

South Oxhey Initiative – Initial Report on Legal Deliverability

1 Introduction

- 1.1 The options for the District Centre and adjoining areas emerging from the public consultation led by Terence O'Rourke are:-
- (a) do nothing
 - (b) total refurbishment
 - (c) part refurbishment and part redevelopment and
 - (d) comprehensive redevelopment
- 1.2 We have been asked to advise on the legal deliverability of the refurbishment and redevelopment options and the risk profile of each.
- 1.3 This report summarises the legal issues which will impact on the delivery of the project, each of which can be covered in greater detail should the need arise as the project progresses.
- 1.4 In terms of risk profile, although some upfront investment is likely to be required from public funds to kick-start regeneration, the comprehensive redevelopment option provides the Council with the lowest exposure to development risk and the lowest requirement for public funding, whereas the refurbishment option would require the Council to provide the capital funding and take the risk of the delivery of the project to programme and within budget

2 Method of Procuring Private Sector Partner

- 2.1 Procurement process for Comprehensive Redevelopment
- 2.1.1 This option would involve the selection of a development partner to assemble, fund and deliver the entire project, taking all development and commercial risk, working alongside the Council and responding to the Council's development brief for the initiative. Although it will be essential to ensure and demonstrate that there is an adequate level of transparency and probity in the process leading to the selection of the Council's developer partner and that the developer's proposals represent the best outcome that can be achieved, this approach should not require the exposure of the arrangement to a full, time consuming, expensive and risky competitive tendering process under the EU public procurement regime.
- 2.1.2 To cover the eventuality that an element of public sector development is drawn into the initiative however, and to demonstrate adequate levels of

probity, transparency and value for money, it is suggested that a “mini competition” under the umbrella of the Homes and Community Agency’s (HCA) developer framework agreement be used as a means of selecting the most appropriate developer partner. This framework agreement was established to facilitate projects of this nature and will remain available for use for at least the next 12 months, and is likely then to be extended for a further 12 months.

- 2.1.3 The list of Members of the HCA Panel which includes contractors, contractor/developers and developers all have capacity to provide mixed use schemes. As the South Oxhey Regeneration is a complex scheme with potential for attracting high values for the private residential elements and a food store operator, the project is likely to attract companies such as Galliford Try, Taylor Wimpey, Crest, Countryside, and Ardmore First Base Partnership all of which are on the HCA panel.

2.2 Procurement Process for the Refurbishment Option

This option would involve the procurement of the design, implementation and funding of the refurbishment works directly by the Council. The process would either involve the appointment of design consultants and subsequently a building contractor by the Council, or the appointment of a design and build contractor. Either of these options would require full competitive tendering procedures under the EU public procurement regime, beginning with a public notice in the Official Journal of the European union or “mini competitions” under suitable framework agreements established by the Government or a government agency. In either case it is highly likely that the Council would have to take the risk of the fitness for purpose of the completed works and the risk of any time and cost overruns and related expenses, such as claims for compensation from tenants.

3 Possible Legal Structure of Contractual Arrangements with Private Sector Partner

- 3.1 If the Council opts for a refurbishment, it will enter into a building contract with a suitable contractor which will be funded out of its own resources with the risks incumbent upon this being as laid out in paragraph 2.2 above.
- 3.2 The possible structures for bringing forward total redevelopment are either through a conditional development agreement followed by the grant of a long lease, or possibly a freehold interest (either before work commences if bank finance is required or at practical completion if it is not); or through a special purpose vehicle (either a limited company or a limited liability partnership) owned jointly by the Council and the Developer.
- 3.3 Both methods have advantages and disadvantages which we have discussed with officers at length. As a result of those discussions we have concluded that the more

traditional conditional development agreement (CDA) route would be more appropriate here. This is principally because under a CDA, the risk and cost of the development can be transferred to the developer; it is a less costly and complex arrangement to structure and it is a method of delivery favoured by the development industry in the current climate, over a corporate structure. It is also an easier structure for the Council to exit from should problems arise.

- 3.4 Assuming the Council chose a single developer to carry out every phase, we would recommend a CDA under which each phase could be drawn down separately, once the various conditions precedent in respect of that particular phase had been satisfied.
- 3.5 Generally, the parties would obtain outline planning permission for the whole scheme at the outset and then launch the CPO.
- 3.6 During this period, if not before, the parties would agree the sequence for the phases to be drawn down. Reserved matters would then be obtained for the relevant phase, followed by procurement of vacant possession, through use of break clauses in the leases, under the redevelopment ground (f) contained in the Landlord and Tenant Act 1954 (referred to in more detail in Section 3 below) or through use of CPO powers or, more likely, through a combination of all three methods.
- 3.7 The funding of the planning process and obtaining vacant possession would be a matter for negotiation with the developer at the procurement stage and would impact on the viability of the phase in question.
- 3.8 The Council would require comfort that the developer had the necessary funding to carry out and complete the development of a phase before it granted a land interest, along with a mechanism for repossessing that interest if the developer goes into corporate default or material breach. These concerns can all be addressed in the detailed drafting under tried and tested provisions. The legal documentation would also give the Council the ability (but not the obligation) to step into the shoes of the developer to complete the development should it chose to do so.
- 3.9 Developers and their funders will generally require a viability test to be run as a final condition precedent to their obligation to draw down a phase and commence development. The parameters for this test should be part of the selection process, as it could determine how much money the Council might be required to contribute to make a phase viable (most likely by way of reduction to the price to be paid for its land up front) or how much of its profit share the developer would be prepared to forgo to make the phase viable.
- 3.10 The developer would be responsible for procuring the building contractor and the professional team and the Council would have rights of approval of and be given collateral warranties from these parties in respect of the buildings in which it may be

retaining a material or long term interest, such as the community hub. The Council would not however have any direct exposure to the construction process.

- 3.11 Generally we would expect to see overage provisions allowing the Council to share in development profit achieved on a phase by phase basis, subject to a developer's priority return. The financial "offer" from the developer in this regard would form part of its tender at the selection stage.

4 Procuring vacant possession from retail tenants.

- 4.1 We understand that vacant possession of the retail units will be required for both the refurbishment and the redevelopment option.
- 4.2 Most business leases are protected by the Landlord and Tenant Act 1954 ("the 1954 Act"). This means that the tenant has a right to a new lease on expiry of the term unless the landlord can prove one of the grounds for possession listed in the 1954 Act.
- 4.3 Ground (f) enables a landlord with a firm and settled intention to demolish or redevelop or carry out substantial works of construction to the premises to refuse to grant a new tenancy. Where ground (f) is used the tenant is entitled to be paid compensation equivalent to rateable value (or twice that if the business has traded from the premises for at least 14 years).
- 4.4 Redevelopment will necessitate demolition, which is sufficient to demonstrate ground (f).
- 4.5 Refurbishment is likely to involve sufficiently substantial works to require vacant possession and as such is likely to satisfy ground (f).
- 4.6 Reliance on the 1954 Act alone is likely to present difficulties with timing. Ground (f) can only be used when a lease expires or at a break date. It does not facilitate early termination of the lease.
- 4.7 For the redevelopment option it is likely that the Council could use compulsory purchase powers to acquire premises where the lease terms expire too late to enable the 1954 Act to be used and terms cannot be negotiated for an early surrender. Such powers would not be available on the refurbishment option.
- 4.8 Compulsory purchase compensation can be much higher than 1954 Act compensation and we would refer the Council to other advice from LSH in this respect.
- 4.9 Where compulsory purchase is not available (for example on the refurbishment option) the only other options for dealing with timing issues are:-

- 4.9.1 Negotiate early surrenders where tenants' leases cannot be terminated in time. Obviously this requires their co-operation. It is likely to require the Council to put together an attractive package which may include alternative accommodation, rent savings, relocation expenses etc. It may also occur if the Council implements rent reviews (where possible) to commercial rent levels.
- 4.9.2 Forfeiture of the lease if the tenant is in breach. The breach would need to be fairly significant as a tenant is entitled to have the lease restored (by relief from forfeiture) if he remedies the breach.
- 4.10 To maximise the ability to use the 1954 Act, we recommend that all new leases from now on incorporate a right for the Council to break on not less than 6 months notice or exclude the 1954 Act rights entirely. In practice exclusion is only likely to be possible with new lettings to new tenants as tenants renewing 1954 Act leases are entitled to retain their 1954 Act rights.
- 4.11 We have been told the Council will work with Thrive to secure vacant possession from residential tenants whichever option is pursued. The Council has also indicated that it will include the long lease hold residential interest acquired under Right to Buy legislation within the Compulsory Purchase.

5 Conclusion

Whilst the delivery of the South Oxhey Initiative has its challenges, these are reasonably typical in a regeneration scheme of this nature and should not deter a developer if the scheme is viable and the planning and political environment positive. Once a decision has been taken by the Council on whether to pursue refurbishment or redevelopment, the key issue of the timing and inter-relationship of commencing the planning application, procuring a development partner and launching the CPO will need urgent consideration, and we would anticipate providing more detailed advice on each topic following the Council's decision.

Clarke Willmott

6th December 2011