

Public Document Pack



Date: **19 October 2015**
Our ref: **Extra Cabinet/Supplementary Agenda**
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EXTRAORDINARY CABINET

29 OCTOBER 2015

An extraordinary meeting of the Cabinet will be held at **7.00 pm on Thursday, 29 October 2015** in the Council Chamber, Council Offices, Cecil Street, Margate, Kent.

Membership:

Councillor Wells (Chairman); Councillors: L Fairbrass, Brimm, Crow-Brown, Stummer-Schmertzing and Townend

SUPPLEMENTARY AGENDA

Item
No

Subject

3. **MANSTON AIRPORT** (Pages 1 - 24)

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REVIEW OF CPO INDEMNITY PARTNER FOR MANSTON AIRPORT

To: **Extraordinary Cabinet – 29th October 2015**

Main Portfolio Area: **Leader of the Council**

By: **Director of Corporate Governance**

Classification: **Unrestricted**

Ward: **All**

Summary: **To update Cabinet on the review of the appointment of a CPO indemnity partner for Manston Airport.**

For Decision

1.0 Introduction and Background

1.1 At the beginning of this report, it is worth setting out the main objective in seeking an indemnity partner. In the report to Council of the 11th December 2014, it said:

'The objective of seeking an indemnity partner is to ensure that – if the Council determines to pursue a CPO – a viable airport comes into sustainable long-term operation as quickly as is reasonably possible without any residual cost to the Council.'

1.2 On the 11th December 2014 Cabinet received a report on the soft-market testing exercise for an indemnity partner for a Manston Airport CPO. The report said that the Council had made every effort to work constructively with (RiverOak) including making several deadline extensions for submitting the information requested from the potential indemnity partner. The report and minute are attached as Annex 1 and Annex 2, respectively.

1.3 The Cabinet considered the following as relevant considerations, which remain relevant today:

- (a) The objective of seeking an indemnity partner (set out at 1.1 above).
- (b) The new owners intend to bring forward regeneration policies for the site.
- (c) The new ownership of the site and any proposals put forward would make it much more challenging to demonstrate an overwhelming case for compulsory purchase. It is important that the Council establishes on objective grounds, the financial status of any partner. The assessment must have due regard to the potential scale of the project and the need to demonstrate that resources are available to complete it.
- (d) Any indemnity partner needs to demonstrate the resources to acquire by private treaty well before the stage of seeking a CPO.
- (e) The experience in other local authorities emphasises the need to ensure a prospective indemnity partner has the resources in place to acquire the site and complete the development. Once the land transfers to the indemnity partner any redress for delay or non-completion could prove difficult to pursue. The main purpose of the CPO is for the authority to achieve a viable development, so the

status of the indemnity partner to deliver the development in its entirety is highly relevant.

1.4 On the 14th July 2015, Cabinet agreed:

1. The recommendation from Council on the 21st May 2015 to review its position in relation to the Manston Airport site, taking account of all the surrounding circumstances relating to an indemnity partner for a possible Compulsory Purchase Order;
2. To authorise that specialist legal and finance advice be obtained to determine whether RiverOak are a suitable indemnity partner in relation to a CPO for Manston Airport and to provide advice on the indemnity agreement and CPO process generally.

2.0 RiverOak

- 2.1 On their website, RiverOak Investment Corp describe themselves as 'having a reputation for identifying under-utilised assets & creating new value from them on behalf of our client investors'. A new company RiverOak Aviation Associates has been set up to deliver this project (referred to as RiverOak).
- 2.2 The proposal from RiverOak is that they will fund the legal CPO process but will not themselves be funding the purchase of the land or the development of the airport. These legal CPO costs are not insignificant and it is intended that £2m will be placed in what is known as an escrow account, reserved specifically for these costs.
- 2.3 The funding for the land purchase and development of the airport will instead come from private investors that RiverOak will try to attract to invest in the project. From the documentation so far provided to the Council by RiverOak it appears that those investors will not be investing until after the confirmation of the CPO by the Secretary of State which would be after any inquiry conducted by a planning inspector.
- 2.4 Prior to and during the progress of the CPO the Council should seek to purchase the land by negotiation which can be done in parallel with the CPO process. The Council has no resources itself to buy the land prior to the securing of funding by RiverOak. The Council has seen no evidence that RiverOak have the resources now available to buy the land prior to the confirmation of the CPO.
- 2.5 Counsel has advised that the possibility of a party wanting to sell their land voluntarily to the Council even if the CPO is abandoned would need to be covered in the indemnity agreement to protect the Council. RiverOak have provided no evidence during the negotiations of their ability to cover this eventuality.

3.0 Timeline

June 2015

- 3.1 Following a meeting in May 2015 RiverOak wrote to the Council setting out their position in relation to the CPO and their proposed role as an indemnity partner. RiverOak included their intention to deposit £250,000 in their solicitor's bank account to fund the CPO process. RiverOak also described how that money would be topped up as the scheme progressed.

July 2015

- 3.2 At a meeting with Council representatives on the 3rd July 2015, RiverOak gave a presentation on their proposals for the airport which included the use of the site to recycle 'end of life' aircraft with some cargo and future passenger activity.

Proposals were also made by RiverOak about financing the scheme and the ability of RiverOak to prove that they could resource the CPO, the land purchase and the development of the airport. Those proposals included:

- (a) An 'escrow' account held by RiverOak's lawyers with funding of up to £2m to fund the CPO process. This was welcomed since it addressed the concern raised in the December report about funding the CPO in stages. Once the escrow account was put in funds, then the whole CPO legal process (but not the land acquisition nor airport development) would be funded.
- (b) RiverOak also proposed to provide a 'letter of credit' from a major European financial institution to cover the costs of land purchase and development of the airport. This meant in the event that RiverOak's third-party investors were unable to make payment on the land purchase, the bank would cover the outstanding amount. This was also welcomed since it addressed the concerns in the December report about the lack of certainty over funding for the land acquisition.
- 3.3 The Cabinet met in July (1.4 above) to agree to review the Council's position in relation to Manston Airport. The Council then instructed Sharpe Pritchard Solicitors who have considerable expertise in CPOs to act for it in negotiations with RiverOak's solicitors. In addition, the Council has also taken advice from a barrister at Landmark Chambers in London who specialises in compulsory purchase. For the sake of brevity, in the rest of the report, references to 'RiverOak' or the 'Council' include RiverOak's solicitors and the Council's solicitors.
- 3.4 Having reviewed the draft indemnity agreement provided by RiverOak, the Council asked them for an up to date business plan for their proposals. The business plan was required to give the Council an understanding of how RiverOak's current proposals met the public interest test which the Council needed to consider before entering into the indemnity agreement.
- 3.5 RiverOak subsequently informed the Council that they would not now be providing their proposed legally binding letter of credit from a bank. So the funding in relation to the costs of the land acquisition reverted back to its December 2014 position. That is, that there is no provision for funding any shortfall from RiverOak or its investors in respect of the monies required to acquire the site. Instead, RiverOak offered to provide a non-binding letter of assurance from a major financial institution.
- 3.6 In response to the request for an up to date business plan, RiverOak referred the Council back to the financial projections previously provided and declined to provide a business plan indicating that this would be provided once the CPO process was underway. This meant that the Council was being asked to enter into an indemnity agreement for the reopening of the airport with no up to date information on the business plan supporting the scheme.

August 2015

- 3.7 RiverOak informed the Council that their next stage in the process was to develop the business plan in detail.

- 3.8 In substitution for the letter of credit, a letter of support was provided by RiverOak. It was a 'subject to contract' letter from a large American financial services company which 'supported' the efforts of RiverOak regarding the opening and development of Manston Airport following a successful CPO. However, the letter says that it is not a 'binding legal commitment' to the project and that 'any investment is subject to confirmation of the CPO for acquisition of the airport site, as well as, usual and customary funding terms and internal approvals'.
- 3.9 Whilst the letter was from a company with a business history of ownership and management of airports, the letter is not legally binding and there is no indication that any investment will be made before the CPO is confirmed and, therefore, for the purpose of providing assurance that finances will be available for acquisition of the land before the CPO is confirmed, it is of little value.
- 3.10 The Council therefore requested RiverOak to provide the financial guarantees (if any) which they would be providing to secure the council's interests in delivering a viable airport operation as quickly as is reasonably possible without any residual cost to the Council. A deadline of the 14th August was given for RiverOak to provide this information.
- 3.11 The Council's legal advice on this point is clear. Whilst funding does not have to be secured at the outset of the CPO process, the Council does have to satisfy itself that there is a real prospect that the scheme will proceed and this means that the Council needs to consider scheme viability and/or funding before making the CPO. At this stage the Council did not have confidence in the finances (which were based solely on the letter of support from the American company) and no written evidence of RiverOak's current proposals for the airport.
- 3.12 The Council then received confirmation from Riveroak that they had placed £1,325,000 with their lawyers which it is intended to be put into the escrow account should the indemnity agreement be entered into. It is worth repeating that this was a positive step forward from the December position where the CPO legal process was to be completed in steps as funds allowed.
- 3.13 On the deadline of the 14th August 2015, RiverOak provided two redacted letters from potential investors (with the details of those investors removed). As with the letter from the company referred to above, the letters expressed strong interest in participating in RiverOak's acquisition of the airport through a CPO. One letter of support was conditional on the CPO process being concluded in a manner satisfactory to RiverOak and its partners. The other potential investor said they were in a position to invest up to £20m subject to satisfactory final documentation. Their final investment decision was conditional 'upon standard commercial due diligence, valuation of the asset and confirmation of the CPO by the secretary of State'.
- 3.14 Since the letters had the details of the authors removed, the Council has been unable to carry out any investigation into the authors of these letters. Counsel has advised that if we knew who the letters were from and could check their bona fides, the redacted letters could have greater weight.
- 3.15 Counsel has advised that the three letters from potential investors by themselves are not sufficient for the council to be satisfied as to the resourcing of the CPO and the likelihood of the scheme going ahead. The letters are of some evidential value but do not by themselves show that all the necessary resources are likely to be available to complete the scheme.

- 3.16 Counsel has pointed out that the letters do not require either the American company or the two investors to fund the CPO if RiverOak were unable to do so. A bond or escrow account or other form of guarantee if sufficient to cover the land acquisition costs and to enable delivery of the project would provide reassurance to the Council. However, the Council would still have to be satisfied that £20m was an accurate figure for land acquisition and start-up costs.
- 3.17 RiverOak referred to a bond in the original draft of their draft indemnity agreement. The Council requested details of this bond with a deadline of the 18th August 2015; the response from RiverOak was that discussion of the bond was somewhat premature.
- 3.18 Counsel advised that the requirement for a bond relates to the financial strength of the indemnity partner and the extent to which they can satisfy the Council that they can resource the CPO. Where there is a concern over the resources of an indemnity partner then a bond or other security would be a sensible way to proceed. It is not necessary for the bond or surety provider to be a party to the indemnity agreement but the Council would have to be satisfied as to the enforceability of the bond or surety before any indemnity agreement was finalised.

September 2015

- 3.19 Representatives from RiverOak and the Council and their respective solicitors met to discuss outstanding issues. The agenda included what has changed since the December Cabinet report; evidence of financial resources for underwriting the CPO costs, land acquisition and scheme costs; the business plan and viability of the scheme; the public interest test; contractual commitment to proceed with the scheme if the land is acquired.
- 3.20 Prior to the meeting, RiverOak were informed that the Council would need all necessary information to be able to draw up a report to Cabinet which evidences that all the necessary resources/funding will be available when required to fund the CPO process, the land acquisition and the implementation and on-going airport operation, of the airport scheme as proposed by RiverOak.
- 3.21 The action points from the meeting were:
- a) Explanatory note covering compliance with the tests outlined in Circular 06/2004 to be drafted by RO and issued to TDC as soon as possible and in any event before 30 September 2015.
 - b) CPO Indemnity Agreement to be reviewed by TDC's legal advisors and comments issued to RO as soon as possible and in any event before 30 September 2015.
- 3.22 Compliance with the tests in Circular 06/2004 was described in the minutes of the meeting as:
- 'TDC being able to satisfy itself and show at a public inquiry that the tests in CPO Circular could be met before the Council agreed to use its CPO powers. In order to do so, TDC requested an overall picture of how the financial resources will be put together from start to finish and how the public interest test under the Circular would be satisfied. For the purposes of accurate, clear and confident reporting within TDC and in order to fully address all points raised by TDC in respect of funding and public interest issues, a request was made of RO to demonstrate how the proposed scheme would match the requirements of the Circular both in terms of resources and the public interest test in promoting the CPO.'

- 3.23 The time limit for the actions after the September meeting (3.21 above) was amended at RiverOak's request to the 22nd September (and then the 23rd September) when it was agreed that our respective documents would be exchanged. The Council provided its documents on the 23rd with RiverOak providing theirs on the 24th September.
- 3.24 In accordance with the action point from the meeting, the Council reviewed the CPO indemnity agreement and proposed amendments to Riveroak. It was proposed to amend the bond so that it secured that funding was in place to acquire the land prior to the confirmation of the CPO by the Secretary of State. RiverOak's position was that a bond would only be available after the confirmation of the CPO.
- 3.25 Another proposed amendment was a requirement for RiverOak to request the Council to acquire the land within a set period after the confirmation of the CPO. This is because in the absence of any other agreement requiring Riveroak to proceed expeditiously with the reopening of the Airport, the Council had to impose an obligation on Riveroak to not delay the revival of operations at the Airport. The Council could not permit the Airport land sitting under the shadow of an unexercised CPO with nothing happening on the ground.
- 3.26 These two provisions were intended to secure the Council's interests in ensuring that the airport comes into sustainable long-term operation as quickly as is reasonably possible without any residual cost to the Council.
- 3.27 RiverOak did not agree with the amendment to the timing of the provision of the bond and subsequently publicly announced on the 11th October 2015 'We want to be perfectly clear, as we have in the past, we will not provide a bond. It is neither economically nor commercially viable to do so and is absolutely not required by the governing law'.
- 3.28 RiverOak have argued that providing funding for the project, for which the CPO is required, post consent is the usual order of events in an infrastructure project, and is not something that is unique to RiverOak. In support of this contention, they cite Hinkley Point C, Crossrail, HS1, HS2, all of which they say were/are to be funded post consent. The difference with any Manston Airport CPO is that the projects referred to by RiverOak were/are backed by Central Government whereas the Council has no resources to back the Manston CPO, which is why it requires a bond or other surety in place to cover the period from when the CPO is made.
- 3.29 With respect to the need to acquire the land within a set period after confirmation of the CPO, RiverOak said that they would need time after confirmation of the CPO to secure and document the funding for the project. Given that the CPO process might take up to two years before the CPO is confirmed by the Secretary of State, RiverOak could then take up to 3 years to obtain the funding, this could see the airport lying dormant for potentially five years if there is no obligation on RiverOak to secure its funding within a set period of the confirmation.
- 3.30 RiverOak provided an explanatory note as agreed in the action point from the September meeting. However, at that time it did not provide the picture of the overall financial framework as agreed and nor did it explain how RiverOak's proposals met the public interest test of Circular 06/2004.

October 2015

- 3.31 At the end of October, over three weeks after the deadline for providing this information had expired, RiverOak provided a revised version of their explanatory note (3.28 above). The document sought to address the public interest test and, as part of this, the other tests that needed to be satisfied; the planning test, the wellbeing test, the financial test and the necessity test. The paper however lacks detailed evidence which it is suggested will be provided in the future and suggests that Council officers are better placed than RiverOak to comment on whether the planning and well-being tests are met. In the absence of an up to date business plan it is difficult to assess that all the tests will be met. The information that has been provided to seek to satisfy the finance test is covered in this report already and the necessity test is based upon the decision of the present owners not to reopen the airport and that therefore the CPO is required to bring back airport use. However, this assertion by RiverOak as to why the CPO is required has to be balanced against the intentions of the current landowners and whether there is any likelihood that the current landowners' proposed use of the site would also satisfy the public interest test.

4.0 The Indemnity Agreement and CPO Powers

- 4.1 RiverOak have sought to separate the decision on whether to enter into an indemnity agreement from the decision whether the Council should use its CPO powers in relation to Manston airport. Counsel's advice is that there is no particular justification for seeking to take a decision to enter into an indemnity agreement separate from the consideration of whether to make a CPO in support of a particular scheme.
- 4.2 RiverOak has not provided sufficient evidence to show the Council that the funding available to deliver the scheme is currently available or likely to be available to deliver the scheme. Information has been provided that sets out RiverOak's funding intentions but it depends on the CPO being confirmed, and there is little clarity as to the funding in place. In relation to the public interest balancing exercise, that requires a balanced view to be taken as between the intentions of the Council in making the CPO to deliver the underlying scheme, and the interests and intentions of the current landowners. The Council considers it sensible to consider the question of entering an indemnity agreement with RiverOak (and its principal terms) alongside the principle of making a CPO, which requires the Council to be satisfied that there is a real prospect of the underlying scheme going ahead.
- 4.3 RiverOak have had many opportunities to provide this evidence and the Council has itself requested this evidence. In the meeting with RiverOak in July their presentation was provided on flip charts which were taken away after the meeting. In August the request for an up to date business plan was refused. In September despite it being agreed that the finances and public interest argument would match the requirements of Circular 06/2004 the expected level of evidence and explanation was not provided.
- 4.4. In relation to finances generally, the figures for the scheme have not been justified to the Council and the Council has not been given an opportunity to satisfy itself that those figures are reasonable. The mechanism through which that investment would occur has not to date been explained or what role RiverOak would have in delivering the project.
- 4.5 In relation to specifics of the funding. An offered letter of credit was subsequently withdrawn. A bond to cover any shortfall in funding was also offered and then withdrawn.

5.0 Changes since the December 2014 Cabinet Decision

- 5.1 The main material change since the December 2014 Cabinet decision is the provision of an escrow account which will guarantee the funding of the CPO process. This is welcomed and means that the CPO process can be run at no cost to the authority as a whole process rather than the step-approach as originally proposed.
- 5.2 However the purpose of the Council using its CPO powers is not to run a CPO process, but to ensure that a viable airport comes into sustainable long-term operation as quickly as is reasonably possible without any residual cost to the Council. In order to do that, both the land acquisition and airport development, will need to be funded.
- 5.3 The only evidence to support other funding are two non-binding, conditional and redacted letters of support and a similar letter of support from an American company. There is uncertainty about how any shortfall in funding will be met and indeed the offer of a bond at any stage of the CPO process now appears to have been withdrawn by RiverOak (as per paragraph 3.27 above).
- 5.4 Counsel has advised that it is reasonable for the Council at the stage of deciding the principle of the CPO to seek evidence that it is likely that the key resource and financial tests are fulfilled. If not, it would be very difficult to move forward unless the Council has a high degree of confidence that these matters would be addressed shortly.
- 5.5 RiverOak's track record of failing to provide necessary information throughout the process dents this required confidence. This also begs the question as to why the Council should progress, before receiving the necessary assurances. There seems little purpose in entering into an indemnity agreement separate from taking a decision on the principle of the CPO which requires consideration of the likelihood of the scheme progressing as part of the necessary public interest test.

6.0 Conclusion

- 6.1 The objective of seeking an indemnity partner is to ensure that – if the Council determines to pursue a CPO – a viable airport comes into sustainable long-term operation as quickly as is reasonably possible without any residual cost to the Council.
- 6.2 The relevant considerations raised in the December 2014 Cabinet report (at paragraph 1.3 above) remain relevant today. In addition the review of this decision since July 2015 has highlighted the following issues:
 - 6.2.1 There remains the lack of evidence that financial resources are in place or proposed to be in place to acquire the land prior to the confirmation of the CPO despite the fact that the Council is obliged to attempt to purchase the land by negotiation in parallel with the CPO process.
 - 6.2.2 Whilst letters of support for the project have been provided by potential investors, any commitment to the project has been caveated and, in the absence of any binding commitment, there is limited evidence of the financial resources proposed to be in place to acquire the land and develop the airport scheme after the confirmation of the CPO and the evidence is not sufficient for the council to be satisfied as to the resourcing of the CPO and the likelihood of the scheme going ahead.
 - 6.2.3 RiverOak's public announcement indicates that no bond or surety will be offered to fund any shortfall for the proposed funding either before or after the confirmation of the CPO. A bond is required both before and after confirmation.
 - 6.2.4 There is insufficient evidence currently available for the Cabinet to be satisfied that a proposed CPO is likely to be successful which would justify its entering into an

indemnity agreement. There is good reason to consider the principle of the CPO alongside the decision to enter an indemnity agreement.

- 6.3 Given the above, your legal advisors and officers are not satisfied at this moment in time that the information or assurances provided to date by RiverOak justify the Council deciding to make a CPO or as part of that process to support the appointment of RiverOak as the Council's indemnity partner in advance of deciding whether to make a CPO.

7.0 Corporate Implications

7.1 Financial and VAT

- 7.1.1 There are no resources currently available to fund costs in relation to a CPO described in this report. The financial context is of limited financial capacity of the Council, together with the prospect of continued severe financial constraint. Any proposals that involve exposing the Council to unspecified and/or unknown costs would substantially increase financial risks and potentially undermine the Medium Term Financial Strategy. It is therefore the Council's objective to secure that all costs related to the CPO are borne by the indemnity partner.

7.2 Legal

- 7.2.1 The legal advice is set out in the report.

7.3 Corporate

- 7.3.1 There are no direct corporate implications at this stage.

7.4 Equalities

- 7.4.1 There are no direct equality implications.

8.0 Recommendations

- 8.1 Having reviewed its position, details of which are contained in this report, that no further action be taken at the present time on a CPO of Manston Airport, on the basis that RiverOak do not fulfil the requirements of the Council for an indemnity partner;

- 8.2 Cabinet note that this is the second time that RiverOak have not fulfilled the requirements of the Council for an indemnity partner.

9.0 Decision Making Process

- 9.1 This is a non-key decision and subject to call in.

- 9.2 This is a Cabinet decision.

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| Contact Officer: | Tim Howes, Director of Corporate Governance & Monitoring Officer |
| Reporting to: | Madeline Homer, Chief Executive |

Annex List

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|---------|------------------------------------|
| Annex 1 | Cabinet Report 11 December 2014 |
| Annex 2 | Cabinet Minutes 11th December 2014 |

Background Papers

| Title | Details of where to access copy |
|-------|---------------------------------|
| None | N/A |

Corporate Consultation Undertaken

| | |
|----------------|---|
| Finance | Tim Willis, Director of Corporate Resources |
| Legal | Tim Howes, Director of Corporate Governance |
| Communications | Hannah Thorpe, Interim Head of Communications |

MANSTON AIRPORT EXPLORATION OF CPO INDEMNITY PARTNER

To: **Cabinet, 11th December 2014**

Main Portfolio Area: **All**

By: **Leader of the Council**

Classification: **Unrestricted**

Ward: **All wards**

Summary: To update Cabinet on the outcome of a soft-market testing exercise undertaken to identify a CPO indemnity partner for Manston Airport.

For Decision

1.0 INTRODUCTION

1.1 Cabinet resolved on 31st July 2014 to carry out a soft-market testing exercise to identify a CPO Indemnity Partner – a third party who could cover the costs of compulsory purchase of the Manston Airport site. A progress report was received by Cabinet on 16th October 2014.

1.2 The purpose of this report is to inform Cabinet on the results of the soft-market testing. It does not address the wider options around the future of site, which will be considered separately as part of the Council's Local Plan process.

2.0 PROCUREMENT PROCESS FOR A CPO INDEMNITY PARTNER

2.1 Expressions of interest were invited for a CPO indemnity partner. Counterparties expressing an initial interest were invited to respond to a questionnaire, composed of:

- Organisational and contact information
- Project questions
- Financial questions

2.2 The independent viability report produced by Falcon Consultancy was also made available to respondents.

2.3 Four counterparties requested a questionnaire; two submitted returns. (Parties A and B). Some discretion was shown over the 31st August 2014 deadline for questionnaire submissions. This allowed additional time for any party seeking to express an interest.

2.4 Both respondents submitting questionnaires were offered a meeting to discuss their responses more fully.

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- 2.5 A meeting took place with Party A's principals on 18th September 2014 to discuss their responses. The meeting was attended by Cabinet members, Group Leaders and the Council's statutory officers. Following the meeting, Party A was asked to respond to a written set of questions by 24th September 2014. This Party A did in a letter of 25th September 2014. Following the response, further clarification was sought from them on some issues. A further meeting attended by Cabinet members, Group Leaders and the Council's statutory officers took place on 29th October 2014. Discussions took place subsequently with Party A's solicitors and there followed various further meetings and correspondence with Party A.
- 2.6 The Council has entered into a confidentiality agreement with Party A. The Council is therefore prevented from disclosing the information provided by Party A for consideration.
- 2.7 Party B did not take up the offer of a meeting. Party B was sent the same written questions as Party A. No response has been received from Party B. It is therefore considered that Party B has conclusively not identified an interest in being the Council's indemnity partner.

3.0 RELEVANT CONSIDERATIONS

- 3.1 The objective of seeking an indemnity partner is to ensure that - if the Council determines to pursue a CPO - a viable airport comes into sustainable long-term operation as quickly as is reasonably possible without any residual cost to the Council.
- 3.2 A majority interest in the site was acquired by new owners in September 2014. The new owners state they intend to bring forward regeneration proposals for the site. The new owners have a business record that includes the Discovery Park Enterprise Zone.
- 3.3 The new ownership of the site and any proposals put forward would make it much more challenging to demonstrate an overwhelming case for compulsory purchase. This compares to the situation before September 2014 when the then outright owner had announced no specific proposals following the airport closure. Given the now increased challenge of securing a CPO, it is essential that the Council establishes thoroughly on objective grounds the financial status of any prospective partner. The assessment must have due regard to the potential scale of the project, and the need to demonstrate that resources are available to complete it.
- 3.4 Any viable indemnity partner needs to demonstrate the resources to acquire by private treaty well before the stage of seeking a CPO.
- 3.5 There are numerous local authority examples of stalled developments or developments where the partner proves not to have the financial capacity to complete the agreement. This experience in other local authorities emphasises the need to ensure a prospective indemnity partner has the resources in place to acquire the site and complete the development. Once the land transfers to the indemnity partner any redress for delay or non-completion could prove difficult to pursue. The main purpose of the CPO is for the authority to achieve a viable development, so the status of the indemnity partner to deliver the development in its entirety is highly relevant.

- 3.6 Counsel's advice is that the Council would need to underwrite any CPO acquisition to demonstrate to the Secretary of State the likelihood of completion. The availability of funds to the prospective indemnity partner is therefore a key factor.
- 3.7 The Council does not have the resources to proceed with any CPO and the subsequent development in the event the indemnity partner could not raise investment resources. The Council's Capital Programme agreed 13th November 2014 is fully committed and already assumes prudential borrowing of £3.645m 2015-16 to 2018-19. The Council would have to borrow to fund acquisition of the airport and its subsequent development in the event an indemnity partner did not prove capable of proceeding. Assuming £20m of borrowing this would result in a revenue capital financing charge of £1.8m. The basic minimum costs (business rates; air traffic; fire and security) of operating the airport are estimated at £2m a year. These revenue costs would prove an unbearable burden for the Council's General Fund.

4.0 DUE DILIGENCE METHOD

- 4.1 Financial information was requested from Party A. Information was analysed in accordance with the Due Diligence Protocol attached at Annex 1.
- 4.2 Checks have been made with other local authorities that have recently sought and successfully identified CPO indemnity partners. Counsel's opinion has also been obtained on the CPO process and the validation of a prospective indemnity partner. The approach taken by Thanet is entirely consistent with both good practice and the process adopted by other local authorities.
- 4.3 In the event that the counterparty is able to fulfil the due diligence requirements, it would demonstrate a viable interest. Conversely if it cannot, no viable expression of interest is demonstrated. The information required is summarised in the table below.

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|---|
| <u>Financial information</u> |
| Last 3 years financial accounts |
| Auditor contact details |
| Financial Plan |
| Evidence of funds required to complete the project. |
| <u>Financial Ability</u> |
| Does the entity have the resources to fulfil its obligations through the contract? |
| Does the entity issue annual accounts? |
| Does the entity have a long track record, how many years has it been established? |
| Does the entity have a stable structure and good governance around financial decision making? |

5.0 PARTY A

- 5.1 Party A is an established organisation incorporated outside the European Union. It is an investment limited liability company. Its adopted strategy is to pursue opportunistic and value-add asset purchases and operational opportunities on behalf of a diversified set of investors ranging from institutions to individuals. It does not of itself have a record of successful airport operation; some team members have experience with other organisations of airport operation and airport financing.
- 5.2 Party A proposes to approach the CPO acquisition a stage at a time. This would be inconsistent with the requirements of Circular 6/2004, sections 20 and 21.

'The timing of the availability of the funding is also likely to be a relevant factor. It would only be in exceptional (and fully justified) circumstances that it might be reasonable to acquire land where there was little prospect of implementing the scheme for a number of years. Even more importantly, the confirming Minister would expect to be reassured that it was anticipated that adequate funding would be available to enable the authority to complete the compulsory acquisition within the statutory period following confirmation of the order. He may also look for evidence that sufficient resources could be made available immediately to cope with any acquisition resulting from a blight notice.'

6.0 ACCOUNTING AND INVESTOR INFORMATION

- 6.1 The information provided by Party A does not demonstrate that it has the appropriate financial status or has committed investors:
 - 6.1.1 to enable it - if required - to acquire the site by private treaty prior to a CPO process being commenced
 - 6.1.2 to fund the preparation of a robust case for CPO acquisition
 - 6.1.3 to meet the expected compensation costs
 - 6.1.4 to develop the airport and operate it viably in the long-term
- 6.2 The use of Party A as an indemnity partner on the basis of the financial information provided would therefore constitute a high risk option given the objective set out in 3.1 above and legal advice secured by the Council.

7.0 BUSINESS PLAN

- 7.1 The Business Plan provided by Party A is a short term (5-year) business plan and the scope is insufficient in the light of the objective set out in 3.1. The plan does not provide for the CPO compensation cost, and this could be substantial. The business assumptions appear to be optimistic as regards revenues and the known costs of operation.
- 7.2 The viability report issued with the soft marketing questionnaire states that 'The success of Manston revival must be proved through a 20-year business plan with financial projections based on the assumption that the trigger will be realised'. A 20-year plan has been requested from Party A but this was not provided. A 20 year business plan is required for a project of this scale to demonstrate long-term viability, and that the proposed operation is sustainable in the long term. Unless these requirements can be clearly demonstrated there is no prospect of achieving a CPO.
- 7.3 The use of such an indemnity partner would therefore constitute a high risk option given the objective set out in 3.1 above and legal advice secured by the Council..

8.0 INDEMNITY

- 8.1 The approach suggested by Party A is that funds would be transferred in tranches to a UK account managed by UK solicitors. The Council could then incur CPO costs to the value of funds in the account. The Council would not be obliged to proceed with further work until new funds were paid into the account by Party A.

8.2 The Council is not seeking a CPO on a speculative basis and would not wish to put itself in a position whereby full achievement and vesting of the site would depend on the partner's ability to generate investment in the project.

8.3 The use of such an indemnity partner would therefore constitute a high risk option given the objective set out in 3.1 above and legal advice secured by the Council..

9.0 CORPORATE IMPLICATIONS

9.1 Financial and VAT

9.1.1 Set out in the main report

9.2 Legal

9.2.1 This report has outlined the process undertaken following the decision of Cabinet on 31st July 2014 to seek expressions of interest.

9.2.2 It has also set out how we have considered the information provided by those interested parties and a thorough consideration of that information and the assurances provided by it.

9.2.3 The conclusions made by the Council's Section 151 Officer are that the information provided does not provide assurances which would satisfy him that a valid expression has been put forward and he is therefore unable to recommend moving ahead with this proposal.

9.2.4 Although the issues here are emotive Members should exercise extreme caution before seeking to move forward with any proposal which is at odds with advice from its officers particularly where there are likely to be significant risks which would affect the Council at a fundamental level.

9.2.5 The Council has secured further legal advice as summarised in 9.2.6 to 9.2.9 below on the financial assessment necessary to support the choice of an indemnity partner.

9.2.6 The Council need to be satisfied in promoting the CPO that it is able to meet the tests of Circular 06/2004 on the likelihood of the project going ahead. The Secretary of State will not confirm a CPO unless he is satisfied that there is a likelihood of the project going ahead.

9.2.7 If a scheme is not financially viable the S151 Officer would be expected to certify (e.g. in a witness statement) that he was satisfied that the project was viable and that the local authority would meet any funding shortfall if the partner investment was not forthcoming.

9.2.8 CPO is a last resort. It is necessary to make direct contact with the owners of the land with a view to determining whether a negotiated sale is possible.

9.2.9 The approach taken to determine whether the prospective indemnity partner is suitable before embarking on any CPO appears correct.

9.3 Corporate

9.3.1 An operational airport is consistent with the Council's economic development objectives. The decision taken here would not affect the status of the site as an Airport within the Local Plan and a separate process is followed in that regard.

9.4 Equity and Equalities

9.4.1 There is no issue arising from the report and recommendations which adversely affects any specific category of Equality group.

10.0 Recommendation

10.1 That no further action be taken at the present time on a CPO of Manston Airport, on the basis that the Council has not identified any suitable expressions of interest that fulfil the requirements of the Council for a CPO indemnity partner and that it does not have the financial resources to pursue a CPO in its own right.

| | |
|------------------|---|
| Contact Officer: | Paul Cook Director of Corporate Resources and S.151 Officer |
| Reporting to: | Madeline Homer, Acting Chief Executive |

Annex List

| | |
|---------|------------------------|
| Annex 1 | Due Diligence Protocol |
|---------|------------------------|

Background Papers

| Title | Details of where to access copy |
|-------------|---------------------------------|
| <i>None</i> | |

Corporate Consultation Undertaken

| | |
|---------|--|
| Finance | Paul Cook, Director of Corporate Resources and S.151 Officer |
| Legal | Steven Boyle, Legal Services Manager and Monitoring Officer |



Annex 1

Due Diligence Protocol

Thanet District Council



1.0 Introduction

1.1. What is Due Diligence?

- 1.1.1. Due diligence is firmly established as an element of corporate good governance and is an investigation of a business or person prior to signing a contract.
- 1.1.2. For the Council this contract can take a variety of forms, examples of these are a contract to provide services, an agreement in relation to a grant, a lease agreement or a joint venture/development partner agreement.
- 1.1.3. Why do it?
- 1.1.4. Both the Bribery Act 2010 and Money Laundering Regulations 2007 contain sections pertaining to the use of due diligence when establishing relationships with third parties.
- 1.1.5. In essence due diligence is undertaken to:
 - (a) Identify the entity and verify the entity's identity on the basis of documents, data or information obtained from a reliable and independent source;
 - (b) Establish the ability of the entity to deliver the contract
- 1.1.6. Due diligence is implemented to cut down on unpleasant surprises and reduces the chance that business practices of a service provider or grant recipient reflect poorly on the Council.
- 1.1.7. Due diligence will not provide a yes or no answer as to if the authority should use/partner with an entity. However, performing these types of investigation results in informed decision making through the use of enhanced information gathered during the process.
- 1.1.8. Decision makers can then analyse information and deliberate regarding costs, benefits and risks prior to entering into contracts.

2.0 What are the steps involved?

- 2.1. As due diligence is such an important part of the contract process, planning is essential as it may take some time to gather the appropriate information, consult experts, analyse the information and provide answers to questions.
- 2.2. Staff resource should also be considered, for example particular legal advice maybe required.
- 2.3. **STEP 1 – Planning**
 - 2.3.1. The steps of due diligence should be planned so that work can be completed before the contract discussions are too far advanced. For contract partners that present concerns it may be useful to consult with legal and finance colleagues to establish the best form of due diligence.
 - 2.3.2. The level of due diligence is likely to vary considerably from contract to contract depending upon the risk to the authority of the contract being entered into.
 - 2.3.3. Therefore planning is a key stage to ensure that all questions are answered and concerns alleviated, prior to contract award.
- 2.4. **STEP 2 – Gather Information**
 - 2.4.1. The first major step is to gather the information required in order to perform due diligence. The planning stage should of assisted in assessing the information that is likely to be required, but at the very least the information that should be gathered can be split into four categories:

2.4.2. Basic Information

- Name of organisation and directors/officers
- Registered address
- CVs of principals
- Contact details
- Group Structure (chart) showing how the contracting company fits into the overall corporate structure
- Company registration number and date of registration (where appropriate)
- VAT number
- Project outline
- Evidence the proposed project would not represent an excessive increase in the overall scale of the organisation's activities.
- Relevant experience of similar projects

2.4.3. Financial information

- Last 3 years financial accounts
- Auditor contact details
- Financial Plan
- Evidence of funds required to complete the project.

2.4.4. Web searches

- External credit rating
- Credit reference (taken by TDC)
- General search on company performance
- Press/media

2.4.5. Government policy

- Compliance with money laundering regulations

2.5. **STEP 3 – Analyse the Information gathered**

2.5.1. Analysis of the information gathered is essential in order make an informed decision regarding contract award.

2.5.2. Key questions that should be considered are:

2.5.3. Corporate image

- Has there been any negative publicity in the media around the company and how has the company dealt with and resolved these issues?
- Are there any pending legal cases against the entity?
- Is the entity only looking for a marketing opportunity by partnering with the Council?
- Is the entity looking only for procurement opportunities or money from the Council?
- Is the entity willing to engage in a transparent manner, with for example due regard to the Freedom Of Information Act?
- Is the entity willing to accept limitations around publicity of its relationship with the Council so that the Council is not perceived as endorsing the entity?

2.5.4. Social Responsibility

- Is the entity involved primarily in activities that the Council do not wish to align with, i.e. tobacco, firearms.
- Does the entity openly discriminate against race, sex or religion?
- Are there any concerns with the entity around corporate social responsibility?

- Is there any history regarding child or forced labour?
- Does the entity endorse standard Health & Safety requirements for workers?

2.5.5. Environmental Responsibility

- Does the entity assess the environmental impact of the project to be delivered?
- How does the entity monitor and set targets for improved environmental performance?
- Are there sufficient contingency plans to deal with emergencies relating to the contract?

2.5.6. Financial Ability

- Does the entity have the resources to fulfil its obligations through the contract?
- Does the entity issue annual accounts?
- Does the entity have a long track record, how many years has it been established?
- Does the entity have a stable structure and good governance around financial decision making?

2.5.7. Policy Compatibility

- Does the entity comply with all statutory regulations?
- Is it subject to any investigations by government, i.e. HMRC.
- Would entering into the contract cause the Council any issues with regards to its own constitution?

2.6. **STEP 4 – Further Specific and supplementary enquiries**

2.6.1. Further supplementary enquires may be required to answer the concerns or questions raised, however the level of these enquiries is likely to be dependent on:

- The scale of the proposed project or contract
- Responses to the initial enquires made

2.6.2. If the financial commitment is at a low level then enquires made will be restricted. The nature of the project and the level of risk are also considerations.

2.6.3. The planning stage of the due diligence process will allow you to assess the required level of further enquiries.

2.6.4. It is essential that a specific time limit is set for entities to respond, so that the awarding of the contract is not unduly delayed.

2.7. **STEP 5 – Decision making**

2.7.1. Once a comprehensive picture is built up of the entity concerned, an informed decision making process can occur using the information obtained.

2.7.2. An entity that has struggled to provide information or answer some of the key questions is likely to be unsuccessful in winning the contract.

2.7.3. When it comes to decision making, a final decision must be reached in a timely manner and in conjunction with advice received from other departments such as legal and finance.

3.0 **Conclusion**

3.1. Due diligence assists in the detection and treatment of risk in relation to a contract award.

3.2. The process can be lengthy, but ultimately leads to the reputational protection of the Council and its finances, as well as the protection and reputation of the decision makers.

Public Document Pack Agenda Item 3

Annex 2

EXTRAORDINARY CABINET

Minutes of the extraordinary meeting held on 11 December 2014 at 7.00 pm in Council Chamber, Council Offices, Cecil Street, Margate, Kent.

Present: Councillor Johnston (Chairman); Councillors Nicholson, Everitt, D Green, E Green and Harrison

In Attendance: Councillors Alexandrou, Bayford, Binks, Bruce, Edwards, Fenner, Gideon, Grove, C Hart, King, Lodge-Pritchard, Marson, Moores, Poole, D Saunders, M Saunders, M Tomlinson, S Tomlinson, Wells, Wiltshire, Wise, Worrow and Wright

223. APOLOGIES FOR ABSENCE

There were no apologies received at the meeting.

224. DECLARATIONS OF INTEREST

Councillor Johnston, Leader of Council informed the meeting that she had in the past attended a Save The Manston Airport Group meeting at which she gave a donation to the Group, sat at the top table at the AGM meeting and was entitled to vote. Mr Steven Boyle, Legal Services Manager & Monitoring Officer advised the meeting based on these representations that it was not his assessment that the Leader would be required to avoid voting on the Manston Airport agenda item at this meeting.

225. THANET LOCAL PLAN PREFERRED OPTIONS

Cabinet was advised that Council had to meet its statutory obligations by developing and adopting the Local Plan that set out how Thanet District would coordinate and manage future growth and developments as well as promote regeneration and economic prosperity for the area. The Local Plan was also an important tool for attracting future investment into the District as it provided a vision for how the District would be developed to meet the future demand for housing and employment whilst ensuring the natural, built and historic environment was protected.

The Local Plan had to be prepared in compliance with the guidance set out in the National Planning Policy Framework; whose core principle was “to proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs.”

Development of the draft Plan was led by a Cabinet Advisory Group whose membership was cross party. Cabinet commended the work done by the Cabinet Advisory Group and officers who supported the process leading up to the drafting of the proposed preferred options for the Local Plan.

Cabinet Members received a detailed power-point presentation from Mr Ismail Mohammed, Strategic Planning Manager on the highlights of the content of the draft Thanet Local Plan, Preferred Options Document that included the strategic policies, future site allocations and development management policies. The presentation also set out the timeline for the key activities that had been undertaken and that would need to be done leading up to the adoption of an updated Thanet Local Plan.

The meeting noted some amendments that were made to the draft document and were highlighted in an addendum to the report.

The following Members spoke under Council Procedure Rule 24.1:
 Councillor Bayford;
 Councillor Bruce;
 Councillor Cohen.

Councillor Nicholson proposed, Councillor Johnston seconded and Members agreed the following recommendations:

1. To approve the Draft Thanet Local Plan to 2031 Preferred Options Document and for the Council carry out a six week public consultation on the Draft Thanet Plan to 2031 Preferred Options Consultation and engage with wider local communities;
2. To delegate to the Director of Community Service in consultation with the Cabinet Member for Housing and Planning Services; to make any minor alteration to the approved Draft Thanet Local to 2031 Preferred Options Document that are considered necessary to ensure accuracy, reference and presentation for public consultation;
3. To set-up a Cabinet Advisory Group or Working Group to prepare the Area Action Plan Development Plan Document for the area of Manston Airport and its surrounding environ;
4. That the Draft Thanet Local Plan to 2031 Preferred Options Document (Annex 1) to the report be amended by deleting the section titled "New Primary School, Margate and Policy CM03" (page 189 of the Cabinet agenda);
5. That the Draft Thanet Local Plan to 2031 Preferred Options Document (Annex 1) to the report, insert: Policy H02G - Land at Melbourne Avenue, Ramsgate on page 122 before the section titled Cliftonville and Margate by deleting the section titled "New Primary School, Margate and Policy CM03" (page 189 of the Cabinet agenda).

226. MANSTON AIRPORT

Cabinet consider a report back on the soft marketing exercise that officers had been tasked to undertake in order to determine the possibility of finding an indemnity partner if Council was to opt for CPO route for the Manston Airport site. The meeting heard that the Council had made every effort to work constructively with Party A including making several deadline extensions for submitting the information requested from potential indemnity.

Cabinet noted that the Section 151 Officer and the other statutory officers had reached their conclusions after fully considering what had been put forward and the implications. The method of analysis and the conclusions are also backed by Counsel's Advice. The Council had entered into a confidentiality agreement with Party A which was specifically requested by them.

Cabinet therefore noted the following four points in particular:

1. There was no stage by stage funding for a CPO. Unless the investment was in place, the prospects of a CPO were much diminished;
2. The new ownership of the site made it more difficult to mount a successful CPO argument;
3. The Council wanted to see a thriving, viable airport. Given all the past unsuccessful attempts to do this, a long-term business plan was simply an essential requirement;

4. Neither Government nor the County Council had come forward with any financial support to help the Council deal with this major project.

Cabinet agreed not to put at risk council tax payers' funds and not to adopt an indemnity partner which carried uncertainty.

The following Members spoke under Council Procedure Rule 24.1:

Councillor Bayford;
Councillor Marson;
Councillor Binks;
Councillor S. Tomlinson;
Councillor D. Saunders;
Councillor Wells;
Councillor Wiltshire;
Councillor Cohen.

Councillor Johnston proposed, Councillor Nicholson seconded and Members agreed the following:

1. That no further action be taken at the present time on a CPO of Manston Airport, on the basis that the Council has not identified any suitable expressions of interest that fulfil the requirements of the Council for a CPO indemnity partner and that it does not have the financial resources to pursue a CPO in its own right;
2. That subject to obtaining written consent from Party A; relevant information is sent to the Minister of State for Transport for consideration.

Meeting concluded: 9.10 pm

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