

## Riverlights – Bond

### SUMMARY

- 1.1 To consider the offer from the Developer to deposit £2M in an escrow account in satisfaction of the condition in the Development Agreement for a bond to secure its obligations to build the new bus station and construct the new road layout associated with the Riverlights scheme.
- 1.2 Subject to any issues raised at the meeting, I support the following recommendation

### RECOMMENDATION

- 2.1 To accept the Developers offer to deposit £2m in an escrow account in satisfaction of the bond condition the Development Agreement subject to the condition that work on the scheme will not commence until the Developer's funding agreement with a suitable lending institution is in place.
- 2.2 To authorise the Director of Corporate and Adult Social Services to conclude any necessary variation to the Development Agreement.

### REASON FOR RECOMMENDATION

3. The ensure the development continues without delay.



DERBY CITY COUNCIL

## COUNCIL CABINET

Report of the Corporate Director  
Corporate and Adult Social Services

### Riverlights – Bond

#### SUPPORTING INFORMATION

##### Background

1. The Council entered into the Development Agreement for the Riverlights Scheme with Metroholst Riverlights Limited (Metroholst) on 2 June 2004.
2. In brief the Development Agreement provides:
  - ❖ The Council will grant the Developer a 150 year lease of the site at a peppercorn rent (this was done on 24 March 2005 after Cabinet approval given on 8 February 2005).
  - ❖ If sixteen pre-conditions (see Appendix 2) are fulfilled the Developer must, at its own cost and within a set timescale, construct the development including a new bus station and an improved road system.
  - ❖ When the development is completed the Council will be granted a peppercorn lease of the new bus station for approximately 150 years.
  - ❖ After the Developer has recovered its costs incurred in the development and taken a priority return of 15% of development costs any further proceeds will be shared equally between the Developer and the Council.
3. Following financial difficulties experienced by the original developer's holding company (Metropolitan and District Developers Ltd) the current developer Derby Riverlights Limited ("The Developer") purchased the share holding in Metroholst on 24 March 2006 and the Development Agreement and the lease of the site were assigned to the Developer.
4. The current agreement does not allow the Developer to commence work on the scheme, other than demolition of the bus station and limited drainage works, until all sixteen pre-conditions summarised in Appendix 2 have been fulfilled or, where capable, waived ("Unconditionally").
5. If Unconditionality is not achieved by the Long Stop Date of 30 June 2007 then either party may terminate the Development Agreement and the Council can bring the lease to the Developer to an immediate end.

## **Bond**

6. The provision of a bond is one of the sixteen pre-conditions the Developer has to meet before the Development Agreement goes unconditional and it can start construction work on the scheme. Unlike most of the other conditions this one cannot be waived by the Developer and it is the only one of the five unwaivable conditions that remains outstanding (see Appendix 2).
7. Under the Development Agreement the bond is meant ... “to secure the performance of the Developers obligations in respect of the Bus Station Works and Roadworks”. That is to ensure the new bus station is built and the new road layout constructed.
8. The size and form of the Bond were not specified in the Development Agreement as at that time (June 2004) it was impossible to make an informed assessment of what the cost of either element would be but it was anticipated that the size of the bond would cover the cost to complete the scheme at any point in time
9. When the Development Agreement was varied in May 2006 to allow the Developer to demolish the old bus station it was on condition that it deposited as security £2M in an escrow account that in the event that the Development Agreement does not go unconditional the Council can call on and use towards the funding of a new bus station.
10. The Developer has now proposed that the Council accept a “rolling bond” of £2M as sufficient to discharge the bond requirement. In effect this would mean that once the Agreement goes unconditional the £2M already deposited in the escrow account by the Developer (see paragraph 9) would remain in place to be called on by the Council should the Developer commence the scheme but not complete the new bus station or the new road layout.
11. As justification for this offer the Developer makes a number of points:

### **Developer’s Commitment**

- (a) The “very substantial” (financial) commitment it has already made to the Scheme in terms of:
  - ❖ The acquisition costs in purchasing the shares of Metroholst (£5.4M).
  - ❖ The costs on acquiring the “Westfield” land necessary for the Riverlights Road scheme (£750,000)
  - ❖ The demolition of the old bus station and provision of the £2M security.
  - ❖ The ongoing costs in progressing the scheme (eg professional fees).

### **Funders “Step in” Rights**

- (b) That, “in the unlikely event of the insolvency of or some other breach of the Development Agreement” by the Developer the Development Agreement allows its financial backers to “step in” and complete the scheme and the Developer is “currently finalising the funding documentation with one of the major UK lending institutions”. These “step in” rights will be a fundamental requirement of the bank as they are funding 75% of the total development costs.

## **Risk Assessment**

- (c) The Developer considers that the cost of the “Roadworks” and Bus Station Works (including service diversions) will be approximately £5-6M. This estimate was produced by the Clients’ Project Manager, Bellamy & Wareham using figures produced for the invitation to tender recently issued to contractors. A breakdown of these is given Appendix 3

The Developer’s Project Manager has assessed the average monthly exposure in terms of finance needed equates to £300,000 - £400,000 per month in respect of the Roadworks and £150,000 - £200,000 in respect of the Bus Station Works.

“Assuming the worst case scenario following a breach of the Development Agreement and pending the Fund exercising its step in rights” the Developer believes “there could be a delay of one month in respect of payments due for the Roadworks and the Bus Station Works. Demobilisation and remobilisation costs to recompense the Contractor will not exceed £500,000.”

“Accordingly, by assessing the simple risk analysis for the project the Council’s exposure would not exceed £1.4M if there was any exposure” (“As the Fund will step in there will in fact be no such exposure”).

## **Considerations**

12. The following factors should be taken into account when considering the Developer’s bond offer:
- ❖ Council officers initial estimates of the cost of the roadworks and new bus station were approximately £10M. The Developer’s estimate is between £5 and 6M and this is based on submitted tenders. The tender for the roadworks has in fact been accepted and a letter of intent issued to the contractor.
  - ❖ It is accepted that if the service diversion works are paid for “up front”, as is the usual requirement, this will reduce the bond requirement by £0.5M. To date the Developer has, it says, already paid approximately £450,000 to statutory undertakers.
  - ❖ The Developer has not as yet produced a detailed programme for either the bus station or the roadworks, though it is understood these are being worked up.
  - ❖ As is public knowledge Derby Riverlights Limited is a company incorporated in Jersey in the last year solely as a development vehicle for this scheme. It has no other assets. We understand Kailash Trust are the financial backers to Derby Riverlights Ltd and that it has significant financial resources. However the Council has no direct contractual relationship with it nor is the Trust or any other company, body or person guaranteeing the performance of Derby Riverlights Ltd. It has to be said that it is not an unusual way for development projects to be structured in this way.

- ❖ The Developer assures us that negotiations are far advanced with one of the “top four lending banks” to provide funding for the development. The Developer has stressed however that it will not make a start on site until this funding is in place. We would advise that we require proof that the funding is in place before we allow the start on site.
  - ❖ Should the Developer fail to complete the scheme there is no contractual obligation on the funder to step in. They have rights to do so under the Development Agreement but they cannot be compelled to exercise them. Whether they do or not will be a matter of commercial judgement for them at the time and they will have up to three months to make such a decision.
  - ❖ At present the Council have received no formal details from the Developer, under the Development Agreement, as to which end users have legally committed to the scheme. This is not unusual as end users normally wait to see that construction has started before finally committing legally to a scheme.
13. The Council Cabinet need to balance the considerations set out in paragraph 12 against the Developer’s “Justification” in paragraph 11, together with the general desire to progress the scheme, when deciding if the “bond” proposal offers sufficient security.

**For more information  
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**Background papers:**

Appendix 1 – Implications

**List of appendices:**

Appendix 2 – Summary of Pre-conditions

Appendix 3 – Breakdown of Developers Estimated Costs

<b>IMPLICATIONS</b>
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**Financial**

1. As set out in the report.

**Legal**

- 2.1 The Development Agreement will need to be amended if Cabinet approves the changes.
- 2.2 Because a bond for the roadworks is required under the Development Agreement no separate bond for the same works will be required under the Section 278 highway adoption agreement between the Council and the Developer.

**Personnel**

3. There are no personnel implications arising from this report.

**Equalities impact**

4. There are no equalities implications from this report.

**Corporate objectives and priorities for change**

- 5.1 Riverlights will provide job opportunities during the construction process and in offices, the bus station and leisure units.
- 5.2 It also promotes the priority of providing shops, commercial and leisure activities, all of which will be incorporated in Riverlights.

<b>SUMMARY OF PRE-CONDITIONS</b>
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1. Developer applied for:
  - (a) highway consents for new road system
  - (b) outline planning position for residential, leisure and office use
  - (c) reserved matters approval for the bus station and residential and leisure elements.
2. Developer applied for all detailed planning permission for the building construction works, road works and use of the completed development.
3. Highway consents have been granted.
4. Planning permission for the development granted.
5. Developer issued satisfactory ground condition certificate to the Council.
6. New bus station specification agreed with Council\*.
7. Temporary bus station location, specification and programme agreed and any necessary planning application submitted\*.
8. Pre-Letting Requirements have been satisfied (ie Letting agreements securing 75% of the anticipated rental income entered into).
9. Building consents (eg for use of cranes) have been obtained
10. Council obtained vacant possession of the site and obtained necessary statutory approval to dispose of relevant part of the Riverside Gardens\*.
11. Funding requirements and/or Forward Sale Requirement and/or Forward Funding Requirement satisfied.

12. Developer obtained satisfactory licences (eg liquor)
13. Developer been granted Title Policy (Covenant indemnity policy).
14. Developer procured the Bond\*
15. Developer:
  - (a) prepared detailed specifications and drawings required to implement the Road Works
  - (b) obtained approval of highway authority to the Road Works specification and drawings.
  - (c) obtained approval in writing of Westfield to Road Works, required under lease of Cockpit car park
  - (d) entered into a deed of covenant with Westfield relating to, the Road Works to be carried out within their land.
  - (e) Entered into all statutory agreements relating to the Road Works
  - (f) Obtained any necessary traffic order.
16. The Council or the Developer has acquired the Westfield land necessary for the scheme\*.

❖ These pre-conditions cannot be waived by the Developer.



**Breakdown of Developers Estimated Costs**

- ❖ Roadworks tender - £2,837,609
- ❖ Electricity diversion - £196,192
- ❖ Ntl diversion - £188,650
- ❖ BT diversion - £59,998
- ❖ Cable and Wireless - £25,173
- ❖ Gas diversion - £1,000
- ❖ Water diversion - £20,000
- ❖ Bus Station Estimate - £2,000,000 to £2,500,000