THE OPEN LAND PROBLEM, SYLVANIA ESTATE, EXETER
EXETER CITY COUNCIL AND THE PUBLIC OPEN SPACES CHARITABLE TRUST

1. INTRODUCTION

This document sets out the results of some research undertaken in August 2011. It confines itself only to facts and describes the relevant roles and responsibilities that Exeter City Council (ECC) and the Public Open Spaces Charitable Trust (POSCT) have a) in general and b) specifically in terms of maintenance of the land in question.

This is a summary of the main report that starts at section 2, below, for easier interpretation of what follows. Anything printed in *italics* is a direct quote from a document.

2. SUMMARY

2.1 CHARITABLE TRUSTS IN GENERAL

2.1.1 Beneficiaries CANNOT bring a court case against Trustees.

2.1.2 Jurisdiction over charitable disputes is shared equally between the High Court of Justice and the Charity Commission. The Charity Commission is the first port of call. However, as long as a Trust stays within its own rules and is properly administered, the regulators (The Charity Commissioners) generally cannot tell the trustees what to do.

2.2 THE PUBLIC OPEN SPACES CHARITABLE TRUST (POSCT)

2.2.1 On 12th October 1989 the developers of the estate, Costain Homes, transferred part of the land on the Sylvania estate to the POSCT. Costain Homes was purchased by Redrow in 1993.

2.2.2 The object of the Trust is very wide. ie: “Upon trust to hold the same as a public open space to the intent that the same may at all times hereafter be available to and be used by the public at large for the purpose of recreation”.

2.2.3 The POSCT Deed of Trust (25.10.1989) states that “The trustees shall at all times hereafter maintain cultivate and preserve the land in good order heart and condition”

2.2.4 The POSCT says it has no funds to undertake any maintenance on the Sylvania Estate other than essential health and safety work.

2.3 TOWN AND COUNTRY PLANNING

The outline planning approval for the estate was granted under Section 52 of the 1971 Town and Country Planning Act.

2.4 EXETER CITY COUNCIL

2.4.1 Exeter City Council has provided us with a copy of the “Section 52” agreement dated 17th May 1978 between the City Council and the estate developers. The agreement includes (amongst other things) sections regarding i) landscaping / planting requirements and ii) future maintenance of public open space on the estate, which was to be built in five stages.
2.4.2 Regarding future maintenance, the agreement set out the terms under which (at that time) Exeter City Council would have been prepared to adopt the open spaces on the estate. Those terms included a one-off payment from the developer to the Council to cover future open land maintenance costs.

2.4.3 In 1978 The City Council required a total payment of £12,138\(^1\) from developers in order for the Council to adopt and maintain the open spaces across the whole of the proposed development (Which is the area bounded to the south by the stream behind Sheppard Road etc, to the west by Pennsylvania Road and to the north and east by what is now the bridle path that runs from the end of Queensland Drive and along the back of the houses in Stoke Valley Road).

2.4.4 The Linnet Close / Plassey Close area was in phase 2 and 3 of the development. The City Council required a total payment of £6,699\(^2\) from the developers in order that the Council would adopt and maintain the open land in those two phases.

2.4.5 There was no obligation whatever on the developers to secure adoption of the open spaces by the City Council because developers may make their own arrangements if they so wish. In 1989 Costain Homes chose to transfer responsibility for maintenance of the open land in question to the POSCT, not to the City Council.

2.4.6 It is the responsibility of the City Council Under paragraph (2) of Section 52 of the Town and Country Planning Act, to enforce Section 52 agreements. (“An agreement made under this section with any person interested in land may be enforced by the local planning authority”)

2.4.7 Today’s equivalent of a section 52 agreement is called a section 106 agreement and works in much the same way. Exeter City Council has a specific fund into which section 106 contributions from developers are paid. During the year 1 April 2010 and 31 March 2011 that fund received contributions of £341,139.73. A publicly available report to the City Council Planning Committee on 18\(^{th}\) April 2011 does not specify the total amount of money held in that fund, nor does it give full details of spending financed from the fund during 2010-2011.

2.4.8 Exeter City Council does not accept responsibility for the maintenance of the land in question because it never received any payments from the estate developers to fund such work.

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\(^1\) According to the Bank of England’s inflation calculator this would be about £54,000 at today’s values.

\(^2\) About £30,000 at today’s values.
3. WHAT ARE THE ROLES AND RESPONSIBILITIES OF THE PUBLIC OPEN SPACES CHARITABLE TRUST?

3.1 WHAT IS A CHARITABLE TRUST?

In England and Wales, charitable trusts are a form of express trust dedicated to charitable goals. There are a variety of advantages to charitable trust status, including exception from most forms of tax and freedom for the trustees not found in other types of English trust. To be a valid charitable trust, the organisation must demonstrate both a charitable purpose and a public benefit.

Charitable trusts, as with other trusts, are administered by trustees, but there is no relationship between the trustees and the beneficiaries. This results in two things;

a) The trustees of a charitable trust are far freer to act than other trustees and
b) Beneficiaries cannot bring a court case against the trustees.

A Trust will be able to take advantage of many tax benefits. Apart from the tax relief on an individual’s donations to the trust, it will not pay tax on its investment income. It will not pay corporation tax or inheritance tax, or business rates (there is mandatory relief against business rates at 80% and a further 20% on a discretionary basis) if it eventually runs its own office. Also a Trust will not have to register for VAT, unless it is supplying a significant amount of products or services that are subject to VAT. This is unlikely if it is simply making grants to other charitable organisations.

Outside supervision of Trusts like POSCT comes from the Charity Commission for England and Wales. Once the Trust has been registered it must publish a formal annual report and accounts which should include a list of any grants made to organisations and report any significant changes to the trust. This involves some paperwork but is generally not a huge burden. As long as the Trust stays within its own rules and is properly administered, the regulators generally cannot tell the trustees what to do.

There are several ways of setting up a trust, but the basic model needs:

- A donor (or 'settlor');
- Trustees;
- Charitable purposes (which set out the type of causes the trust can support); and
- A trust deed (which forms the trust’s constitution).

The trustees hold and control the Trust’s assets. They decide how the income and capital (assets) of the Trust should be distributed, and make sure that this is in line with the charitable purposes of the Trust.

There are two sets of potential liabilities that charity trustees face.

(a) The first is in respect of the duties owed to the charity to act with the necessary care and not to act outside the objects and powers of the charity. If trustees cause a loss to the charity, either through a lack of proper care or by spending money for purposes outside the charity’s objects, they can be called upon to refund the charity out of their own resources.

(b) The second set of liabilities has to do with potential claims by third parties. Examples of these would be: claim for damages for personal injuries; claim for compensation for unfair dismissal by an employee; claim for breach of contract by a supplier of goods and services
(e.g. building contractor on building project); claim for damages in respect of “wrong”
counselling advice. It is in respect of these potential claims that insurance protection can be
purchased by trustees.

The charitable purposes, or aims, form part of the Trust deed and describe the sort of causes that
the trust can support. These can be worded in quite a general way so the trustees can keep their
options open and allow the areas of interest to develop over time, or they can be very specific to
ensure that the funds are distributed for the purpose intended by the donor. The charitable
purposes must be for public benefit within the purposes that the law regards as charitable, which
include relieving poverty, promoting education or religion, or helping the community in many other
ways.

The trust deed is the constitution of the charitable trust. It sets out the framework within which the
trustees must operate. Apart from describing the charitable purposes the Trust has been set up for
(which can be general), a Trust deed will generally describe:

- The powers and responsibilities of the trustees;
- How they are appointed and removed;
- The approach to investment;
- How the constitution (but usually not the charitable purposes) can be altered; and
- What will happen after the death of the donor (settlor).

3.2 HOW ARE DISPUTES WITH CHARITABLE TRUSTS RESOLVED?

Jurisdiction over charitable disputes is shared equally between the High Court of Justice and the
Charity Commission. The Commission, the first port of call, is tasked with regulating and promoting
charitable trusts, as well as providing advice and opinions to trustees on administrative matters.

Where the Commission feels there has been mismanagement or maladministration, it can sanction
the trustees, removing them, appointing new ones or temporarily taking the trust property itself to
prevent harm being done. Where there are flaws with a charity, the High Court can administer
schemes directing the function of the charity.
3.3 WHAT IS THE PUBLIC OPEN SPACES CHARITABLE TRUST?

The following summary information about POSCT has been obtained from the Charity Commissioners website.

PUBLIC OPEN SPACES CHARITABLE TRUST

Reg. Number - 328402
Contact - ESTATES & MANAGEMENT LTD, MOLTENO HOUSE, 3, 302 REGENTS PARK ROAD, LONDON, N3 2JX. Tel: 0208 371 2827
Trustees - Mr Walter Kenneth Goldsmith (Who is also a trustee of the Jewish Music Institute) and Mr Michael John Gaston
Governing document - Trust Deed is dated 25th October 1989
Area of benefit - Not defined
Charitable objects - UPON TRUST TO HOLD THE SAME AS A PUBLIC OPEN SPACE TO THE INTENT THAT THE SAME MAY AT ALL TIMES HEREAFTER BE AVAILABLE TO AND BE USED BY THE PUBLIC AT LARGE FOR THE PURPOSE OF RECREATION.
Date registered - 02 November 1989
Classification:
What – General charitable purposes
Who – The general public / mankind
How – Provides buildings / facilities / open space

3.4 WHAT DOES THE TRUST DEED SAY ABOUT THE PURPOSES OF POSCT?

On 12th October 1989 Costain Homes (*) transferred part of the land on the estate to the POSCT.

The Deed of Trust that created the Public Open Spaces Charitable Trust was signed on 25th October 1989, “to the intent that such land should be at all times hereafter be held by the Trustees as open spaces for the enjoyment thereof by a public at large for the purpose of recreation”.

Section 3 of the Deed states that “The trustees shall at all times hereafter maintain cultivate and preserve the said land in good order heart and condition”.

Other provisions in the Deed (ie: Trusts power to impose regulations, investment management, appointment of new trustees, solicitor’s costs) are not directly relevant here)

* Note: In July 1993 COSTAIN eased its debt burden and departed from the British private sector house-building market when it sold its loss-making Costain Homes division for £23 million. The buyer, Redrow, became the UK’s largest private property group.

3.5 WHAT WE KNOW ABOUT POSCT

POST is a charity (Reg 328402), formed on the 25th October 1989. It has the objective to maintain public open spaces in the United Kingdom. It receives income from ground rent, charitable donations and bank / mortgage interest. Expenditure includes open spaces management and management fees.

* Molento House (a modern building in Finchley, London) is also the registered address of a number of the many companies of which Michael Gaston, a Trustee of POST, is (or was) a Director.
The accounts of the charity are available on the Charity Commissioners website ([http://www.charity-commission.gov.uk/](http://www.charity-commission.gov.uk/)).

Here is a summary of the accounts of the charity each year since 2006

<table>
<thead>
<tr>
<th>Year</th>
<th>Income</th>
<th>Expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>£5,900</td>
<td>£19,900</td>
</tr>
<tr>
<td>2007</td>
<td>£5,400</td>
<td>£27,400</td>
</tr>
<tr>
<td>2008</td>
<td>£5,500</td>
<td>£32,000</td>
</tr>
<tr>
<td>2009</td>
<td>£29,100</td>
<td>£44,900</td>
</tr>
<tr>
<td>2010</td>
<td>£36,700</td>
<td>£33,000</td>
</tr>
</tbody>
</table>

In financial terms the charity is extremely small and accrued a loss each year up until 2010. The 2009 accounts included the following statement. “There was a continued increase in resources (spent) due to increased costs of maintaining various sites. Every effort is being made ... to rectify this position by restricting expenditure to current income”.

The financial rectification – which started in 2010 - is presumably one of the reasons why the ground maintenance of the area in Sylvania is no longer being undertaken to a satisfactory standard.

At 31st March 2010 POST showed fixed assets in its accounts worth £12,690, being “Tongham Meadows”, £9,500 and “St Peters Place”, £3,190. The former is a modern housing estate near Guildford in Surrey. We have not been able to trace the latter. There is no valuation in the accounts of any other land ownership anywhere in the UK. We assume the reason for that is that all other POST landholdings such as that on the Sylvania Estate are “worthless” (In accounting terms).

The total acreage of ‘worthless’ land that POST owns is unknown.

The POSCT charity states that it is now so short of funds that it can only pay for essential health and safety maintenance work.
4. WHAT ARE THE ROLES AND RESPONSIBILITIES OF EXETER CITY COUNCIL?

4.1 WHAT IS TOWN AND COUNTRY PLANNING?

During World War 2 a series of Royal Commissions looked at the problems of urban planning and development control. These studies resulted in: The New Towns Act (1946) and the Town and Country Planning Act (1947).

The 1947 Act, in effect, nationalised the right to develop land. It requires all proposals, with a few exclusions, to secure planning permission from the local authority, with provision to appeal against refusal. The Act—the essential nature of which is unchanged—requires local authorities to develop local plans to outline what kind of development is permitted where, and to mark special areas on Local Plan Maps.

This is a copy of part of the Act of Parliament that was in force at the time planning consent was given to the building of the estate:

Town and Country Planning Act, 1971, PART III

GENERAL PLANNING CONTROL

Additional powers of control

Section 52 - Agreements regulating development or use of land

(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

(2) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land, as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

The planning system underwent a number of alterations over the years, which were consolidated in the Town and Country Planning Act of 1990. Section 106 of the 1990 Act replaced Section 52 from the previous (1971) Act. These sections cover agreements, (known as "planning obligation agreements," or more commonly "Section 106 (or Section 52) agreements"), under which a developer is subject to detailed arrangements and restrictions beyond those that a planning condition could impose. These may include financial contributions made by the developer beyond the immediate building works to offset development effects on the local community or enhance them.
4.2 WHAT WERE THE TERMS OF THE SECTION 52 AGREEMENT FOR THE SYLVANIA ESTATE?

Exeter City Council has provided us with a copy of the original Section 52 agreement, dated 17 May 1978. Here is a summary of the most relevant parts of the agreement.

i) Under section 52 of the 1971 Town and Country Planning Act, outline planning permission for residential development was granted for the area bounded to the south by the stream behind Sheppard Road etc, to the west by Pennsylvania Road and to the north and east by what is now the bridle path that runs from the end of Queensland Drive and along the back of the houses in Stoke Valley Road.

ii) The whole area was divided into five separate sections, each of which formed the site of a phase of development of the land. The approved plan included the “approximate boundaries of areas of open space and play areas” within the whole development. The Linnet Close / Plassey Close area was within phases 2 and 3.

iii) The agreement set out in detail how the areas of open space and play areas within the development should be landscaped. This included specification of the species, size and density of trees and shrubs to be planted in those areas. Here are some examples:

“Oak trees ... to be planted ... as standards of 16 to 18 centimetres girth”, “all shrubs to be planted as whips 3 to 4 feet in height” and “one large tree ... one small tree ... and one shrub ... per 10 sq. metre run”.

iv) Part of the agreement relates to the future maintenance of the open spaces.

Paragraph 2 states that: “The Council shall not be obliged to take over any open space unless and until a payment has been made to the Council in respect of the area of open space in question”. The one-off payment that the Council required from the developers in order that the Council would adopt and maintain the open spaces in each phase of the development was set as follows, (subject to inflation from the date of the agreement).

<table>
<thead>
<tr>
<th>Phase</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase 1</td>
<td>£2,573</td>
</tr>
<tr>
<td>Phase 2</td>
<td>£3,654</td>
</tr>
<tr>
<td>Phase 3</td>
<td>£3,045</td>
</tr>
<tr>
<td>Phase 4</td>
<td>£1,764</td>
</tr>
<tr>
<td>Phase 5</td>
<td>£1,102</td>
</tr>
</tbody>
</table>

Bearing in mind this was an outline approval and subject to late changes, the one-off payment required for Linnet Close / Plassey Close area (phases 2 and 3) was in the region of £6,699.

It must be noted that there was no obligation whatever on the developers of each phase to secure adoption of the open spaces by the City Council because developers are free to make their own arrangements if they wish. And as we have already seen, in 1989 Costain Homes chose to transfer responsibility for maintenance of the open land to the POSCT, not to the City Council.
4.3 WHAT ARE EXETER CITY COUNCIL’S PLANNING REQUIREMENTS THESE DAYS?

Very broadly, the planning requirements remain as they were at the time the plans for the Sylvania Estate were approved. The City Council’s website sets out the position under current legislation, as follows:

“Planning obligations are agreements entered into between the Council and developers, usually in conjunction with the granting of planning permission. Planning obligations apply to land, binding it and whoever owns it. They are made using powers under section 106 of the Town and Country Planning Act 1990, which is why they are also called ‘section 106 agreements’.”

Also available on the website are the Council’s many standard clauses for section 106 agreements, including agreements made with developers in relation to provision of “Public Open Space”. These specify (amongst other things) the conditions under which the transfer of the Public Open Space (and Play Areas) to the City Council will take place.

4.4 HOW MUCH MONEY DOES THE CITY COUNCIL RECEIVE FROM SECTION 106 AGREEMENTS?

The Exeter City Council website provides general information about the financial contributions developers must pay before the Council will adopt public open space. These conditions apply to developments of 10 or more dwellings

“Schedule A ... contains benchmark figures covering the provision and maintenance of public open space facilities. These reflect current average costs and will be updated regularly. They provide a basis for negotiation and variations may be necessary reflecting particular characteristics of the site”

The amount for “Provision and maintenance of open space for family housing on the development site (no play equipment)” is given as “£380 per dwelling”. This is calculated in the following way:

“Provision of open space for family housing on the site (no play equipment): = Cost of construction by the Council in lieu of the developer”

Plus

“Maintenance of open space for family housing (no play equipment) = Annual cost of maintaining open space for housing x 14; including a contribution towards items requiring maintenance at intervals greater than one year, e.g. retaining walls or fences”.

In effect, this clause requires developers to pay the cost of 14 years of maintenance of an open space to the Council before the Council will accept responsibility for the maintenance work.

The most recent Section 106 agreement monitoring report was presented to the Planning Committee of the City Council on 18th April 2011. The report is 38 pages long and covers all planning obligations arising from development proposals in the City that require financial payments by developers and can be viewed at [http://committees.exeter.gov.uk/mgConvert2PDF.aspx?ID=17847](http://committees.exeter.gov.uk/mgConvert2PDF.aspx?ID=17847)

During the year 1 April 2010 and 31 March 2011 the fund received contributions of £341,139.73

The total £ value of the fund as at 31.3.2011 is not stated in the report.
4.5 HOW DOES THE CITY COUNCIL SPEND THE INCOME FROM SECTION 106 AGREEMENTS?

The way in which the Council uses the money it receives from developers for future maintenance of open spaces is described in general terms on the website:

“17 Money received by the Council for future maintenance of public open space is added to a single interest bearing account into which all payments of this kind are made. A fixed percentage of the total amount in the account is paid to the Parks and Open Spaces Manager every year to be applied specifically for the maintenance of public open space. Other contributions are each paid into a separate interest bearing account. Progress with expenditure of this money is monitored regularly. The results of this are reported to the Council’s Development Control Committee every 6 months”.

If we have understood this correctly it means that in addition to the specific allocation of monies to specific schemes (for example a play area development), a fixed percentage (currently 5%) of the accumulated total of that fund (including interest) is added to the Parks and Open Spaces Manager’s budget each year.

Here is another extract from the report dated 18th April 2011:

“3.1 Total contributions of £341,139.73 were received between 1 April 2010 and 31 March 2011. £129,300.24 was collected in relation to community and leisure schemes (a further £50,000 was received as part of a security deposit in respect of the Crossmead, Barley Lane development). £37,500.00 was received towards environmental enhancements and £124,339.49 was collected in relation to eight schemes for highway improvements, public transport, traffic orders and travel packs (Table 14).

3.2 Information on financial contributions spent is only presently available in relation to Highway and Transportation issues (Table 15).

3.3 £173,384 was spent on footpath and cycleway improvements at Matford and Bishops Court; and on improvements to bus facilities at Clyst Heath (Table 15)”

The report was duly “noted” by the Committee.

4.6 DOES THE CITY COUNCIL ENFORCE SECTION 106 AGREEMENTS?

“19 The Council will use its enforcement powers if the Section 106 Agreement is not complied with. In addition, the fact that a development is taking place despite non-compliance with a Section 106 Agreement will be included as a standard response to searches from prospective purchasers of dwellings being provided. Other measures could include publicity in the local press and warning Local Authorities in the area of persistent offenders”.

Exeter City Council does not accept responsibility for the maintenance of the land in question because it did not received any “Section 52” payments from the developers of phase 2 and 3 of the estate to fund such work.

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4 Now the Planning Committee