OFFICER DECISION RECORD

This form should be used to record Executive decisions taken by Officers

Decision Ref. No:			
Service Area:	Regeneration and Economy	**Date:**	13th November 2020
Contact Name:	Sam Munnings	**Tel No:**	WFH
E-mail:	sam.munnings@bcpcouncil.gov.uk		
Subject:	Durley Road Car Park Development – Lease to a development subsidiary of Bournemouth Development Company LLP (**BDC**)		

Decision taken:

To approve the final terms and the grant of a lease of the Durley Road Car Park site to Durley Road Development LLP (the Subsidiary) at less than the best consideration reasonably obtainable and otherwise on terms in accordance with the Option Agreement dated 17th February 2011.

To approve the final terms and the entry into of the Council Loan Note and Additional Council Finance Loan Note, together with the associated security agreement between the Council and BDC LLP (BDC).

Reasons for the decision:

To comply with the terms of the Option Agreement dated 17th February 2011 between Bournemouth Borough Council and BDC (**the Option Agreement**), and section 123 of the Local Government Act 1972 (**Section 123**), to enter into a lease and to comply with the decision made by Cabinet on 24th June 2020, which authorised the Corporate Property Officer in consultation with the Council's Section 151 Officer and Monitoring Officer to agree the detailed provisions of the legal documentation, including and not limited to the lease and the loan agreements.

Background:

The background to the matter was set out in detail in the Cabinet report dated 24 June 2020. However, in brief the Council's statutory predecessor entered into an Option Agreement with BDC on 17 February 2011, which is binding on the Council. Durley Road Car Park was one of the sites within that agreement. In 2014 Bournemouth Borough Council approved the Durley Road Site Development Plan and BDC progressed with obtaining planning permission for the site for residential development. Following a lengthy planning process, development of the site was granted planning permission for 44 flats and associated car parking through appeal in January 2020.

BDC intend to serve notice exercising their rights under the Option Agreement for the grant of a long lease of Durley Road Car Park to the Subsidiary, which is required to proceed with the Durley Road scheme.

The Site Lease Value (i.e., the market value using a Red Book residual value calculation and assumptions set out in the Option Agreement) has to be agreed or determined by an expert. The Development Appraisal at the time of the Cabinet report showed a Site Lease Value at a minimum of £250,000.

Consultations undertaken:

The Durley Road Scheme is located within the Westbourne & West Cliff Ward. The Ward Councillors have been consulted as part of the Cabinet approval process and recognise that this site falls within the Option Agreement.

Finance and Resourcing Implications:

A valuation has been undertaken by a suitably qualified RICS Valuer who has determined that the restricted value in accordance with the terms of the Option Agreement is £350,000. The unrestricted value of the site, i.e., the value that the site would achieve in the open market and ignoring the terms of the Option Agreement, is £550,000.

The Site Lease Value, calculated in the final Development Appraisal dated 30th October 2020 is £382,500.

The Council is required by Section 123 to dispose of land (including by way of a lease of seven years or more) only for the best consideration reasonably obtainable, unless the Secretary of State has consented to a disposal at less than best consideration. The valuation mentioned above was arranged to ascertain whether the grant of the lease was at an undervalue, and if so by how much.

Whilst the Site Lease Value exceeds the restricted value which recognises that the Council is contractually bound to comply with the terms of the Option Agreement, there is an argument that the grant of the lease could constitute a disposal at an undervalue on the basis that the Site Lease Value does not exceed the unrestricted value of the site.

The Council has received an expression of interest from a third party for the Site in a sum which far exceeds the Site Lease Value. In considering the disposal of the Site to a third party, the Council would need to take into account that:

(i) the site is subject to the Option Agreement (further referred in the legal implications section below)

(ii) the Council would have to cover the costs incurred to date of securing the planning;

(iii) the Council would have to negotiate a release of the Site from the Option Agreement; even if the Council's partner in BDC were willing to release the Site from the Option Agreement, it would be reasonable in those circumstances to expect it to seek sufficient consideration to compensate it for any loss of anticipated development profit from the Durley Road Scheme.

Therefore, if the Council were able to accept an offer in the region of that referred in the expression of interest, once the costs set out above had been deducted from that amount, the Council would receive considerably less than the Site Lease Value and the anticipated profit share. It is therefore not recommended to proceed with any such negotiation for release of the Site from the Option Agreement or to try to agree terms with a third party.

In the event that the grant of the lease would constitute a disposal at an undervalue, a general consent (The Local Government Act 1972: General Disposal Consent (England) 2003) has been made by the Secretary of State under section 128(1) of the Local Government Act 1972. This permits local authorities to dispose of land at an undervalue if: (a) the purpose of doing so is to promote the economic, social and/or environmental well-being of their areas; and (b) the difference between the consideration obtained and the unrestricted value of the land does not exceed £2 million.

The grant of the lease for the Site Lease Value (which is £167,500 below the unrestricted value) is supported by the Council for the following reasons:

- The Council will take a 50% share in the profit from the site. This is currently calculated through the Development Appraisal, which has been checked and agreed by the Valuer, as £913,406. When added to the Site Lease Value, this equates to a potential return to the Council of £1,295,906, which is in excess of the unrestricted value.
- The unrestricted value does not take account of the cost of gaining an implementable planning permission. If planning permission had not be gained the value of the site would be less than the reported unrestricted value and there would be no guarantee that redevelopment with housing could be possible.
  If the Council had undertaken the work to obtain planning permission, they would have had to incur the significant cost of that process. In addition, as planning permission for the scheme was granted through appeal, it is unlikely that the Council would have achieved such a valuable permission.
- The disposal is to be made in line with the Option Agreement with BDC, a development joint venture partly owned by the Council; the objectives of BDC include benefitting the economy through regeneration, improving Bournemouth as a place to live, work, visit and shop, driving demand for homes and jobs in the area and increasing sustainable job opportunities, creating residential and visitor communities and improving the physical landscape, access and public transport in the town.
- The provision of housing within the Town Centre, will promote sustainable living, with those occupying the properties living in close proximity to services and facilities. In addition, the development is well placed for use of public transport to access the BCP area as well as further afield. This will promote economic activity in the area, while reducing the need for reliance on personal vehicles for both social and work purposes. This also results in increased local spend.
- The development will result in increased Council Tax receipts and New Homes Bonus to the Council, which will provide funding for council delivered services. In addition, the development provides a considerable s106 receipt to support projects that improve social and environmental wellbeing. This includes affordable housing contribution, pedestrian highway improvements, speed reduction measures in relation to the local school and, heathland mitigation.
- Of the spend associated with the construction of the development, typically 70% goes to business with a BH postcode. This improves economic activity in the area and supports local businesses of varying sizes.
- A number of other social, economic and environmental benefits will be achieved as referred in the Impact Assessment section below.

The existing use value of Durley Road Car Park has been calculated as £1,000,000 by capitalising car parking income. The public parking displaced by the redevelopment of this site should be redirected to other BCP owned car parks in the locality. Therefore, the loss of the Durley Road car parking revenue will be mitigated by an increase in revenue at these other car parks. This will result in an uplift in revenue and therefore existing use value of those sites.

Therefore, the redevelopment of the Durley Road Car Park site will see the Council benefit from a land value receipt of £382,500; a profit share of £913,406, and; an uplift in car park revenue and capital value of other Council-owned car parks.

Consideration has been given to protecting the Council's interests whilst it supports the Durley Road scheme via the provision of Additional Council Finance. In this regard, the Council has taken the decision to include a longstop date for repayment of the Additional Council Finance Loan Note on the earlier of the date which is five years after the date of the loan note and the date which is nine months after the sale of the final property.

It should also be noted that in order to reduce BDC's funding costs, following repayment of third-party funding but before repayment of the Additional Council Finance, up to a maximum amount of £402,553 in sales proceeds from the site (the **Retention**) will be permitted to be used by BDC to pay specified development costs (agreed by the Council) which arise following completion of the scheme.

Name: Adam Richens **Date: 13/11/20**

Signature: [redacted]

Legal Implications:
The terms of the lease and the authority to grant it have been delegated to the Corporate Property Officer under the Cabinet resolution dated 24th June 2020. The form of lease is in accordance with the Option Agreement, including the calculation of the Site Lease Value.

The Council is empowered to dispose of land pursuant to section 123 of the Local Government Act 1972. The Council's powers to dispose of the site at less than the best consideration reasonably obtainable have been set out in the previous section and are not repeated here. The total income from the Site Lease Value and profit share is in excess of the unrestricted market value and this, together with the assessed economic, social and environmental benefits outlined above, provides the rationale for the Council's decision to dispose of the site for the Site Lease Value (in line with the General Consent, if applicable) notwithstanding the fact that this is slightly below the section 123 unrestricted valuation obtained.

Furthermore, the Site is subject to an Option Agreement between the Council and BDC. Upon satisfaction of the Option Conditions, the Council can be required to grant a lease of the Site to BDC. In respect of the Site, the Option Conditions have been satisfied and the Site is subject to a binding contract for sale pursuant to the terms of the Option Agreement.

Where it is alleged that a local authority 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.

In usual circumstances, 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. However, in this circumstance and as mentioned above, the Council is bound to comply with the terms of an Option Agreement entered into pursuant to an OJEU compliant tender process undertaken circa. 2010 and the criteria for State aid are therefore not considered to be present.

The site was appropriated for planning purposes by Cabinet resolution on 27th January 2016, which converted third party rights (including a number of express drainage and similar rights reserved by the 1971 Conveyance under which the site was acquired) to the payment of compensation in order to enable a development to take place in accordance with a planning permission. The resolution will enable development to take place without risk of injunction from third parties who would otherwise have the benefit of private rights over the site.

There are no express rights to light burdening the site, but as a general rule such rights can sometimes be acquired after 20 years' uninterrupted enjoyment. Under section 204(1) of the Housing and Planning Act 2016 and clause 3.9 of the lease, the Subsidiary is responsible for payment of any compensation arising from the appropriation. While the payment of compensation will impact on the profit from the development, the amount calculated to cover this eventuality was considered negligible and therefore its impact on the profit will be minimal, if any.

The Council will receive a Council Loan Note from BDC LLP in a sum equal to the Site Lease Value and this will be secured in accordance with the Members' Agreement.

The Council also approved the grant of a loan £950,000 Additional Council Finance directly to the Subsidiary on the basis that the Additional Council Finance would not have a fixed repayment date and would be repayable out of sales proceeds following repayment of all third party funding in respect of the scheme. It was anticipated that the Additional Council Finance would be secured by way of second ranking fixed and floating charges over the assets of the Subsidiary.

It is instead agreed that the Additional Council Finance will be lent to BDC and then on lent to the Subsidiary. It will therefore be documented by way of secured loan notes issued by BDC to the Council (the **Additional Council Finance Loan Notes**). The on lending of the Additional Council Finance to the Subsidiary will be documented by second ranking and subordinated loan notes issued by the Subsidiary to BDC (the **Subsidiary Loan Notes**).

The Additional Council Finance Loan Notes will be repayable out of repayments of the Subsidiary Loan Notes. The Subsidiary Loan Notes will be repayable out of sales proceeds of units within the Scheme after repayment of the senior debt and after withholding of the Retention (referred to in the Financial Implications section above).

The Subsidiary will grant first ranking fixed and floating charges over all its assets (including the Lease) to a third-party funder.

The Council and the PSP will also hold security over BDC's membership interests in the Subsidiary (per the Members' Agreement and associated security arrangements); however, in line with the principle that the third-party debt will be repaid and secured in priority to the Council and PSP debt, security will also be granted to the third-party lender over BDC's membership interests in the Subsidiary and that security will rank ahead of the Council and PSP security.

In accordance with legal advice, the terms of the agreements are such that the Council will not be in a materially different position as a result of the above-mentioned changes to the debt structure

Name: Susan Zeiss **Date:** 13 November 2020

Signature:
[redacted]

Risk Assessment:
An initial risk assessment has been undertaken for the scheme which outlines it as high risk due to the value.

There is a risk that the development is not profit making. This is a risk to which the Council is exposed, but this has been considered within the valuation as this takes account of recent sale data from similar schemes. The valuation suggests that the Gross Development Value put forward by BDC is appropriate in the current market.

Name: Sam Munnings **Date:** 10th November 2020

[redacted]

Signature:

Impact Assessments:
The Equality Impact Needs Assessment indicates that the Town Centre Vision, the at the BDC developments are part of, provides substantial opportunities to create a positive Equalities Impact, particularly by improving accessibility of the town centre.

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 scheme within the town centre has easy access to key 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.

The evolution of the construction industry demands that buildings are delivered more economically, within shorter time frames, more cost-effectively and with reduced impact on the environment. BDC currently uses Building Information Modelling (BIM) to deliver benefits on its projects but, going forward, would look

to integrate BIM more to increase the opportunity for offsite prebuild. This includes engaging and supporting the supply chain to adopt BIM standards and processes on a typical project, and delivery of data to drive automated manufacture and offsite production. BDC seeks to work closely with local suppliers, clients, designers to procure sustainable materials wherever possible. Rather than just optimising the acquisition, use and disposal of resources, BDC looks to create a loop of reusable resources and assets for their clients. This is demonstrated on existing projects from choosing materials and components to optimise operation as well as build, to promoting training and employment within the local community. BDC will procure environmental risk assessments, through the supply chain, for each project that address the construction, commissioning and handover phases. Every project, once on site has an environmental management plan that describes the systems, monitoring and auditing to achieve the project's objectives in a sustainable manner.
Information for publication
Background Papers Cabinet Report Dated 24 June 2020

Any declaration of interest by the Officer responsible for the decision	Nature of Interest
No	

Any conflict of interest declared by a Cabinet Member who is consulted by the Officer taking the decision	Name of Cabinet Member	Nature of interest	Details of any dispensation granted by the Monitoring Officer
No			

Decision taken by: Graham Farrant, Corporate Property Officer

Signature: [redacted] **Date of Decision: 13 Nov 2020**

Decision taken by: Adam Richens, S151 Officer

Signature: [redacted] **Date of Decision:13/11/20**

Date Decision Effective:

Note: A record of this decision should be kept by the Service Area within which the decision falls.