

NON EXEMPT

Havant Borough Council

Cabinet

1st July 2020

FOR DECISION

Sale of Council Owned Land Known as Brockhampton West

**Report of: Simon Kennedy, Regeneration Project
Manager**

Portfolio: Leader of the Council - Cllr Michael Wilson

Head of Service: Clare Chester

Key Decision: YES

1.0 Purpose of Report

1.1. On the 20th March 2019 cabinet considered the future of the land known as Brockhampton West under cabinet paper dated 20th March 2019. Cabinet agreed under minute 139, where relevant to Brockhampton West, that:

“.... 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...”

1.2. To give effect to the decision of cabinet a bidding process was undertaken and the bids evaluated. It is necessary for cabinet to approve the selection of the purchaser and approve the terms of sale for the Council owned former landfill site known as Brockhampton West in accordance with Cabinet direction dated 20th March 2019 (Site location/plan - Appendix 1).

1.3. To set out the process and due diligence that has led to the selection of a preferred bidder.

1.4. To seek final approval for exchange of contracts and completion for this disposal.

2.0 Recommendation

- 2.1. Cabinet is recommended to agree sale of the land to Exton Estates in accordance with the terms as set out in confidential Annex 1 of this report. The anticipated net receipt to the Council is also clearly shown within Annex 1. The anticipated costs associated with the sale are shown in Appendix 6.
- 2.2. to Instruct the Director of Regeneration and Place, in consultation with the Section 151 Officer, to exchange contracts and complete the sale in line with the terms set out in this report (Appendix 2).
- 2.3. The details relating to the final negotiations of the contract terms and the environmental insurance be delegated to the Director of Regeneration and Place, in consultation with the Section 151 Officer.

3.0 Executive Summary

- 3.1. On 20 March 2019 Cabinet instructed officers to seek best value for the disposal of the former landfill site known as Brockhampton West, the direction for disposal was in order to generate capital funds to invest in the Council's Regeneration Strategy.
- 3.2. The key objective of this transaction is to obtain the best possible capital receipt for the land while:
 - a) Minimising the impact of historical contamination relating to the site's former use as a landfill site and reducing the Council's ongoing liability relating to past and future contamination and;
 - b) facilitating development that will have a positive effect on the Borough's economy in line with its allocation in Havant's Local Plan.
- 3.3. Work to obtain best value for the site was undertaken using an informal tender process following MHCLG guidance for disposal of Local Authority Assets as delegated by minute 139 of Cabinet report dated 20th March 2019.
- 3.4. Throughout the process professional property advice was sought from Lambert Smith Hampton and more recently, Legal advice was procured from Womble Bond Dickinson.
- 3.5. Seven financial bids were received. These were evaluated using a scoring matrix (Appendix 3). This was weighted to calculate the risk profiles of the various bids in order to provide a comparable assessment. Evaluated and risk adjusted financial offers summary is available at Annex 1.

- 3.6. In order to reach a recommendation on best value expert advice was obtained from the Economic Development and Environmental Health teams. External property input was provided by Lambert Smith Hampton. Specialist legal advice relating to the Council's ongoing liability for the site was sought from Womble Bond Dickinson. Advice was also sought through Counsel opinion from a specialist contaminated land QC.
- 3.7. The recommendation within this report is in line with the output of the scoring matrix and the recommendation from the commercial agent and the internal property team.
- 3.8. The recommended bid is based on simultaneous exchange and completion on 17th July 2020. This was considered to be the best offer giving the optimum capital receipt, combined with the significant mitigation of the residual contaminated land risk to the Council.

4.0 Additional Budgetary Implications

- 4.1. If successful, this transaction will contribute a capital receipt to the Council.
- 4.2. 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.

5.0 Background and relationship to the Corporate Strategy and Directorate Business Plan/s

- 5.1. As well as meeting the requirements of the Cabinet direction, Councils have an obligation under section 123 of the Local Government Act 1972 to achieve the best value reasonably obtained.
- 5.2. The sale of Brockhampton West meets the following Corporate objectives:
- A thriving local 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.
 - 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.
 - 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

- Approved Regeneration Strategy/Business Plan – Sale of Brockhampton West meets a key objective of the approved Regeneration Strategy.

6.0 Options considered and reasons for the recommendation

- 6.1. A consultant report was commissioned to provide an indication of the potential costs associated with the Council undertaking remediation prior to the disposal of the site. The consultants cost estimate suggested the site would be unviable for development should the Council attempt to remediate the land directly. In real terms this would result in a cleaner site but would result in a financial loss to the Council.
- 6.2. The possibility of sharing the cost of full remediation of the site, and/or liability for future claims has been investigated with Hampshire County Council (HCC). As the original licence documents no longer exist we are unable to show that HCC breached the conditions of their licence. As such we are unable to prove sufficient liability on the part of HCC to take forward this option (Appendix 4).
- 6.3. Investigations as to the value of the site for less intrusive uses such as solar or development mitigation land were undertaken. Although there was potential for some revenue as shown in Appendix 4 this was offset by upfront capital investment required and management responsibilities. The maximum potential income from solar being £2.5m over 20 years.
- 6.4. A full analysis of all alternative options is considered at Appendix 4

7.0 Resource Implications

- 7.1. Financial Implications – Retention of the land and its status quo, raises potentially major remediation costs. Expected capitalisation value for project costs is available at Appendix 6.
- 7.2. Human Resources Implications – None

8.0 Legal Implications

- 8.1. When agreeing the sale of the land the Council must be satisfied it has met the requirements of the Local Government Act (1972) The Councils legal responsibility for any future residual liability resulting from its use as landfill is reduced on sale. In consideration of this the Council has taken expert legal advice from Womble Bond Dickinson as well as seeking expert Counsel advice where appropriate.

8.2. The site being sold is part of title number SH28289, which is owned by the Council. 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 sale site" and "the whole site", respectively). The whole site is presumed to be a high contamination risk.

8.3. Counsel's opinion has been obtained on the extent of the Council's potential liability for contaminated land (whether the sale site is disposed of or not) and steps that could be taken to mitigate that liability. Counsel's advice deals primarily with the statutory contaminated land regime, but also potential liability under common law nuisance. Some of the key points as they relate to this transaction are, in very brief summary:

- The Council is a Class A appropriate person for the purposes of the statutory contaminated land regime
- If the buyer takes the sale 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
- Liability between Class A appropriate persons can be apportioned by two means under the statutory regime – by entering into an explicit "agreement on liability" between the parties and by the application of the so-called "exclusion tests"
- 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
- 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 automatically 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).
- 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.
 - 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).

8.4. The sale site is being sold in the expectation that the buyer will carry out commercial development (light industrial or warehousing). It is anticipated that conditions will be imposed through the planning

system requiring a certain degree of remediation or betterment work to the sale site, prior to its development. The heads of terms for the sale have been negotiated by our retained agents, Lambert Smith Hampton, with input from Womble Bond Dickinson. In order to agree terms for the sale that are acceptable to the buyer and achieve the best price for the Council, it has been agreed that there will be no specific remediation obligations in the contract or contractual restrictions on the use of the site.

- 8.5. To mitigate the Council's risk in relation to the sale site, the sale contract will include 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. The sale contract will also include a full 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.
- 8.6. The Council is negotiating with the bidder the provision of insurance cover for future pollution events. This will either cover the Brockhampton site in isolation or potentially the wider Broadmarsh site. This was also recommended by Counsel. Given that the agreement serves to transfer liability to the buyer and indemnifies the Council against any statutory or civil liability, the main value to the Council in relation to the sale site is to cover the scenario where the contamination liability arises and the buyer has gone out of business and cannot therefore meet its remedial obligations. The buyer has agreed as a term of the sale to pay one half of the cost of procuring such insurance. It should be noted that the availability of insurance will be subject to detailed due diligence by the insurer to quantify the risk. It may not provide full cover for the buyer and the sale site after development has started. The Council may require a more robust policy than offered by the purchaser. Where this is the case additional costs would need to be recovered from the Capital receipt. The anticipated cost for insurance is based on insurance policies taken out by the purchaser on similar sites. The figure anticipated (Appendix 6) includes an allowance to increase the robustness of the terms of the insurance above those that may be offered by the developer.
- 8.7. Contractual indemnity will limit the risk 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. 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.

9.0 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 erosion forces. Such risk brings with it potentially significant remediation costs in the future.
- 9.2. Upon the sale proposed taking place, the Council will retain a residual liability for historic landfill contamination. However, this is reduced through the indemnity clauses within the contract (appendix 2) and the potential to seek environmental insurance. The developments will not fully remediate the site. The complete removal of all waste is neither financially viable or ecologically sustainable as it simply transfers the problem. Instead the developer will construct measures to contain the contamination and prevent any leeching in line with statutory requirements for development. This physical betterment will reduce the likelihood of any incident and is required under the planning regime.
- 9.3. The economic climate is likely to be challenging moving forward, although interest in the site is currently strong, with investment available for purchasers, should the sale be delayed the value of the site may decline rapidly.

10.0 Consultation

- 10.1. Throughout the project consultation was undertaken with HBC's Economic Development, Property, Legal and Environmental Health teams. External property input was provided by Lambert Smith Hampton. Specialist legal advice relating to the Council's ongoing liability for the site was sought from Womble Bond Dickinson as well as through Counsel opinion from a specialist contaminated land QC.
- 10.2. Progress was reported regularly to at all levels including to the Executive Board and the Portfolio Holder
- 10.3. Consultation was undertaken with the Strategic Regeneration Programme Board (SRPB) through regular updates and briefing notes. The SRPB includes the consultees required under the 2019 Cabinet direction to dispose of the site.

11.0 Communication

- 11.1. SRPB, EB, Cabinet Briefing

12.0 Appendices:

- 12.1. *Annex 1 – Commercial Terms (EXEMPT)*
- 12.2. Appendix 1 – Location and site plan
- 12.3. Appendix 2 – Draft sale contract (EXEMPT)

- 12.4. Appendix 3 - Bid evaluation evidence and scoring matrix (EXEMPT)
- 12.5. Appendix 4 - Alternate option appraisal (EXEMPT)
- 12.6. Appendix 5 – Legal (EXEMPT)
- 12.7. Appendix 6 – Project cost summary (EXEMPT)

13.0 Background Papers:

- 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

MONITORING OFFICER COMMENTS

Cabinet must be satisfied they have enough evidence to agree the sale and that it is a fair representation of best value given the extremely wide range of pricing proposals in appendix 3. Cabinet should be able to clearly understand how the bids have been compared and the reason for the recommendation taking into account any mitigation such as insurance.

Cabinet must be satisfied in respect of the extent and scope of the residual risk at sale. Appendix 5 provides advice dated 4 March 2020 The advice at paragraph 29 would require you to be satisfied as to the impact of any propose development on the risk profile. Paragraph 76 requires on clarity on the historic liability, although the historic liability will not alter on sale, cabinet must be satisfied the risk is sufficiently understood to allow for the correct mitigation. The potential limitation on insurance are articulated at paragraph 83 (d).

The report indicates a contractual indemnity has been obtained and cabinet should be satisfied as to the financial covenant of the purchaser giving that indemnity and how the purchase price is funded.

The Report indicates a form of insurance is proposed to be obtained at some point. The table setting out the costs of sale provides for a significant contingency and for any insurance to be met from the proceeds of sale. Cabinet must be satisfied that the proposal to insure mitigates the risks identified and how the costs are apportioned. Cabinet should also satisfy itself the correct insurance is available, and that timing of purchase is appropriate.

Cabinet must be satisfied that there is enough evidence to assess the current risk, the future changes in risk, the value of the proposed mitigation, costs of sale, against the potential receipt to the council to make an informed decision. Cabinet should careful note the proposed value of the insurance and the delegation at recommended at 2.3.

David Brown (Monitoring Officer)

Dated: 25 June 2020

CHIEF FINANCIAL OFFICERS COMMENTS

Cabinet needs to assure itself that there is sufficient financial information within the report to ascertain clarity on the final financial receipt due to the authority and therefore be able to fully satisfying itself that the disposal of the asset has achieved best value on behalf of the authority.

The Report indicates that insurance is due to be obtained at some future date, it is for Cabinet to satisfy itself that the current information is sufficient for them to clearly understand all risks including financial and the potential impact on the Councils future financial stability.

In particular Cabinet should be aware that any excess or contingent liability arising from the form of insurance procured will require the authority to set aside directly from the sale proceeds a reserve to deal with these potential future liabilities and therefore should be considered when considering this report and the recommendations within. There is currently no reserve which to mitigate any future liabilities.

As per the Monitoring Officers advice, Cabinet must satisfy themselves that there is sufficient evidence within the report for them to fully understand the financial risks, cost of sale, sale proceed and any future contingent liabilities.

The recommendation at 2.3 suggest that this be delegated to officers, Cabinet may wish to consider that they would wish to fully understand the benefits, risks and final costs of the procurement of the insurance as this has the potential of having a significant financial impact on the value of the receipt and whether this is so significant that they consider this a matter that requires clarity for them to be able to make a fully informed decision. As it cannot be included in this paper as neither the insurance or the cost has been confirmed then it becomes a key decision in its own right.

The resolution within para 1.1

“... 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...”

I am required to confirm that I have not been involved in the procurement or evaluation of the proposed sale and therefore am not able to certify compliance with the resolution above.

Lydia Morrison (Section 151 Chief Financial Officer)
Dated: 25th June 2020

Agreed and signed off by:

Monitoring Officer: 25.06.20
S151 Officer: 25.06.20
Director: 25.06.20

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