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EXTRAORDINARY CABINET AGENDA

Membership: Councillor Wilson (Chairman)

Councillors Inkster, Bains, Bowerman, Rennie, Turner, Hughes and Thain-Smith

Meeting: Cabinet

Date: Wednesday 18 November 2020

Time: 1.00 pm

Venue: Skype for Business

The business to be transacted is set out below:

Gill Kneller
Chief Executive

10 November 2020

Contact Officer: James Harris 01730 234098
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PART 1 (Items open for public attendance)

1 Apologies for Absence

To receive and record any apologies for absence.

2 Declarations of Interests

To receive and record any declarations of interest.

Leader of the Council

3 Disposal of former landfill site known as Brockhampton West

1 - 138

Please note that annex 1 and appendices 2,3,4,5,6 and 8 to the report contain information that is classed as exempt under Part 1 of Schedule 12A (as amended) of the Local Government Act 1972.

If Cabinet wishes to discuss the detail of the exempt appendices it is recommended that the resolution at item 4 be passed to cease the public broadcast of the meeting, thereby excluding the press and public.

PART 2 (Confidential items - closed to the public)

4 Exclusion of the Press and Public

The Cabinet is asked to consider whether to pass a resolution to exclude the press and public from the meeting if it wishes to discuss the exempt appendices in relation to item 3 – Disposal of Former Landfill Site at Brockhampton West.

If members wish to do so, then this could be achieved by passing the following resolution. Members are not required to pass the resolution, but the Solicitor to the Council recommends that it does due to the commercial confidentiality of the matters to be discussed:

It is recommended that the press and public be excluded from the meeting during consideration of agenda item 3 – Disposal of Former Landfill Site at Brockhampton West because:

- (a) it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information of the descriptions specified in paragraph 3 of Part 1 of Schedule 12A (as amended) of the Local Government Act 1972 shown against the heading in question; and
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

GENERAL INFORMATION

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Havant

BOROUGH COUNCIL

PROTOCOL AT MEETINGS – RULES OF DEBATE

Rules of Debate

- Councillors must always address each other as “Councillor ...” and must always address the meeting through the Chairman;
- A motion must relate to the business included on the agenda or accepted by the meeting as urgent business
- A motion must be proposed and seconded before it is debated until it is either accepted or rejected by a vote;
- An amendment can be proposed to the original motion and this must be seconded before it is debated;
- An amendment cannot be considered if it is inconsistent with an amendment previously adopted or repeats an amendment previously rejected;
- The mover of an original motion may, with the consent of the mover of an amendment, incorporate an amendment into the motion;
- Only one amendment may be moved at a time. No further amendments can be moved until the previous amendment has been dealt with;
- Each amendment must be voted on separately;
- If an amendment is carried, the amended motion becomes the substantive motion to which further amendments may be moved;
- If an amendment is lost, other amendments may be moved to the original motion.
- The mover may withdraw an amendment at any time
- After an amendment has been carried, the Chairman will read out the amended (substantive) motion, before accepting any further amendment, or if there are none, put it to the vote.

Voting

- Voting may be by a show of hands or by a ballot at the discretion of the Chairman;
- Councillors may not vote unless they are present for the full duration of the item;
- Where there is an equality of votes, the Chairman may exercise a second (casting) vote;
- Two Councillors may request, before a vote is taken, that the names of those voting be recorded in the minutes
- A recorded vote will always be taken in respect of approval of the Annual Budget
- Councillors may not vote unless they are in the meeting for the full debate on any particular item
- A Councillor may request that his/her vote be recorded in the minutes

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PART-EXEMPT

HAVANT BOROUGH COUNCIL

CABINET

18 November 2020

Disposal of former landfill site known as Brockhampton West

FOR DECISION

Portfolio Holder: Cllr Michael Wilson

Key Decision: Yes

Report Number: HBC/013/2020

1. Purpose

- 1.1. This paper is submitted to Cabinet for authority to dispose of the freehold interest of the site known as Brockhampton West (outlined in red on the location plan at Appendix 1) in accordance with the Cabinet resolution of 20th March 2019 (minute 139) and s123 of the Local Government Act 1972.
- 1.2. The report sets out:
 - a. an options appraisal that was undertaken to determine the most effective way to bring the site forward to meet the objectives of the March 2019 Cabinet Resolution;
 - b. the outcome of site investigations to determine the level of contamination on the site and the implications on development options;
 - c. the outcome of a market assessment and soft market testing to establish commercial interest in the site;
 - d. the evaluation process used to compare the value of the financial bids submitted to the Council and arrive at a recommended preferred bidder.

2. Recommendation

- 2.1 Members are requested to approve:
- 2.2 the disposal of the land for best value in line with the outcome of the options appraisal carried out subsequent to the 20 March 2019 Cabinet Resolution and;

- 2.3 where 2.2 is agreed, the evaluation criteria (set out in Appendix 3 of this report) as the mechanism for selecting a preferred bidder and;
- 2.4 where 2.2 and 2.3 are agreed, the outcome of the evaluation process and the selection of the preferred bidder (set out in Appendix 4 of this report) as overseen by the Director of Regeneration and Place in line with the 20th March 2019 Cabinet Resolution and;
- 2.5 where 2.2, 2.3 and 2.4 are agreed, the instruction of the Director of Regeneration and Place, in consultation with the Section 151 Officer, to exchange contracts and complete the sale of the land to the preferred bidder in line with the terms set out in this report. (confidential Annex 1 and Appendix 2);
- 2.6 where 2.2, 2.3 and 2.4 are agreed, the instruction of the Director of Regeneration and Place, in consultation with the Section 151 Officer, to procure suitable environmental insurance at the appropriate time to reduce future liability relating to contamination, in line with the Council's procurement rules.

3. Executive Summary

- 3.1. The report relates to the council-owned site known as Brockhampton West ('the site' as outlined red on location plan at Appendix 1) that sits between the A27 to the north and Harts Farm Way to the south. The site forms part of the wider Broadmarsh landfill site which continues to the south of Harts Farm Way having Chichester Harbour as its southern boundary (title number SH28289). The wider Broadmarsh site does not form part of the disposal.
- 3.2. The site was used for landfill from 1969 until the 1990s since when it has been surplus to operational requirements.
- 3.3. On 20th March 2019, Cabinet resolved to dispose of the site under minute 139:

"...it was RESOLVED that the Director for Regeneration and Place and the Head of Regeneration in consultation with the Cabinet Lead for Property, Finance and Regeneration and the Chief Finance Officer be instructed to: 1. achieve best value for Brockhampton West Havant in accordance with the Local Plan Policy C10..."
- 3.4. The work to progress the disposal of the site in line with the March 2019 Cabinet Resolution has been led by the Regeneration team under the direction of the Director of Regeneration and Place.
- 3.5. Following an options appraisal (see appendix 4), site investigations, market testing (see appendix 7) and considering expert advice relating to the complex nature of the site it was determined that best consideration would be achieved through a

direct sale without the need to secure planning permission. The site was marketed by Lambert Smith Hampton on behalf of the Council through an informal bid process. A wide range of financial offers were received a number of which were above the expected values set in an independent market appraisal commissioned by the Council.

- 3.6. The bids were appraised by the project team and the Council's external property agent in order to determine the potential net receipt for the Council and potential purchasers were shortlisted. An evaluation matrix was agreed in advance of receipt of financial bids, and subsequently by the Director of Regeneration and Place. Legal advice was sought relating to residual liability. A preferred purchaser has been identified and Cabinet agreement to proceed with the sale is now sought.
- 3.7. The anticipated net receipt to the Council is shown within Annex 1. The anticipated costs associated with the sale are shown in appendix 6.
- 3.8. The Council is advised that the disposal of the site for development in full knowledge of the history and conditions of the site will reduce the risk to the Council by transferring most of the liability for future pollution events to the purchaser (Appendix 5).
- 3.9. For the purpose of this report best consideration can also be read as best value. It is demonstrated in this report that both best value and best consideration would be achieved through this transaction.

4. Additional Budgetary Implications

- 4.1. None.

5. Background and relationship to Corporate Strategy and/or Business Plans

Site History

- 5.1. The site was originally purchased by the Urban District Council of Havant and Waterloo between 1968 and 1970 from three different owners.
- 5.2. Evidence suggests that the site was initially used by Urban District Council of Havant and Waterloo for landfill from 1969. However, in the mid-1970s Hampshire County Council became the waste disposal authority and at this point, although the site continued to be tipped by the Urban District Council of Havant and Waterloo, it would have been under the management of Hampshire County Council.
- 5.3. The site continued to be used for landfill until the 1990's. Following the closure of the landfill there was some activity on the site relating to the construction of the adjacent teardrop

junction on the A27. Records suggest that there has been no active use since this time other than informal use by dog walkers, as such the site has been surplus to operational requirements.

- 5.4. The site was formally registered with the Land Registry by Havant Borough Council in 2009.

Rationale for disposal

- 5.5. **Local Plan** – The site is identified in Policy BD11 of the Havant Local Plan (Allocations) and allocated for commercial development. *'The Local Plan identifies an opportunity for a high-quality gateway employment site that could provide up to 23,400 sq m of new manufacturing and/or warehouse floorspace, supporting between 334 and 650 jobs.'*
- 5.6. **Regeneration Strategy** - The site was included as a key employment site in the Opportunity Havant Regeneration Strategy. The Regeneration Strategy was adopted by the Council in November 2018.
- 5.7. In addition to the economic benefits realised by the development of the site, the Strategy states that the Approach to delivering regeneration will include *'Selective strategic use of assets (including selective disposals with returns reinvested to deliver further key regeneration objectives).'*
- 5.8. **Cabinet Resolution** – The disposal of the site for commercial development was approved by Cabinet on 20 March 2019. Cabinet resolved to dispose of the site for best value for development in line with Policy C10 of the Local Plan.

Governance and Project Management

- 5.9. Marketing of the site, selection of a preferred bidder, due diligence and negotiation of terms of a disposal were delegated to the Director of Regeneration and Place.
- 5.10. A project group was set up comprising officers from Regeneration, Property, Legal Services, Environmental Health, Planning Policy and Economic Development. The Project Group reported into Director of Regeneration and Place. Further external expert advice was secured by way of consultant property, legal and contamination specialists. The Strategic Regeneration Programme Board was also provided briefings and updates.
- 5.11. While the officer project team has instructed and undertaken an options appraisal, market testing, due diligence etc. in line with the March 2019 Cabinet Resolution, no actions have been undertaken to this point that place any financial or contractual obligation on the Council. All key decisions have been brought back to Cabinet for approval by means of this report.

- 5.12. **Project Initiation Document (PID)** – A PID for the project was produced and shared with the Strategic Regeneration Programme Board in line with the Council’s project management practices. This document set out the scope of the project which, at that time was considered to be to dispose of the site with the benefit of Outline Planning Consent in order to realise the greatest value. Where the scope of the project was subsequently widened this was done in consultation with Strategic Regeneration Programme Board and was approved by the Director of Regeneration and Place.

Due Diligence

- 5.13. **Market Assessment**– Prior to testing market interest in the site an independent professional market evaluation was undertaken on behalf of the Council by Lambert Smith Hampton. This was based on current market intelligence and evidence from similar sites. This provided a potential achievable value for the site (pre due diligence and site investigations) (see Appendix 7).
- 5.14. **Site investigations** – The Council commissioned an intrusive ground investigation study in 2016 by White Young and Green that examined the level of contamination on the site and the likely requirements for remediation should the site be brought forward for development. The report concluded that if the Council opted to undertake the necessary remediation in order to dispose of a ‘clean’ site, the result would be a negative value that would make the site unviable.
- 5.15. **Legal view on Liability Relating to Contamination** – Due to the contaminated nature of the site, both in-house advice and external specialist legal advice (from Womble Bond Dickinson) relating to the Council’s current and ongoing liability for the site was sought. Counsel’s opinion was also sought from Mathew Reed QC who was instructed to advise on ways to mitigate risk on disposal as well as provide advice on current liability (see Appendix 5). The details of the legal advice relating to the Council’s residual liability is set out in section 9 below.

Options Appraisal

- 5.16. It was originally considered that the approach of selling the site with the benefit of outline Planning Permission would increase the potential sale value by more than the cost of securing planning permission. Subsequent due diligence and market testing demonstrated that, due to the complex nature and history of the site, the cost of meeting environmental obligations required to obtain a consent would be prohibitive. Extensive and detailed technical surveys and due diligence relating to the ground conditions would be required in order to fully assess the cost of mitigating the environmental constraints. Lambert Smith Hampton were instructed to carry out an options appraisal to

determine the most effective strategy for meeting the objectives of the Cabinet Resolution. The list of options appraised is set out in section 6 below.

Market testing

- 5.17. In order to inform the options appraisal, Lambert Smith Hampton advised that the site could be marketed through an informal bid process on a without prejudice basis to determine the level of market interest. This would create a competitive environment that provided flexibility to the Council on contract negotiations up to the point of exchange of contracts.
- 5.18. A pack of particulars (including the ground investigations reports) was produced. Bidders were invited to submit expressions of interest with their proposals, through Lambert Smith Hampton, and subsequently bid for the site on both a conditional and unconditional basis.
- 5.19. Twelve expressions of interest were received from commercial developers. Further discussion with the bidders around development constraints and funding requirements resulted in seven financial bids subsequently being received.
- 5.20. The details of the financial bids are set out in Appendix 3. It was clear from the level of interest and the range of bids that it would be possible to sell the site without planning consent and realise a value that exceeded the previous independent market appraisal, thus demonstrating best consideration in accordance with Section 123 of the Act.

Evaluation of Bids

- 5.21. Legal and Professional Advice - The evaluation of the seven financial bids was undertaken by the project team. This was supplemented with specialist advice from the Economic Development team, the Environment team and Legal Services. External expert property advice was provided by Lambert Smith Hampton as part of their appointment as property agents for the disposal.
- 5.22. The development approaches proposed by bidders seek to incorporate physical betterment measures either through containment or partial remediation. These measures would facilitate the development of the site and reduce the risk of future contamination events against the current position without the need for complete removal of contaminated material. The robustness of the various bidders' approaches to this was interrogated as part of the evaluation process. The detail and implementation of betterment scheme would be controlled through the Planning Process.
- 5.23. The gross bids were submitted with different levels of conditionality. The project team were required to determine the

level to which the bidders' approach to due diligence would be likely to reduce bid value by the time of exchange of contract, and therefore what the likely net capital receipt to the Council would be. This evaluation was based on the robustness of the research undertaken by bidders and the detail of the proposed valuations and mitigation schemes, the timing of the capital receipt and the risk to the Council in terms of contingent liability at a future date.

- 5.24. An evaluation scoring matrix was used as a tool to support professional judgement and to assess the various bids on a like-for-like basis. The evaluation matrix was developed and agreed by the project team in advance of receipt of the financial bids and was subsequently agreed by the Director of Regeneration and Place in line with the 20th March 2019 Cabinet Resolution.
- 5.25. The evaluation matrix also gave scores for the economic benefit and added value that the proposed development would bring to the local economy based on square footage which links to job density and additional business rates for the Council. This was given a lower weighting to make it a secondary factor that did not impact the primary financial evaluation. This economic benefit criterion ultimately had no bearing on the outcome of the evaluation as the proposals were similar in nature.
- 5.26. The three highest bids reflect the value established by the independent market value assessment. Of these, one bid was unconditional. The other two were conditional on a range of measures to be determined through further due diligence work.
- 5.27. Full details of the scoring matrix and methodology are set out in Appendix 3.

Preferred Bidder

- 5.28. The recommended preferred bidder is the only one of the top three bids that was wholly unconditional and therefore the only bid where the value is likely to be realised in full. The unconditional nature of the recommended preferred bidder's bid and a commitment to exchange and complete within four weeks of receiving the legal pack is considered to present the least commercial risk to the Council.
- 5.29. The value of the recommended preferred bid exceeds the independent market assessment previously prepared for the site. The advice from the Council's independent property advisor is that the recommended sale value is in a range where the valuation is robust and is consistent with the extremely strong market conditions within the pre-Covid pandemic market.
- 5.30. The net value that will be achieved by the Council from this disposal will be the realised capital receipt minus costs. In other

words, the optimum capital receipt having regard to the contingent risk. This demonstrates both best value and best consideration in accordance with the s123 of the Local Government Act 1972.

5.31. The sale of Brockhampton West meets the following **Corporate objectives**:

- a. A thriving borough economy – Development of the land will increase job density within the Borough. The potential development of the site will also compliment the already successful Broadmarsh industrial area.
- b. A sustainable council – Realising the capital value of this currently unused and contaminated land will allow capital projects to be undertaken that will increase the revenue income to the Council and develop a more sustainable economic model.
- c. An environmentally aware and cleaner borough – The land for sale is contaminated, ‘betterment’ will be required through the development process. This will act to help mitigate the impacts of historic landfill and result in a cleaner Borough.
- d. Approved Regeneration Strategy/Business Plan – Sale of Brockhampton West meets a key objective of the approved Regeneration Strategy.

6. Options Considered

6.1. Based upon the expert advice received, a range of alternative options have been considered for the future use of the site. These have been evaluated having regard to both the financial benefit to the Council and the level of legal and financial risk. The options and the financial information are set out in Appendix 4. The options considered are:

- Do nothing option
- Council retaining the site and introducing non-invasive uses (e.g. Solar PV)
- Retention of the site for wild bird mitigation land relating to the Local Plan
- Sharing cost of remediation
- JV/Council to develop the site directly or with a partner
- Disposal of the site with outline planning consent
- Unconditional disposal

6.2. **Do nothing** – The Council has the option of not disposing of the site and continuing to manage it as a property asset. This

option would not generate a capital receipt or additional revenue for the Council or meet any of the regeneration objectives. In addition to this the site is deteriorating over time as a result of underlying physical processes. The wider Broadmarsh site is also subject to the effects of coastal erosion. This means that without intervention, a future pollution event becomes increasingly more likely. Currently the Council does not have contingency measures in place and self-insures to cover any potential financial impact.

- 6.3. **Non-intrusive uses** – Investigations into the value of the site for less intrusive uses such as solar PV have been undertaken. Although there was potential to generate a revenue income stream, as shown in Appendix 4, the required upfront capital investment and management responsibilities would be substantial resulting in a negligible net financial return over time. This use would tie up the site for around twenty years in order to recoup the initial investment and realise a return. Although use for solar PV would retain the asset whilst generating a modest income over time, this would not reduce the residual liability to the Council regarding the former landfill use. Use for solar PV would not deliver on the Council's regeneration objectives around employment or generate additional business rates income.
- 6.4. **Wild bird mitigation** – The site is recognised in the Solent Brent Geese and Waders Strategy as being a low use site meaning that it would have some potential environmental value as an additional habitat site. This use would attract funds from developments in other parts of the Borough that were impacting on habitat and needed to provide mitigation. This use would be similar to the do-nothing scenario in that it would not reduce the residual liability to the Council regarding the former landfill use. The financial value of the land for this use would be nominal when compared to development for commercial use in line with the Local Plan allocation. As such it would not be possible to generate a comparable capital receipt.
- 6.5. **Sharing the cost of remediation** – The possibility of sharing the cost of full remediation of the site, and/or liability for future claims with Hampshire County Council (HCC) as the previous operator of the site and license holder for tipping, has been investigated. As the original licence documents no longer exist it is assumed that Hampshire County Council complied with all the conditions of their licence. As such we are unable to prove sufficient liability on the part of HCC to take forward this option. In addition to this, full remediation of the site would not be financially or environmentally viable. The cost of full remediation to create a clean site would be prohibitive. Removing all contaminated material would only move the problem elsewhere.

- 6.6. **Developing directly or with a JV partner** - The possibility of developing the site with a development partner (commercial or other public body) was considered. Legal advice indicated that this would not reduce the residual liability to the Council regarding the former landfill use. As the Council has no experience in developing contaminated sites this would present a major risk. Advice from Lambert Smith Hampton, combined with legal advice and the advice of the Council's Property team, was that this route would not achieve best consideration to the Council. It was also considered that we would receive a reduced income or receipt for the land whilst sharing part of the cost and the risk associated with development should a joint venture approach be undertaken.
- 6.7. **Disposal with Outline Planning Consent** - At the outset of the project in early 2019 consideration was given to a disposal of the site with the benefit of outline planning consent for development. It was felt that this would potentially increase the potential sale value by more than the cost of securing planning permission. Lambert Smith Hampton were asked to give a view on this as part of their initial engagement. Subsequent due diligence and market testing have demonstrated that, due to the complex nature and history of the site, the cost of meeting environmental obligations required to obtain a consent would be prohibitive. Extensive and detailed technical surveys and due diligence relating to the ground conditions would be required in order to fully assess the cost of mitigating the environmental constraints. Market testing has also demonstrated the strong level of market interest in the site. Potential developers have made it clear that the allocation of the site in the Local Plan is sufficient to give them confidence to proceed in the current market. This means that it will be possible for the Council to realise the value of the site without the need to take on the cost and risk associated with securing a planning consent.
- 6.8. **Unconditional disposal** – Lambert Smith Hampton were instructed to test the market on the basis of an unconditional disposal, i.e. without the Council securing an outline planning consent or undertaking remediation. This demonstrated that there is a clear commercial interest in the site for a number of uses. The market was made aware of the contaminated nature of the site. Bidders were invited to submit both unconditional offers and offers that were conditional on various levels of investigation and due diligence, depending on their preferred approach. The range of financial offers received showed that best consideration for the site would be realised by disposing of the site under the most unconditional terms available as this would reduce the level of financial risk to the Council without impacting on the financial return.
- 6.9. **Impact of a delay due to Covid-19** – As well as the options considered above the, the option to delay the sale of the land as

a result of the Covid-19 pandemic was also considered. At the point that financial bids were made Lambert Smith Hampton were asked to give a commercial view. Their advice was that the market relating to warehousing and distribution was at a relative high. There are however questions over the confidence of the market moving forward, it is considered that the option of a delay would not represent best consideration to the Council. It is also considered that unreasonable delay on behalf of the Council may result in a loss of the current offer due to current economic uncertainties.

- 6.10. The Council's agents have advised that a short delay is considered manageable given the current pandemic. However, there is a risk that if momentum with the sale process is lost. The recommended preferred bidder has indicated that they still wish to proceed at the current time.

7. Resource Implications

Financial Implications

- 7.1. Upon completion, a substantial capital receipt will be realised by the Council. The net financial benefit to the Council will be the capital receipt minus the development costs (see Annex 1).
- 7.2. Revenue costs associated with the disposal are currently being met from within the Regeneration South revenue budget. Subject to exchange and completion of the sale, and in consultation with the Section 151 Officer, the costs associated with the delivery of this project (including professional fees and insurance costs etc.) will be capitalised and recouped from the capital receipt in order to reduce the revenue impact on the Council. Expected capitalisation value for project costs is available at Appendix 6.
- 7.3. Contingent financial risks to the Council will be mitigated based upon contractual indemnity with the purchaser and the procurement of a suitable environmental insurance policy at the appropriate time. Quotes obtained for the policy and level of cover provided are set out at Appendix 6.
- 7.4. If the Council opts not to go ahead with the disposal of the site, retention of the land raises potentially major future remediation costs as a result of the deterioration of the wider Broadmarsh site due to coastal processes.

Section 151 Officer comments

Date: 15.09.20

Section 151 Officer confirms that the proposed offer is in line with the independent valuation and has no further comments.

Human Resources Implications

- 7.5. None.

Information Governance Implications

- 7.6. Commercially sensitive information relating to the bidders will be kept confidential, including information relating to the respective bids.

Other resource implications

- 7.7. None.

8. Legal Implications

- 8.1. Consideration of s123 LGA 1972 was given to each of the options set out in section 6 of this report in order to demonstrate 'best consideration' for the site.
- 8.2. The Council is identified a Class A appropriate person under the terms of the statutory contaminated land regime, the Council will always retain a level of liability relating to the site (see Appendix 5).
- 8.3. The site being sold is part of title number SH28289, which is owned by the Council. It should be noted that only part of the land owned by the Council is being sold, with the majority being retained by the Council (referred to in this paper as "the site" and "the wider Broadmarsh site", respectively). The wider Broadmarsh site is presumed to be a high contamination risk given the historic use to which the site has been put.

- 8.4. The Council has a legal obligation to notify the public of its intention to dispose of the land. The Council's Property team will undertake this work as part of the disposal process.

Monitoring Officer comments

Date: 4 September 2020

The Monitoring Officer has been consulted in the drafting of this report and has no further comments.

9. Risks

- 9.1. Retention of the land in its current state means the Council retains an already deteriorating site. This risk is exacerbated by the site's proximity to the coast and coastal processes. Such risk brings with it potentially significant remediation costs in the future.
- 9.2. In order to mitigate risks to the Council various specialist expertise has been considered, including:
- a. legal experts with specialist knowledge of disposal of contaminated land
 - b. Property professionals with local knowledge and both local and national expertise
 - c. Detailed advice has also been received from the in-house Environmental Control Officer.
- 9.3. Based upon the detailed and expert advice received, the following measures were discussed and agreed as the best way to mitigate the risk.
- a. Evaluate disposal options having regard to maximising the capital receipt and mitigating contingent liability.
 - b. Provide full disclosure to prospective bidders/purchaser
 - c. Interview and interrogate prospective purchasers to assess their understanding of ground conditions and proposed remedial activities.
 - d. Invite bids on a conditional and unconditional basis for comparative analysis purposes to ensure best capital receipt available (having regard to risk)
 - e. Seek a contractual indemnity from the purchaser against any costs claims actions whatsoever as a result of the disposal
 - f. Consider insurance options in order to mitigate risk.

- g. Exercise professional and commercial judgement having regard to experience and expertise.
 - h. Provide estates recommendation for inclusion in scoring matrix.
 - i. Provide regular updates to Strategic Regeneration Programme Board at all stages of the process with views and opinions.
- 9.4. It should be noted that it is NOT possible to accurately quantify the level of hypothetical contingent risk in so far as it is dependent upon a range of factors beyond our reasonable control e.g. legislative changes, environmental changes, coastal erosion, market conditions etc. in addition to considerable risks associated with the ground conditions

Legal Risk

- 9.5. Counsel's opinion was sought from Mathew Reed QC who was instructed to advise the Council on the extent of legal liability and identify ways to mitigate such liabilities and risks. (whether the sale site is disposed of or not). Counsel's opinion primarily relates to the statutory contaminated land regime, but also potential liability under common law nuisance.
- 9.6. The key points as they relate to this transaction are as follows:
- a) The Council is a Class A appropriate person for the purposes of the statutory contaminated land regime
 - b) If the buyer acquires the site with knowledge of the contamination, and has sufficient control of the site to deal with it, they will also be a Class A appropriate person in relation to the sale site only
 - c) Liability between Class A appropriate persons can be apportioned by two means under the statutory regime a) by entering into an explicit "agreement on liability" between the parties and b) by the application of the so-called "exclusion tests"
 - d) An agreement on liability serves to explicitly allocate responsibility for historic contamination according to the express wishes of the parties, and the competent authority is required to give effect to such terms
 - e) Additionally, there are a number of exclusion tests which serve to apportion liability between Class A appropriate persons according to the specific facts of any scenario. The relevant test here for the sale site is the "sold with information" test, which excludes a seller from liability for contamination for a site in circumstances where information is provided to a buyer as to the risk of contamination and/or the buyer is afforded access to a site to make its own evaluation of the risk (whether or not they avail themselves of such access).
 - f) In relation to the remainder of the site, being retained by the Council, the Council's liability as a class A person will remain, as

will the risk of claims from third parties in nuisance if contaminants escape from the land being retained.

- g) Any transferred risk under the statutory contaminated land regime can revert to a seller where the buyer taking on liability ceases to exist and there has been no onward transfer of liability (i.e. in an insolvency scenario).
- 9.7. In order to mitigate the Council's risk in relation to the sale site, the disposal contract includes an express agreement on liability of the contamination risk and an acknowledgement by the buyer that the site is "sold with information", and that it therefore accepts all liability for contamination on the site.
- 9.8. It is likely that any development of the site will not result in full remediation of the contamination. Based upon expert advice, the complete removal of all waste is neither financially viable nor ecologically sustainable. The strategy of the purchaser is likely to involve measures to mitigate or remediate the harmful effects of the contamination and prevent any leeching to adjoining sites in line with statutory requirements for development. This physical betterment will reduce the likelihood of any incident and is required under planning legislation.
- 9.9. The recommendation in this report is for the site to be sold unconditionally (i.e. not subject to planning or details of betterment activities). However, it should be noted that any development activity would be subject to full scrutiny and approval by both the Environment Agency, the Local Planning Authority, Highways Authority as well as other public bodies in the usual way. The local planning authority will also be able to restrict uses to those that are compliant with Council policy.
- 9.10. The sale contract also includes a full contractual indemnity from the buyer in relation to any third-party claims, or damage to the Council's retained land, arising from the escape of contaminants from the sale site.
- 9.11. Advice from the Council's Environmental Control Officer is that the greatest period of risk is during the construction phase while the ground is being disturbed. While this will be covered through the contractual indemnity with the developer, this would not be enforceable where the developer went into liquidation. For this event it is considered prudent that the Council should take out additional environmental insurance in order to reduce the financial risk to the Council as far as is reasonably possible. The environmental insurance recommended as part of the sale is considered in full within Appendix 2 of this report and forms part of the contract of sale. This also provides a review of the level of cover and supporting recommendation from Womble Bond Dickinson. The quoted cost of the insurance is provided in Appendix 6 as part of the schedule of disposal costs.

- 9.12. The insurance only covers the sale site and not the wider Broadmarsh site as retained by the Council. It is understood that the Council's Property team are seeking to include the land retained by the Council on the Corporate Risk Register.
- 9.13. The contractual indemnity will limit the risk of a contingent liability on sale, environmental insurance will sit alongside this and provide protection to the Council against 3rd party claims, or in the event of the purchaser/developer becoming insolvent. There is a risk that a contingent liability arises post disposal of the site however the measures have been put in place to mitigate that risk.
- 9.14. The recommended preferred bidder has agreed to share the cost of environmental insurance that would cover the Council for up to £20M for a period of ten years linked to the start of the development. If any work is required on land retained by the Council arising from development activity on the sale site, the cost of this work would be recovered by either the contractual indemnity or insurance.
- 9.15. As a result of the physical betterment measures that will be implemented as part of the development, on completion of construction, the risk of a pollution event will be reduced to a level lower than that before the site was developed.
- 9.16. The disposal process has been undertaken in accordance with Ministry for Housing Communities and Local Government Guidance for disposal of Local Authority Assets (The Guidance). This will minimise the risk of Judicial Review or challenge to the outcome from unsuccessful bidders.

Commercial Risks

- 9.17. In order to mitigate the commercial risk to the Council of the site being immediately sold to another purchaser at a higher price by the successful bidder, an overage provision has been agreed whereby if the site is sold within 2 years the 50% of the uplift above the agreed sale price will be returned to the Council. Advice from the Council's property agent is that the likelihood of the purchaser immediately selling on the site in its current undeveloped state is highly improbable. The recommended preferred bidder has stated an intention to develop the site and dispose of the built scheme.
- 9.18. Development of the site will require major upfront financial investment by the developer, including extensive and costly mitigation at an early stage in order to realise a profit. The level of profit reflects the level of investment and considerable risks associated with the development of the site. The risk appetite of developers differs from that of local authorities.
- 9.19. The recommended preferred bidder has a well-regarded reputation in the development market and are funded by a cash

resourced partner, CWC Clowes Developments UK Ltd, with no reliance on third party funding. The advice and recommendations from the agent are that the purchaser and funding partner have the experience and funding to deliver the proposed development of this site.

Impact of Covid-19

- 9.20. Whilst the industrial and logistics market appears to be holding up, the economic repercussions and developer confidence and funding ability may falter as a result of the pandemic. It must be considered a real threat as to whether the market will continue to perform and how it will react in the coming months is unpredictable at the present time.

10. Consultation

- 10.1. The Director of Regeneration and Place has been given regular briefings throughout the project to ensure that he was fully aware of all actions and could be fully assured that the best consideration for the site is represented, in line with the 20th March 2019 Cabinet resolution. .
- 10.2. Briefings have been provided to the Strategic Regeneration Programme Board (SRPB) through regular papers and verbal updates. A project book is updated monthly as an ongoing record of all projects in the Regeneration Programme. This includes updates to this project and is circulated to members of the SRPB in advance of meetings. The SRPB includes the consultees required under the 2019 Cabinet direction to dispose of the site. The SRPB is not a decision-making body. This process ensured that the consultees identified by the direction were fully updated on all actions taken so that any issues could be identified at the earliest opportunity.
- 10.3. In addition to being a member of the SRPB, the Portfolio Lead for Regeneration was briefed on the project on a regular basis by the Head of Regeneration in regular one-to-ones.
- 10.4. Extensive engagement has taken place over the past 12 months as part of the detailed due diligence exercise with HBC's Economic Development, Property, Legal and Environmental Health. teams, Lambert Smith Hampton, Womble Bond Dickenson and Matthew Reed QC. The Environment Agency have also been consulted in respect of historic contamination issues.
- 10.5. Progress on the project has been reported to the Council's Executive Board at key milestones or when guidance was required on the most appropriate course of action in order to meet the objectives of the March 2019 Cabinet Resolution.

11. Communication

- 11.1. Communication of the project objectives, scope, decisions and outputs has been communicated to the SRPB, Executive Board and Cabinet. The disposal has not been promoted in the public domain due to commercial sensitivities, although the allocation of the site for commercial development was made public as part of the Local Plan consultation.
- 11.2. Once the disposal is complete there will be an opportunity to promote the positive benefits of the development through press releases and social media outlets.

12. Appendices:

- Annex 1 – Heads of Terms and Sale Particulars **EXEMPT**
Appendix 1 – Location and site plan
Appendix 2 – Draft sale contract **EXEMPT**
Appendix 3 – Bid Evaluation and Scoring Matrix **EXEMPT**
Appendix 4 – Options Appraisal **EXEMPT**
Appendix 5 – Legal Advice and Insurance Details **EXEMPT**
Appendix 6 – Project cost summary **EXEMPT**
Appendix 7 – Guidance on Disposal of Council Property Assets
Appendix 8 – Independent Market Appraisal **EXEMPT**

13. Background Papers:

- Opportunity Havant Regeneration Strategy
- Disposal Guidance – Local Authority assets (MHCLG)
- Cabinet decision relating to disposal of Brockhampton West (20th March 2019 under minute 139)
- Strategic Regeneration Programme Board updates

Agreed and signed off by:

Monitoring Officer
S151 Officer
Director
Portfolio Holder

Contact Officer: Simon Kennedy
Job Title: Regeneration Project Manager
Telephone: 02392 446616
E-Mail: simon.kennedy@havant.gov.uk

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of the Local Government Act 1972.

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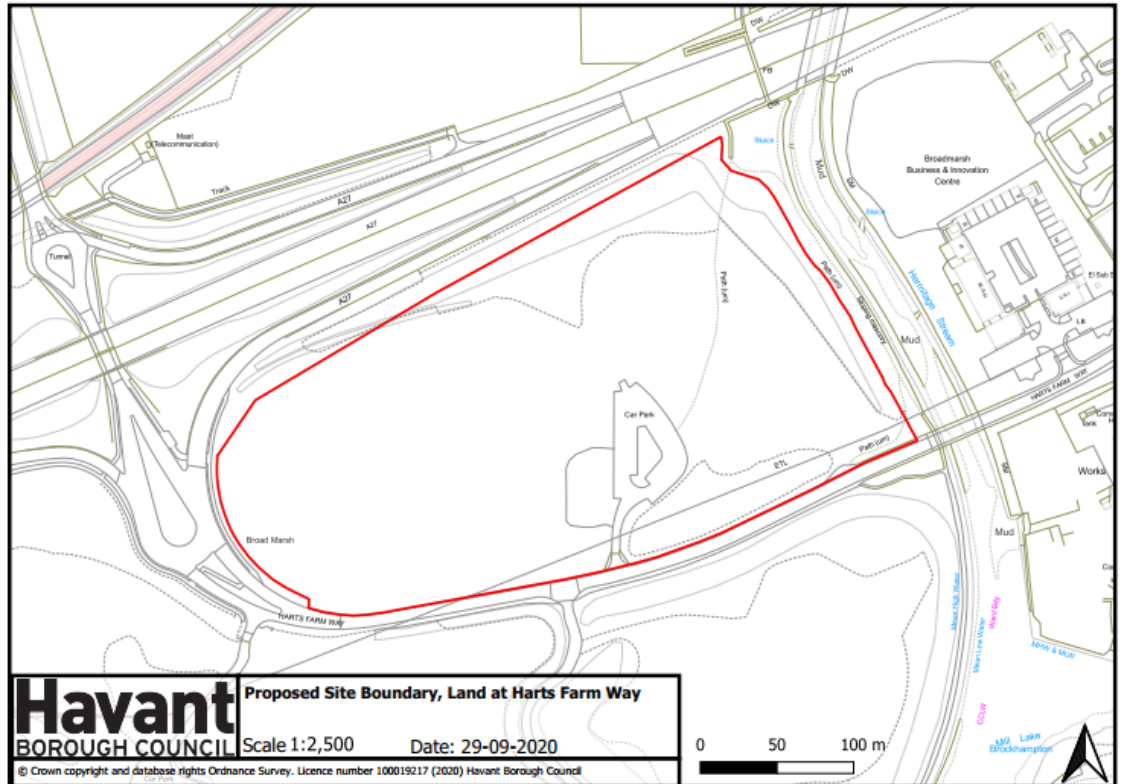
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Appendix 1 – Site location and Red Line Plan

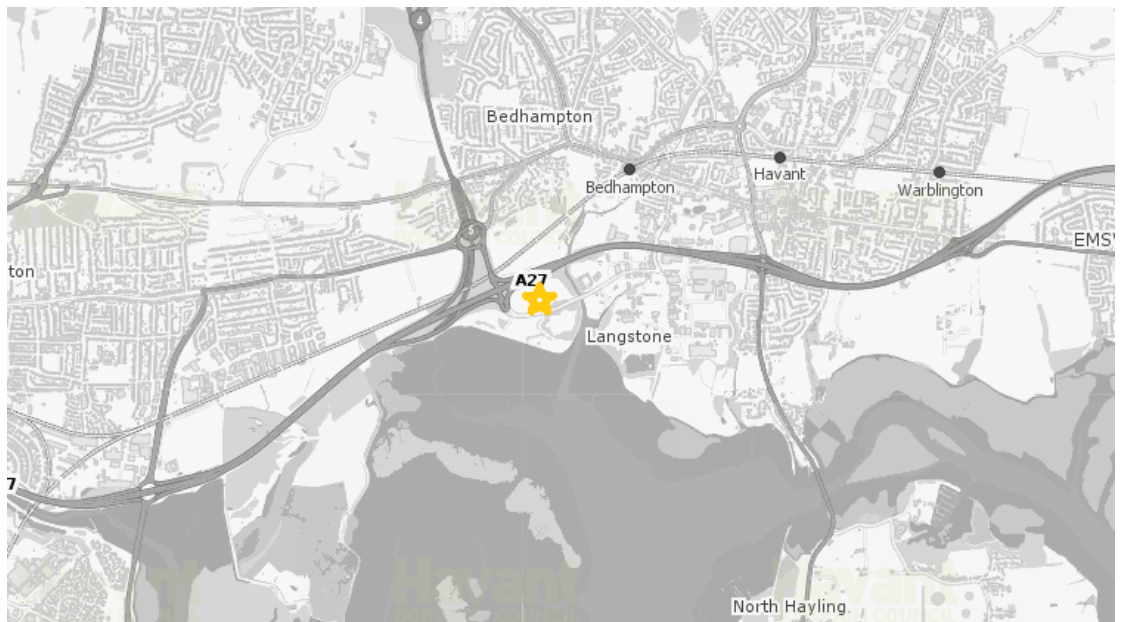
Site Details

Address – Brockhampton West
Harts Farm Way
Havant
Co-ordinates - 470114,105670

Site Plan -



Location Plan -



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Appendix 7 - Guidance on Disposal of Council Property Assets

- 1.1. As well as meeting the requirements of the Cabinet direction, Local Authorities have obligations to comply with s123 of the Local Government Act 1972
- (i) states that **a local authority may dispose of land in any way they wish.**
 - (ii) states that a local authority **'should not dispose of land less than the best that can reasonably be obtained ie best consideration'**
- Local authorities must exercise their function and comply with their fiduciary responsibilities in a proper manner and provide reasoned consideration of the issues.
- A Council can be found to be in breach if:
- a) it failed to take proper advice
 - b) failed to follow proper advice that cannot be justified
- or
- c) followed advice that was simply wrong

- 1.2. Guidance is available to Councils on the disposal of Local Authority assets¹. The guidance identifies the key principles to be considered so that land is disposed of effectively and efficiently. The key principles and steps met to meet these principles are set out below.

Every disposal having clear objectives from the outset. These should establish the key objectives and targets for land disposal – for example, this could be to maximise housing capacity, receipt or employment floorspace, or to reduce costs through divestment.

The approved Council Regeneration Strategy sets out the Councils objective to dispose of the land known as Brockhampton West. The Regeneration Strategy is clear that the maximum value should be obtained from the sale in order to re-invest the funds to the benefit of the Council. The cabinet direction noted within section 1 of this report reinforces this objective by delegating authority to officers to achieve 'best value' for the site.

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/508307/160316_Land_disposal_guidance.pdf

Disposals rooted in local plans. Land disposals should help deliver local planning objectives, addressing matters such as the requirement for a five year land supply, or the assessed need for housing and employment land.

The site is included in both the extant and emerging local plan for development of employment uses.

Early and meaningful engagement with other public bodies and the market. Early engagement with other public bodies will ensure that the views of all authorities with an interest can be taken into account, so that land is used as efficiently as possible. Early market engagement should inform the disposal strategy and brief, and ensure the opportunity is attractive to the market.

Engagement was undertaken with a number of stakeholders in order to develop the disposal strategy and form a recommendation ensuring best consideration would be obtained on disposal. The Environment Agency was consulted in order to better understand the responsibilities to the Council related to development of former landfill. Engagement with the Environment Agency, the Local Planning Authority, and the Councils own Environmental Health team formed a better understanding of the constraints to development. This engagement allowed the disposal strategy to account for considerations arising from the contaminated nature of the site. The market was also engaged extensively in a number of different areas to confirm the strategy for disposal that would achieve the best consideration to the Council in line with its clear objectives. Market engagement will be considered more fully within section 6 of this report.

The appropriate level of investment determined prior to disposal. To ensure the best possible return, in many cases it may be appropriate to invest in a site before disposal, for example by obtaining planning permission or providing infrastructure. The appropriate type and scale of investment will depend on the individual circumstances of the site, and understanding these early will ensure the best outcome for authorities.

Through engagement with appropriate bodies, and due to the sites use as former landfill, the consideration of the amount of investment required prior to disposal was of particular relevance when following the guidance. The amount of investment required, in combination with the objective of obtaining best consideration was a key consideration and is clearly set out in section 6 of this report.

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of the Local Government Act 1972.

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