

Georgina Morgan-Denn

Subject: FW: ExternalRE: ExternalAdvice regarding public open space lease and deed of covenant

From: Kate Jackson
Sent: 09 December 2022 12:43
To: Georgina Morgan-Denn <clerk@haydonwick.gov.uk>
Subject: ExternalRE: ExternalAdvice regarding public open space lease and deed of covenant

Dear Georgina

Please see my responses below to your comments of 18 November 2022 and the subsequent email from which I have copies the further queries.

1. All areas we maintain and operate as open space / play areas. Except for Little Copse the play equipment, surfacing and fence were removed from here at least 2 years ago.

Noted. Arguably given that there will be a surrender of the current leases there will need to be an advertisement in accordance with s123 of the Local Government Act 1972 in relation to those areas which are Public Open Space pursuant to the Act. This seems a bit pointless given that a lease will be re-granted with the land remaining public open space. I may raise this with Swindon because the same applies to them.

2. Can we have some clarification on Havisham Drive as well – there's a brick archway that needs to be repaired, it is within the play area boundary but installed by the housing developer. Should we be maintaining?

I cannot see this on your list of existing leases, but it will depend on the terms of the lease. I have not seen the terms of any of the existing leases. I suspect the maintenance of the brick archway is the Council's liability but it is a point I could raise with SBC as looking at the draft lease I am not sure it is clear who would have responsibility either. There is reference to structure and surfaces but more in the context of play equipment. However I suspect SBC will argue it is caught by that clause, especially as the Council is receiving an upkeep fund.

Unless you have any additional comments, whilst it would be helpful to have a full set of plans, I believe I can start to add amendments to the draft lease if you are content for me to do so whilst I wait to heard from SBC regarding the outstanding matters. Please confirm.

Best wishes
Kate

From: Georgina Morgan-Denn [<mailto:clerk@haydonwick.gov.uk>]
Sent: 18 November 2022 15:42
To: Kate Jackson
Subject: RE: ExternalAdvice regarding public open space lease and deed of covenant

Dear Kate

Thank you for your email.

The working party has taken a look at your detailed review of the public open spaces legal matters. I have the following comments for your response. I have a meeting on the 13th December – would there be an update in time for this one or January 24th? Thanks.

1. Any issues with the plans areas of land to be transferred;

I am checking with our open spaces team that the plans are consistent with areas we maintain. I believe they are....

Noted. I am still waiting for the balance of the balance from SBC. I have chased but the solicitor is on annual leave until 13 December 2022.

2. Any issues with the restrictive covenants the Council is expected to enter a deed of covenant in relation to;

None

Noted

3. The position regarding occupation/surrender of existing leases;

Our understanding is we have existing leases with SBC on these areas already - is the revised lease superseding this and starting again at 99 years? Is the previous lease annulled when we sign this revised lease?

On looking at the draft lease it is the intention that all of the current leases listed in the new lease will be surrendered and re-granted. So yes one lease will be brought to an end and the other granted as a new lease with a term of 99 years.

^See below regarding further queries on the amended lease.

4. Whether any enquiries/searches may be required;

Awaiting clarification on the outstanding issues you've identified in the summary table (eg. Basil Close, Capesthorpe Park, Galloway Road, Havisham Drive, Lilian Close, Lilian Close, Luna Close etc etc)

Noted – as above I have chased.

5. Any other queries/concerns.

Little Copse – is no longer a play area but Parish still maintains the open space in this title – does that need to be reflected differently anywhere?

I don't believe so.

^Query

We received from Ian in July the following queries on the revised lease with some outstanding matters – are you taking these forward?

On the draft lease itself the following are the salient terms:

- 1 term – 99 years without breaks
- 2 rent £1 pa if demanded; there are no rent reviews
- 3 all existing arrangements lease etc are deemed to be surrendered – this will need to be checked – I will need copies of all of the existing leases to check this is properly dealt with in the draft lease. If you are able to provide them that would be helpful, if not I shall get them from SBC
- 4 the Council is to pay all outgoing
- 5 the Council is to maintain and to repair the properties and the equipment cll 3.3 – 3.5
 - a. for the purposes of 4 above SBC is to hand over (or already has handed over) two funds: the Lilian Close and the Upkeep Fund – these appear to be commuted sums payable by the developers to SBC under the terms of the s 106 agreement. They are evidently single payments not indexed linked (unless there was such provision in the s 106 agreement although one suspects that any indexation would have accrued to the sums as they were paid to SBC). I shall need to check the s 106 agreement(s). I have seen a s106 Agreement from 2005 but I cannot see any reference to

commuted sums in it but it does refer to other agreements. If you have not had opportunity to check it may be easier for me to ask SBC?

- b. the repairing obligations extend to the fences and to the play areas themselves cl 3.5 although I think that there is a definitional issue about the scope of the permitted use [GMD – explain further] I agree the permitted use as currently drafted is too restrictive. As yet I have not gone through the draft lease thoroughly as the starting point is checking have identified the correct areas of land. From Ian's note and my cursory look, there are amendments which will be necessary.
- 6 cl 3.6 alienation needs amendment [GMD – explain further] Its just poorly drafted and needs fleshing out a bit more. This will be addresses with the other amendments. The gist is that there is no permission to assign, sub-let the whole or part of the land. Given these are multiple sites this may want to be reconsidered.
- 7 cl 3.9 there is a ban on any building, structures, hardstanding without SBC's consent – I think that this conflicts with the idea of a public open space and recreational facilities and is unreasonably restrictive in a 99-year lease. There is a potential conflict with cl 3.13. [GMD - what do we add instead to be less restrictive?] The clause needs to be amended to exclude play equipment and associated structures and tie in with clause 3.5
- 8 cl 3.10 needs amending to ensure that the properties can properly be used as public open space This is always a challenge because some people consider play areas to be a nuisance by their very nature. Again this just needs a bit more thought to ensure there is no risk of breach/most flexibility to the Council,
- 9 cl 3.14 requires the Council to insure against third party liability but the clause is silent on property insurance – this needs resolution. It would usual for the Council as tenant to insure the properties and the structures and equipment. This will be amended with the other points.
- 10 cl 3.16 graffiti – is this acceptable? [GMD – yes we do this already] Noted
- 11 the landlord is to maintain the street lighting
- 12 the provisions of the Landlord and Tenant Act 1954 are not excluded which means at the end of the term the lease continues until terminated in accordance with the Act.
- 13 You may to consider the lease checklist alongside the lease.
- 14 There are no plans which are of course an integral part of a lease. I shall need to see these [Kate – as per your recent emails?] Yes – we have some but still await other and/or clarification of some of the plans.

I need to bring to Council's attention that they'd be taking on responsibility of tree maintenance and check they're accepting of this additional responsibility.

3.3.2 – to properly maintain and prune as necessary all trees, bushes and other plants –

Finally, as part of this exercise will you be completing the attached Lease checklist?

The lease checklist is really just for reference to ensure nothing is overlooked. It is not necessary to complete it, but I can if the Council believes this would be helpful?

Thanks
Georgina

From: Kate Jackson
Sent: 17 October 2022 11:42
To: Georgina Morgan-Denn <clerk@haydonwick.gov.uk>
Subject: ExternalAdvice regarding public open space lease and deed of covenant

Dear Georgina

I have now been through all of the titles to the various pieces of land which SBC is proposing to transfer to Haydon Wick PC.

I have attached an overview but there is some information missing, which I either have requested from SBC or shall do this morning, namely:

1. The s106 agreement;
2. Some of the transfer plans which are either missing or insufficient in detail and likely to be rejected by HMLR;
3. A transfer relating to one of the titles requiring a deed of covenant;

The drafting of the Deed of Covenants is fine, provided the restrictive covenants in the attached transfers do not prevent the Council from operating the pieces of land in the way they intend. The Restrictive Covenants in question are at panel 12, paragraph 3 of the attached transfers, they are almost identical in each transfer. I anticipate they will be the same in the transfer I have not been able to obtain online but it is necessary to check.

If you believe any of the restrictions will cause the Council an issue please let me know.

The titles to the majority of the pieces of land are extensive and do contain many rights and restrictions which I have not noted on the table attached as most of them relate to the development and what the parties could and could not do in that regard and are therefore unlikely to be relevant to the Council. I will however send copies of the titles separately. I will not be able to send the title plans to all of them as they are A1 and I cannot scan them. I will also send a separate email with the plans for the proposed lease, save for those which I am waiting to receive from SBC. The Council should check that so far as it is aware, they do reflect the parcels of land which the Council is anticipating being leased to it.

Ian has already advised on the amendments which are necessary to the lease, and once I have the response to the above I can go back to SBC with the suggested amendments.

One point which needs clarification is the surrender of any existing leases. Does the Council currently hold any leases in respect of any of these parcels of land, and/or is it already in occupation. It may be necessary to check any existing arrangements.

Also if there are any parcels of land which the Council does not already occupy or hold a lease to it may want to consider whether it wants to raise any enquiries with SBC or undertake any searches. I can advise on this further if any of the parcels of land are essentially unknown to the Council.

One of the points Ian raised in his initial advice was the publication of the notice to dispose of public open space. This has been done by SBC and I attach a copy of the same.

I look forward to hearing from you in respect of the following:

1. Any issues with the plans areas of land to be transferred;
2. Any issues with the restrictive covenants the Council is expected to enter a deed of covenant in relation to;
3. The position regarding occupation/surrender of existing leases;
4. Whether any enquiries/searches may be required;
5. Any other queries/concerns.

I shall be sending a further email with the titles to the various parcels of land attached and an email with the proposed lease plans.

I shall be in touch once I have the outstanding documents from SBC.

Best wishes
Kate

Kate Jackson
Surrey Hills
Solicitors 