CABINET

Report subject	**Happyland, East Undercliff Promenade – Grant of Lease**
Meeting date	12 July 2019
Status	Public Report
Executive summary	Happyland is a prime beachfront site that is in need of extensive repair or redevelopment in order to comply with the Council's obligations under the lease and to ensure the future stability of the cliff. As a result of comprehensive legal and procurement advice, entering into a licence with the Meyrick Estate to allow development of the site is considered the most appropriate course of action. This report sets out the proposed option and seeks approval for the recommendation set out below to enable the redevelopment of the site.
Recommendations	**It is RECOMMENDED that:** **(a) The Council issues a Voluntary Ex-Ante Transparency (VEAT) Notice advertising the Council's intention to enter into an agreement for lease of the Happyland site, shown edged red on the attached plan, with a special purpose vehicle established by the Meyrick Estate (the SPV) to grant a lease to a nominee of that SPV.** **(b) The Council enters into an agreement for lease with the SPV to grant a 150 year lease at an initial rent of £1,001 per annum and an initial premium that reflects the uplift in value arising from the grant of the planning consent, after deduction of the costs of obtaining the consent.. This Agreement for Lease to be conditional upon the grant of planning consent for the redevelopment of the site.** **(c) To enter into a licence to alter and sublet with the Meyrick Estate, as freeholder, to permit the future development of the site. In consideration, the Estate will receive an appropriate share of the rent under this lease and a share of any additional capital value accruing to the Council.** **(d) To delegate authority to agree terms for all the relevant legal documentation and the content of the VEAT Notice to the Corporate Property Officer in consultation with the S151 Officer and Monitoring Officer.**

Reason for recommendations	The Happyland site is a leasehold site earmarked for redevelopment under the Seafront Strategy. The existing building is in poor condition and will require significant expenditure in order for the Council to meet its repairing obligations under the lease This decision means that the freeholder of the site is able to progress development proposals in accordance with planning policy in order to add to the range of facilities for visitors to Bournemouth beach. This proposal is motivated by place-shaping, rather than financial gain, as it is unlikely to generate a significant financial return for the Council.
Portfolio Holder(s):	Councillor Lewis Allison, Tourism, Leisure & Communities Councillor Mark Howell, Regeneration & Culture
Corporate Director	Bill Cotton, Regeneration & Economy
Contributors	Chris Saunders, Head of Operations, Destination and Culture
Wards	Westbourne & Westcliff
Classification	For Decision

Background

1. The Happyland site is part of a larger area of the seafront and cliffs leased by the Council from the Meyrick Estate under a 999-year lease granted in 1903. This lease restricts the Council's ability to redevelop this site without the consent of the Freeholder.
2. Previous developments elsewhere on the land covered by the 1903 lease have been promoted by the Council, with the Freeholder's consent sought for subletting and redevelopment once a preferred bidder has been selected. However, the Meyrick Estate has indicated a desire to take a more active role in development on its freehold land.
3. This has led to a close working relationship on the Happyland site, with the Council and the Estate jointly funding site investigations and planning advice. A market engagement exercise in the summer of 2018 indicated strong interest in the site for a variety of uses including hotel, restaurants, leisure, and events space. Feedback from this exercise demonstrated that the objectives of the Estate are closely aligned with those of the Council.
4. It is proposed that the Meyrick Estate will create a Special Purpose Vehicle (SPV) to promote development of this site. An SPV is a single-purpose, limited liability company established for the delivery of a single project. The Council will enter into an agreement to grant a 150-year lease to this company, conditional upon planning consent for redevelopment. The SPV will market the site, inviting premium bids for the assignment of the SPV's 150-year lease, when granted. The Meyrick Estate will then select its preferred bidder and enter into a conditional contract with that party, which will seek planning consent for its proposals. The grant of planning consent will then trigger the grant of the 150-

year lease and it is anticipated that the SPV will direct that this lease is granted direct to the developer.

5. The Council will have no ownership of the SPV and will have no direct control over its activities. For example, the Council is not able to specify what development it wishes to see on the site.
6. The Council's consent for alterations and/or change of use will be required under the lease. Via a licence for alterations, the Council will be able to impose conditions on the developer to ensure that the development proposals are carried through to completion within a reasonable timescale.
7. Although the SPV will be a wholly-owned subsidiary of the Meyrick Estate, the consent of the Estate, as Freeholder, will still be required for the grant of the 150-year lease and for any subsequent alterations. This separation of roles will ensure that their Trustees are be able to properly discharge their duties. The Meyrick Estate will secure a share of any uplift in value via a Licence for Alterations and Subletting with the Council.
8. At the end of the 150-year lease, however terminated, the Meyrick will be able to propose terms for the grant of a new lease of up to 150 years. The Council will then be under an obligation to properly consider this proposal and not to unreasonably reject this offer provided it constitutes best consideration. The Council will still have legitimate grounds for rejection, e.g. planning policy. In view of the landlord controls in the 1903 lease, which restricts the Council's ability to redevelop or sublet the site without the Estates consent, this is seen as a reasonable provision.

Alternative options considered - and reasons for rejection

9. <u>a) The Council could market the site itself to seek a developer/operator.</u> This would ensure that any development proposals coming forward on the site are evaluated in accordance with its own criteria and the selection of the preferred bidder would fully reflect the Council's aspirations for the site.
10. Recent legal decisions suggest that disposals of this nature, that would place development obligations on the preferred bidder, would likely fall under the Public Procurement Regulations. Due to the value of the scheme, this would necessitate an EU compliant tender, which would be both costly and result in a lengthy process. Furthermore, soft market testing suggests that there would be a reluctance to engage in this process in view of market uncertainty around the impact of Brexit.
11. Any procurement on this basis would still require consent for subletting and alterations under the lease from the Meyrick Estate, as Freeholder. Since it may be difficult to incorporate sufficient flexibility into a public procurement to meet the requirements of the freeholder, this increases the chance of an abortive procurement if consent is subsequently withheld.
12. An agreement for lease with a special purpose vehicle, established by the Meyrick Estate, will overcome many of these issues. The Estate is not subject to the same procurement restrictions as the Council and will therefore be able to engage with the market and select its preferred development partner via a cheaper and more market-friendly process. This carries a greater chance of a bidder coming forward with proposals that meet the requirements of the Freeholder. Whilst the Council will have no direct control over selection of the

Estate's development partner, it will hold the right of veto, under this proposed agreement in the unlikely event that inappropriate development proposals are put forward. The agreement for lease and lease will also include safeguards so that the Council will be able to regain control of the site if development does not happen.

13. For these reasons, a Council-run procurement is not the preferred way forward.

14. b) Do nothing, i.e. continue letting the building as an amusement arcade. Unfortunately, the building housing the amusement arcade is in poor condition and requires significant expenditure to put it into good order. Also, the low ceiling at first floor level severely limits commercial use of this space.

15. The back wall of the building serves as a retaining structure for the cliff above and whilst this is performing adequately at present if the whole building remains, a long-term solution that will provide new, fit for purpose visitor facilities whilst at the same time ensuring cliff stability is the preferred way forward. Modelling of a suitable replacement retaining structure has suggested a likely cost of £5million. If we 'do nothing' then the Council will be liable for this cost in the short to medium term.

Summary of financial implications

16. The Happyland site currently generates a rental income of £28,150 per annum for the lease of the amusement arcade. The Meyrick Estate currently receives an appropriate share of this income under a licence to sublet. This income is reliant on the building remaining in a safe condition and this is ensured by regular monitoring. However, it is likely that the building will shortly deteriorate to a point in the next few years where it is forced to close and this income will be lost. The grant of the Agreement for Lease to the Meyrick Estate SPV will likely bring forward the date when this income is lost as this lease will be terminated prior to the grant of the proposed 150-year lease. This reduction in income, whether from the deterioration of the building or from the grant of the lease, will need to be accommodated from within the seafront service budgets. Whilst there are no firm proposals in place at this stage, this adjustment needs to be considered in the context of the overall income budget for the Seafront, which is around £12,700,000. This income represents 0.2% of this budget and the rent foregone will be added to the savings targets for 2020/21 onwards.

17. Under the terms of the proposed Agreement for Lease, a premium will be payable on the grant of the lease. This is to be assessed as a capital sum having regard to the Planning Consent and the offer received by the SPV from its preferred bidder following marketing of the site, after deducting its costs of marketing, legal costs, irrecoverable tax, etc.

18. After deduction of the costs, estimated at £250,000, the Council will be able to retain the majority of the next £230,000 of this premium, which represents the capital value of the existing rent, with the Estate receiving the remainder, reflecting the current rental share. Any surplus, over and above this figure will be distributed appropriately, in consideration for its consent as Freeholder to the subletting and alterations. The Freeholder will also receive a share of the £1,001 rent.

19. Although initial indications indicate that redevelopment is viable, it is possible that premium offers may be at a level that do not allow the SPV to recover its costs and/or for the parties to receive recompense for their lost rental income.

20. These arrangements will satisfy the Council's Best Value obligations under S123, Local Government Act 1972. The Council does not have a marketable interest in the site without the cooperation of the Freeholder. Therefore, the grant of a lease to an SPV under the control of the freeholder on terms that ensure that the quantum of the premium payable for the grant is established following marketing of the site will deliver best value for the Council.

21. The Risk Assessment section below identifies a potential liability of up to £125,000 in respect of abortive costs if the Agreement for Lease is terminated. A budget for the costs has been provided by the Estate and any change to this will need to be agreed with the Council. In the event that this liability crystallises then this will be funded from the Asset Investment Strategy – Rent, Risk and Repairs Reserve.

Summary of legal implications

22. The proposed 150-year lease to an SPV of the Meyrick Estate, without the inclusion of any development obligations, will likely fall outside of the Public Contracts Regulations 2015 ("PCR 2015") so will not need to be subject to a procurement process

23. The disposal of land is not an activity governed by the PCR 2015. However, a land transaction incorporating a public works contract (equal or exceeding the estimate value of £4,551,413) is likely to be caught by the EU procurement rules. If it is below this value, it may still require a degree of advertising and competition under EC Treaty principles where there is a realistic prospect of cross border interest.

24. A public works contract is likely to arise where there is a legally enforceable obligation upon the developer to carry out works required or specified by the Council where the Council receives a direct economic benefit. The Council does not need to be the recipient of the works for a public works contract to arise. However, to establish that a contracting authority has specified the requirements, the authority must have taken measures to define the type of work, or at the least, have had a decisive influence on its design.

25. Economic benefit can be met when an authority:

    - is to become the owner of the works; or
    - is to hold a legal right over the use of the works (or to make them available to the public); or
    - derives economic advantages from the future use or transfer of the work, has contributed financially to the work, or has assumed economic risk in case the works are not commercially successful.

26. In this case, the Council will not become the direct owner of the works as it will have granted a long-lease for the SPV to develop the site independently. Nor is it reserving rights over the use of the works or investing in the wider scheme.

27. Whilst the Council will not be the direct owners of the hotel, it will receive a premium for the grant of the lease and a rent will be payable under the lease (as

mentioned above). However, the premium will be calculated on the value of the land prior to development taking place and the rent is payable whether or not the building works are carried out, so the economic benefit is not linked to the completion of the hotel.

28. If the chosen developer chooses to initiate the works, it will need to covenant directly with the Council in a licence to alter to commence and complete the approved works in a good and workmanlike manner. However, this ought not to constitute a public works contract requiring competitive tendering where such requirements are of a general planning nature (so only have a low level of design specification) as this ought not to constitute a "decisive influence" for the purposes of creating a public works contract. Furthermore, the main purpose of any obligations will not be the delivery of the works but rather obligations imposed from the Council's interest as landlord.

29. However, if the arrangements are deemed to require advertising and competition under the PCR 2015 then the Council would be susceptible to the risk of a procurement challenge. In order to mitigate the risk of the contract being set aside the Council will use the Voluntary Transparency Notice procedure in Regulation 99 of the PCR 2015 (as amended) advertising the Council's intention to proceed on this basis.

30. The VEAT notice procedure prevents the contract being declared ineffective. It requires that the Council considers it is permitted to award the contract without competition in compliance with the procurement rules; to publish a VEAT notice setting out those reasons and then observing a 10 day standstill period (beginning with the day after the date on which the VEAT notice is published in the OJEU) before entering into the contract.

31. Due to procurement restrictions, the Council is not able to impose any development obligations in the lease. The lease will include a break right if development activity does not commence within a certain time period as an incentive for works to be carried out and the lease will stipulate that any alterations will require the Council's consent as landlord. Other than through its statutory planning role, the Council will have little influence on the form of development that comes forward.

Summary of human resources implications

32. None

Summary of environmental impact

33. The Environment Impact Checklist indicates that the outcomes are likely to be balanced. One the one hand, the redevelopment of the site will consume raw materials, power and water, and result in some waste materials going to landfill despite efforts to recycle the demolition materials. The new building will likely be larger and more intensively used than the current building. Whilst it will be more energy efficient, it will likely result in a greater energy and water usage. Balanced against this are improvements to the quality of the local built environment, enhancement of visitor facilities, and economic benefits, with new jobs created.

Summary of public health implications

34. None

Summary of equality implications

35. An Equalities Impact Needs Assessment indicates that the project will have broadly positive outcomes with the opportunity to improve access for people with a disability both to the beach, via a new lift from the cliff top, and to the building itself. At a socio-economic level at is also likely to be positive, providing new jobs both in the construction and operation of the new building. However, the pricing of the new offer may be beyond the means of some sectors in the community.

Summary of risk assessment

36. A risk assessment shows this to be medium risk project. The development risk will be borne by the private sector and the procurement risk will be mitigated by issuing a VEAT Notice – see legal section above.

37. There is a risk that the marketing exercise undertaken by the Meyrick Estate SPV will fail to secure a suitable developer or, having identified a development partner, it is unable to secure a suitable planning consent or to develop the site for another reason. In this eventuality, the Agreement for Lease is terminable, and the Council will be liable to pay 50% of the SPV's abortive costs, which are estimated at £250,000. The Council's liability for up to £125,000 is addressed in the Finance and Resourcing Implications above.

Background papers

- Risk Assessment
- Equalities Impact Needs Assessment Screening Record
- Environment Impact Checklist

Appendices

Appendix 1 - Site Plan