

Cabinet Meeting	
Meeting Date	01 February 2017
Report Title	Deed of Variation to the Development Agreement between the Council and Spirit of Sittingbourne
Cabinet Member	Cllr Mike Cosgrove, Cabinet Member for Regeneration
SMT Lead	Emma Wiggins, Interim Director of Regeneration.
Head of Service	Charlotte Hudson, Interim Head of ECS
Lead Officer	Peter Binnie, Sittingbourne Town Centre Senior Project Advisor.
Key Decision	No
Classification	Open
Forward Plan	Reference number:
Recommendations	<p>1. That Cabinet delegates authority to the Interim Director of Regeneration, in consultation with the Leader and the Cabinet Member for Regeneration to agree a Third Deed of Variation to the Development Agreement to:</p> <ul style="list-style-type: none"> (i) amend the Developer's Phase 1 Conditions; (ii) remove the Council's obligation to pay section 106 costs; (iii) remove the Council's obligation to pay a contribution from the multi-storey car park budget; (iv) allow the Developer to vary the Developer's minimum percentage profit margin; and (v) allow for construction works to elements funded by the Council to be carried out under an access licence rather than a building lease.

1 Purpose of Report and Executive Summary

- 1.1 This report provides the background and relevant information to request delegated authority to the Interim Director of Regeneration, in consultation with the Leader and Cabinet Member for Regeneration, to agree a Third Deed of Variation to the Development Agreement (DA) entered into between the Council and Spirit of Sittingbourne on 19 September 2012 and subsequently varied by the First Deed of Variation and the Second Deed of Variation both dated 20 January 2015.
- 1.2 In a project of this complexity it is inevitable that over time the DA will be varied, and this process following on from discussion and negotiation creates greater flexibility and the ability to deliver.

- 1.3 The purpose of this Third Deed of Variation is to allow the Council and the Developer to unlock the proposed development of Sittingbourne Town Centre and start the physical construction works that are being delayed due to having to comply with Developer conditions that cannot be waived in the existing Agreement.
- 1.4 The Deed will remove obligations for the Council to fund section 106 works and a contribution from the multi-storey car park budget, and will allow the Developer to accept a reduced margin below the current minimum of 12.5% if it so chooses.
- 1.5 Full details, and where relevant the risks associated with each variation, are detailed in section 3.

2 Background

- 2.1 The Council's corporate priority for the regeneration of Sittingbourne is to deliver the highway works, cinema, restaurants and retail units. Significant work has been undertaken to ensure that these are viable and fully funded and ready to be built out, subject to the Development Agreement (DA) between the Council and Spirit of Sittingbourne going unconditional.
- 2.2 The DA contains a number of conditions that have to be satisfied in order that it can go unconditional. Substantial progress has been made in meeting the conditions of the current DA for Phase 1 of the project. Phase 1 incorporates the Big Box retail, Leisure (cinema, Travelodge, MSCP, public realm) and residential. However, some conditions which are not capable of being performed under the DA as it is currently drafted are delaying the DA going unconditional and hence work starting on site.
- 2.3 In terms of progress made, planning consent has been granted at Committee for the whole of Phase 1, and two additional planning permissions for a hotel and the retail park. Final determination of planning matters is imminent, subject to signing of the section 106 agreement that is now agreed by all parties.
- 2.4 Highways and public realm works and the statutory suppliers and service diversions for Phase 1 have all been tendered, and orders for the work have been placed by Spirit. The works are being programmed to start at the soonest dates possible, subject to lead-in times and co-ordination of works from each of the suppliers.
- 2.5 The Developer has received tenders for demolition works to the depot site, and an access agreement has been prepared between Spirit and the Council, and a BAPA (Basic asset protection agreement) has been prepared between Spirit and Network Rail to allow demolition works to proceed ahead of DA unconditionality. It is anticipated that demolition works will commence in February 2017.
- 2.6 The Council has agreed to fund the highways and infrastructure works up to £2.2m to supplement and match fund £2.5m of SELEP funding which needs to be spent by March 2017. This work has been tendered by Spirit, and is being scheduled and programmed so that it can be implemented in full when the DA goes unconditional.

- 2.7 Subject to final due diligence, the Council has undertaken to fund the leisure and retail elements of the project in order to generate significant financial returns. These will also be built out subject to the DA going unconditional.
- 2.8 In terms of conditions that are holding up the DA going unconditional, within the DA there are Council obligations to meet section 106 costs and to make a contribution from the multi-storey car park budget, both of which have been superseded by the Council becoming funder and investor for the leisure and retail units, and contributing £2.2m to the highways and infrastructure works. The proposals below seek to remove these and other conditions from the current DA.

3 Proposals

- 3.1 The DA contains a minimum Developers Margin required to allow the Development to go unconditional, and this may not be met. The Developer has therefore asked for the flexibility to accept a reduced margin, and so the proposed Deed of Variation will allow the Developer to accept a margin below the 12.5% minimum requirement in the current DA.
- 3.2 As already noted, the Council has recently taken the decision in principle to fully fund the retail and leisure elements; and to contribute £2.2m of Council funds to the highways and infrastructure works, alongside the £2.5m SELEP allocation. Together these now make redundant the obligations in the current DA for the Council to contribute £500k to section 106 and £512k to highways and infrastructure works from the multi-storey car park budget. The Third Deed of Variation will remove these obligations from the DA.
- 3.3 The current DA also does not allow the Developer to waive any of the Developers Phase 1 Initial Conditions. Most of these conditions have already been satisfied, other than the Planning Condition that will shortly be satisfied upon final determination of the planning permission, and the Vacant Possession Condition. The proposed Third Deed of Variation will allow the Developer to waive or vary the Vacant Possession Condition to allow for vacant possession in stages as necessary to meet the programme, and not as a prerequisite for unconditionality. Specifically:
- the Depot Site is already vacant, and hence the condition is already satisfied for that site;
 - the properties on Fountain Street are on a one month notice, and so delaying vacant possession will result in ongoing rental income to the Council and not having to secure the buildings and incur empty building rates; and
 - there are some small areas of highway land that KCC has agreed to transfer to Swale that are on six months' notice, and the variation will allow these to be drawn down by Spirit to best meet their programme, and not as a prerequisite for unconditionality.
- 3.4 It is in the Council's interests to agree to this variation so as to maximise rental income from the Fountain Street properties, and remove any possibility of adverse publicity from the premises remaining empty for a length of time.

- 3.5 In addition, the current DA does not allow the Developer to waive any of the Developers Phase 1 remaining conditions, comprising the Tender Condition, the Funding Condition, and the Viability Condition. Currently, these conditions are required to be satisfied for all of Phase 1 before the DA goes unconditional. The Deed of Variation will uncouple the elements so that each can be delivered in isolation, with no obligation to deliver the others unless the conditions are all satisfied. This will allow each element to be delivered independently or grouped together as the Developer proposes, and the conditions will all need to be satisfied for the respective building lease or licence to construct to be issued.
- 3.6 The risk of this proposed variation is that the Developer may not draw down all of the building leases and build out all of the Phase if it does not satisfy the conditions. However, the Council's retail, leisure and highways priorities are all fully funded, so any risk of non-delivery would relate solely to the remaining areas (namely the residential).
- 3.7 Lastly, the DA only allows for all of the construction work to be carried out under a building lease. The Developer has requested that works to be funded by the Council be carried out under an access licence rather than a building lease, to avoid the inefficient double-transfer of the property interest. Specialist commercial and legal advice is being sought from the Council's independent tax and legal advisors in order to establish the degree of risk in doing so before exercising the delegation in this regard.
- 3.8 Agreement to this Third Deed of Variation as proposed will unlock the development and allow the DA to go unconditional without delay, and the Developer to start construction work to deliver the leisure, retail and highways works that are fully funded. Agreement to this Third Deed of Variation and uncoupling of the elements within Phase 1 will also allow the Developer the flexibility to maximise the return from the remaining sites without delaying the leisure, retail and highway works.
- 3.9 The Council has taken legal and commercial advice on all of the proposed changes to the DA and any risks identified have been set out above.

4 Alternative Options

- 4.1 The alternative is to proceed under the existing DA. In this case, the date when the DA will go unconditional and the Developer will be able to proceed with the development would be significantly delayed.

5 Consultation Undertaken or Proposed

- 5.1 Consultation has been carried out with the Leader and the Cabinet Member for Regeneration, relevant staff, and the Council's independent tax and legal advisors.

6 Implications

Issue	Implications
Corporate Plan	Delivering “a Borough to be proud of”, and in particular priority PR3 Regenerating town centres.
Financial, Resource and Property	All costs, including by Swale BC staff and the Council’s independent professional advisors, are being contained within existing budgets. Pinsent Mason has provided advice on the key legal issues. The detailed financial impact on the Council will be reflected in the coming year’s Medium Term Financial Plan and the annual budgets, starting with the 2017/18 financial year.
Legal and Statutory	Detailed professional advice has been provided by Pinsent Mason and the Council’s own Legal Team.
Crime and Disorder	No implications have been identified from these changes.
Sustainability	The regeneration proposals ensure the future of the Town Centre, and contribute significantly to its sustainability.
Health and Wellbeing	No implications have been identified from these changes.
Risk Management and Health and Safety	No implications to the Council have been identified at this stage - the changes proposed are all of an administrative nature. Risk Management and Health and Safety are all fully covered in the Development Agreement.
Equality and Diversity	No implications have been identified from these changes.

7 Appendices

7.1 The following documents are to be published with this report and form part of the report:

- None

8 Background Papers

8.1 Cabinet approval for the original Development Agreement
<http://services.swale.gov.uk/meetings/CeListDocuments.aspx?MID=1422&RD=Minutes&DF=09%2f04%2f2014&A=1&R=0>

8.2 Cabinet approval for the first and second deeds of variation
<http://services.swale.gov.uk/meetings/CeListDocuments.aspx?MID=302&RD=Minutes&DF=06%2f06%2f2012&A=1&R=0>