

CABINET MEMBER DECISION RECORD

Decision Ref. No:
Responsible Officer: Martin Tiffin- Town Centre Vision Programme Leader
Subject: St. Stephen's Road Car Park Residential Development ("the Project")
Decision taken: <ol style="list-style-type: none">1. Not to clarify the terms of the Members' Agreement between the Council and Community Solutions for Regeneration (Bournemouth) Ltd or issue a VEAT Notice prior to entering into a development agreement for the delivery of the Project.2. To approve the increase in the price from £11.65 million to £12.083 million to reflect the increase in construction value and design specification changes.3. To approve additional enabling costs of £58k be incurred by the Council, to safeguard the delivery of the scheme.
Reasons for the decision: <ol style="list-style-type: none">1. At the Cabinet meeting on the 22 March 2017, Cabinet authorised the Council to enter into a deed setting out certain contract clarifications to the Members' Agreement ("the Deed of Clarification") in relation to the method of financing the construction phase, specifically to permit the parties to enter into a development agreement in order to realise a Council-funded and retained scheme.2. On 26 April 2017, Cabinet approved the award of a development agreement to BDC for delivery of the Project and the retention of ownership of the completed Project in consideration of £11.65 million.3. The additional funding is required to enable the delivery of the approved scheme. This is due to inflation on standard industry construction costs, additional enabling costs previously unknown and subsequent design changes requested by the Council to ensure the scheme would comply with future legislative reforms on fire safety in response to the Grenfell Tower disaster.4. The construction phase is scheduled to start in December 2018, therefore this decision needs to be approved before this date.

Call-in and Urgency:

This decision is subject to the Council's call in procedure.

Background:

1. The Council is the freehold owner of St. Stephen's Road Car Park ("**the Site**").
2. The Council and Community Solutions for Regeneration (Bournemouth) Ltd (a wholly owned subsidiary of Morgan Sindall Investments Limited) ("**the Parties**") have formed a limited liability partnership called Bournemouth Development Company llp ("**BDC**") to act as its delivery vehicle for bringing forward development on Council owned sites including the Site.
3. BDC secured planning permission for the Project in July 2017.
4. The Parties are in the process of agreeing the detailed terms of a development agreement pursuant to which BDC will procure the construction and delivery of the Project pursuant to the Council Decision ("**the Development Agreement**").
5. At the Cabinet meeting on the 22 March 2017, the Cabinet authorised officers to agree and effect the Deed of Clarification. The way in which schemes are progressed under the Members' Agreement and Option Agreement are set out in paragraphs 6 – 10 of the report to Cabinet of 22 March 2017 ("**the Advertised Approach**").
6. On 26 April 2017, Cabinet agreed that the Council would commission BDC to deliver the Project on the Site pursuant to a development agreement with a view to retaining ownership of the completed Project ("**the Council Decision**") on the basis to be set out in the Deed of Clarification.
7. The Deed of Clarification was intended to facilitate an ongoing alternative approach from that which is referred in paragraph 5 above in circumstances where the Council would otherwise have granted a lease pursuant to the terms of an option agreement and entered into an agreement for the forward purchase of a scheme on an option site; the Deed of Clarification provided recognition of the Parties' intention that they should be able to enter into a development agreement for any given site, so as to negate the requirement for the exercise of the option and a sale back to the Council where it wished to retain that scheme.
8. Following further consideration, the Council is no longer minded to enter into the Deed of Clarification, nor issue a corresponding VEAT notice, prior to entering into the Development Agreement.
9. The Council will instead award the Development Agreement and seek a release of the option over the site on a standalone basis. The Council has also decided not to issue a VEAT Notice.
10. Should it be decided that the Council wishes to retain future schemes and commission their development by a development agreement, then as part of that decision, consideration will be given as to whether the Council should seek to enter into the Deed of Clarification with BDC and, in each case, whether a corresponding VEAT notice should be issued.

11. Due to a number of factors, the commencement of the Project has been delayed meaning costs have increased from the original total scheme costs detailed in the financial appraisal incorporated in the Cabinet Report dated 26th April 2016 by 3% (circa £350k).
12. BDC tendered the construction contract in 2017 and selected the main contractor Herbert H Drew & Son, unfortunately in May 2018 this company fell into administration. As a result, a retendering exercise was undertaken, which has attributed to the time delays and incurred additional tendering fees.
13. Pending the finalisation of the design & build contract there is an opportunity to incorporate a fire sprinkler system into both blocks at pre-construction stage in order to ensure the development would comply with future legislative reforms on fire safety in response to the Grenfell Tower disaster. Whilst this would incur additional costs of circa £83k this would be more cost effective than deciding to retro fit a sprinkler system should Building Regulations change.
14. The Council has appropriated the land and undertaken title and site searches and a Right of Light survey in order to identify the risks of any 3rd party rights to compensation. These risks remain with the Council and insurance costs has been included within the revised financial model.
15. In addition, the Council is required to undertake enabling works in order to hand over a safe clean development site to Bournemouth Development Company including a needle pick of the site. Recent site investigations also identified a fibre CCTV cable connecting the Town Hall to Richmond Gardens Car Park which will need to be retained and re-routed prior to the commencement of development.
16. Conversely, against these cost increase pressures, market rent levels have also increased since April 2017 and officers have re-run the financial model to reflect the increases in both expenditure and income. This is partly due to rental inflation and the availability of directly comparable market evidence. In order to secure the rental income and mitigate voids a small marketing budget has been included within the revised financial model and any additional marketing costs will be met from future service budgets.
17. The costs detailed in items 14,15 and 16 above were not included in the original financial modelling and will cost circa £58k.
18. The revised model identifies marginal changes to the Net Revenue Position (NRP) which confirms the continued financial viability of the scheme.
19. The model recognises that the amount of PWLB borrowing has increased due to the additional costs as well as shifts in borrowing rates of the 2-year loan increasing by circa 0.8% and the 48-year loan increasing by 0.04%.
20. The revised Bournemouth Development Company Development Appraisal highlights a residual land value of zero. It was explained in the April 2017 Cabinet Report that the actual land value is fixed at the point of transfer and that it was likely to reduce from the previous estimate. This was because the highway contributions were unknown, and the construction cost was only an estimate. The projected developer's profit remains comparable to the figure previously reported.

Options - and reasons for rejection:

1. Option – agree and enter into a Deed of Clarification as set out in paragraphs 30-37 of the 22 March 2017 Cabinet Report.
2. Reasons for Rejection – it is not necessary to enter into a Deed of Clarification where the Council does not wish to facilitate an alternative to the Advertised Approach on an ongoing basis, but rather wishes to enter into the Development Agreement on a standalone basis.

Consultations undertaken:**Consultation:**

The Council has consulted with the BDC Board, Morgan Sindall Investments Limited the Head of Housing & Communities and the Portfolio holders for Housing and Local Government Reorganisation & Economic Growth.

Finance/Resource Implications:

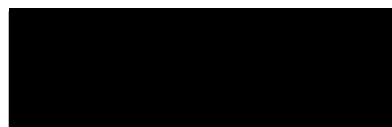
The increase in purchase price is offset by the increase in value of the completed scheme. The projected rent from the scheme exceeds the costs of borrowing and has no detrimental impact on the medium term financial plan. The inclusion of this valuable asset on to the Council's balance sheet will have a positive impact.

Name: Adam Richens

Signature:

Date:

9/11/18.

**Legal implications:****Deed of Clarification / VEAT**

1. The Council sought external legal advice from Pinsent Masons (“PM”) in relation to the procurement risks presented by the award of a development agreement in lieu of following the Advertised Approach as referred in paragraph 5 of the Background section of this report.
2. Following a detailed analysis of the proposed contract structure for another BDC scheme analogous with St. Stephen's, PM concluded that there is a strong argument that the proposed approach would not be considered a “substantial change” in a procurement law context.
3. However, that conclusion assumes that at least a reasonable proportion of the schemes to be brought forward by BDC are structured in order that land is transferred into BDC or its nominee as per the Advertised Approach.
4. The rationale for PM's conclusion is that, whilst the original procurement documentation was drafted in order that the Council could exercise some flexibility in respect of how schemes could be brought forward, there is a strong inference that schemes would, at least in the majority, be facilitated in accordance with the Advertised Approach.

5. Therefore, it is arguable that the proposal to proceed on the basis of the Advertised Approach may have lead certain businesses to decide not to bid for this opportunity (e.g. on the basis that they would be required to procure considerable third-party finance to contribute to the realisation of a number of schemes). PM's view is that if the original intention was not to follow the Advertised Approach at all, this would have constituted a very different proposition to the market, and thus, would arguably have affected who decided to participate in the competition.
6. PM stated that if all the schemes were brought forward in a manner which was inconsistent with the Advertised Approach then this would constitute a substantial change.
7. Finally, PM advised that in the event the Council is minded not to implement any (or a very low number of) schemes going forward applying the Advertised Approach, the Council may wish to consider a number of risk mitigation strategies such as issuing a VEAT notice.
8. Further detail as to the practical and financial implications of those risks and mitigation of those risks is contained in the PM advice appended hereto.
9. In the Development Agreement, there are mutual indemnities for breach of the Public Contracts Regulations 2015 ("**the PCR**"). This financial implication is not covered in the PM advice. However, if losses were suffered by BDC as a result of the Council's failure to comply with the PCR in relation to the Project (e.g., delays), the Council would be bound to indemnify BDC for such losses.

Third Party Rights

10. The Rights of Lights Survey has recommended a contingency provision for compensation under section 203 of the Housing and Planning Act 2016, with fees in addition. It is possible that a court or tribunal would award more compensation.
11. BDC will not warrant the accuracy of the information given to the surveyor to prepare the Rights of Light Survey, though such a warranty was sought in negotiation. Confirmation that the plans of the consented scheme were provided has been offered (and the draft consent schedule so provides). It will also be possible to obtain a letter of reliance from the surveyor, which will establish a duty of care.
12. Further development-related costs may arise to the Council out of the usual development risks, including statutory consents, compensation payments and other agreements necessary to progress the development (e.g., diversion of services and new wayleaves/easements or similar). Party wall requirements may be relevant in relation to the boundary with the adjoining site owned by Nationwide, but it is not yet known whether any costs may be associated with these.

Other

13. The Council has the requisite powers to borrow an additional sum in relation to the increase in costs of the Project and to proceed on the basis proposed; the Council has the power to make this decision in the proposed manner following proper consideration of the risks set out in the legal advice from PM.

Name: Tanya Coulter

Signature: 

Date: 9.11.18

Risk assessment:

1. The existing suite of BDC contracts has served the parties well over the past 8 years and has enabled BDC to bring forward both public and private led projects utilising different funding sources. The BDC delivery model is now widely used by many local authorities and to date there has been no legal challenge to any of the BDC projects or any projects nationally using the BDC style delivery model.
2. An Initial risk assessment has been completed and this shows this to be a high-risk project. This is principally due to the significant sum of money expended on this purchase.

Name: Martin Tiffin

Signature: 

Date: 12.11.18

Impact Assessments:

An Environmental Impact Assessment recognises that the use of this land as a surface-level car park does not make a significant contribution to the local environment. Its redevelopment will allow high-quality, energy-efficient housing to come forward in a sustainable location from a public transport perspective. This is likely to be a positive contributor.

An Equality Impact Needs Screening Tool has been completed. This shows that the decision to purchase this investment asset has no impact in terms of equalities.

Information for/not for publication:

Decision Notice for publication

Full legal advice from PM appended, but not for publication on the grounds of legal professional privilege.

Detailed financial model and summary of key financial changes appended, but not for publication on the grounds of commercial sensitivity.

Background papers:

Cabinet Reports dated 22 March 2017 and 26 April 2017

Any conflict of interest declared by a Cabinet Member who is consulted by the Member taking the decision	Name of Cabinet Member	Nature of interest	Details of any dispensation granted by the Monitoring Officer
No	N/A	N/A	N/A

Decision taken by:

Councillor Philip

Broadhead.

Cabinet Portfolio - Local Government Reorganisation and Economic

Growth

Signature



Date of decision:

12.11.18

Date of publication of record of decision:

Date decision effective –

