North Northamptonshire Council

EXECUTIVE
20th April 2023

Report Title	**Knights Farm, Rushden – Overage Agreement**
Report Author	George Candler, Executive Director for Place & Economy Jonathan Waterworth, Assistant Director of Assets & Environment.
Lead Member	Councillor Graham Lawman, Executive Member for Highways, Travel & Assets

Key Decision	☒ Yes ☐ No
Is the decision eligible for call-in by Scrutiny?	☒ Yes ☐ No
Are there public sector equality duty implications?	☐ Yes ☒ No
Does the report contain confidential or exempt information (whether in appendices or not)?	☒ Yes ☐ No
Applicable paragraph number/s for exemption from publication under Schedule 12A Local Government Act 1972	Part 1, Para 3

List of Appendices

Appendix A – Plan showing Land ownership
Appendix B – Plan Showing Rushden SUE
Appendix C – Savills LLP Recommendation Report

1. Purpose of Report

1.1. Northamptonshire County Council (NCC) sold Knights Farm, Rushden in 1998 for £300,000; see **Appendix A** for site area. As part of this sale, NCC reserved overage provisions for a period of 40 years to ensure that the Council benefited from any uplift in value should the agricultural land achieve a change of use and obtain planning permission for housing development.

1.2. The site subsequently fell into the Rushden East Sustainable Urban Extension (SUE) and the landowner entered into an agreement with a promoter (Camland Rushden Ltd) to progress a planning permission on the site for up to 500 residential units. As part of this agreement, the landowner approached NCC to vary the overage provisions as they were not deemed to be commercially viable.

1.3. Negotiations between NCC and the landowner to vary the Overage payments to include new allowable deductions from the uplift land value were agreed in March 2018 and a Deed of Variation was annexed to the original overage agreement.

1.4. This 2018 Deed of Variation expired in April 2022. The landowner's agent contacted the Council after the above expiry date to request an extension of the deed of variation to April 2024 on the same terms.

1.5. Legal advice received has confirmed it is not possible to extend a contract that has expired and so the Council would be required to enter a new Deed of Variation should terms be agreed.

1.6. The Asset Management team have sought professional and legal advice and this report asks Executive to consider this information and determine the way forward.

2. Executive Summary

2.1 The Council is a beneficiary of an overage agreement dated 1998 and subsequently varied in 2018. If the landowner was successful in obtaining planning permission to change the land use from agricultural to residential, the Council will benefit from a share of the uplift in value.

2.2 The landowner entered into a promotion agreement in 2017 and a Deed of Variation was completed in 2018, which resulted in allowable deductions being added to the overage formula. The deductions are various development costs, to be repaid from the gross uplift in value, leaving a residual net value. The net value would then be split on the same terms as the original overage agreement 50:50 between the Landowner and the Council.

2.3 Other changes were made in 2018 which included a capital receipt of £50,000 from the Landowner and regularisation of an area of land required for A6 road improvements.

2.3 NCC asset team monitored the Landowner's progress and on vesting day this monitoring passed to North Northamptonshire Council.

2.4 The Council was approached by the Landowner's property agents, Bletsoe LLP, asking the Council to vary the Deed of Variation to extend the trigger dates by two years.

2.5 Legal advice confirmed that, because the timescales envisaged by the Landowner's agreement with their promoter had not been met, the Deed of Variation had, in effect, expired at the date of their request and, therefore, it was not possible to extend the agreement. The overage terms, therefore, revert to the original 1998 agreement.

2.6 The Landowner is not prepared to accept the original agreement as a reasonable option and has requested a new Deed of Variation on the same terms as the expired agreement, or they state they will not bring the site forward for development.

2.8 Expert advice has been received. The deductions proposed are commercially acceptable, subject to various restrictions, and the 50:50 split between landowner and the Council is retained. This split is more favourable for the Council than the market norm. Providing an open book and evidence-based process is applied to the overage calculation at the point of sale, it is recommended that the new variation to the overage agreement is progressed on those terms as outlined on page 14 of **Appendix C**.

3. Recommendations

3.1 It is recommended that Executive grants delegations to the Executive Member for Highways, Travel & Assets in consultation with the Assistant Director of Assets & Environment, to authorise the completion of a new Deed of Variation in substantially on the same terms recommended by Savills LLP, as outlined on page 14 of **Appendix C**, with a longstop date of April 2024.

3.2 Reasons for Recommendation:

- It will provide the Council with the most certainty that the scheme will be brought forward for housing.
- This will result in the Council obtaining a capital receipt in a reasonable time frame.
- Because of alterations to the access to the property arising from the A6 bypass, there is potential for a dispute between the Council and the Landowner as to the allocation of value between the original sale land and land added to the site by Department of Transport when they built the bypass. Legal advice is that this is an unusual and novel argument which bears a degree of risk if pursued. It was written out of matters in the original variation and entering into a new variation will, again, protect the Council from this risk and provide greater certainty on an eventual receipt.
- It will reduce the amount of legal and other professional fees payable should the landowner decide to take legal action against the Council.
- It is in support of the corporate plan and the Rushden East Sustainable Urban Extension (SUE).

3.3 Alternative Options Considered:

- The Council could refuse to enter into negotiations to vary the 1998 original overage agreement, i.e., do nothing. If the site is brought forward without any variations this would result in the highest capital receipt for the

Council, however, the Landowner and Promotor have stated that if they cannot obtain a revision from the Council, they will not pursue the Promotion Agreement and will let it lapse. They would look to retain the existing use on Site rather than promote the alternative redevelopment use (currently in for planning) and this would generate no overage receipt.

- The Council could try to negotiate revised terms in the new Deed of Variation, but to date, Savills and the Council's in house development surveyors have met with rejection from the Landowner and the Promotor when seeking agreement to change their position on these terms. Negotiation is, effectively, at an impasse and proceeding as recommended is regarded as the only way to break this deadlock.

4. Report Background

4.1 An overage agreement is an agreement whereby a purchaser of landowner agrees to pay the seller an additional sum of money (on top of the purchase price) following the occurrence of a future event that enhances the value of the land. It is usual to include this in sales of land to safeguard the agreed sale value basis and secure a share of any uplift in value resulting from a change in use of the land.

4.2 There are several reasons for negotiating overage agreements, but, in this instance, there was no indication at the time of the sale, that the area would be considered for housing. It was an agricultural farm and landholding that NCC determined was surplus to requirements and the sale to the farmer completed in 1998.

4.3 This agreement is a planning overage agreement, so an uplift is payable once permission has been obtained which increases the value of the land.

4.4 Overage agreements include a formula for the parties to calculate the sums owed at the trigger date. This formula usually includes allowable deductions, such as the buyers' costs of obtaining the land, costs of obtaining planning permissions and other costs the buyer may incur as a result of obtaining the planning permission, such as a Promotors' costs, abnormal or infrastructure costs.

4.5 The negotiated terms are dependent on the circumstances of the land in question and the economic climate at the time the deal is agreed. There is no legal or financial fixed formula for overage agreements and surveyors act as advisors.

4.6 The original 1998 agreement did not provide for any allowable deductions. When the planning policy changed to indicate the wider area had housing potential, the Landowner approached Northamptonshire County Council (NCC) to modify the original agreement, to introduce deductions that would make the scheme viable to progress for planning permission. NCC agreed to do so, and this resulted in a Promotors Agreement and Deed of Variation being completed in 2018.

4.7 Since then, the Landowner entered into a side agreement with the Promotor which they believed extended the Deed of Variation, but they did not share this new agreement with the Council. The new agreement between the Landowner and Promotor had the effect that they believed the trigger date had been extended to April 2023.

4.8 The new agreement was not known to the Council, however, nor linked to the Deed of Variation by legal process and, therefore, legal advice has confirmed the agreement between the landowner and promoter does not bind the Council.

4.9 At the end of April 2022, the Council received a request from the Landowners to extend the Deed of Variation, but, Legal advised that it had already expired, and that the overage agreement has reverted to the original 1998 agreement.

4.10 The Landowner is disappointed about this situation and has said that under the original agreement the development it is not viable; it does not allow them to recover their costs and is commercial unreasonable. The Landowner has stated that they will not bring the site forward until 2038 unless there is a new Deed of Variation on substantially the same terms. If the Landowner does not bring the site forward until after 2038, the Council will receive no overage from the site.

4.11 This is a complex overage agreement and, therefore, negotiations and advice has been received from Savills LLP development team, headed by a Savills Partner, as expert advisors on overage terms, with their report enclosed at **Appendix C**.

4.12 Savills LLP advice is that the Landowner is being reasonable to request a new agreement on substantially the same terms, with some definitions improved for purposes of clarity and caps on deductible costs.

5. Issues and Choices

5.1 This review is required to ensure that the Council fulfils its responsibilities to obtain value for money; it is not a disposal as the sale completed in 1998, and the landowner has owned the site for 25 years.

5.2 The requirement, therefore, is to determine whether the request to enter a new Deed of Variation on the terms requested by the Landowner is reasonable.

5.3 The Council has procured professional advice to enable them to reach a decision and this advice provided by Savills LLP is annexed to this report.

5.4 The Savills report confirms the Landowners requested terms for a new Deed of Variation are reasonable and provide advice to improve some of the contract definitions.

5.5 The Council could choose to do nothing and let the original agreement run its course, to expire in 2038. The Landowner has stated they will not bring the site forward if this is the situation. This could lead to no capital receipt and be contrary to the Councils wider corporate objectives of supporting growth in North Northamptonshire and supporting one of the Council's Sustainable Urban Extensions to come forward for development.

6. Next Steps

6.1 Subject to Executive approval, heads of terms for the varied overage deed would be produced and solicitors instructed to document the variation. This would enable to the landowner to agree a new promoter agreement and recommence the site being brought forward for development.

7. Implications (including financial implications)

7.1 Resources, Financial and Transformation

7.1.1 This report has no implications for transformation.

7.1.2 The Savills report includes a financial comparison to demonstrate the difference in capital receipt to the Council between the existing overage agreement and a varied agreement.

7.1.3 It assumes that the Landowner would agree to bring the site forward on the existing agreement, which the Landowner has stated they will not do.

7.1.4 It is included to provide a financial guide to help the Council make an informed choice. The inputs for the formula are based on today's land values and are, therefore, for comparative purposes only.

7.1.5 The range of financial outcomes could, therefore, be that the Landowner does not bring the site forward until the overage expires, which would result in no capital receipt for the Council.

7.1.6 Another outcome is that the Council and Landowner agree the terms of a new deed of variation on the same terms as the expired agreement and benefits from a proportion of the uplift in land value as a result of the grant of planning permission which, at today's land values, results in a capital receipt in the region of £12.2m.

7.1.7 If the Landowner had agreed to bring the site forward on the basis of the original 1998 overage agreement, the capital receipt at today's land values would have been in the region of £14.7m, however, as outlined above, this scenario is unlikely to arise.

7.1.8 Capital receipts are required to support the capital programme.

7.2 Legal and Governance

7.2.1 The Council is not under any particular legal obligation to agree a new Deed of Variation.

7.2.2 Without a new variation, however, the Landowner has stated that they will not bring the land forward and, if they carry out this threat, the Council receives no receipt at all.

7.2.3 In addition, the terms of the 1998 disposal, when considered with the subsequent alterations to access arising from the A6 construction (which could not have been foreseen at the time) raise the possibility of an argument by the Landowner that a substantial amount of the value of development is attributable to the land which they acquired from Department for Transport, rather than the land acquired from NCC. This is a novel argument, the success of which, if taken to court, is very difficult to predict, therefore, pursuing it to its conclusion creates a risk (for both parties) which it would be reasonable to consider avoiding if that is possible. Forcing the Landowner to choose whether to proceed under the 1998 overage provisions is not, itself, a risk-free option for the Council.

7.2.4 Savills' advice is that the terms of the Deed of Variation remain consistent with likely open market arrangements. On this basis, the Council's obligation under s123 Local Government Act 1972 to obtain the best consideration reasonably obtainable for land would still be fulfilled. At the same time, the risk of future dispute over the access land issue mentioned above would be mitigated.

7.3 Relevant Policies and Plans

7.3.1 The proposal will meet the priority in the corporate plan to use our assets, skills, knowledge and technology most effectively.

7.4 Risk

7.4.1 The recommended way forward provides the least risk that the site would not be brought forward, and the Council will receive a capital receipt.

7.5 Consultation

7.5.1 The information in this report has been reached in consultation with professional advisors and assets management experts.

7.6 Consideration by Executive Advisory Panel

7.6.1 This item has not been considered by an Executive Advisory Panel.

7.7 Consideration by Scrutiny

7.7.1 This item is eligible for call in by the Scrutiny Commission as part of their work plan.

7.8 Equality Implications

7.8.1 An equality assessment form has been completed and confirms no negative impact.

7.9 Climate and Environment Impact

7.9.1 The development will be controlled through planning policy and include any requirements for biodiversity and building regulation standards.

7.10 Community Impact

7.10.1 The changes to the overage agreement will have no direct impact on the community. The development will ensure the community is considered as part of the planning process.

7.11 Crime and Disorder Impact

7.11.1 There are no implications arising from what is being proposed.

8. Background Papers

8.1 There are no background papers.