
Royal Sands Development

To: **Cabinet – 11 September 2014**

Main Portfolio Area: **Cllr Rick Everitt, Cabinet Member for Finance & Estates**

By: **Edwina Crowley, Head of Economic Development & Asset Management**

Classification: **Unrestricted**

Ward: **Eastcliff**

Summary: Further information has become available since Cabinet adopted the recommendations of the Overview and Scrutiny Panel on 20th February. Cabinet are asked to consider this information and determine the resolution.

For Decision

1.0 Introduction and Background

1.1 On 20th February Cabinet made a number of decisions based upon the recommendations of the Overview and Scrutiny Panel which it received and adopted.

2.0 The Progress since the Decision on 20th February

2.1 Since the Cabinet report of 20th February there has been a change in project team as follows:

Edwina Crowley	Project Lead, Head of Economic Development and Asset Management
Steven Boyle	Interim Legal Services Manager
Mike Humber	Technical Services Manager
Grant Burton	Capital Development Manager

2.2 The team is supported by Stuart Wortley and Luke Miotte of Pinsent Masons (legal advice) and Tim Mitford-Slade of Strutt and Parker (valuation advice). The project team have re-visited the site and reviewed the documents and correspondence.

2.3 Acting on the recommendations contained in the Cabinet report made on the 20th February the Council served Notice on the developers legal advisor requiring remedy of the breach of the agreement.

2.4 Following the service of the Notice the development agreement contractually provides for parties to enter into mediation when there is a significant dispute and therefore on 10th July, a without prejudice meeting took place at the offices of Pinsent Masons.

2.5 At this meeting the Developer informed officers that they had been approached by Cardy Construction Ltd to acquire the share capital of SFP (Ventures) Ltd thereby proposing to take ownership of all SFP contractual obligations (including this development agreement with the Council) and that in principle, the Developer is keen

to accept the offer. This would mean that Cardy Construction Ltd would become responsible for finishing the construction works in accordance with the planning permission.

- 2.6 Furthermore Cardy Construction Ltd would amalgamate this company into the established parent group of companies which has a long history of successful performance with such schemes.
- 2.7 Additionally, Cardy Construction Ltd are, in principle, in a position to enter into an agreement which, subject to successful negotiations between the parties, would mean the Council would not only receive the overage payments in advance of completion of the construction but also provide additional benefits for the Council.
- 2.8 Cabinet is asked to note at this point that the current contractual arrangements with SFP entered into in 2006 mean that the Council has substantially disposed of its freehold interest in the land (with freehold transfer provisions documented in the development agreement); the Council's only continuing legal interest is the right to receive overage payments in respect of the completed units.
- 2.9 Notwithstanding the problems that the developer has outlined which they state have caused a problem in developing out this construction (see 3.2.3) if the matter progressed to Court, the Courts would expect the Council to undertake an objective assessment of all reasonable offers put forward in order to complete this construction project and by doing so receive the overage payments owed to them.

3.0 The Current Situation

- 3.1 In light of this offer advanced through the mediation process, the council development project team has reviewed all the documents and correspondence and can provide the following comment on the position.
- 3.2 It is clear following legal advice that terminating the development with SFP would not be straightforward for the following reasons:-
- 3.3 Notwithstanding the expiry of the date for compliance contained within the Notice served on the developer's legal advisors, the procedure for terminating the development requires the service of 3 additional separate notices. The Notice served referred to the breach committed and had to allow the developer reasonable time to comply with performance documented in the notice. The developer may comply in full or in part, and at the end of the period for compliance the developer would be allowed further time to proceed to the next phase of works.
- 3.4 To continue down this route of performance management means the process will be likely to be drawn out over a number of years.
- 3.5 Furthermore, SFP (Ventures) Ltd could at any stage decide to contest any attempt to terminate the development agreement by formal action on the basis of several arguments. Whilst there are varying degrees of merit to these potential challenges they might include:-
 - a) some of the delays to the development were caused by matters outside of their control and therefore may validate the request by SFP to extensions of time, for example the problems with the cliff face wall, access and egress restrictions.

- b) SFP have also made allegations about the actions of a particular Councillor trying to undermine its attempts to fund the scheme and promote the development (including its attempts to identify a suitable hotel operator).
- c) Notwithstanding the programme of works agreed at the time of the 2009 variations required the developer to build in an illogical manner because the hotel could not sensibly be opened with the residential still underway; the highways issue in 2010 made it practically impossible too for the reasons documented in (d) below.
- d) A review of the programme of works in light of the access/egress restrictions mentioned means that it would be extremely difficult to follow in a safe and practicable manner (given that if the hotel was built first in accordance with the programme, access to the remaining site would be obstructed by the hotel), and Health & Safety Construction Regulations require adjustments to works programmes where there is a safer way of delivering the project.

3.6 SFP claim to have invested significant sums of money in the development, accordingly, they are likely to fight very hard to protect SFP's interest in the development site.

3.7 For these reasons, any formal attempt to terminate the development agreement would undoubtedly take a considerable time and there is always a risk with litigation that the Council may be unsuccessful and at the very least the outcome would be uncertain. Contentious litigation would be very likely in this case and progressing with such action would be expensive (with uncertainty as to where the Court would award the costs) and could tie the development site up for many years.

3.8 The Council's decision through Cabinet to terminate the development agreement on 20th February 2014 was reached on the basis of a summary of Pinsent Masons' legal advice. Issues which have been raised by Parry Law in response to the Notice served for the breach have resulted in amendment to the original advice, including (as requested by Members) a review of the comments around the absence of a long stop date being a "material defect"

3.9 There was no one off long stop date in the development agreement whereby if the developer had not performed the Council would have step in rights to get the site back. The agreement did however have several performance indicators; failure to perform one of them would trigger a review of the agreement with the Council taking action as appropriate. In light of the amount of money that the developer would have invested at each stage, Pinsent Masons advise it is unlikely that they would have been agreeable to a long stop date when the contracts were being negotiated in 2006.

4.0 Cardy Construction Ltd

4.1 Focusing on the present situation, it is clear that circumstances have materially changed in that there is now a reputable and established construction company, willing to take over SFP and they in turn have indicated they are willing to transfer their interest to this company. Upon completion of company transfer contracts between SFP and Cardy Construction Ltd, the current owner of SFP would have no further involvement with the development.

4.2 Cardy Construction Ltd have in principle funding in place to complete the development within a reasonable time frame. Furthermore, they are of a sizable nature, have proven technical expertise and a consistent record for delivering quality projects of this type and scale.

- 4.3 It is also proposed that the Cardy Construction Ltd will employ local tradespeople for this project and engage apprentices. A construction project of this scale will employ up to 200 people on this project when in full operation, there is also the ongoing opportunity for jobs aligned to the hotel trade, commercial units and servicing of the residential common parts.
- 4.4 Overall, Cardy Construction Ltd is therefore considered a much stronger covenant for the development and for this reason are able to attract funding for the scheme, making delivery viable.

5.0 Commercial Considerations

- 5.1 The project team had been asked to consider the present value of the site and what the implications would be if the council was able to buy the site from the developer. Valuation experts Strutt and Parker were asked for advice on the present value of the freehold interest.
- 5.2 Strutt and Parker advised that the site is worth a significant amount of money even in its part developed state.
- 5.3 The Council does not have the funds to buy the site back (see section 7.1 below) even if the developer was willing to sell the site. The market value of the scheme is the value added by the granted planning permission for the finished scheme.
- 5.4 Even if the Council was able to buy back the site then the Council would still be required to secure an alternative developer, in order to secure the best financial value for the site, so it is likely that the same scheme or a scheme of similar type and scale would be developed out.
- 5.5 Therefore, the offer by the Cardy Construction Ltd to finish the scheme and compensate the council for the overage money owed is considered to be a good solution. To get the site developed will not only bring financial return to the council but will support regeneration in Ramsgate, both by direct and indirect employment opportunities.
- 5.6 The project team have considered the benefits of receiving the overage payment in advance of completion of the development. The project team are also confident that they can negotiate better contractual terms for the council to include a call in option for non-performance.
- 5.7 The offer from the Cardy Construction Ltd to build out the site in a timely manner is, subject to successful negotiations, considered by the project team to be acceptable in principle.

6.0 Recommendations

- 6.1 It is therefore recommended that Cabinet authorise officers to defer the recommendations of the Cabinet paper dated 20th February whilst positive negotiations continue;
- 6.2 Furthermore, that Cabinet authorise the project team (in consultation with the S151 Monitoring Officer, Head of Paid Service and Cabinet Member for Finance and Estates) following due process and procedures to progress with negotiations;
- 6.3 That a report be brought back to Cabinet in October, documenting the outcome of the negotiations for final decision.

7.0 Corporate Implications

7.1 Financial and VAT

The Royal Sands development is currently accounted for within the Council's asset register and subsequently within the Balance Sheet. The financial implications of the aforementioned have been detailed below:-

To receive the overage monies owed to the Council would result in a substantial capital receipt that would be used to fund council's capital expenditure programme.

It is noted that preliminary investigations were held by the project team to get an indicative present value for the site and that this amount is a considerable sum. There is no allowance in the budgets to take this action, it would constitute as capital expenditure for acquisition of the rights bought back that had previously been sold. There has been a decline in capital receipts over the past few years due to the economic downturn and the need to achieve best value. Currently the council does not hold sufficient funds in the unallocated capital receipt reserve to fund such expenditure as it has been fully committed to fund the existing capital programme. It is likely the Council would need to borrow to facilitate the purchase of the leases, which would result in increased revenue costs for the Interest on borrowing and the minimum revenue provision for principal repayment.

Once agreement has been sought on which option would be the most appropriate then specialist VAT advice will need to be sought.

7.2 Legal

The legal issues are broadly as outlined within this report.

There are processes to be followed to seek to terminate the existing agreements as outlined. There is likely to be a challenge to this process which will be costly and time consuming.

Careful attention needs to be made to any action taken either to terminate the existing agreement, purchase the leases or seeking to sign a new agreement to ensure the Council's legal position is secured.

Appropriate advice has been sought at all stages so far to ensure that the Council's position is sustainable.

7.3 Corporate

As outlined within this report the position has changed materially since the Cabinet Decision was taken in February.

Given that there is now an alternative which may bring about a solution to the problem avoiding the legal challenges it is appropriate that members are given the opportunity to consider this and to take a decision based upon all of the options.

7.4 Equity and Equalities

If Cabinet agree to taking this forward, all discussions and agreements are subject to a Council equity and equalities assessment.

8.0 Decision Making Process

8.1 This is a key decision subject to call in.

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Reporting to:	Madeline Homer, Acting Chief Executive

Corporate Consultation Undertaken

Finance	Nicola Walker, Finance Manager - HRA, Capital & External Funding
Legal	Steven Boyle – Interim Legal Services Manager & Monitoring Officer