

TITLE OF REPORT: CHURCHGATE AREA, HITCHIN: INTERIM OPTION PROPOSAL

REPORT OF THE PROJECT EXECUTIVE FOR THE CHURCHGATE PROJECT BOARD

1. SUMMARY

1.1 The purpose of the report is to:

- (i) Update Members on progress regarding the Churchgate Project.
- (ii) Give consideration to granting Hammersmatch exclusivity until the end of the year (i.e. 31 December 2015) subject to a number of agreed requirements as set out in section 8 of the report and at recommendation 2.1.
- (iii) Seek further funding for external professional legal and commercial advice as required to inform the preparation of draft Heads of Terms between the Council as landowner and Hammersmatch subject to Hammersmatch delivering on the agreed requirements as set out in recommendation 2.1. Any draft Heads of Terms would be subject to further approval from Full Council and would be subject to being able to satisfy procurement and best value requirements. Hammersmatch can therefore have no legitimate expectation that the Council will be able to reach agreement with them.

2. RECOMMENDATIONS

2.1 That in seeking to satisfy the Council resolution of 12 February 2015 '*to investigate the Council's preferred approach for a smaller scheme in the short term*', the Council grants Hammersmatch exclusivity until the end of the year (i.e. 31 December 2015), and during that period Hammersmatch will:

- (i) Seek a solution for the market based on the outcome of their consultant's feasibility study.
- (ii) Provide an updated design that is acceptable to the Council as landowner based on the market solution.
- (iii) Provide an updated financial appraisal to reflect the updated design, including a review of all elements of the appraisal to take account of current market conditions.
- (iv) Provide evidence of discussions regarding potential pre-lets with a cinema operator and retailers.
- (v) Undertake this work wholly at their own risk and cost.

- 2.2 That the exclusivity offer is on the basis that no Heads of Terms could be agreed without a further report to Full Council and is subject to being able to satisfy procurement and best consideration requirements.
- 2.3 That the Project Executive be instructed to write to Hammersmatch setting out the terms of the exclusivity period.
- 2.4 That officers continue further discussions on the Draft Heads of Terms with Hammersmatch during that period.
- 2.5 That the Council commit an additional budget of £30,000 to undertake any commercial and legal advice as may be required with regard to the draft Heads of Terms and in giving further consideration of the potential ways forward in respect of procurement requirements.

3. REASONS FOR RECOMMENDATIONS

- 3.1 To allow the Council to continue with its investigations for a smaller scheme in the short term, whilst allowing Hammersmatch a limited period in which to meet the requirements set out in recommendation 2.1 and for officers to be able to fully inform Council on the next steps in the project post December 2015.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 See Section 8 of the report.

5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 5.1 The members of the Churchgate Project Board have discussed and noted the interim option forming the content of this report.
- 5.2 Members are reminded that in accordance with the Terms of Reference of the Churchgate Project Board
“1.1 To act on behalf of the Council in respect of all functions required under the Development Agreement and the delivery of the Churchgate project generally.”
Any submission would be presented and discussed with the Members of the Churchgate Project Board, prior to any report being presented to Full Council.
- 5.3 Information notes have been provided to Hitchin Area Committee and published in MIS at appropriate stages through the project to keep members updated on progress.

6. FORWARD PLAN

- 6.1 The report contains a recommendation on a key decision that was first notified to the public in the Forward Plan on 22 January 2013.

7. BACKGROUND

- 7.1 Full Council on 27 November 2014 considered options on the way forward, including legal advice from Eversheds, and concluded that it wished to discontinue the approach
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based on the Churchgate Planning Brief and to instead consider alternative approaches for a smaller scheme in the short term. Full Council on 12 February 2015 considered a report on the Churchgate area including the next steps in the project relating to officers continuing to investigate the Council's preferred approach for a smaller scheme in the short term. This included seeking quotations for an independent valuation of the site; continuing further discussions with Hammersmatch and other interested parties; investigating revenue implications for the Council; finding a solution for the Hitchin Market; and seeking additional funding requirements.

- 7.2 Since February 2015, officers of the Churchgate Project team have been in discussion with Hammersmatch regarding their proposal and also with another interested party. These discussions are in accordance with items (2), (3) and (4) of the Full Council resolution below (12 February 2015 meeting).

RESOLVED:

- (1) *That an initial budget of up to £40,000 be committed at this stage to undertake an independent valuation of the site, any commercial and legal advice as may be required;*
- (2) *That the principle of a lease to a developer of the site for a minimum term of 150 years subject to contract be accepted, and granted only upon completion of the whole of any agreed redevelopment;*
- (3) *That the Council continues to require all interested developers on the Churchgate site to seek a solution for the market, at the developers' expense, in consultation with appropriate officers; and*
- (4) *That officers continue to investigate the Council's preferred approach for a smaller scheme in the short term and report back to Full Council setting out options and points for consideration to progress the project.*

REASON FOR DECISION: *To allow the Council to continue with its investigations for a smaller scheme in the short term and provide clarity on its preferred options going forward.*

- 7.3 Some weeks after the Council resolution, the other interested party confirmed that they would not be pursuing their interest as they would be unable to produce a viable smaller scheme and indicated that if circumstances should change, they remained interested in working with the Council. The Eversheds advice to Full Council in November 2014 stated at paragraph 3.32:-

"Specifically, the Council has two developers interested in entering into exclusive arrangements with it. It seems to us that there is an immediate challenger if the Council chooses one developer over the other, especially as it has been receiving proposals from both developers. In addition, other economic operators may challenge, including those who bid in the previous procurement exercise."

As there is currently only one developer expressing an interest in the project the potential risk of challenge to a decision to enter into a temporary exclusivity arrangement is reduced, but as noted above "other economic operators may challenge". If this were to occur the Council would need to consider its approach and how to respond.

- 7.4 Consultants have been appointed and are in the process of undertaking an independent valuation of the Churchgate site. The valuation being sought is on the existing use and potential future uses including the proposed Hammersmatch Development and any implications it may have on the value of the whole site. This will assist the Council in its considerations on how it may wish to proceed with any land transaction in the future.
- 7.5 One of the Key Projects identified for the Priorities for the District 2015/16 is to “Continue an open dialogue with interested developers on the Churchgate site”.

8. INTERIM OPTION PROPOSAL

- 8.1 Following the Full Council meeting, officers have met three times with Hammersmatch and also with the Churchgate Project Board to discuss their proposal in light of the requirements set out in the Full Council resolution of 12 February 2015. The Board has also reiterated the Council’s requirements that there should be a market in the town and that existing car-parking numbers should be at least preserved.
- 8.2 The Board has expressed their concern regarding Hammermatch’s progress towards delivering a scheme that will provide best value and best consideration for the Council, and their hesitance to meet all the requirements set out in the Full Council Resolution including a request for an up to date financial appraisal. This hesitance is based on Hammersmatch expressing their concern as to lack of certainty from the Council regarding exclusivity before committing further resources to move their proposal forward. Hammersmatch are unwilling to commit further resource without some degree of safeguard from the Council.
- 8.3 Both officers and the Churchgate Project Board Members have been clear in outlining the Council’s position in looking for a smaller scheme in the short term where Members were looking for something that could happen more quickly. In discussions, Hammersmatch have acknowledged that the launch publicity over a year ago for their concept scheme including a cinema may have created an impression in the town that they would be ready to start on site immediately whereas the officer assessment (and Hammersmatch’s own thoughts on timescales) is that as they will still require planning approval, funding and letting of the building contracts, it should be anticipated that planning and preparations will take up to 2 years and then up to a further 2 years to build out the scheme.
- 8.4 Hammersmatch has continued to express their commitment to develop a scheme that will improve the Churchgate Centre for the benefit of the town centre. Confidential meetings have been on going regarding the preparation of draft Heads of Terms for the Council as landowner and Hammersmatch to enter into a development agreement. Hammersmatch have also sought consultant quotes for seeking a solution for the market, but have expressed concern about committing resources to undertake the study without some certainty from the Council regarding exclusivity. In turn the draft Heads of Terms are not at a sufficiently advanced stage that they can be considered by Full Council, as there is too much unknown information which Council would need in order to make a decision (information that Hammersmatch are unwilling to commit resources to providing without more certainty).
- 8.5 In order to move the project forward and in seeking to find a viable option that meets the Council’s resolution of 12 February and recognises Hammersmatch’s requirement for more certainty from the Council before committing further resources to move their proposal forward, the following option is proposed:

- 8.5.1 That the Council considers granting Hammersmatch exclusivity until the end of the year (i.e. 31 Dec 2015), and during that period Hammersmatch will:
- Seek a solution for the market based on the outcome of their consultants feasibility study
 - Provide an updated design that is acceptable to the Council as landowner based on the market solution
 - Provide an up dated financial appraisal to reflect the updated design, including a review of all elements of the appraisal to take account of current market conditions
 - Provide evidence of discussions regarding potential pre-lets with a cinema operator and retailers.
- 8.5.2 Hammersmatch has advised that they are willing to proceed with the suggested option outlined in paragraph 8.5.1. The above work will be wholly at Hammersmatch's own risk and cost.
- 8.6 The Council will need to seek external professional commercial advice once Hammersmatch have provided the updated information. This will be required to ensure that the information provided will enable officers to inform members on whether or not it would be in the Council's interest to continue to work with Hammersmatch in progressing towards delivering a scheme that will provide best value and best consideration for the Council. There is currently too much information unavailable which means that instructing consultants at this stage would not be a good use of the Council's resources.
- 8.7 During this approximately six month period further discussions on the Draft Heads of Terms will be progressed and this will be subject to the Council seeking both external professional legal and commercial advice as required. The legal advice will include further consideration of the potential ways forward in respect of satisfying the procurement requirements for the Council to deal exclusively with one developer, i.e. with Hammersmatch Development Limited. One option to protect the Council's interest which has already been suggested to Hammersmatch and rejected by them would be to require the developer to meet the Council's costs of obtaining the necessary commercial and legal advice in return for the exclusivity agreement.
- 8.8 The exclusivity offer would be on the basis that no Heads of Terms could be agreed without a further report to Full Council. It is also subject to being able to satisfy procurement and best consideration requirements without putting the Council at undue risk. The exclusivity offer does not bind the Council to any course of action and Hammersmatch can have no legitimate expectation that the Council will reach agreement with them.
- 8.9 Eversheds provided advice to Full Council in November 2014 and officers will seek an update to that advice in the light of the proposals from Hammersmatch and the current situation of there being only one developer in contact with the Council. This advice will consider what options are open to the Council, the risks attached to the options and what steps can be taken to mitigate the risks.
- 8.10 Full Council at its meeting on 12 February previously granted a budget of up to £40,000 to undertake an independent valuation of the site and for legal and commercial advice as required. A third of the budget was earmarked for the valuation advice and it was suggested that up to £25,000 be set aside for legal and commercial advice should it be

required. It is now considered that in addition to the £40,000 an additional £30,000 will be required to seek the necessary procurement and commercial advice to inform the next stage of the project.

- 8.11 Depending on the options taken forward post December 2015, Members are advised that alternative sources of funding will need to be found to provide for or backfill any necessary staff resources, given that the current officers on the Project Team are actively involved in delivering other key priority projects for the Council, such as the Local Plan, the North Herts Leisure Centre project at Letchworth, Asset Management Strategy, Office Accommodation project and other capital programme schemes.
- 8.12 It is important to note that considering alternative approaches for a smaller scheme and entering into exclusivity with one developer will not be without risk and potential further cost to the Council in the event of challenge. Should such a challenge be received it will be necessary to consider how to respond to it and the options available to the Council. This may necessitate a further report to Full Council.

9. LEGAL IMPLICATIONS

- 9.1 Full Council made the original decision to award the contract to Simons on 25 February 2010. The reason Council was asked to make the decision as to whether to award the contract or not was that the likely land values of the Council land being used for the project fell within Council's terms of reference.
- 9.2 Full Council adopted the Hitchin Town Centre Strategy on 18 November 2004 and the Churchgate Development Area Planning Brief on 3 November 2005. On 27 November 2014 Full Council decided that *"having considered its aspirations for the future of the Churchgate site and its surrounding area, the Council discontinues the current approach based on the Churchgate Planning Brief and considers alternative approaches for a smaller scheme in the short term"*.
- 9.3 As Full Council has made these previous strategic decisions, Full Council should make the decision as to the future strategy for the Churchgate Area.
- 9.4 It is possible that an interested party could seek to challenge a Full Council decision to offer the temporary period of exclusivity at this stage
- 9.5 The Council has chosen a strategy to investigate alternative approaches for a smaller scheme in the short term and the legal implications of potential options will need to be considered in the light of the specific proposals. The legal implications would likely include procurement, contract, governance and property considerations. Further specific external legal advice (in addition to the general advice previously received) will be required to provide advice on the exclusivity procurement option and on the emerging draft heads of terms.
- 9.6 In accordance with previous reports to Full Council, Members are advised that taking part in Council decisions on the strategy to adopt for the Churchgate Area was unlikely to create a valid perception of predetermination in relation to a Member of the Planning Committee who takes part in the decision relating to any future planning application.

10. FINANCIAL IMPLICATIONS

- 10.1 Under Section 123 of the Local Government Act 1972, the Council is required to get best consideration reasonably obtainable for all of its assets, and with regard to Churchgate this potentially includes the freehold of the Churchgate Centre, the market and the adjoining car parks (St Mary's; Portmill East & West and Biggin Lane).
- 10.2 In this period of ongoing Government funding reductions the Council's alternative (i.e. non Government) sources of income are particularly important. Gross direct annual income in total from the Churchgate car parks amounts to over £500k which contributes to the Council's costs of parking provision and the Council also receives an annual rental income for the Churchgate Centre that is reviewed every 14 years, as well as income from the market operation. Therefore any proposal that adversely impacts on these income streams would at least need to provide sufficient return overall to the Council from other sources to compensate fully for this impact.
- 10.3 The Council has incurred external costs of almost £1 million in total over the past ten years or so in respect of pursuing development opportunities for the larger Churchgate development area. Since the end of the Simon's scheme the Council has incurred, up to a further £10,000 for Eversheds legal advice and also up to £20,000 for the valuation work that is currently being prepared. The Churchgate area does not currently feature in the Council's capital programme for major investment, although funding for some works to the car parks and related areas for resurfacing, replacement and repairs has been allocated, with some works completed.
- 10.4 The contract previously signed with Simons Developments did not require Council financial resources to be allocated to the development of this scheme. The Council's contribution was to make its land holdings available for the development. Enquiries subsequently made by Simons in 2012 regarding the possibility to vary the terms of the Development Agreement, including whether the Council could consider making further financial contributions to the scheme, were declined. It remains the position that Council financial resources should not be required to contribute to a development scheme and a Full Council decision would be required if this position was to change, taking full account of whether this was permissible in State Aid terms.
- 10.5 It is clear that in order to progress any scheme as landowner, be it with Hammersmatch, or any other interested party, will require further investment by the Council in seeking the necessary property, legal and financial advice. There is then a risk that if the scheme does not proceed the costs incurred will have to be written off.
- 10.6 One option to protect the Council's interest, which has already been suggested to Hammersmatch and rejected by them, would be to require the developer to meet the Council's costs of obtaining the necessary commercial and legal advice in return for the exclusivity agreement.
- 10.7 If the Council were minded to instruct officers to proceed with the necessary investigatory work required, officers would require authority to incur external expert advice, and a Full Council decision to release additional further funding of up to £30,000 for this work is being sought.
- 10.8 It should be noted that when a viable solution is proposed by a developer the Council will require further specialist advice on legal, valuation, markets and development issues and

that further funding is likely to be required at that time. The Council may seek to recover some or all of these as development costs.

11. RISK IMPLICATIONS

- 11.1 The Council has identified Churchgate and Surrounding Area as a Cabinet Risk. This risk is monitored and updated regularly as part of the Council's risk management procedures.
- 11.2 The Top Risk has been amended to include the Council's resolution of 27th November 2014 and currently has the following description:
"The risks arising from continuing to work with any interested developers during production of the new Local Plan due for submission in late 2015 and considering alternative approaches for a smaller scheme in the short term, includes:
- impact on available resources in continuing a dialogue
 - public perception that developers proposals in terms of planning permission are at a more advanced stage than is the case
 - proposals that are developed may not be in adherence to the final Local Plan
 - proposals are developed that fail to make the best use of Council assets
 - proposals that are developed might not meet the expectation of all stakeholders
 - proposals that are developed for a smaller scheme in the short term might hinder ability to fulfil longer term needs for the District
 - a phased approach to development may impact on financial viability of any future development of the site and the development value of the rest of the area
 - possible challenge from other parties
- 11.3 As there is currently only one developer expressing an interest in the project the potential risk of challenge to a decision to enter into a temporary exclusivity arrangement is reduced, but "other economic operators may challenge". As no other developers are currently expressing an interest, not granting an exclusivity agreement to Hammersmatch may mean the end of current negotiations leaving the Council to again consider alternative options for the site.
- 11.4 The Council's Risk and Opportunities Management Strategy refers to Contractors and Partners as follows: *"Contractors and Partners are included in the Risk & Opportunities Management Strategy for NHDC. The risk appetite for both contractors and partners should be considered prior to engaging into contracts or partnerships. Ideally a joint Risk Register should be in place for significant contracts and partnerships. In order to achieve the Council's priorities, Client Officers/relationship managers should implement an ongoing review of risks jointly with appropriate contractors/partners. Contractors and Partners should be able to demonstrate that they have resilient business continuity plans in place."*
- 11.5 In accordance with this Strategy the Churchgate Development Project with Simons Developments had its own Risk Register. Such a document would also be considered should the Council decide to proceed with a development of any size on this overall site in the future.

12. EQUALITIES IMPLICATIONS

- 12.1 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 the next paragraph, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.
- 12.2 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.
- 12.3 Depending on what may be considered, any future development proposals for the site, detailed proposals surrounding thoroughfares, access, surface treatments etc. and needs of any users for any resulting development will be considered and recorded under separate equality analysis at the time of such application.

13. SOCIAL VALUE IMPLICATIONS

- 13.1 The recommendations made in this report do not in themselves constitute a public service contract, subject to the measurement of 'social value' as required by the Public Services (Social Value) Act 2012, although potential equalities implications and opportunities are identified in the relevant section at paragraphs 12.3. However, any decision Council may make with regard to Churchgate which could, either in whole or part, constitute a public service contract would need to report on the social value implications at the time of consideration. This would, in brief, consider how every £1 spent could best be spent to benefit the local community, which may include award of some aspects of redevelopment or management of the centre etc. by local social enterprises, a contractor offering an apprentice scheme or similar.

14. HUMAN RESOURCE IMPLICATIONS

- 14.1 In terms of human resource implications the preparation of the Local Plan and the delivery of the other identified corporate priorities and key projects have been factored into work plans as identified at paragraph 8.6.2. If the Council sought to pursue a strategy for the Churchgate Area in the interim this would impact on the Council's current staff and financial resources and would result in the need to review existing work plans and objectives and/or the need for employing external expertise.

15. APPENDICES

- 15.1 None.

16. CONTACT OFFICERS

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17. BACKGROUND PAPERS

- 17.1 Full Council Report 31st January 2013 – Churchgate and surrounding area redevelopment project, Hitchin
- 17.2 Report to Finance, Audit and Risk Committee 13th June 2013 – External costs incurred by NHDC during the Churchgate Report.
- 17.3 Full Council Report 18th July 2013 – Options for the future of Churchgate and Surrounding Area, Hitchin
- 17.4 Full Council addendum Report 18th July 2013 – Options for the future of Churchgate and Surrounding Area, Hitchin
- 17.5 Full Council Report 24th July 2014 – Update on Churchgate and Surrounding Area, Hitchin
- 17.6 Full Council Report 27th November 2014 – Churchgate and Surrounding Area, Hitchin: Legal Advice
- 17.7 Full Council Report 12th February 2015 – Churchgate Area, Hitchin: Next Steps