sections 8.3 – 8.6.

The Portfolio Holder must have regard to the legal advice given by Bevan Brittan LLP's as well as other Legal Implications set out in this section of this Report when making a decision as requested above.

8.2 Public Open Space Disposal

In accordance with Section 123 (2A) of the Local Government Act 1972 the Council is legally obliged to publish notice of its intention to dispose of open space for two consecutive weeks in a newspaper circulating in the area in which the open space is situated. In the context of the transfer and devolution of assets to Town and Parish Councils, approved on 5th September 2011, the Council has advertised the proposed disposal of the three allotment sites to the Parish Council.

As well as a requirement to advertise, Section 123 (2A) provides that a principal council may not dispose of open space unless, before disposing of the open space, consideration is given to the objections / representations made. Objections / representations were made in relation to the three Alderley Edge allotment sites and a single objection / representation was made in respect of disposals of allotment sites in each of two other towns/parishes: Nantwich and Poynton.

8.3 Allotment Legislation

8.3.1 Section 8 Allotments Act 1925 provides:

“Where a local authority has purchased (or appropriated) land for use as allotments the local authority shall not sell, appropriate, use or dispose of the land for any purpose other than use for allotments without the consent of the (Secretary of State DCLG) and such consent may be given conditionally or subject to such conditions as the Secretary of State thinks fit

Therefore, if the allotments are statutory allotments (which is generally understood to be the case) and the Council proposes to dispose of them for purposes other than allotments user, the consent of the Secretary of State is required to the disposal.

If the Council disposes of the freehold in an allotment site to the Parish Council and the Parish Council then wishes to change the use of the allotment the consent of the Secretary of State is required to the change of use. Section 8 concludes to say that the consent will not be given unless the Secretary of State is satisfied that “adequate provision” will be made for the displaced allotment holders or the provision is unnecessary or not reasonably practicable. The Netherfield/ Lydiat Lane site referred to in section 10 might be “adequate provision” assuming ownership and planning permission for its use is secured.

8.3.2 Section 30 Small Holdings and Allotment Act 1908 allows a notice to quit to be served on an allotment tenant living more than a mile beyond the area for which the allotments are provided.

8.4 Best Consideration

The Council has powers under Section 123 of the Local Government Act 1972 to dispose of land (whether by freehold sale or lease) but cannot dispose of any land for less than the best consideration that can be obtained except with the consent of the Secretary of State. The specific consent of the Secretary of State is needed to any sale at less than best consideration unless the Council can rely on a general disposal consent. Other disposals of land to Town and Parish Councils are being undertaken in reliance on the General Disposal Consent (England) 2003 which can be relied on if

- (a) The Council considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of

the following objects of the whole or any part of its area, or all or any persons resident or present in its area:

- The promotion or improvement of economic well-being;
 - The promotion or improvement of social well-being;
 - The promotion or improvement of environmental well-being;
- (b) The difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2m; and
- (c) All other conditions and requirements of the consent are satisfied.

Therefore the Council needs to satisfy itself that any transfer to the Parish Council at nil value will not represent an undervalue of greater than £2 million and also that any disposal will fit within its well-being powers. In considering Option 5 in circumstances where there might be a transfer without restrictive covenants the Portfolio holder must be mindful that the treatments of the 5 sites described in section 10.7 are closely interlinked and it is necessary to examine exactly what public benefits will be derived from the Parish Council's proposals, and also whether these benefits are likely to be delivered i.e. there needs to be some reasonably well defined outcome which is proposed to promote or improve the well-being in question.

Therefore, the Portfolio Holder must analyse each site and determine the intended benefits.

The salient legal advice the Council has from Bevan Brittan LLP, on the facts known to them, can be summarised as follows:

- (a) it is questionable whether the Council facilitating the conversion of an allotment site to car parking would fit within its well-being powers and derive significant public benefits.
- (b) It is unclear whether the relocation of the medical practice in Alderley Edge will be of any direct benefit to the community.
- (c) Alderley Edge Girls School (AEGS) has stated that in order to remain competitive it needs to have all weather pitches available to the school but this is not a matter for the Council, as AEGS is an independent school that does not benefit the public at large. If the Council does not secure any public benefit the transfer would not meet the requirements of the Disposal Consent as there are no tangible public benefits being derived from the Wilmslow Road site being sold at an undervalue. If AEGS were to agree to allow public access to their new playing fields facility this would provide some justification for disposing of the site at undervalue as there would be an obvious benefit to the local community.

- (d) no public benefits will be derived from the relocation of the allotment site and if the Netherfields / Lydiat Lane site is not as advantageous as the Heyes Lane site it could be argued that the proposals run counter to the Council's well-being powers.

Bevan Brittan LLP conclude, based on the information supplied to them, that any decision to dispose of Heyes Lane or Wilmslow Road at an undervalue would not be in accordance with the requirements of the Disposal Consent and would be at significant risk of challenge on the basis the Council would have acted outside of its statutory powers.

8.5 Fiduciary Duty

The Council owes a fiduciary duty to local council tax payers and even if the Council is of the view that it is appropriate to dispose of any site in accordance with the Disposal Consent it will need to have regard to its general fiduciary duty. This is owed to the council tax payers from whom it obtains the monies needed to carry out its statutory functions. A local authority cannot exercise a statutory power without regard to this duty and if it purports to do so it is acting beyond its statutory powers. This includes a duty to deploy the financial resources that are available to it to the best advantage. Furthermore such a decision must satisfy the Wednesbury test of reasonableness. In general, therefore, there must be exceptional reasons for any disposal to be at less than the best consideration and this would only usually arise if there was a general benefit to the wider community, not just to a private interest.

8.6 State Aid issues

All disposals need to comply with European Commissions State Aid rules. When land is disposed of by a public authority to an undertaking carrying on an economic activity at an undervalue a subsidy will be provided to the transferee. Where this occurs, local authorities have to ensure that the nature and amount of the subsidy complies with State aid rules, as a failure to do so could render the aid unlawful and mean that the recipient has to pay it back together with interest. The Council has previously had advice that, ordinarily, the transfer of assets to Town and Parish Councils at nil value does not create a State aid issue, that the ultimate risk in an improper State aid situation is borne by the aid recipient in any event and that if any Town or Parish Council grants State aid to third parties via the use of the assets it acquires it is difficult to see how that would rebound on the Council in any way. However, there could be an issue if any Parish or Town Council "goes into business" utilizing the asset received.

8.7 Crichel Down Rules

The Wilmslow Road site is subject to the Crichel Down Rules as although it was acquired by private treaty, the land was under the threat of compulsory acquisition at the time. This means the site should be offered back to the former owner or its successor in title at the current market value. If the former owner does not wish to purchase the surplus land or terms cannot

be agreed the Council will be free to dispose of the land on the open market. If the former owner wishes to buy the land and terms are agreed within the relevant period the Council must transfer the land to the former owner. The Council is in the process of offering all land surplus to the Alderley Edge and Nether Alderley Bypass to former owners.

8.8 Freehold Covenants

As stated in section 10.10 of this report the Heyes Lane site was transferred to a predecessor council of Cheshire East in 1917 subject to a covenant that it could not be used other than as allotments and other recreational uses.

The benefit of restrictive covenants can be assigned or pass to purchasers of land which the covenants were intended to benefit but (a) even if people have the benefit of these covenants, there may be difficulties in enforcing them or securing a remedy preventing a change of use and (b) it would be open to the Council or a successor in title to apply under Section 84 of the Law of Property Act 1925 to have the covenants released or modified.

If the Council were to dispose of the Heyes Lane site by way of a long lease, the Council could be the respondent in any claim for breach of the freehold covenant.

If the Council were to dispose of the Heyes Lane site by way of a freehold transfer, the purchaser from it would most likely be the respondent in any claim for breach of the freehold covenant as it would be the landowner but, as the Council, albeit it in its capacity as a predecessor authority, was the contracting party, it could also be a respondent as a contracting entity.

8.9 Potential to dispose of a freehold interest in any / all allotment sites

Whilst the Cabinet approval of 5th September 2011 does not preclude the transfer of the freehold interest in any allotment site, the Council, in papers made available for public inspection as part of the public open space advertisement process referred to above, confirmed these disposals would each be by way of a 125 year lease.

If the Portfolio Holder is minded to approve the sale of the freehold interest in one or more of the sites then, before any decision to sell the freehold is made, new advertisement(s) under Section 123 (2A) of the Local Government Act 1972 would have to be placed and the statutory process relevant to open space as described in section 8.1 would have to be repeated.

8.10 The Parish Council's ability to secure vacant possession of allotment sites

Whilst the first draft standard leases in respect of each allotment (and all allotments across Cheshire East) make transfers subject to any existing allotment society leases and any direct leases of plots to allotment holders, these arrangements are capable of termination in a variety of circumstances and, therefore the rights of the societies and plot holders are not safeguarded.

9.0 Risk Management

- 9.1 There is a risk that the intention of transferring assets for community use and to the most local tier of government will not be achieved depending on which of the above options is preferred. Option 1 preserves the use of the asset for allotments
- 9.2 There is a risk that the parish council will not accept the transfer on the terms offered and that further work will be required to find an alternative delivery model.
- 9.3 There is a risk that the allotment society, allotment holders and/or the objectors will not be satisfied that the preferred option gives them enough protection and complies with their interests.
- 9.4 There is a risk that the parish council will be prevented from achieving their aspirations if the preferred option is not perceived to be in line with their redevelopment plans
- 9.5 If Option 5 is the preferred option there is a risk that Cheshire East will breach best value considerations. Further work and discussions would be required to mitigate this risk if option 5 was the preferred option.

10.0 Background and Options

Cabinet Decision

- 10.1 On 5th September 2011 a decision was taken by Cabinet in to transfer a number of assets and services to the relevant town and parish councils. This included the transfer of three allotment sites in Alderley Edge at Heyes Lane, Chorley Hall Lane and Beech Close.
- 10.2 As part of this decision Cabinet gave delegated authority to the Strategic Director (Places and Organisational Capacity), Section 151 Officer and the Monitoring Officer to finalise agreed legal and financial terms for a package of transfers (or leases) of the assets and functions to Town and Parish Councils. There was to be a presumption that the transfer of assets would protect community use of the assets and following from the Cabinet meeting the Officers to whom authority was delegated approved

generic heads of terms for all the assets and confirmed that allotment transfer would be by long lease.

Public Notice

- 10.3 In accordance with Section 123 (2A) of the Local Government Act 1972 the Council published notice of its intention to dispose of all the allotment sites for two consecutive weeks in newspapers circulating in the areas where the sites are situated. The Council complied with this statutory requirement in respect of the three Alderley Edge allotment sites by placing adverts in the Wilmslow Express on 29th February and 7th March 2012. The closing date for objections was 21 March 2012. As well as a requirement to advertise, Section 123 provides that a principal Council may not dispose of land which consists of, or forms part of open space unless, before disposing of the land, consideration is given to objections which are made.
- 10.4 The advertising of the Council's intention to dispose of Heyes Lane, Chorley Hall Lane and Beech Close allotment sites resulted in a number of objections (129) being received. The majority were received before the closing date for comments. The three decision making officers (see 10.2), considered the objections on 16th April 2012 and decided to refer the decision as to whether to dispose of some/ all of the sites to the Portfolio Holder and also to refer to him the decision as to the method and terms of disposal to be adopted.

Summary of Objections

- 10.5 Appendix A contains further information outlining the objections. There were a total of 129 objections and the salient points made by the objectors are that the Parish Council has shown no interest in the allotments and is openly planning to use the site (Heyes Lane) for development purposes and the other two sites for housing. Further issues are a fear that the open allocation policy will cease and that there will be disputes between the Parish Council and the Allotment and Garden Society. In addition, that there is a lack of regard for plot holders, the impact from lack of green space, loss of wildlife and recreational uses.

Other Relevant Factors

- 10.6 It is relevant to this decision to provide background information in respect of the Council's understanding of the Parish Council's aspirations for Heyes Lane. Its aspirations, if any, for the other allotment sites are not known to the Council although note the objectors' concerns that these two sites could be used for housing.
- 10.7 There are five areas of land most relevant to the feedback from objectors and the stated aspirations of the parish council
- Site of Festival Hall; freehold ownership of the Parish Council
 - Allotment site off Heyes Lane; freehold ownership of the Council

- Land off Wilmslow Road; freehold ownership of the Council
- Land at Lydiat Lane/Netherfields; believed to be within the freehold ownership of Alderley Edge School for Girls (AESG)
- Garage site off Wilmslow Road; believed to be within the freehold ownership of Russell Homes

10.8 The Heyes Lane site is currently occupied for allotment purposes and is believed to be a statutory allotment. It was gifted to the Council's predecessor authority in 1917 out of an estate subject to a covenant that it could not be used other than as open space, recreational ground, playing fields, allotments and public gardens. Statutory allotments have the benefit of statutory protection. See Section 8 of this report in that regard.

The Wilmslow Road site was acquired by private treaty as a part of a larger transaction to enable the construction of the Alderley Edge bypass. AESG expressed an interest in acquiring this green belt land from Cheshire County Council prior to Local Government Review. They have re-stated this interest to the Council.

The Council has received an approach from the Parish Council to acquire the Wilmslow Road site at nil cost as a catalyst to initiate a series of transactions which it considers will address a number of long standing issues within Alderley Edge.

10.9 The Parish Council are seeking to initiate the following;

- a) The relocation of (an) existing medical practice(s) in Alderley Edge to part of the Festival Hall
- b) To undertake (a) there is a requirement for additional car parking for the Festival Hall and the provision of a new public entrance into Festival Hall. The adjacent Heyes Lane allotment site is necessary to facilitate these requirements.
- c) The garage site is currently occupied by the existing garage under lease/licence and the current owner is seeking to progress residential development on the site. There is a desire to retain the garage facility within Alderley Edge and the Heyes Lane allotment site may be an appropriate site.
- d) The Heyes Lane allotment site would need to be relocated within Alderley Edge. The Netherfields/Lydiat Lane site is considered by the Parish Council to be suitable for this purpose.
- e) There is a longstanding on street parking issue in the Netherfields/Lydiat Lane area and it is considered that the development of the Nethersfield/Lydiat Lane site and the provision of off street parking facilities will assist this situation.

- f) AESG have identified a shortfall in their current recreational facilities but despite it being in their ownership, they do not consider that the Netherfields/Lydiat Lane site is suitable for this purpose. They have identified the Wilmslow Road site as an appropriate site.
- g) The Parish Council consider that the transfer of the Heyes Lane allotments to them by the Council at nil premium will initiate the above events whilst minimising cost to the residents of Alderley Edge.

Restrictive Covenants

10.10 Evidently, the Parish Council would not be entitled to develop the Heyes Lane site and use it as it wishes if the Council grants a long lease of it and imposes within it the standard restrictive covenants it intends to impose in leases of other allotments sites across the Borough, as set out in the next paragraph, and enforces those covenants.

The key standard restrictive covenants are covenants prohibiting use of the land other than for allotment purposes and prohibiting transfers on or subleases by the Town/ Parish Council other than short leases to allotment holders or an allotment society.

Additionally the Heyes Lane allotment site is subject to restrictive covenants restricting its use to allotment and other recreational uses which may benefit i.e. may be enforceable by third parties including local land owners. The allotment site will remain subject to these covenants if it is disposed of whether by freehold transfer or by lease.

Additional controls and amendments to the standard lease

10.11 All three allotment sites are currently leased to Alderley Edge Allotments and Gardens Society (AEAGS). The Parish Council would take the allotment sites subject to the AEAGS leases but those are determinable in certain circumstances, including if development is intended. The Parish Council has made it known that it has taken legal advice as to how to obtain vacant possession of the Heyes Lane Site.

10.12 AEAGS through the Chair of a Sub-committee formed to consider the proposed changes in management wrote to the Borough Solicitor on 23 April. Principally AEAGS seeks amendment to the standard lease to allow an open allocation policy and for the Council to retain management control and to resolve disputes between the Parish Council and AEAGS. The Council has confirmed through its external lawyers and officers that the substantive points in the Allotment Society's letter will be considered by the Portfolio Holder before any action is taken. The letter is attached at Appendix C.

11.0 Access to Information

The background papers **other than** relating to this report can be inspected by contacting the report writer:

Name: Vivienne Quayle

Designation: Head of Performance, Customer Services and Capacity

Tel No: 01270 685859

Email: vienne.quayle@cheshireeast.gov.uk

Email: christopher.allman@cheshireeast.gov.uk