

Strategy and Resources Committee

29 September 2022

HORTON CEMETERY

Head of Service:	Mark Shephard, Head of Property and Regeneration
Wards affected:	(All Wards);
Urgent Decision?(yes/no)	No
If yes, reason urgent decision required:	
Appendices (attached):	Appendix 1 - A clear, impartial guide to compulsory purchase (RICS) Appendix 2 - Confidential Budget Breakdown Appendix 3 - Confidential Counsel's Opinion

Summary

This report considers a formal request from a local charity for the Council to exercise its compulsory purchase powers to acquire Horton Cemetery.

Recommendation (s)

The Committee is asked to:

- (1) Decline the formal request for the Council to use its statutory powers to compulsorily purchase Horton Cemetery.
- (2) Agree for officers to act as a third-party facilitator to explore if the owner would be willing to sell the site to the FHC.

1 Reason for Recommendation

- 1.1 The Council has been asked by a local charitable organisation, The Friends of Horton Cemetery ("the FHC"), to exercise its statutory powers to compulsorily purchase Horton Cemetery for the benefit of the community.
- 1.2 The FHC has now requested confirmation of the Council's official position in the use of a Compulsory Purchase Order (CPO).

2 Background

Strategy and Resources Committee 29 September 2022

- 2.1 Horton Cemetery is a derelict 5-acre cemetery historically linked to Epsom's five former psychiatric hospitals comprising the Manor, Horton, St Ebba, Long Grove and West Park Asylums, collectively known as the "Epsom Cluster".
- 2.2 The site has not been used for burials since the 1950s and was sold by the Department of Health & Social Care in 1983 to a private property company. Since private ownership, the rectangular site has reverted to its natural state, a woodland, as shown in the photograph below.



- 2.3 As a natural woodland (and given the rural setting of the surrounding area), the land is not considered to be inherently untidy.
- 2.4 Above ground, the only evidence today of the former hospital cemetery are the boundary railings and a number of original trees (the previous chapel and gravestones all removed). Below ground, Epsom & Ewell History Explorer's website confirms approximately 8,450 patient burials.

Strategy and Resources Committee

29 September 2022

2.5 At its 9 September 2021 meeting, the Council's Licensing and Planning Policy Committee agreed to the Local Listing of Horton Cemetery, including the boundary railings and a war memorial built in 2004 outside the railings and facing onto Horton Lane. The Local Listing will aid in protecting the site from development which would be considered harmful to its historic significance.

2.6 The FHC is active in raising the site's historic profile and their stated goal is to:

"Bring dignity and respect to the thousands of mental health patients, including war heroes, who died within the Epsom Cluster of asylums and are buried, forgotten and unmarked on a neglected piece of land in Surrey, England.

Our ambitious plans include reclaiming the derelict site and transforming it into a beautiful, calming garden-arboretum, with a lasting memorial and 'book of the dead' containing the names and details of all known burials."

The FHC were instrumental in securing the Local Listing. They have also tried repeatedly, without success, to acquire ownership of the site.

Further information on the FHC and the history of Horton Cemetery can be found on their website:

<https://hortoncemetery.org/>

3 Site value – indicative market value

3.1 The site is both a former cemetery and a woodland.

3.2 Market value is an estimate of the likely price an asset will sell at or more technically; *"The estimated amount for which an asset will sell between a willing buyer and a willing seller in an arm's length transaction after property marketing where the parties had each acted knowledgeably, prudently and without compulsion."*

3.3 It therefore follows that where an asset has several uses or functions, a seller will likely achieve the best sale price by ensuring the marketing includes the most valuable use.

3.4 The definition of a woodland by The Oxford English Dictionary is; *"land covered with trees"*. Horton Cemetery is clearly woodland and supported by the site's Tree Preservation Order (TPO) 319/A1 dated 8 May 1996; *"For land at former cemetery, Hook Road, Epsom – area comprising Poplars, Horse Chestnuts, Sycamores, Sweet Chestnuts, London Plane, Ash, Acacia, Copper Beech, Oak, Lime, Maple and Lawsons Cypress."*

Strategy and Resources Committee

29 September 2022

- 3.5 As a former cemetery, the site has nominal commercial development value as the costs associated in preparing the site (mass exhumation and associated remediation) would almost certainly render it financially unviable.
- 3.6 Furthermore, the former cemetery is protected from commercial development by the Disused Burial Grounds Act 1884. Section 3 of the Act provides; *“It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship.”*
- 3.7 However, this does not prevent Horton Cemetery deriving value as an amenity woodland. An amenity woodland is; *“typically small areas of woodland, such as shelter belts, not managed as either commercial woodland or short rotation coppice.”*
- 3.8 In contrast to a commercial woodland, the site is left in its natural state for the owner to enjoy the amenity woodland’s wellbeing benefits. Activities of a commercial nature and which would ordinarily require planning consent (such as tree harvesting, paintballing, off road biking, etc) do not take place.
- 3.9 In its Amenity Woodland Spotlight dated October 2021, Savills mention:
“According to Forest Research, around 50% of people who have visited local woodlands as a result of Covid-19 restrictions reported an increase in their level of happiness when in the woods.”
- 3.10 They go further to state that:
“Since the lockdowns, we have seen an increase in demand for amenity woodland – clients are coming to us wanting to buy pockets of woodland as places to escape the city and reconnect with nature.”
- 3.11 Savills report that the average price for a woodland (under 5 ha) across the UK from 2017 – 2021 is £45,000. The report is assessable in the link below:
- 3.12 https://www.savills.co.uk/research_articles/229130/320470-0
- 3.13 Amenity woodlands for sale are available on many public websites including:
<https://www.woodlands.co.uk/>
<https://www.woods4sale.co.uk/>
- 3.14 South East woods recorded as sold on the above websites were marketed with the following guide prices:
- | | | |
|--------------------------------|------------|---------|
| Garrison Copse, near Guildford | 3.16 acres | £54,500 |
|--------------------------------|------------|---------|

Strategy and Resources Committee

29 September 2022

Waddler Wood, near Guildford	2.23 acres	£38,000
Buffers Wood, near Winchester	5 acres	£89,000
Saddle Wood, Tunbridge Wells	4 acres	£75,000
Cradle Wood, Rye, East Sussex	5 acres	£95,000

4 Compulsory Purchase Order - site acquisition compensation

- 4.1 The basis of compensation payable for the compulsory acquisition of land is based on the principle that the owner should be paid neither less nor more than their loss.
- 4.2 There are several components to CPO compensation but the relevant one to Horton Cemetery is market value under the Land Compensation Act 1961, section 5, rule 2:
- “5(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.”*
- 4.3 The determination of Horton Cemetery’s market value would form an important element of the CPO process and be assessed on the Council’s behalf by specialist valuers. The process further allows for the market value to ultimately be determined by the Upper Tribunal (Lands Chamber) in the absence of agreement between the respective specialist valuers.
- 4.4 Based on Horton Cemetery being a 5-acre Surrey site and with due regard to the publicly available information contained in paragraphs 3.10 to 3.13, it is reasonable to assume that its market value could be in excess of £100,000 as amenity woodland. The total cost of land acquisition could be even higher if the case went to Tribunal.
- 4.5 A consumer guide published by the RICS – *A clear, impartial guide to compulsory purchase* – is attached at Appendix 1. Attention is drawn to page 11 which explains compensation is paid to reflect the market value of the land / property that is being compulsorily acquired.

5 Land acquisition using compulsory purchase powers

- 5.1 The use of a CPO is one of last resort and there must be a compelling case in the public interest for the Council to use the powers.
- 5.2 In promoting a CPO the Council should be sure that the purposes for the CPO justify interfering with the human rights of those with an interest in the land affected. The Council must also take into account its public sector equality duty contained in the Equality Act 2010.

Strategy and Resources Committee

29 September 2022

- 5.3 There are a range of enabling statutory powers depending on the purpose for which the land is being acquired. In its latest guidance update (July 2019) to acquiring authorities, the Department for Levelling Up, Housing and Communities (DLUHC) reiterates best practice to use the most specific power available for the purpose in mind, and to only use a general power when a specific power is not available.
- 5.4 A general power to acquire is contained in section 121 Local Government Act 1972 and the Act further allows under section 214, a single specific power to acquire land for a statutory function, including the operation of cemeteries.
- 5.5 Previously in April 2018, the Committee considered a paper seeking authority to use a CPO to extend Epsom Cemetery to provide further burial capacity in the Borough. A CPO would have been pursued as a last resort but fortunately, was not required as agreement was reached with the private landowner.
- 5.6 The Council does not consider section 214 would apply to Horton Cemetery as the purpose of the acquisition is not for the statutory function to provide burial capacity. In contrast, the purpose as proposed by FHC is to acquire the land for its environmental, historical and cultural significance.
- 5.7 To acquire Horton Cemetery using a CPO would therefore require reliance on a general power and Section 226 of the Town and Country Planning Act 1990 is typically used to acquire land compulsorily for development and other planning purposes. This broad power can be used where no single specific compulsory purchase power is appropriate.
- 5.8 To exercise its compulsory purchase powers under section 226, the Council would need to consider whether there is a public interest in acquiring Horton Cemetery. Under section 226(1A), the acquisition would need to satisfy the following:

“(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects—

- the promotion or improvement of the economic well-being of their area;*
- the promotion or improvement of the social well-being of their area;*
- the promotion or improvement of the environmental well-being of their area.”*

Strategy and Resources Committee

29 September 2022

- 5.9 An acquiring authority must dedicate extensive resource both in terms of time and cost to successfully exercise a CPO. Secretary of State approval (DLUHC) is required before any CPO can be exercised. It is very process driven and specialist external legal and CPO property advice would be required by the Council.
- 5.10 External legal and property consultants would advise on procedure, justification and valuation, draft orders and represent the Council in any proceedings.
- 5.11 The Council does not have in-house property or legal resource to prepare or undertake a CPO. To coordinate the various external appointments, the Council would require a temporary internal project management resource.
- 5.12 For the Council to be in a position to seek DLUHC consent would take at least 18 months and would almost certainly include a public inquiry. The government's target for deciding compulsory purchase orders is 20 weeks from the close of a public inquiry with the remaining cases to be decided within 24 weeks. It is therefore likely that the whole process could take 2 – 3 years to complete.
- 5.13 Furthermore, there is no guarantee that the CPO will be confirmed by the DLUHC. If it is not confirmed, the reasonable costs of remaining objectors will need to be met by the Council.
- 5.14 The RICS consumer guide at Appendix 1 explains the CPO application process on page 4 and the necessity to obtain DLUHC approval. It is the Secretary of State who will decide if the CPO should be authorised and not the local authority.
- 5.15 A total project budget requirement of £342,000 is considered necessary to pursue a CPO acquisition of Horton Cemetery. There would also be a need to identify further annual savings or additional income to fund the estimated annual maintenance requirement of £22,000 per annum.
- 5.16 A full confidential breakdown of the estimated acquisition costs is attached at Appendix 2. It is considered commercially sensitive due to the inclusion of untendered external consultancy fees.

6 Counsel's Opinion

- 6.1 As explained in paragraph's 5.12 to 5.14 above, it is not the Council that determines whether a CPO is ultimately progressed, it is the Secretary of State that issues the authorisation.
- 6.2 To assess whether approval would be forthcoming from the Secretary of State, the Council has taken Counsel's opinion from a specialist chambers in planning and CPO law.

Strategy and Resources Committee

29 September 2022

- 6.3 Counsel is in agreement that an applicable statutory power to undertake a CPO has been identified. However, this is a separate question from whether a compelling case for compulsory acquisition exists.
- 6.4 Counsel confirms that there are several significant impediments to the Secretary of State receiving the assurance necessary to authorise a CPO.

These include:

- 6.4.1 **Human Rights** – *“Whether the landowner is a human individual or a limited company, they have human rights protected by Article 1 of the First Protocol to the European Convention on Human Rights. This protects property and prevents deprivation of property otherwise than in accordance with the law and which is necessary for specified purposes and proportionate. If there is no compelling case for acquisition when tested against the policy requirements in the CPO Guidance, then it is likely that the compulsory acquisition would be found to be an impermissible disproportionate interference with the rights given qualified protection by the Convention.”*
- 6.4.2 **Attempts at Voluntary Acquisition** - Compulsory purchase is intended to be used as a last resort after all attempts at negotiation have failed. Correspondence sent to the owner from the FHC clearly states the Charity’s intentions and ambitions for the site. However, this approach has failed to induce negotiations between the parties. *“Trying to promote a CPO with no attempt at acquisition would fail, save in the most extreme or urgent situations, of which this is not one.”*
- 6.4.3 **Funding** – *“The CPO guidance makes it plain that the Secretary of State is unlikely to consider that a compelling case for compulsory acquisition exists unless the scheme underlying the CPO is going to be funded so as to make it deliverable”.*

The FHC has provided no evidence of the funds required to indemnify the Council for its CPO acquisition costs or the ongoing maintenance liability. The FHC maintains its intention to pursue fund raising once the Council has acquired the land and transferred it to the Charity.

If the Council funded the CPO from its Corporate Projects Reserve, it would substantially reduce the funds available for other corporate and capital priorities.

The Council has no budget identified to fund the estimated recurring post CPO maintenance costs of £22,000 per annum. To fund this liability on an ongoing basis, either additional recurring income or savings from services would need to be identified.

Strategy and Resources Committee

29 September 2022

To reiterate the comments in paragraph 10.4 (Section 151 Officers Comments); *“In general terms, Councils shouldn’t enter into unfunded future commitments. No budget has been identified to fund any future annual maintenance costs associated with the cemetery, and with the Council already facing a projected revenue budget deficit of £1.8m from 2023/24 (as reported to Strategy and Resources in July 2022), the Council’s reserves are already likely to come under substantial pressure in future years. As such, unless funding*

can be identified, the Council’s budget does not appear to support a CPO acquisition and the future annual associated maintenance liability of the cemetery.”

- 6.5 The FHC has stated; *“The point of a CPO is to open the Cemetery to the public and to properly respect the dead.”*
- 6.6 Counsel concludes; *“There is no convincing justification for compulsory purchase under the 1990 Act (or any other power) at present. I accept that providing and maintaining a respectful setting for the dead is an important matter but that will not be a determinative factor in itself.”*
- 6.7 Counsel’s opinion is attached at confidential Appendix 3.

7 Proposal

- 7.1 It is not recommended the Council exercises its statutory powers to compulsorily purchase Horton Cemetery for the FHC because:
- There is insufficient statutory justification available to the Secretary of State to authorise a CPO;
 - There is no identified revenue funding from either the FHC or the Council;
 - There is no identified capital funding from the FHC and the Council’s limited reserves are already likely to come under substantial pressure in future years.
- 7.2 Notwithstanding the above, the Council is sympathetic to the FHC’s objective and in this regard, has tentatively engaged with the private owner of the site.
- 7.3 It is therefore recommended the Council offers the FHC its support by acting as a third party facilitator to explore if the owner would be willing to sell the site to the FHC.

8 Risk Assessment

Legal or other duties

Strategy and Resources Committee

29 September 2022

8.1 Equality Impact Assessment

8.1.1 Not applicable.

8.2 Crime & Disorder

8.2.1 Not applicable.

8.3 Safeguarding

8.3.1 Not applicable.

8.4 Dependencies

8.4.1 None.

8.5 Other

8.5.1 None.

9 Financial Implications

9.1 To avoid incurring costs in relation to Horton Cemetery, the Council can decide to decline the request at this stage, as per recommendation 1.

9.2 If the Council decided to pursue a CPO, the estimated one-off costs of £342,000 could be funded from the Corporate Projects Reserve (revenue element) and the Capital Receipts Reserve (capital element). However, this would reduce the funds available for other corporate and capital priorities. While the capital receipts reserve holds an estimated balance of £3.3m, the reserve is already close to the minimum threshold of £1m when considering future capital liabilities as set-out in the Council's Asset Management Plan.

9.3 The Council has no budget identified to fund the estimated recurring post-CPO maintenance costs of £22,000 per annum. To fund this liability on an ongoing basis, either additional recurring income or savings from services would need to be identified.

9.4 **Section 151 Officer's comments:** In general terms, Councils shouldn't enter into unfunded future commitments. No budget has been identified to fund any future annual maintenance costs associated with the cemetery, and with the Council already facing a projected revenue budget deficit of £1.8m from 2023/24 (as reported to Strategy and Resources in July 2022), the Council's reserves are already likely to come under substantial pressure in future years. As such, unless funding can be identified, the Council's budget does not appear to support a CPO acquisition and the future annual associated maintenance liability of the cemetery.

10 Legal Implications

Strategy and Resources Committee

29 September 2022

- 10.1 An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. In making this assessment an acquiring authority should have regard, in particular, to the provisions of Article 1 of the First Protocol and Article 6 of the European Convention on Human Rights (“the Convention”), and Article 1 states that:
- “...Every natural or legal person is entitled to peaceful enjoyment of his possessions... no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law...”*
- 10.2 Although the owner of the land will be deprived of their property if the CPO is confirmed, this will be in accordance with the law and appropriate financial recompense will be made. However the acquisition of land “in the public interest” is specifically allowed by the Convention and if there is a compelling case in the public interest for the compulsory acquisition of land which outweighs the Convention rights and the use of compulsory purchase powers in this matter must be proportionate.
- 10.3 The Council is empowered under s 226(1)(a) of the Town and Country Planning Act 1990 (TCPA) as amended, to acquire any land in its area if it is satisfied that the proposed acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. The Council may utilise its compulsory purchase powers under section 226 of the TCPA:
- A if it thinks the acquisition will facilitate the carrying out of development, or redevelopment or improvement on, or in relation to the land or
 - B which is require for a purpose which is necessary to achieve in the interests of the proper planning of an area in which the land is situated
- 10.4 In order to make an acquisition under section 226(1)(a) of the TPCA, the Council must also consider that the development, redevelopment or improvement will contribute to the promotion or improvement of the economic social or environmental well-being of its area.
- 10.5 The Acquisition of Land Act 1981 governs the procedures which apply to compulsory acquisition. The Compulsory Purchase Act 1965 governs post confirmation procedures and the Land Compensation Act 1961 governs the amount and assessment of compensation.
- 10.6 The Council must pay due regard to its Public Sector Equality Duty (PSED) as set out in section 149 of the Equalities Act 2010
- 10.7 **Legal Officer’s comments:** As set out above and in the body of the report.

Strategy and Resources Committee

29 September 2022

11 Policies, Plans & Partnerships

11.1 **Council's Key Priorities:** The following Key Priorities are engaged:

11.2 **Service Plans:** The matter is not included within the current Service Delivery Plan.

11.3 **Climate & Environmental Impact of recommendations:** An acquisition of the land using its CPO powers would give EEBC the right as landowner to ensure the site remains open and the historic asset retained. However, this is currently addressed through the Council's planning powers assisted by the recent Local Listing.

11.4 **Sustainability Policy & Community Safety Implications:** Not applicable.

11.5 **Partnerships:** None.

12 Background papers

12.1 The documents referred to in compiling this report are as follows:

Previous reports:

- Horton Cemetery, Strategy & Resources Committee Special meeting 5 May 2022 (Paper withdrawn prior to meeting and not discussed)

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=132&MId=1370>

- Local Listing of Horton Cemetery, Licensing and Planning Committee 9 September 2021

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=131&MId=1170>

- Epsom Cemetery Extension, Strategy & Resources Committee 17 April 2018

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=132&MId=420>

Other papers:

- Guidance on Compulsory purchase process and The Crichel Down Rules, Department for Levelling Up, Housing & Communities July 2019