

DECISION OF THE EXECUTIVE MEMBER FOR HR, ASSET
MANAGEMENT, CAPITAL PROGRAMME AND TRANSFORMATION
WITH ADVICE FROM THE SECTION 151 OFFICER OF THE COUNCIL,
CORPORATE SERVICES DIRECTORATE



DECISION NO: CSD151

SUBJECT:

Adoption of land known as Portbury Nature Reserve, Portishead, North Somerset

Executive summary

Portbury Nature Reserve is a valuable site providing the wildlife and access objectives laid out in the original planning permission and is greatly appreciated by local residents and other visitors.

North Somerset Council was instrumental in the creation of the reserve and remains committed to its long term sustainability.

The significant problem with the site relates specifically to the sustainability of its funding model. It has cost £30,000 a year to collect the levy, and not all residents have paid, increasing collection costs for debts and leading some to consider the levy unfair. Last year Port Marine Management Limited (PMML) was charged £75,000 for the maintenance charge, resulting in a total annual cost (maintenance and collection) of £105,000. North Somerset Council is currently carrying out interim management of the reserve and to maintain continuity is implementing Avon Wildlife Trust's management plan, but for an annual cost of £40,000.

Without adequate funding the site will fall into disrepair losing its effectiveness as a local recreational resource and wildlife refuge. North Somerset Council must address this matter, on behalf of all local residents, and the only option considered to be sustainable is for the Council to adopt the land, with the benefit of current funds held.

Acknowledging problems in the funding arrangements now means that the quality of the site can be sustained into the long-term, while avoiding the risk of the Council being forced in the future to take over the site without the benefit of the accrued funding.

North Somerset Council's long-term commitment to the nature reserve is endorsed by this approach and using the option within the s106 agreement to adopt the land is the only guaranteed way of ensuring the site's continued existence.

Background:

Site History

Planning permission for land that is now known as the Ashlands was granted on 30 August 2002 (ref: 00/P/1844/OT2) for "Housing development, primary school, open space provision, and associated infrastructure."

Several conditions were imposed on the consent, together with a s106 agreement, which created the 47 hectare Portbury Nature Reserve [see Appendix A for site plan]. This s106 agreement also set out the options for the future ownership of the land, giving North Somerset Council the ultimate responsibility for making this decision.

In the Appropriate Assessment for this development, drawn up by North Somerset Council, the overall vision was to:

'... provide a safeguarded wildlife refuge which can be managed as a single unit to optimise its nature conservation potential both in terms of providing specific mitigation and also as a major ecological resource within the Area. The proposal for a wildlife reserve, however, presents an opportunity to safeguard 50 hectares of vulnerable land and to guarantee a green link between the estuary foreshore and the Gordano Valley.'

Part of the intended mitigation in the assessment for the Nature Reserve was also to provide a new and enhanced network of routes for public access that would not cause disturbance to the wading bird species.

The proposal to create a Nature Reserve therefore presented an opportunity to safeguard vulnerable land and to guarantee a green link between the estuary foreshore and the Gordano Valley.

In addition, the restricted public access proposals around the Nature Reserve were designed to ensure that the principal ecological mitigation objectives were not compromised and that the proposals were sensitive to the rural setting and landscape character around Sheepway.

The 2002 planning consent and accompanying s106 therefore sought to achieve a compromise between two conflicting objectives – public access and nature conservation, and to facilitate the funding of maintenance through a local levy raised from properties built during this development.

Detailed designs and technical solutions were subsequently approved and the physical works to create the Nature Reserve itself were substantially completed in 2007.

However, progress slowed for a period after this date with a list of outstanding works and issues such as fencing, planting, bird hide provision and signage. In July 2010 Persimmon appointed the Avon Wildlife Trust (AWT) to act as their contractor to manage the site until the future ownership matter was determined as laid out in the s106 agreement.

The site is now considered as being entirely completed with the outstanding matter being future ownership and maintenance of the reserve.

Funding of Portbury Nature Reserve management and maintenance

Part of the planning consent for the Port Marine development was therefore granted by North Somerset Council on condition that the ongoing costs of managing and maintaining the Reserve were met by the development and this manifested itself with the creation of Port Marine Management Ltd (PMML).

PMML was therefore formed as a vehicle to collect the levy from residents for the nature reserve and then to maintain the site or arrange for a third party to maintain and meet the costs of the body carrying out the works.

This local levy became implemented through a charge on each new house in the Port Marine development, requiring the owner to pay an annual charge to PMML.

It is understood that a restriction has therefore been registered against the titles of all the properties on the development in favour of PMML and the developer (now Persimmon), to ensure that whoever owns any of the properties is aware of the requirement to make a contribution.

The effect of the restriction is that before any sale of a property can be registered certain requirements need to be gone through. In particular a Deed of Covenant needs to be sent to PMML in which the new owners promise to make the appropriate payments. Without those requirements being met, and certain fees being paid, PMML will not give their consent and any new purchaser will not be able to be registered at the Land Registry.

An evaluation of the effectiveness of the funding model

The funding of the nature reserve is obviously the most important factor affecting the site because without sufficient funds it is not possible to manage the site satisfactorily.

Portbury Nature Reserve is often claimed by its supporters as a flagship site with a major reason being this funding model. It is claimed that by making local residents fund the site there is greater buy-in, leading to a willingness to pay premium rates to enable the reserve to meet high environmental standards.

North Somerset Council's role in delivering the s106 agreement means it has a responsibility for the future of the reserve. Having identified future funding as the key issue affecting the reserve, it is natural to critically evaluate the current model, and especially consider its sustainability into the future. This will protect both levy payers, the wider community and the nature reserve itself.

1. PMML's role

PMML has been established solely as an organisation to collect fees from residents (via the levy) and maintain the land or pay the party that maintains the land. However, significant flaws exist with PMML's structure that when carefully evaluated indicate serious risks for the future:

- The PMML board has limited accountability to local residents. In setting the amount of the levy PMML can create and maintain a sinking fund which in effect enables it to raise the levy to any level it chose without reproach.
- PMML has encountered operation difficulties over a number of years and on several occasions e.g. failing to submit company returns on time; failing to deal with financial affairs in a timely manner which has led to fines from HMRC. While current directors have reversed this trend since taking office, there is no guarantee it will not happen again in the future following any further changes in office holders.
- It costs £30,000 a year to collect the levy.
- PMML constitution and rules have been unfamiliar to past office holders to the extent that directors have been incorrectly appointed. While they have all acted in good faith, and therefore beyond reproach, it indicates an organisation that lacks safeguards for both residents and the reserve. The extent of this problem is indicated by the fact that the original members of the company failed to appoint successors as provided for by the company constitution. There have been numerous changes of directors of the company over the years but, as the directors have to be company members, these director appointments have been incorrectly made. Since this issue was identified by the council's due diligence checks PMML has been seeking to resolve the problem. This has taken almost a year and caused the delays and consequent frustrations for many in trying to secure the future of the Reserve. While some of the directors, being unaware of the issue and acting in good faith, have been able to continue the company transactions such as issuing the Land Registry consents referred to above, the situation would clearly have been of far greater impact on home owners if those directors had not been able to act and the consents not issued with resulting impacts on property transactions.

2. Accountability of land owner

The land is currently still owned by the developer. Once completed, as is now the case, the site should be transferred to its future owner. Transfer to an organisation such as an environmental body would require future maintenance to be in accord with a managed plan agreed with NSC. There would be no duty on such an owner to consult with residents on any management plan or management options which obviously impact on the amount of levy.

An alternate approach to ownership and maintenance envisaged in the S106 is for ownership to transfer to the council with funding for future maintenance.

3. Fair funding

Residents will be aware of the levy on their property at the point of purchase and therefore must knowingly enter into the transaction. However, some residents have questioned the fairness of this levy arrangement when it has become evident to them that the nature reserve serves a much wider population and should therefore be funded by the wider community.

Options for managing the nature reserve

The s106 agreement between the developers and the Council has always ensured that Persimmon would transfer the ownership of the nature reserve to another party. The s106 agreement identified three options for the future ownership and maintenance of the nature reserve.

The three options for future ownership of the reserve are therefore through:

1. A management company
2. An environmental trust or similar
3. North Somerset Council.

The three options are discussed in detail below.

Option 1 - Management Company

The s106 Agreement laid out this option where a dedicated management company could be set up to own the Reserve subject to the approval of North Somerset Council.

Such a company would be established to implement and administer the management plans for the site with its directors drawn from local, relevant organisations including, for example, North Somerset Council, Portishead Town Council, local residents, the developer and a wildlife trust or similar.

For the sake of clarity it is evident from the documentation, the s106 agreement and PMML's ongoing activities that PMML is not the management company identified.

An evaluation of this option is provided below.

Advantages:

- a) Local representation – the management of this open space by a committee mainly drawn from the local area may be influenced by views of the levy payer although ultimately it would not be answerable to those local residents unless this was contained in the constitution of the Management Company.

Disadvantages

- a) The foremost problem relates to funding because the management company will be reliant on PMML to collect the levy in order to be able to pay for the management and maintenance of the reserve. As described above there have been operational problems with this approach which brings into question its sustainability and seriously threatens the future of the reserve.
- b) With such concerns about the funding model, combined with a risk that the management company does not succeed there will be a requirement for the land to be managed and it is likely that this would fall on North Somerset Council. This has happened with other community assets and places a financial burden on the authority if a commuted sum payment or funding allocation is not available.
- c) The Company will be required to manage the maintenance contract and will therefore require additional staff to deliver technical aspects at further cost to the levy payers
- d) Company directors – administrative support for the management company will be required to ensure directors are able to discharge their responsibilities correctly at further cost to the levy payer.
- e) Skills – it will be a challenge for this company to contain sufficient skills to ensure the nature reserve is managed appropriately by the company itself or its appointed

contractor and to support volunteers. Levy payers will have to fund specialist advice in addition to the cost of maintenance.

Option 2 – Environmental trust or similar

The s106 agreement includes the option of transferring the land directly to an environmental trust who will take on ownership of the land and all associated responsibilities.

Advantages

- a) An environmental trust that has experience relevant to this habitat will ensure that the reserve is appropriately maintained.
- b) Such trusts usually have good relationships with local communities and encourage the involvement of volunteers

Disadvantages

- a) The foremost problem relates to funding because the environmental trust will be reliant on PMML to collect the levy in order to be able to pay for the management and maintenance of the reserve. As described above there have been operational problems with this approach which brings into question its sustainability and seriously threatens the future of the reserve.
- b) With such concerns about the funding model, combined with a risk that the trust does not succeed there will be a requirement for the land to be managed and it is likely that this would fall on North Somerset Council. This has happened with other community assets and places a financial burden on the authority if a commuted sum type payment or funding allocation is not available.
- c) There will be no external moderation of the trust's activities/ or performance or expenditure unless the trust is able to develop a method of accountability with levy payers.
- d) The site is at risk of flooding because sea water levels are rising and the Portbury Sea Wall is no longer an adequate source of protection. It will be necessary to ensure that the selected environmental trust is able to address this change effectively.

Option 3 – North Somerset Council adopts the nature reserve

The s106 agreement includes the option of North Somerset Council adopting the nature reserve.

Advantages

- a) In contrast to the other options North Somerset Council is able to address the long term funding of the site. This would require PMML dedicating their remaining reserves (c £400,000), similar to the provision of a commuted sum to the Council's maintenance of the nature reserve which will last in the region of 10 years. The Council is currently carrying out interim management of the site and it estimates that annual costs are in the region of £40,000. The Council routinely adopts strategically important open space and funds the management and maintenance of these sites through its revenue budget once commuted sums are spent.

- b) The site is an important strategic open space highly valued by the Council who will ensure it is protected in perpetuity.
- c) As an important strategic space with district wide importance its maintenance will be funded by the whole community rather than a narrow group as it is now.
- d) The Council is accountable to the wider community ensuring that activities related to the nature reserve are carried out transparently.
- e) The Council has significant skills in managing a whole range of open spaces including nature areas which are used by hundreds of thousands of visitors.
- f) The Council is able to draw on its large contracts and internal specialist staff so will provide a considerably cheaper maintenance operation than recent fees charged to levy payers.
- g) The £30,000 that levy payers are collectively charged for collecting the levy will stop.
- h) The Council has wide experience of working with a range of volunteers and will actively work with the community to continue this at the nature reserve.

Disadvantages

- a) It has been widely argued that the wider financial austerity measures faced by the Council will negatively impact the site. While it is difficult to predict the future economy, the Council has a track record of robust financial management and ten years to prepare for accommodating these costs. Given the inherent risks of the current levy based approach, Council ownership provides the most secure financial future.
- b) Negative perceptions exist about the Council's competence and willingness to manage the reserve but these have been addressed above. AWT have also provided their management plan to the Council during the interim management phase to ensure continuity of maintenance and this will be followed into the future and is within the capability of the Council to do so.

Preferred option

On balance Option 3 is preferred because of the certainty it brings to future funding; alongside North Somerset Council's commitment to protecting the nature reserve in perpetuity; the Council is accountable to the community; and the Council has the skills to ensure the land is managed appropriately.

Other issues

There are several associated issues raised below that address issues including matters that will directly impact levy payers; are risks to the Council; or are helpful in terms of providing information to the general public about the future of the site.

A nature reserve in perpetuity

It is important to explicitly state that North Somerset Council does not intend to develop the site into another use because:

1. The Council created the nature reserve as part of the wider planning process behind the whole development. This was done to ensure a buffer between the development and the docks; and to help mitigate for wildlife issues caused by the development of several thousand houses. These objectives are still valid and important so the Council remains fundamentally opposed to developing this land.

2. A covenant could be entered into with Persimmon to prevent building on the land to reinforce this point.
3. In practical terms, most of the site is in danger of flooding and is not therefore suitable for development.

Future funding

North Somerset Council currently estimates it will cost about £40,000 a year to carry out day-to-day maintenance of the nature reserve. The AWT management plan will be evaluated in more detail and this will guide the future maintenance of the site and enable more detailed budgeting to take place at that stage.

To put this annual maintenance cost in context, Avon Wildlife Trust was recently charging PMML c. £75,000 per year to maintain the nature reserve which includes permanent staffing. An additional £30,000 is raised by PMML to administer the levy collection. For information, in contrast North Somerset Council's budget for the repairs and maintenance [excluding the grounds maintenance contract] of its whole open space estate is £110,000.

This significant difference in costs exists because North Somerset Council does not employ site based staff and has the advantage of being able to draw on larger contracts for procurement of services. For example, the Parks and Street Scene contract could be used for many tasks on the reserve. This could make the delivery of the maintenance considerably cheaper but no less effective. Glendale (the Council's contractor) has wide experience of countryside management and could appoint, on the council's behalf, an appropriately qualified and experienced operative to help maintain the site and to work with volunteers. Other resources would also be available from this contract as required.

Existing Council staff would monitor contractors, manage the site and support the volunteers.

PMML currently holds £400,000 of reserves. These reserves would have to be transferred/made available to North Somerset Council in order for the Decision to adopt the land to be implemented by PMML.

These funds will be used to finance the future management of the site and when they have been used the annual maintenance costs will be covered by the Council's revenue budget.

North Somerset Council has experience of failed community ventures and, as the responsible body for community matters, can and has been called upon to intervene to prevent loss of public facilities. This means that the Council has to take on responsibility of land or buildings with no commuted sum. The factors identified above indicate a significant risk of failure around the management of the nature reserve and the Council is currently in a position to pre-empt such a failure and, at the same time, be in receipt of funds from PMML's reserves to offset the potential impact on its budget.

Residents' covenant with PMML

If North Somerset Council adopts the nature reserve there will no longer be a requirement for PMML to collect a levy and this will mean that the covenant on each property can be lifted or deemed satisfied. PMML and Persimmon would need to satisfy this requirement before the transfer to NSC being concluded.

Several residents have stated that they want to continue paying the levy and so do not wish it to be removed from their property as a matter of principle. While they may hold this view, if PMML no longer chooses to do so, it is simply not possible for residents to force collection. However, there would clearly be nothing preventing such residents making donations towards future maintenance.

Persimmon have agreed in principle to progress this solution subject to decisions by the Council and PMML.

Inner sea wall maintenance

The strategic sea defence for the Ashlands development and surrounds is provided by the inner sea wall. The Environment Agency will manage and maintain the sea on behalf of North Somerset Council.

North Somerset Council will therefore adopt the inner sea wall but not be responsible for its sea defence capabilities.

DECISION:

North Somerset Council adopts the land known as Portbury Nature Reserve in accordance with the option in the Section 106 agreement (of the Town & Country Planning Act 1990) relating to Land to the East of Portishead Dock and the East Quays Development Portishead, North Somerset provided that PMML transfer/commit current reserves (c. £400K) to the Council and PMML and Persimmon complete requirements to lift the covenant regarding levy payments or have it deemed satisfied.

Reasons:

See background

Risk Assessment:

1. The nature reserve is at risk from being inundated by the sea because the Portbury Sea Wall is not high enough to deal with the predicted rise in sea levels and more intense storms that climate change is predicted to cause. This will have a significant impact on the nature reserve in terms of existing wildlife and access.

However, this can be considered as managed realignment which in itself can host a positive wildlife habitat; and in fact is very relevant for this low lying location.

2. The long-term hydrological maintenance of the inner sea wall (the actual sea defence for the Port Marine development and Portishead) is a significant liability and will be the responsibility of the Environment Agency.
3. Hinkley power station extension. The Government has recently approved the route of the Hinkley power lines which will pass through the reserve and this is likely to cause considerable impact to the site during power line construction. Detailed mitigation plans have been proposed but it will be necessary to be vigilant during the construction to ensure that long-term damage is avoided and disruption is kept to a


minimum. In the longer-term the removal of some existing overhead cables will benefit the site.

Financial Implications:

Maintenance for the first 10 years will be covered by a 'commuted' sum provided by PMML and thereafter it will be considered a growth item in the council's Medium Term Financial Plan in the same way that all other land adopted following development is funded.

Implications for Future Years:

See above

Signed: 

Councillor David Pasley
Executive Member for HR, Asset Management, Capital Programme & Transformation

Dated: *17 May 2016*

Signed: 

Malcolm Coe
Section 151 Officer, North Somerset Council

Dated: *17.5.16*