

DECISION ITEM

REPORT OF	MEETING	DATE	ITEM NO
DEVELOPMENT SERVICES DIRECTORATE	TOURISM AND LEISURE COMMITTEE	4 NOVEMBER 2021	4
LARBRECK AVENUE PLAY AREA ELSWICK			

PUBLIC ITEM

This item is for consideration in the public part of the meeting.

SUMMARY

The report concerns a small play area located in Elswick which is currently maintained by Fylde Council as part of the schedule of parish playgrounds but is neither in the ownership of the borough council nor the parish council. The report proposes making an adverse possession claim to the Land Registry on behalf of the parish council and if successful then transfer the land to Elswick Parish Council.

RECOMMENDATIONS

The Committee is recommended to:

1. To authorise officers to make an adverse possession application for the play area at Larbreck Avenue provided that Elswick Parish Council confirm its acceptance of the land if the application is successful.
2. If the application is successful, the land then be transferred to Elswick Parish Council.
3. If the application is successful, that the Tourism and Leisure Committee consider a capital bid that would assist Elswick Parish Council in replacing missing items of equipment and repair surfacing. On the agreement that Elswick Parish Council contribute £10,000 to the required works.
4. If the application is unsuccessful that officers bring a further report to committee outlining the implications of pursuing a Compulsory Purchase Order to acquire the site.

SUMMARY OF PREVIOUS DECISIONS

None

CORPORATE PRIORITIES

Economy – To create a vibrant and healthy economy	
Environment – To deliver services customers expect	√
Efficiency – By spending money in the most efficient way	√
Tourism – To create a great place to live and visit	√

REPORT

BACKGROUND

1. Fylde Council maintains a small play area on Larbreck Avenue, Elswick. The play area and adjacent grass covers an area of 1,095m² and contains two items of play equipment. The cost to Fylde Council to maintain the play area is currently £576 per annum. A plan of the site is attached at appendix 1.
2. The play area was provided and laid out by the developer of an adjacent residential development. The planning permission for the development, granted in 1975, had included a requirement to provide the play area and to implement a landscaping scheme. However, there was no requirement to transfer ownership of the play area.
3. The play area is not owned by Fylde Council or by Elswick Parish Council. Because the land is not registered at the Land Registry¹, it has not been possible to find out who owns it. The 1975 planning application refers to the owner as Mr Salthouse c/o Land Development Consultants, Wood Street, St Anne's. Attempts have been made to make contact using these details, but without success.
4. During the 1980s, maintenance costs for this play area were deducted from the Parish Precept paid over to Elswick Parish Council, by Fylde Council as was then policy with all Town and Parish Councils. Since 2010, Fylde Council have paid for the maintenance of the play area directly.
5. The purpose of this report is to bring about a resolution of the current unsatisfactory situation in that Fylde Council is maintaining a facility that it has no proprietary interest in.

OPTIONS AND RECOMMENDED WAY FORWARD

6. The options for dealing with this situation are:
 - a) Do nothing and Fylde Council carry on maintenance and management of the play area. This may or may not include replacement of any equipment in the future.
 - b) Fylde Council withdraws entirely. Equipment would be left unmaintained and eventually fall into disrepair and may become dangerous. Although Fylde Council would be unlikely to be legally responsible for the equipment, there will be an expectation locally that the council should not abandon the site.
 - c) Fylde Council makes an application for adverse possession to the Land Registry and if successful transfer the land to Elswick Parish Council.
 - d) Fylde Council makes a compulsory purchase order on behalf of Elswick Parish Council (which doesn't have the powers to do this), with a view to regularising the ownership position (Under this process the council would have to pay the compensation to the owner as well - even if the owner is not identified, the compensation is paid into the court). The parish council would need to underwrite the costs of this.

It is recommended that option c) (make an application for adverse possession) is the most appropriate way forward at this stage.

ADVERSE POSSESSION

7. Acquiring land by adverse possession is the process by which a person who is not the legal owner of the land can become the legal owner by proving possession of the land for a specified period of time. As the land is unregistered the period would be 12 years under the Limitation Act 1980.
8. There are two elements to adverse possession:
 - Factual Possession, and
 - Intention to possess.

The case for and against each is discussed in the following paragraphs:

¹ Voluntary registration of land at the Land registry was not in place at the time the area was developed.

9. To show Factual Possession, the land must have been in the applicant's possession for 12 years up to the date of application. The test is there must be a sufficient degree of exclusive physical control over the land and the applicant must have the necessary capacity to exercise exclusive physical control. What is deemed 'sufficient' will depend on the circumstances of that particular case and the manner in which the land is used. In broad terms the claimant must be shown to have been dealing with the land as an occupying owner would have expected to deal with it and no one else must have done so.
10. Our evidence in support of factual possession will be maintenance inspection schedules which document when inspections and repairs have been carried out. This demonstrates that the borough council has dealt with it in terms of maintenance, upkeep and looking after the land.
11. As a play area, the council has clearly not exerted exclusive control in the sense of excluding all others. However, case law² suggests that for certain kinds of land, the necessary factual possession can be established without all other person being excluded from the land.
12. To show intention to possess, there needs to be shown an intention to possess the land on the council's own behalf and exclude all others (as far as reasonably practicable), however an intention to possess is not the same as an intention to own or acquire ownership. The evidence needed to show factual control would also be material in showing an intent to possess.

ASSESSMENT

13. Fylde Council have maintained this play area for many years. Regular inspection, repair and maintenance of the play facilities has been undertaken and also repairs to the lighting column. It is considered that an application for adverse possession based on the information held, being that Fylde Council have maintained the equipment for many years, can be made.
14. Officers have met with representatives from Elswick Parish Council to establish a way forward. Elswick Parish Council confirm that they would support an application by Fylde Council for adverse possession of the land, and state they do not know of any other organisation or individual that would object or make a claim for the land themselves.
15. If Fylde Council are successful with the application for adverse possession, Elswick Parish Council have confirmed that they would support the transfer of the land to them. Although, the Parish Council would require some financial assistance from Fylde Council to support to replace missing items and carry out surfacing repairs.
16. Elswick Parish Council have confirmed that they are willing to contribute £10,000 if Fylde Council will contribute the remaining amount of funds to carry out the required works. The estimated figure to carry out all the works required is circa £40,000. This would include replacement of missing and deteriorating equipment, new fencing and surfacing, furniture, path and lighting repairs. The site already has a group of parents who have raised circa £2000 towards future improvements, and Elswick Parish Council have confirmed that they will work with Fylde officers to work through the 10-point community parks development plan.
17. Elswick Parish Council have also confirmed that they would be responsible for the future maintenance of the play area and would cover the annual maintenance costs currently incurred by Fylde Council.
18. If the application is unsuccessful, it means another claim cannot be made for a further 2 years, however option d) (a Compulsory Purchase Order (CPO)) would still be available.
19. Regardless of being successful or not, by submitting a claim Fylde Council would be covering all avenues before considering whether to take the formal CPO route which is a longer process.

Thorpe v Frank and Another [2019] EWVA CIV 150: Repaving a Forecourt was sufficient for adverse possession claim under the Limitation Act 1980. In this case the relevant area had always been open plan in character and paving with a permanent surface was a clear assertion of possession sufficient for the purposes of the Limitation Act 1980 and material in determining that possession had been taken. In the case of open land, it was generally impossible to secure every part of the boundary so as to prevent intrusion. It did not matter that, after the work, the (true) owner could continue to pass and repass over the area as before. The case is noteworthy as it establishes that laying paving alone may suffice to establish possession, though it will depend upon the nature of the land and how it is used. Although no authority had been put forward where paving alone had been found to constitute possession, in a number of cases making physical changes to the surface of land had been held to be material in determining that possession had been taken

20. It is therefore recommended that an application for adverse possession (c above) is made to the Land Registry and if successful the land then be transferred to Elswick Parish Council.
21. If subsequently the application is unsuccessful a report will be brought to members outlining the implications of a CPO application.

IMPLICATIONS	
Finance	The report proposes making an application for adverse possession of the play area to the Land Registry and if successful transferring the land to the parish council. The costs of this process are estimated to be £80 and will be met from existing revenue budgets.
Legal	The legal implications of this are outlined in the report.
Community Safety	None arising from this report
Human Rights and Equalities	None arising from this report
Sustainability and Environmental Impact	None arising from this report
Health & Safety and Risk Management	None arising from this report

LEAD AUTHOR	CONTACT DETAILS	DATE
Paul Walker	mailto:paul.walker@fylde.gov.uk paul.walker@fylde.gov.uk 01253 658431	4 June 2021

BACKGROUND PAPERS		
Name of document	Date	Where available for inspection
None		

Attached documents –
Appendix 1 – Location/site plan