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| DELEGATED POWERS REPORT OF THE GROUP DIRECTOR OF FINANCE (S151 OFFICER) | | |
| The Stage - Overage Key Decision No. F S281 | Classification | Enclosures |
| | Open | OPEN |

1. SUMMARY

- 1.1 The Council has the benefit of an overage agreement relating to land at a development known as the Stage. The overage payments are secured by charges on property.
- 1.2 The developer is in the process of refinancing the development and wishes to pay out an estimate of the overage payment expected. In return the Council would forgo its security based on the flats.
- 1.3 On completion of this deal the Council will receive £11,184,545 in cash, which comprises an estimate of overage payable in the future and sums fixed within the contract payable at times linked to the practical completion of the development.
- 1.4 There will be an amendment to the development agreement that will provide for a final accounting of the overage payment that may see any over-payment repaid by the Council to the developer or conversely any underpayment being made good.
- 1.5 The security was to ensure the cash payment, however with the payment made early to the Council, the need for security is largely redundant. The Council will also benefit from early access to fixed sums that are currently diminishing in real value due to inflation as well as receipt of the overage payment which gives advantages in terms of both cash flow and the ability to earn interest on this money.

RECOMMENDATION(S)

- 2.1 **To amend the deed of overage dated 13/11/2014 so that the developer pays on completion of the deed £11,184,545 comprising of overage, the residential payment (£2,500,000) and the additional payment (£1,545,455).**
- 2.2 **To further amend the deed to provide for equalisation provisions to ensure that the final amount payable is that as anticipated by the original deed.**
- 2.3 **To further amend the deed to remove the requirement for the developer to make security of its property in favour of the Council.**

3. REASONS FOR DECISION

- 3.1 The Developer is to pay £2.5 million to the Council on the date ("Residential Sales Date") on which there has been a disposal of 75% of the Units of Accommodation

(which excludes Affordable Housing) in the residential tower to be constructed as part of the Stage development. 75% shall be calculated by value or number whichever is earlier.

- 3.2 The Overage falls due on the residential sales date or 12 months from practical completion (23/8/23). The estimate of overage payable is £7,139,090. This sum comprises of the developers estimate of overage, a 2.5% uplift and a sum of £190,000 to make good the declared overage on a bulk sale which is the subject to a future revaluation.
- 3.2 The Additional Sum falls due two years after practical completion of development at the arches (July 2025) and is £1,545,455
- 3.3 The sums of £2.5 million and £1,545,455 are fixed sums but the overage payable is a function of sales prices and can not be truly known until either the property is sold or the valuation exercise as detailed in the overage deed has been completed. There is an obvious advantage in obtaining the fixed sums at the earliest possible moment and that advantage also applies to getting the overage payment, albeit there will be equalisation measures in place in case of either under or over payment.
- 3.4 The overage is therefore an estimate based on the sales that have been exchanged (and therefore the prices have been fixed) and the developers estimate of future sales values. This estimate has been inflated by 2.5% to account for possible future growth and an additional £190,000 to take account of a likely revaluation relating to a recent bulk sale.
- 3.5 An analysis of sales prices achieved and expected is found in the exempt appendix.

4 DETAILS OF OPTIONS CONSIDERED AND REJECTED

- 4.1 The developer originally asked that the payment be a once and final settlement to completely remove any further possible sums, this was rejected as high risk and the equalisation provision put in place to remove that risk.
- 4.2 The only other option is to leave the deed unaltered, which would be a perfectly acceptable outcome as that was the deal the Council originally entered into, save that there are cash flow advantages in securing the money now as well as the ability to benefit from the interest on the money.

5. BACKGROUND

- 5.1 On 13 November 2014 LBH entered into a development agreement with Fairchild Place Ltd and at the same time granted a lease to Fairchild Place Limited to facilitate the development of land and buildings at and known as the Viaduct, 500 - 508 Fairchild Place.
- 5.2 In addition, LBH agreed to assist in facilitating the development through entering into a Lease and leaseback arrangement of landed bounded by Curtain Road to allow the development to benefit from the provisions of s.237 of the Town and Country Planning Act 1990 (TCPA 1990) with regard to third party rights over the site. Accordingly, on 9 March 2015 Shoreditch Stage 2 Ltd granted to the Council a lease of the development

site which LBH entered into pursuant to powers s.227 of the act noted above. In turn, LBH subsequently granted an underlease of the land to Shoreditch Stage 2 Ltd pursuant to s.233 of the TCPA 1990.

- 5.3 As part of the suite of documents pertaining to the development the developer agreed to pay an overage based on the sales prices agreed for the residential part of the scheme. The Developer is to pay £2.5 million to the Council on the date ("Residential Sales Date") on which there has been a disposal of 75 % of the Units of Accommodation (which excludes Affordable Housing) in the residential tower to be constructed as part of the Stage development. 75 % shall be calculated by value or number whichever is earlier.
- 5.4 The Developer is to make an Overage Payment to the Council 20 Working Days after the date which is the earlier of:
 - (a) the Residential Sales Date; and
 - (b) the date 12 months after the practical completion of the residential tower
- 5.5 The payment is calculated by a formula based on a percentage of income above a threshold level and it is payable on reaching 75% sales by either value or number and secured on properties within the development charged in favour of the Council. This charge covers sufficient value to cover the overage and the Residential Payment, which is a fixed sum of £2.5 million.
- 5.6 There is also an 'Additional Sum' attached to the lease over the viaduct that the developer will be seeking to payout in the sum of £1,545,455.

Equality Impact Assessment

There are no identified equality issues related to this transaction.

Sustainability

There are no sustainability considerations arising from this proposal.

Consultations

No formal consultations are required as part of this report.

Risk Assessment

The initial proposal from the developer was to make a final settlement for the overage now, however this ran the risk that the sum agreed could be significantly less than what may have been due if the Council had left the contract as is. The other side of this is that the sum paid could be in excess of what is finally due by the overage clause as is. Whilst the full settlement proposal does involve risk on both sides the Council has chosen to mitigate its downside risk by requiring an equalisation clause in the amended documentation. This means that there is no downside risk to the developer in this but the Council will benefit from early access to the funds.

The other major proposed change is that the Council will be giving up its security. This is a charge against a number of flats in the development to a value that equals the developers reasonable estimate of the overage payable plus £2,500,000. The purpose of the security was to ensure that if the developer did not pay the overage then the Council could sell these properties to cover the money due to it. The mitigation for this is found in the payment of the money now as if the Council will be in possession of the developers reasonable estimate of the overage payable, £2,500,000 and £1,545,455 (the Additional Sum that is not subject to any security). A risk remains in that the sums paid now could be an underestimate but mitigation is found for this in the equalisation provision whereby if additional overage is due then the developer will be obliged to pay.

Some residual risk remains in that if the developer defaults on equalisation provisions then the Council may lose some of the receipts, however given that the security is based on their reasonable expectations of the overage payable in the future the same risk exists with the deal left as originally written, as in an analogous case the security held would be insufficient to cover the overage due.

Overall receipt of the money now has the effect of lowering the risk to the Council on this transaction.

6. COMMENTS OF THE GROUP DIRECTOR OF FINANCE (\$151 OFFICER)

- 6.1 This report formally requests authorisation for the modification of the overage deed existing between the Council and Fairchild Place Limited, the developer, concerning the development site known as "The Stage."
- 6.2 The proposed amendments encompass three payments to be made by the developer upon the execution of the amended deed. These payments consist of the residential payment in the amount of £2,500,000 and the additional payment totaling £1,545,455, both of which are fixed sums, as well as the estimated overage amounting to £7,139,090, which is calculated based on the proceeds from the sale of residential units. It is essential to note that the ultimate overage sum will remain undetermined until the property is sold or until the valuation exercise, as described in the overage deed, has been concluded. The prevailing deed currently includes conditions for the Council to receive these payments at later dates. Consequently, the Council stands to benefit from receiving these payments sooner upon the execution of the amended deed.
- 6.3 Furthermore, the proposed amendments incorporate a provision in the deed to establish equalisation for the overage, ensuring that the final payment aligns with the expectations outlined in the original deed. To address this, a provision will be established to facilitate the reimbursement of any overpayments that may arise from the ultimate calculation of the overage owed to the Council.
- 6.4 A final modification to the deed involves removing the requirement for the developer to make security of its property in favour of the Council.

7. COMMENTS OF THE DIRECTOR OF LEGAL AND GOVERNANCE SERVICES

- 7.1 The comments of the Corp Director of Legal HR & Regulatory Services submitted under the original Cabinet Report of 22nd July 2013 confirmed that the proposed disposal complied with the best value considerations as prescribed by s123 of the Local Government Act 1972.
- 7.2 Under Part 3A (1.8) of the Council's Constitution, key decisions can be made by Officers. Therefore this decision is being presented to the Interim Group Director for Finance (S151 Officer). The decision maker must comply with the requirements of the Access to Information Procedure Rules as set out in Part 6C of the Constitution in the making of the decision and therefore 28 clear days statutory notice has been provided.
- 7.3 The amendments now proposed to the disposal instrument, the Deed of Overage, will benefit the Council twofold by a) ensuring the sooner payment of the fixed sums and b) providing for equalisation of the overage whilst retaining the required legislative conformity.
- 7.4 There is no perceived legislative risk that would compromise the original decision regarding this transaction and we would recommend that the variation proceeds accordingly.

8. COMMENTS OF THE DIRECTOR OF STRATEGIC PROPERTY SERVICES

- 8.1 This report seeks authority to alter the overage deed associated with the Stage development signed in 2014 by entering into a Deed of Variation.
- 8.2 The proposal is for the developer to pay out an estimate of the overage, with a small provision for price inflation and a sum relating to a bulk sale along with two fixed sums, one due under the overage deed and another under the lease of the viaduct.
- 8.3 The sums would not otherwise be payable until certain triggers have been met, but the earliest of these is a year from practical completion of the tower, or when 75% of the properties have been transferred. The Additional Payment is not due until 6 July 2025.
- 8.4 There are clear benefits in having the money in hand, however the cost is foregoing the security provisions in the overage. Cash in hand is a better form of security and as the amount of property charged as security is determined by the developer's estimate of overage, then if the payment based on their estimate is low, the security based on their estimate will also be so. These proposals do not, therefore, materially weaken the Council's provision regarding the security of its interest, and quite possibly improve it.

APPENDICES

Exempt Appendix 1

BACKGROUND PAPERS

In accordance with The Local Authorities (Executive Arrangements) (Meetings and Access to Information) England Regulations 2012 publication of Background Papers used in the preparation of reports is required

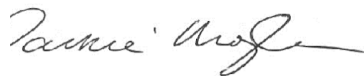
Description of document

Delegated Powers Report

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AUTHORISATION OF GROUP DIRECTOR OF FINANCE:

Name: Jackie Moylan



Signature:

Date: 10 November 2023

Appendix 1 - Exempt

By Virtue of Paragraph(s) 3 Part 1 of schedule 12A of the Local Government Act 1972 this appendix is exempt because it contains Information relating to the financial or business affairs of any particular person (including the authority holding the information) and it is considered that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.