CABINET

Report subject	**Cotlands Road and York Road Site Development Plan (SDP)**
Meeting date	12 February 2020
Status	Public
Executive summary	In February 2019, Bournemouth Borough Council Cabinet approved the Site Development Plan (SDP) for the Cotlands Road and York Road car park sites. This report highlighted the requirement to include the two Council owned car parks at York Road within the BDC option agreement to facilitate the overall development of Cotlands Road and clarified why they were added to the SDP. At that time the Cabinet report did not detail the proposed land values for the York Road car park sites or set out the proposed delivery model. Therefore it is appropriate that approval is now sought with the benefit of this additional information and the corresponding legal and financial implications. The delivery of a new public multi storey car park (MSCP) on one of the York Road car park sites is a key piece of enabling development to unlock the Cotlands Road site, which will generate significant economic regeneration and financial benefits and meet the key objectives of the Lansdowne Delivery Plan, however this development cannot be progressed until a new public MSCP is operational. This report sets out the proposed delivery mechanism to enable the Council to fund the development of a new public multi-storey car park on one of the York Road surface car parks by the Bournemouth Development Company in accordance with the approved SDP and retain the asset in-house operation.

	The public realm and pedestrianisation of Holdenhurst Road in 2020/21 as part of the Lansdowne Vision will assist with consolidating parking provision in the area. The non-public part of this report considers the financial business case for proceeding with this enabling development.
Recommendations	**RECOMMENDED that Cabinet:** **1. Approves the inclusion of the two Council owned York Road car parks (the Additional Sites) into the Bournemouth Development Company option agreement to support the redevelopment of Cotlands Road for the residual value detailed in the non-public report.** **2. Approves the development of one of the Additional Sites by the Bournemouth Development Company through the proposed delivery mechanism to provide the Council with a new public Multi-Storey car park at York Road.** **3. Delegates authority to the Chief Executive (and Corporate Property Officer) and the Monitoring Officer, in consultation with the Portfolio Holder for Regeneration and Culture to agree the terms and authorise the Council to enter into;** **(i) a deed of variation to the BDC option agreement to add the two York Road car parks as Additional Sites;** **(ii) a development agreement for one of the Additional Sites;** **(iii) and to decide whether to implement the contract clarifications and/or to issue a VEAT notice and, if so, on what terms.** **That Cabinet recommends to Council to:** **1. Amend the Capital Programme to include a £10.6 million provision for the construction of a Multi Storey Car Park on one of the Additional Sites to be funded by prudential borrowing.**

Reason for recommendations	On 20 February 2019, Bournemouth Borough Council's Cabinet approved the SDP for these sites and the recommendations outlined clearly align to the purpose of the SDP. The inclusion of the Additional Sites in the Option Agreement means that the Council can deliver a new public car park with sufficient capacity required to enable BDC to undertake a comprehensive development at the Cotlands Road site and meet the objectives of the Lansdowne Delivery plan. The inclusion of the Additional Sites in the Option Agreement enables BDC to require the Council to grant BDC a lease of the Additional Sites (subject to certain conditions) and so to retain control over the development of the Additional Sites and the Cotlands Road Site to facilitate the development as outlined in the approved SDP. The three development sites which total circa 1ha are currently used as surface level car parks which is not an efficient use of land. The development proposal will consolidate and facilitate maintenance by the Council of the same quantum of public car parking provision through the Council-funded construction of a decked structure and release valuable land for development by BDC.
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Wards	Town Centre/ East Cliff/ Springbourne
Classification	For Decision

Background

1. Bournemouth Development Company LLP ("BDC") is the Council's delivery mechanism for bringing forward development on a number of pieces of land owned by the Council as part of the Bournemouth Town Centre Regeneration initiative known as the "Town Centre Vision". To date BDC has completed four development projects with a fifth currently underway at the former surface level car park at St. Stephen's Road.

2. The Town Centre Vision is enshrined in *11 Key Objectives*, one of which is to promote development in the Lansdowne Area of the Town Centre.

3. In 2016, a group of key stakeholders with interests in the Lansdowne area worked with Bournemouth Borough Council to produce a vision for the Lansdowne This vision aimed to create a vibrant, dynamic, smart, enterprising, connected and networked place that is an exciting and attractive place to live, work, study and enjoy. This has evolved to become the Lansdowne Programme

4. The Lansdowne Programme has attracted financial support from Dorset Local Enterprise Partnership for significant improvements to the public realm. In addition, the private sector has been developing new business space, hotel and student accommodation, and Bournemouth University is investing in new landmark teaching facilities, all of which has contributed to a hive of development activity in this dynamic part of the Town Centre.

5. The Cotlands Road and York Road car parks scheme is the latest development to be proposed by BDC and aligns with the Council's long-term vision for the Lansdowne.

6. The BDC development proposal, outlined in the SDP approved by Cabinet in February 2019, is for an employment-led mixed-use scheme consisting of a significant proportion of employment / office space including new homes, active ground floors with retail and café space, re-provision of public car parking spaces, and residential parking.

7. At its meeting of 20th February 2019, Bournemouth Borough Council Cabinet recognised and approved the addition of the Additional Sites to the BDC Option Agreement. The rationale for adding the Additional Sites into the BDC Option agreement is:

   - Officers and Councillors (both pre and post-merger of the 3 authorities that formed BCP) have advised BDC that early delivery of a public MSCP is a key piece of enabling development to unlock the Cotlands opportunity i.e. the Cotlands Road site cannot be closed until a new public MSCP is operational.

- There are no other BCP owned sites in the locality where development of a new MSCP is deliverable to the project programme.

- Given the significant financial and resource investment required to take the Cotlands Road project to a start on site, BDC has asked for control over the delivery of the Additional Sites.

- The inclusion of the two Additional Sites gives BDC:

    - the ability to deliver the replacement MSCP in close proximity to the existing provision at Cotlands Road;
    - flexibility to design the sites to meet the demands of the LPA in terms of phasing of delivery, design and quantum of spaces;
    - the comfort to commit £5m of expenditure to the detailed design and planning of the Cotlands Road scheme;
    - to ability to efficiently phase the delivery of the redevelopment for the whole area.

- The Town Centre Area Action Plan adopted by Bournemouth Borough Council in March 2013 highlights Policy A8 (Cotlands) and A6 (Christchurch Road) as the relevant site-specific policies for this project. The policy states that a comprehensively planned development of this area is desirable and that any development of individual sites or a combination of sites should not compromise the redevelopment of neighbouring sites or the creation of a strong and attractive frontage to Cotlands Road and York Road. The inclusion of the Additional Sites within the Option Agreement as part of the Cotlands Road project would enable “comprehensive development” to be delivered in accordance with this policy.

- If the Additional Sites are not added to the option agreement then BDC will not have the control it needs over delivery of the enabling York Road MSCP development, which is needed to unlock delivery of the regeneration of the Cotlands site.

8. The principle of the addition of the Additional Sites to the option agreement approved by Bournemouth Borough Council has yet to be actioned. Therefore it is appropriate that BCP Cabinet is asked to approve this decision with the benefit of the additional information in respect of the valuations of the York Road Sites and the corresponding financial and legal implications of the proposed delivery mechanism.

York Road sites - Proposed Development

9. BDC has identified that a good quality employment-led mixed-use scheme is capable of attracting investment into the Lansdowne. The area benefits from good connectivity to the town's public transport routes, is close to the town's prime retail and leisure offerings and to the town's beaches and gardens. The Lansdowne has benefitted from significant investment of approximately £125 million from the commercial and education sectors in recent times and this project seeks to build on this success.

10. As highlighted above, the proposal is for an employment-led mixed-use scheme which meets a requirement to re-provide public parking. The Council recognises the substantial increased demand for public car parking in the area and therefore requires Cotlands Road car park to remain open until such time as the new MSCP at York Road is delivered. This will secure continuity of public parking provision during the development phases and importantly some car parking revenue to the Council.

11. The proposal is that Phase 1, the enabling works for the Cotlands Road development involves the construction of a new MSCP(s) on one of the York Road car park sites. The delivery and opening of new public parking facilities at York Road will enable Cotlands Road car park to close in Q2 2022 once the new MSCP is opened to the public. This enabling development will also satisfy the planning requirement to provide a new public car park facility as per the Town Centre Area Action Plan (TCAAP) Planning Policy (A8).

12. As soon as the new MSCP is operational, the Cotlands Road car park can be closed, and Phase 2 development will see delivery of significant new employment space and new homes on the Cotlands Road site.

13. One of the issues facing BDC is planning risk. The key issues will be: -

    - The 2013 Town Centre Area Action Plan (TCAAP) policy A8 for Cotlands Road requirement is for 420 public car parking spaces to be re-provided. This requirement, plus any additional requirement to re-provide public spaces from the current York Road car parks, can be easily accommodated within the new MSCP facilities at York Road which the Council proposes to provide.

    - In terms of permitted planning use, TCAAP Policy A8 (Cotlands Road) and TCAAP Policy A6 (which includes the York Road Car Park) both state that development should be employment or tertiary teaching-led and that proposals must provide a significant proportion of employment space. The proposal is to deliver significant employment space.

- TCAAP Policy A6 and A8 provide flexibility to introduce other supporting uses where these meet the objectives of the area in relation to the Spatial Strategy. The Core Strategy Policy CS8 (Lansdowne Employment Area), which is the strategic planning policy for this area, does refer to residential as being a potential use as part of an employment or tertiary teaching-led scheme.

- As such the development proposals across the two sites do in principle meet the TCAAP requirements.

BDC Delivery Mechanism

14. Site Development Plans are progressed for individual sites in accordance with the timescales identified in the Partnership Business Plan. These detail the proposed uses and form of development proposed. They also include initial financial appraisals and set out profit targets for the scheme. Importantly, they specify a budget for pre-construction costs, such as survey, architects and planning fees, which is then drawn down as an Advanced Sum from MSIL.

15. BDC contracts with MSIL to provide a development management service. This service includes scheme design, obtaining planning consent, procuring a construction contract, obtaining development funding, managing the delivery phase, marketing and sales. In performing this role, it works with specialist consultants appointed by the BDC. It receives a development management fee for this service, which is calculated as a percentage of the scheme costs.

16. Once certain pre-conditions are met, including that a satisfactory planning permission has been granted; development funding is in place; the site lease value is agreed; viability criteria set out in the Site Development Plan are met; and the Council has met its Best Value obligations, the BDC may call for a 150 year lease [or the Council may require the BDC to take the grant of a 150 year lease] which places development obligations on the BDC. The option agreement originally covered 17 sites and the option has been exercised on 3 of these. Additional sites may be added to the option agreement, but this is covered further in paragraph 23.

17. Upon grant of the lease, the BDC issues a loan note to the Council in a sum equal to the agreed site lease value. MSIL is then required to match fund this investment, with any Advance Sums counting towards that investment. MSIL similarly is issued with a loan note in a sum equal to its investment. It is open to either party to provide additional finance (and in the Council's case subject to its statutory powers and any restrictions / approvals required).

18. Interest is payable on loan notes, as equity investment this will be repaid in accordance with the terms of the members agreement. and the loan notes are repaid when the development is complete, and all sales completed. The BDC

will determine the scheme profit to be distributed, in equal shares, to the partners. In making this decision it will consider the funding requirements of future schemes, partnership overheads and unrecoverable costs incurred on other schemes.

19. Generally, these arrangements have worked well and give BDC sufficient flexibility to progress schemes in the most cost-effective way. For example, on the Citrus development, BDC bore all of the development and sales risk. It secured scheme funding, constructed the building, and sold the completed units to repay the loan and generate a profit.

20. In this instance however, the Council wishes to enter into a fixed price Development Agreement with BDC for one of the Additional Sites added to the option agreement in order to fund and purchase the new MSCP as detailed in the proposed delivery mechanism section of this report.

Proposed Delivery Mechanism

21. The Council wishes to retain one of the Additional Sites and enter into a fixed price Development Agreement with BDC in order to fund and purchase the new MSCP. Entry into a Development Agreement for that Additional Site enables the Council to keep control of the delivery (via BDC) of the car park to a programme that enables the wider delivery objectives and financial benefits of the Cotlands Road site to be realised. This mechanism will give BDC the assurance that the MSCP will be delivered in line with the wider project programme so MSIL can commit circa £5 million into the Cotlands Road Scheme to fund pre-construction activity.

22. The proposed deed of variation will add the Additional Sites in to the BDC Option Agreement referred to in the Member’s Agreement Definitions by way of an amendment to the schedule of Sites.

23. The heads of terms for the development agreement for the Additional Site to be utilised for the Council’s MSCP remain to be agreed and authority is requested to be delegated in line with Recommendation 3.

24. BDC will sign heads of terms with third party occupiers for the Cotlands Road scheme and progress their planning and detailed design.

25. Upon confirmation of the viability and progression of the Cotlands Road scheme the Council will finalise the terms of the Development Agreement. It is intended that the option on the Additional Site utilised for the Council MSCP will be released and the MSCP constructed in accordance with the Development Agreement.

26. Upon practical completion the Council will own and operate the new MSCP.

Other options;

27. BCP funds and owns the car park but it is operated by a third party. This enables the Council to control the delivery of the car park (through BDC) within a programme that supports the wider delivery objectives of the Cotlands project and Lansdowne Programme. By passing operation and / or management to a specialist third party the Council could generate a rental revenue through lease payments but will lose the ability to control how the car park is managed and optimised as well as car parking charges. Under this option the Council does not need to transfer the site.

28. BCP funds and undertakes a procurement exercise to appoint a Contractor to design and build a MSCP and enters into a separate deed with BDC to provide mutual obligations to deliver a MSCP. This option would put the procurement risks and costs onto BCP, and BDC may not have the comfort required to commit to the £5m expenditure required to undertake the detailed design work on Cotlands Road and would not give BDC control over the comprehensive development programme timescale.

29. Upon inclusion of the Additional Sites in the option agreement, the Council would grant an option (as per the option agreement) and grant a development lease as detailed in the Bournemouth Development Company Delivery Mechanism section in this report. This option would result in increased project costs through the application of SDLT on the land transfer and on any subsequent transfer of the MSCP to the Council (should it want to retain and operate the MSCP itself).

30. A third-party funds the delivery of the car park which could be operated or managed by the Council. This would result in a third party funding the building of the car park in return for a rental income from the Council. This will have an impact upon the Council's revenue account. The Council may have less control of the delivery of the car park which might compromise the wider objectives of the Cotlands masterplan. Under this option the Council will need to transfer the site to a third-party funder and would result in increased costs through the grant of a lease.

31. Do nothing. The asset would continue to operate as a car park. This would impede any comprehensive redevelopment opportunities for Cotlands Road and would not deliver the wider objectives of the Lansdowne Regeneration programme.

Consultation

32. Stakeholder consultation on the Lansdowne Programme has taken place and it has wide support. Councillor engagement has been undertaken in the form of a workshop to inform the Site Development Plan and the detail of the development proposed will be subject to full public consultation through the planning process.

Summary of financial implications

33. The combined existing use land values and the financial implications of including the Additional sites are outlined in the non-public part of this report.
34. By adding the two York Road sites to the BDC Option Agreement, the Council's Corporate Property Officer is of the opinion that this triggers the requirement of Section 123 of the Local Government Act 1972.
35. Under the BDC structure, the Council is entitled to receive the land value for any sites brought forward for development and to share in the development profit. The land value becomes fixed at the point of transfer and is the figure shown in the latest development appraisal at that date. It is calculated by deducting gross development costs and developers profit from the gross development value. This is also known as the residual land value.
36. The Council's Corporate investment strategy outlines the Council's intention to use Public Works Loan Board borrowing to generate financial returns for the Council and where the opportunity has wider economic and regeneration outcomes. It states that new investment could be made for site assembly; opportune purchases; commercial property investment; building new assets to generate a financial return; and building new assets to support service delivery.
37. The purchase price provisionally agreed for the forward purchase of the MSCP development to be constructed on a York Road car park site is £10.6m.
38. The projected figure equates to a construction cost of £20k per car park space. This is comparable with RICS building cost information survey construction data (BCIS) as at January 2019 at £20k per space.
39. BDC will seek tenders for the construction works, on the basis of an agreed specification, in order to demonstrate best value and enter into a fixed-price contract with the successful contractor to construct a new 500 space MSCP. BDC will manage the construction process. The Council will be responsible for the pre-construction costs, which are payable at the date of exchange, and for making stage payments as the construction progresses. Since the car park is being delivered under a development agreement, BDC will not take a developer profit.
40. The Council's total contribution is fixed the risk of cost overruns will fall to BDC.
41. A full breakdown setting out the delivery cost will be prepared once planning permission has been granted, the detailed design is complete and the procurement process to appoint a building contractor is complete. It is anticipated that this will be in the Autumn of 2020.

42. As part of Town Centre Vision and agreeing to develop on Council-owned town centre surface level car parks, the Council acknowledge that during the construction phase of the development, the revenue generated from the car parks in question would cease and car parking would be displaced to other car parks in the locality.

43. In reality the level of car parking income across the Town Centre Car Parks as a whole has been going up year on year despite a number of car parks being closed as people take up space in previously less used car parks. It is anticipated that the car parking revenue received from the closure of York Road Surface level car park will result in an increase in car parking revenue in other car parks in the area including those owned by the Council and third-party operators.

44. It must however be noted that any decrease in the level of the Council's car parking income must be balanced against the value of regenerating the area, a land value which demonstrates "best value" under section 123 of the Local Government Act of 1972 and a 50% share of the profit from the development of the Cotlands Road Scheme.

45. The income projections within the financial model rely on increasing the car park tariffs for this site only. It should be noted that in relation to this site only the proposed pricing strategy would be a change from the current Council pricing policy.

46. It is proposed that the net operating income that can be reasonably and robustly assumed from the new MSCP at York Road will be applied to (a) fund the capital and interest payments required under prudential borrowing to fund the build the York Road MSCP and (b) annual operational expenditure.

47. The scheme has been modelled over a 30-year term at 3.5% using PWLB borrowing and at the end of the term the Council will own the assets with no outstanding loans.

48. The financial model concludes that the scheme will breakeven in year 1 and will have a positive revenue benefit over the 30-year term.

49. By funding this enabling development, the Council will also benefit from BDC profits generated from the development of the Cotlands Road car park.

50. Once purchased, the performance of this asset will be closely monitored to ensure that it continues to meet income and expenditure projections, with necessary corrective action taken as necessary.

51. Although the aim will be long-term asset retention so that the Council benefits from revenue and capital growth, there will be the option going forward of selling the asset to realise a capital receipt to recoup the original investment.

52. In addition to funding this investment the financial risks considered have also include the following factors;

    - Legal parameters within which Prudential Borrowing can be undertaken –The Government retains the power to "cap" any local authority undertaking what they regard as risky borrowing. Any such cap could impact on other programmes and ambitions of the Council. In addition, CIPFA has started a review of the prudential code in response to concerns expressed by some commentators regarding increasing property investment activity by Council;

- State Aid implications;
- Availability of capital resources – including Community Infrastructure Levy, and impact assessment of their depletion on the Council;
- Cashflow implications.

53. The non-public part of this report considers the detailed terms for the purchase and the financial business case for proceeding with this redevelopment opportunity.

Summary of legal implications

Disposals of Land

54. Local authorities are permitted to dispose of land pursuant to and in accordance with section 123 of the Local Government Act 1972 (the "LGA 1972") at a price which is the best that can reasonably be obtained unless Secretary of State consent is obtained to a disposal at an undervalue. This could include the grant of an option over land as is proposed in relation to the Additional Sites by their inclusion in an option agreement entered into between the Council and BDC in 2011 (the "Option Agreement").

55. The Local Government Act 1972 General Disposal Consent 2003 provides that the consent of the Secretary of State is deemed if the undervalue is less than two million pounds.

56. The General Disposal Consent does not absolve local authorities of their fiduciary duties to their Council tax and business rate payers and so, in making any decision to dispose of valuable assets at an undervalue, the Council must clearly and demonstrably balance those fiduciary duties with the discharge of its other functions, e.g. to secure the promotion or improvement of the economic, social or environmental well-being of its area.

57. In exercising any power (or fulfilling any duty), the Council must act for proper purposes, in good faith and must exercise their powers properly, following proper procedures and acting reasonably, i.e. for proper motives and taking into account all relevant considerations, ignoring irrelevant ones, not acting irrationally and balancing the risks and rewards.

58. Where it is alleged that a Council has failed to comply with its statutory or fiduciary duties or has improperly exercised its power to dispose of land pursuant to section 123 LGA 1972, the remedy would ordinarily be sought by way of judicial review of the Council's decision. Such a challenge could be brought by anyone with sufficient interest; in this instance any Council tax or business rate payer within the administrative area of the Council. It is conceivable that a challenge could be brought by a party without a local connection, e.g., if the

grounds for challenge were incompatibility with the Council's adopted stance on the climate emergency.

59. By the proposed transaction, a call option is proposed to be granted to BDC over both of the Additional Sites. On exercise of the option by BDC, the Council would be bound to dispose of the Additional Site/(s) by the grant of a 150-year development lease to BDC. Under the proposed arrangement, BDC could choose to call for a 150-year development lease of either or both Additional Sites (subject to satisfaction of the usual conditions precedent which are set out in the Option Agreement); it is understood that BDC intends to exercise the option in respect of only one of the Additional Sites, although it would have the right to exercise the option over both of them. BDC intends to release the other Additional Site from the Option Agreement if / when the Council awards BDC a development agreement for the construction of the MSCP on that released site (and which the Council will therefore retain).

60. The detailed terms will need to set out whether the option over the Additional Sites will be released for any other reason, e.g. if a planning permission for the Cotlands Road and Additional Sites were not obtained by a given date. The terms will also need to address when BDC will become bound contractually to deliver the scheme on Cotlands Road (and the Additional Site leased to BDC), e.g., upon award of the development agreement (since it is proposed that the MSCP will be delivered first). It is recommended that these matters are considered in the negotiation of the detailed terms of the transaction.

61. The evaluation methodology adopted under the Option Agreement is different from that used by the Council to assess the best consideration obtainable in respect of its land which is not subject to the Option Agreement. If the valuation of the Additional Site/(s) calculated as per the Option Agreement (the "Site Lease Value") were lower than their unrestricted open market as at the date of disposal, then it is possible that such Additional Site could be disposed of at an undervalue, for which mitigating steps are referred to in paragraph 68.

62. The Council will not receive an upfront capital receipt for either Additional Site in respect of which the option is exercised by BDC; rather BDC's debt to the Council in a sum equal to the Site Lease Value will be evidenced by a loan note, the repayment terms of which are set out in the Members' Agreement. The loan note instrument converts the Council's contribution of a sum equal to the Site Lease Value to an equity investment in BDC.

State Aid

63. State aid can arise in circumstances where the Council provides an advantage through its resources on a selective basis to any organisation which could give rise to a distortion of trade between Member States of the European Union (EU). For the purpose of this report, the advice is based on the current status of the

laws in relation to State aid and procurement; it is possible that the law may change in those areas during the course of the transaction proposed.

64. If land were disposed of at an undervalue, the undervalue would be at risk of being considered to be an advantage for the purpose of the State aid rules. The question as to whether that disposal at an undervalue could be said to amount to State aid is complex and regard would need to be had to the final financial terms of the proposed arrangement. It might be possible to rely on the de minimis exemption (where any element of State aid does not exceed euros 200,000 over a rolling three-year period), or the market economy operator principle, which would allow the Council to provide any benefit on market terms and acting in the same way as a rational operator in a similar situation and on commercial terms.

65. To avoid State aid in land transactions, local authorities should ensure there is:

(i) a sufficiently well-publicised, open and unconditional bidding procedure; or

(ii) an evaluation of the market price by one or more independent asset valuers of good repute on the basis of generally accepted market indicators and valuation standards.

66. It is not possible to ascertain whether any State aid will arise until the Site Lease Value is assessed. To mitigate the risk, the detailed terms (authority for which is requested to be delegated) could provide that the price paid for the Additional Sites is no less than the best consideration that can reasonably be obtained.

67. Any State aid exceeding the de minimis level may be notifiable to the Commission. If the Commission were to consider that any State aid had been given, then it could require the repayment of State aid by any recipient of it, together with interest; further, there is a risk that a third party could try to establish a claim for damages against BCP.

68. If the delivery of the MSCP by the Council is a planning condition imposed on BDC in connection with the scheme at Cotlands Road, then it is important that further legal advice is sought to ensure that the discharge by the Council of a BDC planning obligation would not be considered to be State aid. It may be sufficient to demonstrate that the value of the retained MSCP exceeds the overall costs to the Council of delivering it and that no advantage is conferred on BDC beyond that which any other commercial operator in the market would have been prepared to provide. In the event that State aid is identified in this regard, then the detailed terms should contain provision to facilitate the removal of any such aid.

Public Contracts Regulations 2015 (the “PCR 2015”)

69. The original procurement and contract documents in connection with the establishment of BDC LLP made provision that sites other than the sixteen sites originally listed in the Option Agreement may be developed by BDC in future. Since the procurement documents make it clear that the main purpose of

the establishment of BDC was to regenerate the Bournemouth area, in particular the town centre, it is likely that the inclusion of the Additional Sites in the Option Agreement would be considered to be within the scope of the advertised opportunity.

Development Delivery Model

70. The delivery model described by the procurement documents is the grant of a development lease to BDC (the “Advertised Approach”); the members’ agreement entered into between the Council and BDC in 2011 (the “Members’ Agreement”) also reflects this structure, providing for the grant of a development lease and so triggering the funding arrangements in relation to the financial commitments from the Council’s joint venture partner, Morgan Sindall Investment Limited (“MSIL”).

71. It is proposed that one of the Additional Sites will be delivered in accordance with the Advertised Approach and that the other Additional Site will be delivered by way of a development agreement whereby the Council retains the ownership of the land and awards a contract to BDC to build the MSCP on it. The option rights granted to BDC by the inclusion of that Additional Site in the Option Agreement will be released by BDC at the same time as the development agreement is entered into.

72. Regulation 72 of the PCR 2015 sets out six circumstances in which a contracting authority can make changes to a contract without running a new procurement ("Permitted Changes"); the only one of those which is relevant here is that set out in Regulation 72(1)(e), i.e. a modification which is not substantial. Modifications will be held to be substantial in the event that any one of the conditions specified in the PCR are met and these conditions include where:

    (i) the modification renders the contract or framework agreement materially different in character from the one initially concluded; or

    (ii) the modification changes the economic balance of the contract or framework agreement in favour of the contractor in a manner which was not provided for in the original contract or framework agreement.

73. This change from granting a development lease per the Advertised Approach to awarding a development agreement on the Council’s own land is at risk of meeting one of the conditions set out in Regulation 72(8) of the Public Contracts Regulations as it could be considered to materially alter the character of the contract. It is possible that other operators in the market might have been interested in delivery of developments for the Council if the proposal were a straightforward development agreement where the development was funded by the Council, rather than a developer investment model.

74. It is also possible that the award of a development agreement (or a series of development agreements) could alter the economic balance between the parties in that MSIL is not required to take the same degree of development risk as it

would otherwise have done where it takes a development lease of the site as per the current arrangement.

75. Whilst there may be reasons for the Council wishing to harmonise delivery of the MSCP with the remainder of the scheme at Cotlands Road, there will remain a de facto risk of challenge arising out of the Council's award of a development agreement to BDC for a site not currently subject to the Option Agreement, instead of seeking bids for the MSCP works by the issue of an OJEU notice in compliance with the PCR 2015.

Mitigation

76. In order to mitigate the risk of there being held to be a material change in the economic balance of the arrangement in MSIL's favour, the Council intends to amend the Members' Agreement to permit the award of development agreements to BDC but on pre-agreed terms which would seek to replicate the existing risk and reward model and so to preserve the existing economic balance between the parties. The purpose behind this variation would simply be to permit the Council to retain some of the BDC schemes instead of transferring the land to BDC for development and entering into a loan agreement to provide the development funding to BDC, with BDC subsequently selling the completed development back to the Council.

77. This step would assist the Council to demonstrate that the development agreement delivery model is not materially different from the Advertised Approach but it may not succeed in defeating any future challenge by simply effecting this amendment because each new scheme might be considered to have departed from the Advertised Approach and so constitute a new ground for legal challenge.

78. The risk of challenge on grounds of the opportunity being materially different in character from that set out by the Advertised Approach has also been assessed to increase on a sliding scale depending on how many schemes are brought forward in an alternative manner (ranging from a relatively low risk profile if only a small number of schemes are advanced in this way, to a high risk profile if this approach applies to all schemes). To date (and including the Cotlands Road and Additional Sites), it is believed that around 50% of schemes have been delivered in accordance with the Advertised Approach.

79. One possible way to mitigate a risk of challenge can be the issue of a VEAT notice in the Official Journal of the European Union; a VEAT notice is used to shorten the timescales for certain types of claim. Consideration as to the merits of issuing a VEAT notice will be undertaken in line with the authority requested to be delegated in line with Recommendation 3 alongside the consideration of other options.

Consequences

80. If a challenge were brought prior to the development agreement being entered into, the award of the development agreement would be prevented by an automatic suspension. The automatic suspension would usually remain in place until the court had decided whether to order the Council to set aside the contract. A challenger may also issue a claim for damages in order that it can seek compensation the event that the court permits the award of the contract. These types of claim can be brought within 30 days of the date when the challenger knew (or should have known) that it had grounds to challenge the proposed award, but the limitation period can be extended up to three months in some circumstances.

81. If a challenge were brought after the award of the development agreement, then there is a risk that the contract could be declared ineffective. One circumstance where the Court can make a declaration of ineffectiveness is where a contract has not been advertised when it ought to have been; any change to the Advertised Approach which is not a Permitted Change would constitute a contract which would be required to be advertised. Challenges can be brought up to six months from the date when the challenger knew (or should have known) of the grounds to challenge the proposed change to the Advertised Approach. Similar to pre-contract challenges, a challenger may also claim damages within 30 days of the date when it knew (or should have known) that it had grounds to challenge the award (but that period can be extended to up to three months).

82. The detailed terms will need to address what the parties would do in the event of challenge and should clarify the apportionment of any resulting financial liabilities between them.

Best Value

83. Finally, the Council is a Best Value authority with a general duty to obtain best value. This means that the Council must “make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness” pursuant to s3 of the Local Government Act 1999.

84. One way in which the Council can comply with those duties is to challenge, compare and compete its delivery arrangements (and, of course, consult on them where appropriate). Whilst the delivery of the Cotlands Road scheme and the MSCP satisfies the requirements of the Town Centre Area Action Plan and the Lansdowne Programme on which consultation has already been undertaken, the Council should also ensure it can demonstrate its consideration and evaluation of the delivery options available and the efficiency and effectiveness of that which is recommended.

Summary of human resources implications

85. BDC has appointed Morgan Sindall Investments as the Development Manager to manage the day to day activity for all town centre developments undertaken by BDC, including the Cotlands Road and York Road schemes.

Summary of environmental impact

87. A key objective of the Corporate Plan is to reduce the town centre's carbon footprint, whilst improving its competitiveness. The scheme presents many opportunities to do this by having more people living in the town centre thereby giving them better access to town centre amenities. This reduces the need for a private car. The location of the Lansdowne with easy access to main town centre retail and leisure attractions, the main Bournemouth transport terminal at the station and regular bus routes make this a very sustainable location. The Environmental impact analysis indicates that this is likely to have a positive impact on the carbon footprint.

Summary of equality implications

88. The Equality Impact Needs Assessment indicates that the TCV provides substantial opportunities to create a positive Equalities Impact, particularly by improving accessibility of the town centre.

Summary of risk assessment

89. The key development risks highlighted in this report for members to be aware of are:-

- Procurement risk inherent in awarding a development agreement to Bournemouth Development Company. The previous advice from Pinsent Mason in relation to this risk is referred to within the legal implications section of this report.

- Delivery Risk that the York Road MSCP is developed out but the Cotlands Road scheme is stalled or not viable. This risk is mitigated within the legal structure which ensures BDC have undertaken detailed design and viability work secured planning and an anchor tenant for the Cotlands Road scheme before the full scheme expenditure is committed and work on the new MSCP commences, however some pre-construction expenditure would be incurred.

- Investment Risk including the risk that the development is non-profit making. If BCP own and manage the MSCP it will have control over the cost of delivery and also future management of the MSCP to ensure that it operates at full capacity and ticket pricing and therefore revenue. The delivery of the MSCP is the first phase of enabling development to unlock development of the Cotlands Road car park site for an exciting employment led mixed-use scheme.

- Planning risk: Assuming BCP own and operate the car park this will be shared with BDC who is proposing to enter into a Planning Performance Agreement with the Local Planning Authority.

- Pre-Construction Financing Risk. BDC is responsible for all of the costs to develop the detailed design, secure planning permission, procurement of the building contractor and arranging construction phase finance. BDC raises the necessary finance for the pre-construction phase from Morgan Sindall.

- Construction Financing Risk. If BCP accept the recommended Option 1, BCP will own and manage the MSCP and will provide financing for the construction phase.

- Construction Risk including late completion and cost overruns. BDC will enter into a fixed-price lump sum contract with the building contractor to mitigate the effects of such risk falling into BDC account.

Background papers
BDC Cotlands and York Road SDP – February 2019.

Cabinet Reports
BDC Business Plan – 20 February 2019.

Appendices
Appendix 1 – Exempt Part of the Report

[NOTE: Should Cabinet wish to discuss the contents of Appendix 1 then the meeting will be required to move into exempt session in accordance with Section 100A (4) of the Local Government Act 1972].