

TITLE OF REPORT: NORTH HERTFORDSHIRE MUSEUM AND COMMUNITY FACILITY**REPORT OF THE PROJECT EXECUTIVE/STRATEGIC DIRECTOR CUSTOMER SERVICES****1. SUMMARY**

- 1.1 This reports sets out proposed arrangements for the development of a new North Hertfordshire Museum and Community Facility in partnership with Hitchin Town Hall Ltd agreed, subject to negotiation on a number of matters, by Council on 10th May 2012. Details of the updated Development Agreement, Lease and associated Management and Community Use Agreement as amended following negotiation are now presented for approval.

2. FORWARD PLAN

- 2.1 This report contains a decision which was first published in the Forward Plan in August 2011.

3. BACKGROUND

- 3.1 This report provides an update on the North Hertfordshire Museum and Community Facility project following Council's decision on 11th November 2010 to proceed with Hitchin Initiative's sponsored 'community' proposal for Hitchin Town Hall now being taken forward by Hitchin Town Hall Ltd. At that meeting Council resolved:

- 1) That officers be instructed to take forward the scheme outlined by Hitchin Initiative and proceed to negotiate the necessary arrangements and consents to use Hitchin Town Hall as the North Hertfordshire District Museum and as a community venue;
- (2) That officers, in consultation with the Portfolio Holder for Community Engagement and Rural Affairs, be instructed to report to the Hitchin Gymnasium and Workmans Hall Trust and seek its agreement to proceed on this basis.

- 3.2 Following this, Council again considered a report at its meeting on 10th May 2012 which sought approval to enter into a Development Agreement, Lease and associated Management and Community Use Agreement. At that meeting Council resolved:

That, subject to the consideration and determination of matters referred to in the Part 2 report, the Council:

- (1) Enter into the

- Development Agreement;
- Lease; and
- Community Use and Management Agreement with Hitchin Town Hall Limited;

- (2) Enter into the Management Agreement with the Gymnasium and Workmans Hall Trust;
- (3) Note the proposed transfer of 14 Brand Street, Hitchin, to the Gymnasium and Workmans Hall Trust;
- (4) Delegate authority to the Strategic Director of Customer Services and Corporate Legal Manager, in consultation with appropriate Portfolio Holder(s), to agree minor variations to Legal Agreements (referred to in Paragraphs 12.1 and 12.2 of the report);
- (5) Note that authority to determine the new project completion date is already delegated to the Strategic Director of Customer Services as Project Executive;
- (6) Note that, if further decisions are required beyond minor variations or to meet conditions required by Futurebuilders, a further report will be presented to Council; and
- (7) Note that progress with the project will also require formal agreement from the Gymnasium and Workmans Hall Trust, Hitchin Town Hall Limited and Futurebuilders.

PART 2

RESOLVED:

- (1) That authority be delegated to the Strategic Director of Customer Services, in consultation with the Portfolio Holder for Community Engagement and Rural Affairs, to conclude negotiations in respect of the Architectural Specification with Hitchin Town Hall Limited, in accordance with Paragraphs 4.4 to 4.6 of the report;
- (2) That the respective positions of North Hertfordshire District Council and Hitchin Town Hall Limited in respect of staffing matters, as set out in the report, be noted;
- (3) That Hitchin Town Hall Limited's governance arrangements be noted and accepted, subject to confirmation that charitable status has been secured, in accordance with Paragraphs 4.17 to 4.21 of the report;
- (4) That the indemnities to be given to Hitchin Town Hall Limited in the Development Agreement, as set out in the report, be approved, and that it be noted that officers are actively seeking to resolve the situation direct with Futurebuilders, with a report being brought back to Council as soon as possible; and
- (5) That acceptance of the initial assessment of Hitchin Town Hall Limited's capacity be confirmed, and that authority be delegated to the Strategic Director of Customer Services, in consultation with the Portfolio Holder for Community Engagement and Rural Affairs, to determine that an appropriate level of assurance in respect of its mobilisation plan has been received.

Appendix 1 lists previous decisions made from August 2005 relating to this project.

- 3.3 Since confirmation of the grant/loan award from the Community Builders Fund subsequently known as 'Future Builders England Ltd' (FBE) and now known as

'Adventure Capital Fund' (ACF) on 10th February 2011 significant progress has been made and regular updates have been provided via Members Information Service (MIS), Cabinet and Hitchin Area Committee . http://www.north-herts.gov.uk/index/leisure_and_culture/art_museums_and_heritage/art_museums_and_heritage_forum/hitchin_town_hall-2.htm

- 3.4 The project is managed by the Strategic Director Customer Services acting as Project Executive operating under delegated authority with input from a Project Board which includes representation from Hitchin Town Hall Ltd. During the active phase of negotiation, meetings of the Project Board were limited as the project could not proceed until the Development Agreement was confirmed. However, regular liaison and project meetings were held with representatives of Hitchin Town Hall Ltd and other stakeholders were updated via the Arts, Museums & Heritage Forum and newsletters and to the public generally via Outlook Magazine and media releases.
- 3.5 In overall terms, this project is one of the most innovative and complex the Council has ever embarked on. The financial, legal and operational complexities and tripartite relationship between Hitchin Town Hall Ltd, Hitchin Gymnasium and Workmans Hall Trust and NHDC whilst challenging, could provide an economically sustainable model of service delivery.
- 3.6 During the course of negotiations officers have been conscious that the project differs from a commercial development and have sought to take a pragmatic approach which retained a focus on the potential overall benefit for the local community and Council Tax payers generally. This approach is consistent with the thrust of provisions within the Localism Act 2011 which provides encouragement to local authorities and organisations to work together to transfer appropriate assets to the communities they serve, provided the organisation has the capacity to do so and that the transfer brings visible benefits to both parties. The project also aligns with the intentions expressed in the Council's 'Priorities for the district' document to 'work with local communities'.
- 3.7 The project is also unusual in the sense that practical steps necessary for the rapid completion of the project to accommodate the financial model adopted by Hitchin Town Hall Ltd and conditions imposed by their funder have taken place simultaneously with the negotiations on the Development Agreement. This created additional risks as delays in either aspect could affect progress in the other.
- 3.8 The Workman's Hall and Gymnasium was given in Trust to the Council in 1934. The objectives of the Trust are:

"Upon trust to use or permit it to be used as a Gym for the benefit of the residents of Hitchin and for other purposes mentioned in s6(3) Museums and Gymnasiums Act 1891 and also for any other (charitable) purpose for the benefit of the North Hertfordshire District for which North Hertfordshire District Council can lawfully use building and land vested in them".

The Trust has no income of its own and the Trust building is managed and funded by the Council.

- 3.9 At its meeting on 10 January 2011, the Hitchin Town Hall Gymnasium and Workman's Hall Trust Sub-Committee resolved:

That the scheme prepared by Hitchin Initiative for use of the Hitchin Town Hall as the North Hertfordshire District Museum and as a community venue be approved in

principle, subject to consideration of the Public Benefit Test and guidance received from the Charity Commission

- 3.10 The Trust subsequently confirmed at its meeting on 22 May 2012 that the public benefit test and Charity Commission disposal requirements were met by the proposed scheme and the terms of the transaction. The Trust also authorised the Council to execute the Legal Agreements with HTHL on behalf of the Trust (subject to reporting back on any substantive changes). At its meeting on the 9th October the Trust resolved:
- (1) *That the information provided by the Strategic Director of Customer Services regarding progress to settling the Legal Agreements be noted, and that it be further noted that the outstanding matters do not directly impact the Trust;*
 - (2) *That the Head of Revenues, Benefits and IT, in consultation with the Chairman of the Trust Sub-Committee, be delegated authority to agree the Legal Agreements; and*
 - (3) *That it be noted that the project will require final approval by Full Council at its meeting to be held on 15 October 2012.*

4. CONSIDERATIONS

Hitchin Town Hall Ltd Funder's Requirements

- 4.1 As detailed in MIS updates, Members will be aware that the transfer of responsibility for funding from Community Builders to FBE meant that critical elements of compliance with the funder's requirements have changed significantly since the award of the grant/loan at the beginning of 2011. An initial requirement, now rescinded, was to conclude a Development Agreement and start work on site by 1st April 2011.
- 4.2 These changes and the very tight timescale proved to be challenging. Nevertheless, huge progress was made in developing the scheme to the point where it secured planning approval and listed building consent at the end of March 2011.
- 4.3 In September 2012, Future Builders England's successor ACF advised Hitchin Town Hall Ltd that the continued failure to draw down the agreed grant/loan was depriving other agreed projects from being supported and required Hitchin Town Hall Ltd (and by implication the Council) to have concluded the Development Agreement by 15th October 2012 and to have let a contract for the construction of the project by 31st March 2013. As a result of this, the anticipated target date for completion of the project is November 2014 and this date is reflected in the Development Agreement.
- 4.4 In consultation with the Leader of the Council and the Portfolio Holder, Officers agreed to work towards these dates to help secure the Hitchin Town Hall Ltd financial contribution from ACF, and this report, if agreed, will ensure the first of those deadlines is met.
- 4.5 In order to achieve the second deadline the Chief Executive authorised the engagement of the Supervising Architect on a day works basis in accordance with the rates submitted in the successful tender to move the design process forward. The Supervising Architect and officers are of the view that whilst it will be challenging to have awarded the construction contract by the end of March 2012 (this task had originally been scheduled to take 8 months and will have to be completed in 5) it would be possible.

4.6 In addition to the deadlines imposed by ACF a number of further requirements have been highlighted by their legal advisers and these are detailed in paragraph 5.6. In brief these comprise of:

- Collateral Warranties
- Development Timescale
- Default and Termination
- Guarantee from NHDC
- Direct Deed Agreement
- Grant of a 'Put Out' option

4.7 As reported to Council on the 10 May 2012, the requirements of ACF at that time were as yet unclear. As part of further discussions, ACF have requested that the Council enter into a direct Deed of Agreement with them, which will be supplemental to the Development Agreement. This addresses the outstanding detail regarding indemnities referred to in the report to Council on 10th May 2012. The terms of this agreement are:

The Council will be required to enter into this agreement simultaneously as the Development Agreement and agrees to the following:

- (i) Consents to HTH Limited charging to ACF, all its interest in the Development Agreement, all interest in any property secured to ACF and the discharge of all obligations present and future due from or incurred by HTH Limited to ACF.*
- (ii) Consents generally to ACF assigning their rights to a third party- the risk to the Council being that there will be no right of choice to the identity of the third party or knowledge of the status of the third party*
- (iii) Not to exercise any power or re-entry or termination under the Development Agreement arising by reason of appointment of a Receiver.*
- (iv) To allow six calendar months to ACF before exercising any power of re-entry or termination under the Agreement, to enable ACF to decide whether to perform the obligations of the Agreement directly or assign it to a third party to perform the obligations of the Agreement directly or to take no action.- These are the 'step-in' rights referred to in the previous Council report. The risks to the Council in agreeing to this are the obvious setting back of the Development for a 6 month period, in the event the Council wishes to re-enter or terminate and the consequential financial, reputational and operational costs to the Council in this event.*
- (v) To agree to observe and perform the provisions of Clause 9 (Financial Support in the event of Completion after the Target Completion Date) of the Development Agreement.*
- (vi) To agree to observe and perform the provisions of Clauses 4.6 (Collateral Warranties), 9 (Financial Support in the event of Completion after the Target Completion Date) of the Development Agreement, 10 (Financial Support between HTH Operational Date and Target Completion Date) and 11 (Put Option).*

Hitchin Town Hall Ltd's Requirements

4.8 As part of the negotiating process, Hitchin Town Hall Ltd have sought a number of changes to the Development Agreement and elsewhere which are now reflected in the relevant documents. The significant changes which represent Hitchin Town Hall Ltd's final position are:

- HTH Limited's Development Requirements - authority to conclude negotiations on this matter were delegated to Strategic Director Customer Services in consultation with the Portfolio Holder and as part of this- a new Clause 5.1 (f) has been added to the Agreement to confirm that the Council will use its reasonable commercial endeavours in the procurement of works to incorporate HTH's Development requirements. Following detailed discussions with HTH Limited and the Supervising Architect , the Council is confident that it can deliver these requirements and that the risk of non-delivery is low.
- Additional Financial Support – Due to the revisions in the project timetable, the Target Completion Date for the Development is estimated as 14 November 2014, allowing for a short period of contingency. HTH Limited have projected , as part of their business plan, that they will require commencement of the operations of the Building by 30 September 2013, which leaves a gap between these dates of approximately 7 weeks. HTH Limited have requested that the Council considers the grant of a further loan to them, to cover any loan interest, holiday period interest and capital loan repayments due to ACF for that period. This is reflected in a new Clause 10 to the Agreement and is similar to the terms previously granted by the Council in Clause 9 (Financial Support in the event of Completion after the Target Completion Date).

Further, as a result of the addition of a new Clause 10 above, consequential amendments have been made to the existing Clause 9 to align with this new clause. Some wording has also been amended to reflect the requirements of the ACF Investment Agreement with HTH Limited.

- Potential expansion of the scheme to include remainder of 15 Brand Street- additional wording has been added at Recital D and a new clause inserted at 4.7 to reflect the commitment of the parties to continue to consider and explore the inclusion of the remainder of 15 Brand Street to form part of the Development, subject to agreement of all parties and on the basis that it will not jeopardise achieving the ACF imposed 31 March 2013 deadline.

4.9 Due to concerns expressed by the Seller of 14 Brand Street, regarding potential disturbance caused by the Council to neighbouring property and breaches of the Party Wall Agreement, it is proposed that a side letter to the Seller, in the form of words below, be approved. This will be to expressly provide as follows:

- (a) The Council shall use reasonable endeavours to ensure that the building contractor causes the minimum of disturbance to the owners and occupiers of the adjacent property and complies with the terms of any Party Wall Agreement relating thereto and agrees to indemnify the Seller against any such claims that may arise.
- (b) As the party engaging the Building Contractor, the Council shall ensure that any works relating to the Party Wall Agreement are completed.

In terms of the Council's obligations in conducting the works of the Development, these requirements will be built into the contract with the Building Contractor.

4.10 Finally, at a meeting on 19th September 2012, Hitchin Town Hall Ltd requested the Council give consideration to the grant of a loan to cover a number of legal expenses for which it did not have the resources to settle until its planned fundraising activity commenced once construction started on site, currently estimated to be in April 2013.

The terms of the request, which are considered satisfactory should Council agree to provide a loan, are that:

- The loan will be up to a maximum of £20k.
- Amounts will be paid to HTH Ltd on presentation to the Council of copy invoices, addressed to HTH Ltd, up to the value of those invoices and £20k as a maximum.
- The loan will be subject to an interest charge of 3.2% per annum, calculated on a daily basis from the day amounts are paid.
- The Directors of HTH Ltd will undertake to repay this sum as soon as practicable, with final repayment no later than the day when HTH Ltd receive the final loan and grant from ACF.
- To this end HTH Ltd will make staged repayments at an amount that is affordable, but at a minimum of £1,000 per repayment, on a quarterly basis from June 2013.

Repayment of this loan would become due by Hitchin Town Hall Ltd to the Council on receipt of their final scheduled draw down from ACF in September 2014.

- 4.11 Council is asked to note that unless this loan is granted, Hitchin Town Hall Ltd would not be in a position to proceed with the development.

Other Matters

- 4.12 A number of other matters, not directly referred elsewhere in this report are drawn to Council's attention.
- 4.13 Hitchin Town Hall Ltd have been awarded Charitable Status and are registered with the Charity Commission (Charity Number 1148921).
- 4.14 In consultation with the Portfolio Holder, the Strategic Director Customer Services has assessed Hitchin Town Hall Ltd's capacity and concluded that an appropriate level of assurance can be confirmed subject to the appointment of a suitably experience, capable and qualified Manager being engaged. It should be noted that, following the meeting of Council on 10th May 2012, Hitchin Town Hall Ltd varied its financial model and anticipates an increased level of both income and expenditure. Whilst there is uncertainty that the revised income figures are achievable in the initial years of operation, it is considered that there is sufficient flexibility in the model and in operational terms to accommodate this.

5. LEGAL AGREEMENTS

- 5.1 Various legal agreements are required to protect the Council's position in respect of the proposed development. The Development Agreement between NHDC and Hitchin Town Hall Limited sets out the parties responsibilities in respect of the Development itself. The Lease controls how HTH Limited may use the building and the rights granted to them and the Community Use & Management Agreement sets out the day to day practicalities of operation of the completed building which will be occupied by both parties.
- 5.2 In order to unify the Council's interest in the Building, the Council and the Trust have negotiated a Management Agreement so that the overall management of the building passes to the Council. This Agreement has not had any substantive changes since it was approved by the Council on 10 May 2012 and the Trust on 22 May 2012.

5.3 In addition to the key documents noted above, there are several legal documents not reproduced with this report which are ancillary to the main documents. These are:

- An Option Agreement to be entered into between Hitchin Town Hall Limited and the current property owner which will give HTH Limited the contractual right to acquire 14 Brand Street.
- A transfer deed which will legally transfer 14 Brand Street from the current property owner to Hitchin Town Hall Limited.
- A transfer deed which will legally transfer 14 Brand Street from Hitchin Town Hall Limited to the Hitchin Gymnasium and Workman's Hall Trust

Development Agreement

5.4 The Development Agreement sets out the legal obligations on the parties, from the beginning to the end of the Development (i.e from signature through to all conditions being satisfied and the lease granted). In essence it states that the following sequential events will occur:

- NHDC will appoint the Architect
- NHDC will appoint the Building Contractor
- HTH Ltd will acquire 14 Brand Street and allow NHDC access to the site for the purpose of the Development.
- NHDC will carry out the Development
- HTH Ltd will fit out the kitchen for the Café at its own cost
- The Architect will confirm completion of the Development
- HTH Ltd will pay its contribution to the Building Contractor
- HTH Ltd will transfer 14 Brand Street to the Trust
- NHDC will grant HTH Ltd a Lease in the agreed form and will also enter into the Community Use and Management Agreement.

The Agreement sets out the detail of each of these stages and deals with ancillary matters such as:

- Dispute resolution
- Liaison arrangements
- The ability for the Agreement to be used as financial security by HTH Ltd.
- Standard clauses that would ordinarily appear in a legal agreement of this nature

5.5 The Agreement also sets out the parameters within which NHDC must instruct the Architect to design the Development.

5.6 As well as setting out the principal steps in the Development, the Agreement addresses some key project issues and the principal changes to the draft considered by Council at its meeting on 10th May 2012 are:

- Collateral Warranties- ACF have imposed a requirement that collateral warranties must be provided by the Architect, Building Contractor and its sub-contractors, in a legal form approved by them. The Development Agreement has been amended to provide for this, subject to Council approval. The implications for the Council are the additional costs to the contract, in making this a requirement. The Architect has indicated that procuring a building contract on this basis is achievable but is not able to quantify the additional costs. It is likely that these costs will result

predominantly from each contractor's insurance requirements and be absorbed in the overall tendered prices.

- Timing (i)- ACF have indicated that they will not release funds to HTH Limited for their purchase of 14 Brand Street, unless ACF have secured a legal charge over the property. The clauses relating to timing of the sequence have therefore been changed in the Agreement, at Clauses 3.2 and 4.1. It is proposed that HTH Limited will exercise the Option, complete the purchase of 14 Brand Street and the Council will formally award the contract to the Building Contractor and commence the Development simultaneously. This ensures that both parties have their interests protected.

(ii) ACF have also indicated that they will not release funds to HTH Limited for their contribution of £490,000 towards the Building Contractors' costs, until they have obtained the grant of Lease from the Trust, through the Council. Therefore, amendments have been made at Clause 4.4 of the Agreement to allow for a simultaneous transfer of 14 Brand Street to the Trust and grant of Lease from the Council to HTH Limited.

- Default and Termination- Due to deadline imposed by ACF for the Building Contract to be awarded by 31 March 2013, the Effective Longstop Date has had to be amended to this date. Therefore, the Agreement will terminate immediately under Clause 8.1 if the Council has not formally awarded the Building Contract by 31 March 2013. The impact has been to reduce the procurement time for the Building Contractor but this has been mitigated by instructing the Architect on a day rate to progress with the project.
- Grant of Put Option by the Council- this new clause addresses the requested 'Guarantee from NHDC to repay to ACF any investment made by them in the event that the project is not completed'. ACF have made it a requirement for a new Clause 11 within the Development Agreement, that would require the Council to grant a 'Put Option' to HTH Limited that, in the event of a Trigger Event, HTH Limited may exercise the Option to require the Council to re-purchase the property at 14 Brand Street from them.

The Put Option can only be exercised from the date of the Agreement until completion of the Lease to HTH Limited.

The Trigger Events are (i) that the Works have not commenced or progressed in a manner likely to achieve the Target Completion Date (ii) HTH Limited terminates the agreement under Clause 8.3 due to a material breach by the Council of its obligations or (iii) the Target Completion Date has not been achieved by 14 November 2016.

In the event of any one of the above, trigger events above occur the Council would be required to purchase 14 Brand Street for the sum of £250,000. Other consequential risks to the Council have already been identified, in the event any of the Trigger Events occur.

The Agreement has also been amended at Clause 8.4, to take into account the provisions of this proposed Direct Agreement with ACF.

- 5.7 A copy of the revised Development Agreement appear as Appendix 3. Some of the annexes in Development Agreement have not been reproduced as they are not material to the considerations before Members.

Lease

- 5.8 The Lease will be granted to Hitchin Town Hall Limited after the Development works are complete and subject to specified conditions in the Development Agreement. Originally the key condition was that Hitchin Town Hall Limited must have paid its £490,000 contribution towards the build costs in full before the lease is granted. However, since being considered by Council on 10th May 2012, ACF have advised that they require the lease to be granted prior to the financial contribution and this is reflected in the Development Agreement at Appendix 3. This requirement reduced a safeguard designed to protect the Council's interest although the likelihood of non payment is remote and would in any event represent an actionable material breach of the agreement.
- 5.9 The Lease term is for 125 years at a peppercorn rent. The Tenant is Hitchin Town Hall Limited (company number 07974116). The Property demised by the lease is identified by blue shading on the lease plans and includes the Mountford Hall and the café area. The Lease will create a legal interest in land that can be sold or mortgaged by HTH Limited. However there are strict conditions regulating the Tenant's ability to sell or mortgage the lease and NHDC's written consent is required in both instances. As HTH Limited are now a registered charity any disposal of the lease by them would also have to meet the Charity Commission's requirements.
- 5.10 The majority of the obligations on HTH Limited in respect of the building are contained in the Lease. However some of the obligations relating to the shared areas are contained in the Community Use and Management Agreement. This is a bespoke arrangement which has been put in place because of the need to remain flexible over the day to day management of the Building and the provisions of the Community Use and Management Agreement can be revised as necessary. The detail of this document is considered further below.
- 5.11 The Lease includes regulation of the Tenant's use of the Property, responsibility for repair, and liability for outgoings and taxes.
- 5.12 No substantive amendments have been made to Lease since the draft was considered by Council at its meeting on 10th May 2012. Some clauses have been amended to meet the requirements of ACF and by way of updating the document, but these are considered to be minor variations and have been approved by the Strategic Director Customer Services and legal team.
- 5.13 A copy of the amended Lease appears as Appendix 4.

Community Use and Management Agreement Between NHDC & Hitchin Town Hall Ltd

- 5.14 The Community Use and Management Agreement (CU&MA) will be completed on the same day as the Lease. It will sit alongside the Lease to regulate the day to day management issues relating to the Building so as to ensure flexibility over these issues. The CU&MA contains provisions for periodic review. A review of the Agreement can be instigated by either party and that party must specify the particular issues that need to be reviewed.

- 5.15 The general principles regulating the service to be offered by the Café are included in the CU&MA. In order to ensure that the Café facilities are appropriate to the museum service, the CU&MA prescribes how often the Café must be open and the general types of product it should stock.
- 5.16 In addition to dealing with general management matters such as cleaning, security, waste removal and safety issues, the CU&MA also regulates use of the key shared areas namely the Central Gallery, the Balcony, the Terrace and the Circulation Route.
- 5.17 No substantive amendments have been made to Community Use and Management Agreement since the draft was considered by Council at its meeting on 10th May 2012. Some clauses have been amended to meet the requirements of ACF and by way of updating the document, but these are considered to be minor variations and have been approved by the Strategic Director Customer Services and legal team.
- 5.18 A copy of the amended agreement appears as Appendix 5

Management Agreement between the Council and the Trust

- 5.19 The Management Agreement is designed to pass management of the Trust Property to the Council so that the Council has complete operational responsibility of the new facility. The Agreement sets out how the Council must manage the Trust Property and also regulates any profit or loss made in respect of the property. The Trust Property is all that land currently owned by the Trust together with 14 Brand Street if and when that land is acquired by the Trust.
- 5.20 Under the terms of the Agreement the Council will be entitled to pass management of part of the Trust Property to HTH Limited. This will enable the Council to enter into the Community Use and Management Agreement in respect of the Trust Property.
- 5.21 No substantive amendments have been made to this Agreement since the draft was considered by Council at its meeting on 10th May 2012. Some clauses have been amended by way of updating the document, but these are considered to be minor variations and have been approved by the Strategic Director for Customer Services and legal team on behalf of the Council
- 5.22 A copy of the amended agreement appears as Appendix 6.

6. LEGAL IMPLICATIONS

- 6.1 Cabinet has responsibility for agreeing policies and strategies other than those reserved to Council. Strategic decisions relating to Museums and Halls are not reserved to Council but in this case because of the potential capital expenditure involved, and in accordance with previous decisions, this matter continues to be presented to Council.
- 6.2 The General Power of Competence contained within the Localism Act 2011 came into force on 18 February 2012 and effectively replaced the previous wellbeing powers. The statutory General Power of Competence gives a local authority the power to do “anything that individuals generally may do”. Section 1(4) of the same Act confirms that in using such power the local authority may do so for the benefit of the authority, its area or persons resident in its area. This power is relevant when confirming that the Council has power to enter into the Legal Agreements set out in detail in this Report.

- 6.3 The Public Libraries and Museums Act 1964 and the Local Government (Miscellaneous Provisions) Act 1976 confirms the Council's statutory power to operate a Museum. S111 of the Local Government Act 1972 confirms that a local authority has power to do any thing (including in relation to finance and property) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
- 6.4 When considering the proposed Lease, Section 123 of the Local Government Act 1972 gives a Local Authority the power to dispose of land provided that it does so for the best price reasonably obtainable. The consent of the Secretary of State is required for any disposal where the consideration is less than the best that can reasonably be obtained, and the Secretary of State has issued a general consent in this regard (the General Disposal Consent 2003). Under the general disposal consent a Local Authority can dispose at less than best consideration if:
- a) The local authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or all or any persons resident or present in the area;
 - i) The promotion or improvement of economic well-being;
 - ii) The promotion or improvement of social well-being;
 - iii) The promotion or improvement of environmental well-being; and
 - b) The difference between unrestricted value of the land to be disposed of and the consideration for disposal does not exceed £2,000,000
- 6.5 A valuation of the entire premises has been carried out which confirms that the unrestricted value of the Building is significantly less than £2million. The valuation of the part of the property to be demised to Hitchin Town Hall Ltd (excluding the café) is £238k. The Estates Surveyor is of the view following receipt of independent valuation advice, that the total value of the property to be demised to Hitchin Town Hall Ltd including the café is significantly below the sum of £440k. Therefore NHDC can be satisfied that the difference between the value of proposed leasehold interest and the consideration to be received under the Lease is less than £2million. The Strategic Director of Customer Services in conjunction with the Head of Finance, Performance and Asset Management has considered all of the above factors, and concluded that the proposals will deliver economic, social and environmental well-being benefits to the District as a result of the grant of this Lease linked to the wider Project. Officers are therefore recommending a disposal at less than best consideration reasonably obtainable because of the well-being benefits which officers consider will flow from the Lease.
- 6.6 The legal issues and implications are otherwise considered within the body of the Report.

7. FINANCIAL AND RISK IMPLICATIONS

- 7.1 Financial and Risk implications of the scheme were included in detail in the last report to Council on the 10th May 2012. Instead of repeating all the implications again this section will provide any additional or changed financial and risk implications since the last report and attempt to summarise the potential financial risk.
- 7.2 The revised project plan, which is set to meet the tight deadlines dictated by ACF, does increase the risk that the stage 2 Heritage Lottery Fund grant will be unsuccessful, either because there is inadequate time to complete the HLF process or

the application process is rushed. If the application is unsuccessful a further £831k of Council resources will be required to complete the project.

- 7.3 Should the Community Facility not be available for Hitchin Town Hall Limited by the 14 November 2014 the Council is liable to pay the ACF loan interest, holiday interest and capital loan repayments and reasonably and properly incurred operational expenses by HTH Ltd until the facility is operational. Any amounts the Council pays will become due to be repaid back to the Council from HTH Ltd once the capital loan repayments have ceased. Amounts due to be repaid by Hitchin Town Hall Ltd will not be subject to interest.
- 7.4 Should the project not complete as a result of a Council decision the Council will become liable for all reasonable costs incurred by HTH Ltd to date up to a cap of £40k. This is not a new provision and was reported to Members previously. Further to this, however, the new clause of a 'Grant of Put option by the Council' may require the Council to re-purchase 14 Brand Street at a cost of £250,000 should a trigger event result in HTH Ltd exercising this option.
- 7.5 As at the end of September 2012 the Council has spent a total of £154k on the project on external costs since work began in 2009/10 (this does not include the officer time put to the project). Should for any reason the scheme not proceed to completion any costs incurred cannot be funded from capital sources and would need to be funded from the general fund. The Council has also committed a large amount of officer resource to the project, taking officers away from other duties.
- 7.6 HTH Ltd have requested a loan of £20k to cover legal fees. The agreement is such that these fees should be repaid by the 14 November 2014 with interest. However, if the project does not complete for any reason or HTH Ltd do not receive the ACF loan there is a risk this loan will not be repaid.
- 7.7 The financial risks of such a complex project are numerous but the following table attempts to summarise the key elements using the Council's method of assessment for known financial risks used in the budget setting process. When setting the Council's budget for 2013/14 the risk value of £444k will be considered as part of the General Fund minimum fund balance recommendation. A low risk is defined as 'unlikely', medium as 'possible' and high as 'likely'. This compares to a total balance for known financial risk of £890k in 2012/13. Officers have endeavoured to mitigate risks within the terms of the Development Agreement where possible but it is clearly not possible to provide absolute certainty on this point. The overall effect of the changes to the Development Agreement from the draft last considered by the Council has been to increase the level of risk to the Council in favour of Hitchin Town Hall Ltd and ACF.

| Risk | Risk Likelihood | Range of Risk Value | % Allowance | Assesment of Risk Value |
|---|-----------------|---|-------------|-------------------------|
| The Council pulls out from the project before completion | L | £0k - £40k (HTH Ltd costs) & £154k - £2.5 million (project costs to be funded from Council resources) | 0 | 0 |
| The facility is not ready for opening on the 14 November 2014 | H | £20k - £50k (per quarter – HTH Ltd costs) | 50% | £18k* (per quarter) |
| HTH Ltd do not repay the loan for legal fees | M | £0K - £20k | 25% | £5k* |
| The HLF stage 2 application is not successful | M | £0k - £831K | 25% | £208k |
| When tendered the construction and fit out costs are higher than expected and the project cannot be completed within budget | M | £0k - £850k (higher value represents a 20% overspend) | 25% | £213k |
| Procurement Challenge leading to a delay in completion and legal costs. | L | £20k - £50k (per quarter – HTH Ltd costs) | 0 | 0 |
| Total | | £224k - £4.75 million | | £444k |

[*In both circumstances Hitchin Town Hall Ltd would have an obligation to repay such costs]

- 7.8 If ACF were to exercise the step-in rights under the Direct Agreement, there could be a delay in the project of up to 6 months. Additionally, the 'side letter' to the seller of 14 Brand Street (para 4.9) will require the Council to indemnify it against any claim arising from the Party Wall works and to guarantee the works themselves. Financial Risks of these eventualities for the Council are difficult to quantify at this stage but there is also a reputational risk to consider.
- 7.8 It should be noted that the cost of securing collateral warranties, required by ACF and detailed in paragraph 5.6, cannot be quantified at this stage. Whilst the Supervising Architect had indicated his own costs to be in the region of £1,000, the cost of warranties from the Professional Team, sub contractors etc will be absorbed within their tendered fees.
- 7.9 HMRC have allowed the Council to breach its VAT partial exemption calculation under their 'occasional breach' guidelines. Without this allowance the Council would have been unable to reclaim all the VAT on the expenditure on this project and on any other exempt activities. While this has relieved the issue for this project the Council will need

to be very careful not to breach the partial exemption calculation again, otherwise the breach could be revisited because it would no longer be seen as an 'occasional breach'. The Council sought further advice from its Specialist Advisors PWC on 1 October 2012 to check that the amendments to the project did not create additional VAT issues. The Advisors have confirmed that the Council will continue to be protected by the ruling by HMRC that the breach of its de minimis limit can be treated as occasional and ignored

8. HUMAN RESOURCE IMPLICATIONS

- 8.1 Council noted the Human Resources implications in the Part 2 report on 10th May 2012 and HR support is being provided to manage the impact of the changes with ongoing advice, communication and consultation. Where applicable, the Council is applying the Re-organisation Policy which included provision to make positive efforts to find staff alternative employment within the organisation.

9. EQUALITIES IMPLICATIONS

- 9.1 The Council recognises the changing nature of equality legislation and incorporates national legislation and regulations into its policies, procedures and services as appropriate, as set out in the Corporate Equality Strategy.
- 9.2 The Equality Act 2010 came into force on the 1st October 2010, a major piece of legislation. The Act also created a new Public Sector Equality Duty, which came into force on the 5th April 2011. There is a General Duty, described in 7.2, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.
- 9.3 In line with the Public Sector Equality Duty, public bodies must, in the exercise of its functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.
- 9.4 The Museum Fundamental Service Review (FSR) Service Improvement Plan was specifically designed to improve accessibility to Museum facilities and in particular to achieve compliance with the provisions of the Disability Discrimination Act. Upper floors of Hitchin and Letchworth Museums and Hitchin Town Hall are all inaccessible to those unable to negotiate stairs, whether due to a disability or other reasons. The new facility will comply with the latest disability access requirements for a construction/refurbishment of this sort.
- 9.5 Throughout the project the needs of all sections of the population and particularly those with a protected characteristic have been taken in to account.

10. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 10.1 Consultation has been carried out on an ongoing basis with Project Board, the Arts, Museum & Heritage Forum, other stakeholders and staff within the relevant service areas and facilities. Regular information notes have been provided to Members via MIS, Cabinet and Hitchin Area Committee .

11. CONCLUSIONS

- 11.1 As highlighted in this report, Hitchin Town Hall Ltd's negotiated position and the Adventure Capital Fund's requirements which have been established since your meeting on 10th May 2012 have significantly shifted the financial risk to NHDC. Further, the revised timescales required by both Hitchin Town Hall Ltd and Adventure Capital Fund, for completion of the project and key stages within it increase the complexity and challenges in an already complex project.
- 11.2 However, and as reported at your meeting on 10th May 2012, the broad conclusions remain that: 'the innovative nature of this project and the prospective partnership with Hitchin Town Hall Ltd would provide wide-ranging benefits for the district; the preservation and enhancement of an important heritage asset, community benefit and significant inward investment. Further, the project would deliver the objectives of the Museums FSR, provide a 'fit for purpose' museum for North Hertfordshire and significantly reduce revenue costs. Whilst, like any project of this scale, there are risks associated with the development officers are of the view that the economic, environmental and social benefit far outweighs these and therefore recommend approval'.

12. RECOMMENDATIONS

Council is recommended to:

- 12.1 Agree a loan to Hitchin Town Hall Ltd on the terms set out in paragraph 4.10, and:
- 12.2 Agree the changes to the Development Agreement and associated documents set out in paragraph 4.7, 4.8, 4.9 and 5.6 and other minor changes incorporated in to the Development Agreement, Lease, Community Use & Management Agreement and Management Agreement between the Council and the Trust, and:
- 12.3 Authorise Officers to enter into the necessary legal agreements.

13. REASONS FOR RECOMMENDATIONS

- 13.1 To reflect the conclusions drawn from the analysis of the negotiated position with Hitchin Town Hall and their funders following Council's decision on 10th November 2010 to take the scheme forward.

14. ALTERNATIVE OPTIONS CONSIDERED

- 14.1 The principal alternative option not to recommend the negotiated position and withdraw from the project would not meet the Council's stated objectives to provide a financially sustainable future for the Museum Service, Hitchin Town Hall or the Trust.
- 14.2 In view of the Council's previous decision to accept the proposal promoted by local community groups, further consideration has not been given to the original Council promoted alternative, previously referred to as 'Gymnasium retained', although this option remains open albeit with significantly higher capital and revenue costs.

15. APPENDICES

- 15.1 Appendix 1: List of previous decisions relating to this project.
- 15.2 Appendix 2: Plans.
- 15.3 Appendix 3: Development Agreement.
- 15.4 Appendix 4: Lease.
- 15.5 Appendix 5: Community Use & Management Agreement.
- 15.6 Appendix 6: Management Agreement between the Council and the Trust.

16. BACKGROUND PAPERS

- 16.1 Report to Cabinet 23rd August 2005 on the Findings of the Review of the North Herts Museums Services.
- 16.2 Draft Collections Centre Business Case submitted to the Museums Project Board, 5th March 2008.
- 16.3 Report to Cabinet 27th January 2009 on the Future of Museums Services.
- 16.4 Cragg Management Services report on the possible relocation of North Hertfordshire Museums to Hitchin Town Hall- Annex 2, Cabinet 19th May 2009
- 16.5 Hitchin Town Hall Museums Feasibility – Options Appraisal Report, 3rd September 2009
- 16.6 Report to Council on 3rd December 2009: Hitchin Town Hall Museum Feasibility Study Outcomes and Actions Arising
- 16.7 Report to Council on 11th February 2010: Hitchin Town Hall/Museum Community Group Proposal
- 16.8 Report to Cabinet on 28th September 2010: Hitchin Town Hall/ Museum Proposals
- 16.9 Report to Council on 10th November 2010: Hitchin Town Hall/ Museum Proposals
- 16.10 Verbal update to Council on 7th April 2011: North Hertfordshire Museum & Community Facility at Hitchin Town Hall
- 16.11 Report to Cabinet on 26th July 2011: North Hertfordshire Museum & Community Facility: Project Update
- 16.12 Report to Council on 10th May 2012: North Hertfordshire Museum & Community Facility

17. CONTACT OFFICERS

- 17.1 John Robinson
Strategic Director Customer Services

CONTRIBUTORS

- 17.2 Margaret Martinus
Senior Lawyer
- 17.3 Vaughan Watson
Head of Leisure & Environmental Services
- 17.4 Ros Allwood
Cultural Services Manager
- 17.5 Tim Neil
Accountancy Manager
- 17.6 Kerry Shorrocks
Corporate Manager Human Resources
- 17.7 Howard Crompton
Head of Revenue & Benefits & IT
- 17.8 Anthony Roche
Acting Corporate Legal Manager and Monitoring Officer
- 17.9 Gavin Ramtohal
Contracts Solicitor